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PREFACE

Projects involving substantial time and effort are, inherently, collaborative efforts. The persons directly involved in this endeavor and to whom I owe the greatest thanks are my colleagues Lorna M. DeAmaral and Roger A. Putnam. They have spent literally hundreds of hours engaged in the tedious tasks of preparing and proofreading the index and the accompanying abstracts of decisions and in suggesting ways to make the latter more readable. Mrs. Marjorie J. Millay and Cathy J. Williams worked on the card file that was the predecessor to this index.

I would be remiss if I did not acknowledge the support and encouragement given me throughout this project by all of the members of the Maine Labor Relations Board and by current and former Board staff: Nancy Connolly Fibish, M. Wayne Jacobs, Esq., Roberta A. Hutchinson, Robert I. Goldman, Esq., Parker A. Denaco, Esq., Carmen D. Fecteau, and Wayne W. Whitney, Esq. I particularly want to thank Edward S. Godfrey, Esq., for his inspiration and good humor, particularly at times when the task seemed insurmountable.

Thanks also to the Labor Relations Press, publishers of the National Public Employment Reporter (N.P.E.R.) for their permission, secured through the efforts of Wayne Jacobs, to use their numbered index system. Although I have expanded their categories in some instances to permit better access to Maine decisions, use of the N.P.E.R. system permits practitioners to locate relevant decisions from the other state jurisdictions in addition to those from Maine.

Recognizing that this effort is far from perfect, I look forward to receiving comments and suggestions for improvement from the labor relations community. Although I received abundant help, the responsibility for this work and its shortcomings is mine.

Marc P. Ayotte
April 14, 1989

INTRODUCTION

This endeavor is dedicated to the members of the Maine labor relations community. Over the years, the Board's staff has received countless inquiries from public employees, public employers, attorneys, and labor consultants asking whether and, if so, how the Maine Labor Relations Board has ruled on particular questions. This index is intended to provide a comprehensive and inexpensive answer to such inquiries and, hence, to help parties in determining their future conduct. This first edition covers the Board's prohibited practice decisions issued during fiscal years 1973 through 1988 and includes Superior and Supreme Judicial Court opinions reviewing the Board's orders.

A short explanatory note is necessary. After locating a particular topic in the index, the user will encounter a listing of numbers made up of individual entries such as 83-04.1 (II). The first four numbers in each entry (83-04) is the MLRB case number. The next number (.1) indicates that the Board has issued more than one decision in the particuliar matter. In the example cited, 83-04.1 refers to the Board's order on Respondents' Motion to Quash Subpoena in Ross v. Portland School Committee. The Roman numeral appearing within the parentheses refers to the numbered paragraph in the abstract of the Board decision that discusses the pertinent legal issue indexed. The case numbers under each topic are listed in chronological order, with the most recent case appearing first. By reviewing the abstracts of decisions, the researcher can determine whether the Board decision is relevant to the particular question at issue. Each category has been interpreted broadly in an effort to avoid omitting any relevant or arguably relevant decisions. As is the case with other research tools, the user should read the full text of the Board or Court decisions abstracted before citing the same as precedent for a given proposition.

INDEX OF MAJOR HEADINGS

		Page
01.	PUBLIC EMPLOYMENT RELATIONS BOARD	1
03.	STATE LEGISLATION	3
04.	FEDERAL LEGISLATION AND REGULATIONS	4
05.	LOCAL OPTION	5
06.	RULES AND REGULATIONS OF STATE BOARD	6
07.	ROLE OF PUBLIC AND GOVERNMENTAL BODIES	6
09.	GENERAL LEGAL PRINCIPLES	8
11.	PUBLIC EMPLOYER	16
15.	PUBLIC EMPLOYEES	17
16.	EMPLOYEES WITH LIMITED STATUTORY PROTECTION	21
21.	EMPLOYEE RIGHTS	22
22.	EMPLOYEE ORGANIZATIONS	24
23.	DUTY OF FAIR REPRESENTATION	26
24.	DUES AND ORGANIZATIONAL SECURITY	27
31.	RECOGNITION	29
32.	CERTIFICATION PROCEDURES	30
33.	UNIT DETERMINATION CRITERIA	33
34.	BARGAINING UNIT	35
35.	ELECTION	36
36.	UNIT CLARIFICATION OR MODIFICATION	42
37.	DECERTIFICATION	44
41.	COLLECTIVE BARGAINING	44
42.	SCOPE OF BARGAINING	46
43.	SUBJECTS OF BARGAINING	48
46.	AGREEMENT	58
47.	GRIEVANCES/GRIEVANCE ARBITRATION	61
51.	IMPASSE	64
52.	MEDIATION AND CONCILIATION	65
53.	FACTFINDING	66
55.	INTEREST ARBITRATION	67
56.	LEGISLATIVE RESOLUTION OF IMPASSE	70
61.	JOB ACTION	70
62.	STRIKES	71
63.	PICKETING	73
64.	OTHER CONCERTED ACTIVITY	74
71.	UNFAIR PRACTICE AND APPELLATE REVIEW PROCEDURES	75
72.	EMPLOYER UNFAIR PRACTICES	82
73.	UNION OR EMPLOYEE UNFAIR PRACTICES	98
74.	UNFAIR PRACTICE REMEDIES	102
81.	ENFORCEMENT OR REVIEW OF BOARD ORDERS	108
82.	CONTEMPT OF COURT JUDGEMENT	113
83.	ACTIONS ANCILLARY TO BOARD PROCEEDINGS	113
84.	ACTIONS COLLATERAL TO BOARD PROCEEDINGS	115

NUMERICAL INDEX

01. PUBLIC EMPLOYMENT RELATIONS BOARD

01.1 Jurisdiction
87-A-07 (IX, X), 87-A-01 (I, II), 86-17 (I, II, V), 84-24 (I), 84-15 (IV), 84-04 (I, IV), 82-10.2 (V), 82-05 (I, IX), 81-54 (VII), 81-53 (I), 81-A-02 (VI), 80-41 (I), 80-36 (I, II), 80-30 (IX), 80-14 (II, III), 80-13 (IV), 79-57 (I), 79-43 (I), 79-24 (I), 79-06 (I, II, III, IV), 78-A-07 (I), 78-A-05 (I, VII), 78-03 (I), 78-A-03 (I), 75-19 (II), 75-01.2 (I), 74-08 (I), 74-04, -05 & -06 (I), 73-05 (I), 70-A-02 (II)

01.11 Advisory Opinions
79-IR-01 (I), 78-IR-01 (I, VI), 77-37 (VI), 76-IR-02 (II), 76-IR-01 (V)

01.12 Declaratory Statements
79-IR-01 (I), 77-37 (VI)

01.13 Conflict with NLRB Jurisdiction
87-A-01 (I)

01.131 Deferral by NLRB
87-A-01 (I)

01.2 Authority and Duties of State Board
84-A-02 (II), 82-10.1 (III), 81-55 (II), 78-23 (IX), 78-A-07 (I), 75-A-01 (I), 74-08 (I), 70-A-02 (II)

01.21 Authority of Board Personnel
88-14, -15 & -16 (I), 88-02 & -04 (I), 88-01 (I), 87-20 (I), 87-A-06 [87-09] (I), 87-A-04 (III), 87-A-03 (III), 86-12 (I), 86-A-02 (I), 85-20 (I, II), 85-16 (II, VI), 85-14 (I), 85-10 (I), 85-03.2 (I), 85-03.1 (I), 85-A-03.1 (II), 85-A-01 (IV), 84-31.1 (I), 84-28 (I), 84-20 (II, III, V), 84-09 (I), 83-25 (I), 83-A-09 (I, VII), 83-08 (II), 83-A-07 (VI), 83-A-05 (II, III), 83-A-02 (II), 83-A-01 (III), 82-15, -16 & -22 (I), 82-A-03 (I), 82-02 (I, III), 82-A-02.2 (I), 81-44 & -56 (VII), 81-43 (I), 81-02 (I), 81-A-02 (VI), 80-41 (XXIII), 80-36 (I), 80-A-04 (IV), 80-A-03 (IV), 79-22 (I), 79-12.1 (I), 79-A-01 (V), 78-23 (IX), 78-A-10 (III), 78-A-07 (I), 77-A-02.2 (II), 75-A-03 (III), 73-13 & -14 (VIII), 70-A-01 (I, IV)

01.22 Authority Over Appeals
87-20 (II), 87-A-06 [87-09] (I), 87-A-03 (I, IV), 86-22, -25 & 86-A-03 (II), 86-21 (III), 86-A-02 (I), 84-20 (II, III, V), 84-A-05 (I), 84-A-04 (II), 84-A-02 (II), 83-A-09 (I), 83-08 (II), 83-A-05 (II, III), 82-A-02.2 (I), 81-47 (I), 81-A-02 (VI), 81-A-01 (V), 78-A-10 (I, III), 78-A-09 (II), 78-A-07 (I), 78-A-04 (I), 78-A-03 (I), 77-37 (I), 77-A-02.3 (X), 77-A-02.2 (II), 75-11 (I), 75-A-03 (III), 72-A-01 (III), 70-A-02 (II), 70-A-01 (IV)

01.23 Authority Over Strikes
87-14 & -15 (I), 80-35 & -40 (XIV, XVI), 80-18 (I), 79-15 (I, II), 76-21 (II)

01.24 Authority to Fashion Units

85-A-01 (IV), 83-A-09 (I, VII), 83-08 (II), 83-A-07 (VI), 83-A-05 (III), 83-A-02 (II), 83-A-01 (III), 82-A-03 (I), 82-A-02.2 (I), 80-45 (III), 80-A-04 (IV), 78-A-10 (III), 78-A-09 (II), 77-A-02.2 (II), 73-13 & -14 (VIII), 70-A-01 (I, IV)

01.25 Determination of Arbitrability

01.26 Determination of Negotiability

86-04 (IV), 85-18 (V), 84-17 (IX), 81-44 & -56 (I), 80-50 (III), 80-41 (VI, XIX), 80-28 & -32 (V, VI), 80-09 (V), 79-68 (III), 79-44 (I), 79-43 (I), 79-36, -39, -45 & -47 (IV), 79-32 (II, III), 79-10 & -18 (V), 79-IR-01 (I), 78-IR-01 (I, II), 77-34 (IV), 76-16 (II, III), 76-15 (II, III), 75-19 (V), 73-12 (III), 73-06 (II)

01.27 Interpretation of Agreements

87-14 & -15 (III), 86-11 (III), 86-09 (I, II, III), 85-19 (III, IV), 85-01 (II, III), 83-07 (III), 82-05 (I, IX, XI), 80-50 (I), 80-46 (I), 80-45 (VI), 80-41 (VI, XIX), 80-35 & -40 (XIII), 80-05 (VII), 79-62 (IX), 79-49 (III), 79-32 (VI), 79-24 (II, III), 79-A-02 (III), 78-31 (V), 78-19 (II), 78-02 (I, II), 77-34 (III, IV), 77-27 (III), 77-01 (I), 76-16 (II, III), 76-11 (I), 75-28 (II, III, IV), 75-26 (I), 75-15.2 (I), 75-10 (I)

01.28 Limitations of Board Authority

87-A-03 (IV), 87-A-01 (I, II), 86-17 (I, II, V), 86-11 (I, II, III), 85-16 (II), 84-24 (I), 84-17 (IX), 84-15 (IV), 84-12 (I, III), 84-06 (II, XI), 83-25 (I), 83-03 (I, II), 82-14.3 (II), 82-10.2 (V), 81-53 (I), 81-52 (V), 81-41 (V), 81-22.1 (VII), 81-02 (II), 81-A-02 (VI), 81-A-01 (V), 80-50 (I), 80-46 (I), 80-41 (I, V), 80-36 (II), 80-33 (I), 80-30 (IX), 80-15 (I), 80-14 (II, III), 80-13 (IV), 80-06 (I), 79-71 (II), 79-64 (VIII), 79-63 (II), 79-57 (I), 79-40.1 (IV), 79-31 (I, II), 79-06 (II, III, IV), 78-34 (III), 78-A-10 (III), 78-A-09 (II, III), 78-A-07 (I), 78-A-04 (I), 78-03 (I), 78-A-03 (I), 78-01 (V), 78-IR-01 (VI), 77-37 (VI), 77-34 (V, VII), 77-32 (I), 76-21 (IV), 76-IR-02 (II), 76-IR-01 (V), 75-28 (II, IV), 75-22 (II), 75-15.2 (I, II), 75-A-03 (III), 75-01.2 (I), 75-01.1 (I), 74-18 (I, VI, VII, VIII, X), 74-17 (I), 74-08 (I), 74-04, -05 & -06 (I), 74-03 (I, II), 74-02 (I, II), 73-17 (I), 73-13 & -14 (VIII), 73-12 (II, III), 73-11 (II), 73-05 (I), 72-A-01 (III)

01.29 Remedial Powers

87-A-02 (II), 85-17 (II), 84-06 (II, XI), 84-04 (I, IV), 83-21 (VII), 83-14 (IX), 83-10.1 (I, II), 83-06 (III), 82-14.3 (I, II, IV), 82-10.2 (V), 82-10.2 (I, II), 82-05 (XI), 81-51 (I), 81-41 (V), 81-22.2 (II), 81-22.1 (VII), 80-41 (IX, XXI), 80-35 & -40 (IX), 80-28 & -32 (VII), 80-26 (X), 80-18 (III), 80-14 (II, III), 80-13 (IV, VII), 80-10 (IV), 80-09 (V), 80-08 (IV), 80-04 (IV), 79-71 (II), 79-70.1 (VI), 79-64 (VIII), 79-62 (XIV), 79-50 (XII, XVI, XVII), 79-36, -39, -45 & -47 (XVII, XVIII), 79-36.1 (V), 79-22 (III), 78-30 (IV), 78-25 (V), 78-23 (IX), 78-03 (I), 77-34 (V, VII), 75-15.2 (I), 74-18 (I, VI, VII, VIII, X), 74-13 (III), 74-12 (III), 73-12 (II), 72-A-01 (III)

01.30 Rule Making Authority

80-A-02 (VIII)

01.31 Rulings
85-16 (VI), 84-31.1 (I), 82-14.2 (II), 80-22 (I), 79-44 (I), 78-23 (IX)

01.311 Expedited Rulings
87-14 & -15 (I), 83-10.1 (II), 82-10.1 (I, II), 80-09 (I), 79-15 (I), 77-37 (I)

01.312 Rulings Only In Case Or Controversy
86-21 (I), 85-08 (III), 84-24 (I), 84-13 (IV), 82-33 (I), 81-53 (IV), 81-41 (IV), 81-40 (I), 81-29 (III), 80-33 (I), 80-30 (III), 80-14 (II), 80-09 (II), 79-67 (II), 79-41.2 (I), 79-40.2 (III), 79-37 (IV), 79-08 (III), 79-IR-01 (I), 78-A-09 (V), 78-IR-01 (VI), 76-16 (V), 76-IR-02 (II), 76-IR-01 (V), 75-01.2 (IV), 73-12 (III)

01.32 Statutory Authority
87-A-01 (I), 86-11 (I, III), 84-15 (IV), 81-55 (II), 81-A-02 (VI), 80-41 (XXI), 80-15 (I), 80-13 (VII), 80-06 (I), 79-63 (II, IV), 79-55 (I), 79-12.1 (I), 79-06 (II, III, IV), 78-30 (IV), 78-23 (IX), 78-03 (I), 77-37 (VI), 77-34 (VII), 75-15.2 (I), 75-01.2 (I), 74-18 (I, VI, VII, VIII, X), 74-08 (I), 74-04, -05 & -06 (I), 74-03 (I, II), 74-02 (I, II), 73-13 & -14 (VIII), 70-A-02 (II)

03. STATE LEGISLATION

03.1 State Constitution
88-EA-01 (V), 84-20 (III), 83-06 (IV), 81-52 (V), 75-19 (IV), 74-18 (VII, VIII)

03.11 Conflict with Labor Legislation
88-EA-01 (V)

03.12 Interpretation, Construction
88-EA-01 (V), 84-20 (III), 83-06 (IV), 81-52 (V), 74-18 (VII, VIII), 73-13 & -14 (VIII)

03.2 Public Employee Relations Act
86-A-01 (II), 85-A-01 (II, III), 83-03 (VII), 83-A-02 (I), 83-01 (VII), 82-15, -16 & -22 (V, VII), 82-14.2 (II), 81-55 (II), 79-64 (VIII), 79-36, -39, -45 & -47 (XVIII), 78-A-09 (III)

03.21 Amendments

03.22 Interpretation, Construction
86-17 (II), 86-12 (III), 86-A-01 (II), 85-A-01 (II, III), 85-18 (V), 84-20 (I), 83-03 (VII), 83-A-02 (I), 83-01 (VII), 82-15, -16 & -22 (V, VII), 82-14.2 (II), 82-14.1 (II), 82-A-02.1 (V), 81-55 (II), 81-A-04 (I), 81-A-03 (I), 80-50 (II, V), 80-41 (XXI), 80-28 & -32 (V), 80-14 (II), 79-70.1 (V, VI), 79-50 (XII, XVI), 79-36, -39, -45 & 47 (IV, XVIII), 78-23 (XI), 78-A-09 (III), 78-A-08 (VI), 78-A-05 (VI), 75-19 (V), 75-15.2 (I), 75-01.2 (I), 74-18 (I, VI, X), 74-16 (II), 74-08 (I), 74-04, -05 & -06 (I), 74-03 (I, II), 74-02 (I, II)

03.23 Constitutionality
74-18 (VII, VIII), 73-13 & -14 (VIII)

03.3 Other State Legislation
86-12 (III), 85-02 (V, VI), 84-19 (II), 83-10.2 (II, III), 82-28 (I, II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 82-10.1 (III), 80-45 (IX), 79-37 (II), 78-23 (VI, XIV), 78-16 & -20 (I), 77-A-06 (I), 77-A-02.3 (IX)

03.31 Education
87-14 & -15 (IV, V), 86-04 (II, IV, V, VII, VIII, X, XI), 85-07 & -09 (VIII, IX, X, XI, XII), 84-13 (II), 83-04.1 (I), 82-28 (I, II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 80-55 (II), 80-28 & -32 (VI), 79-68 (II, III), 79-56 (I, II), 79-44 (II), 79-42 (II, III, IV), 79-36, -39, -45 & -47 (I), 79-36.1 (I, II), 77-39 (I), 77-18, -19, -20 & -29 (III), 76-16 (II), 76-15 (II, III), 75-24 (III), 75-19 (III, VII), 75-01.2 (II), 75-01.3 (II, III, IV), 74-17 (II, III), 74-16 (II), 74-08 (III), 74-04, -05 & -06 (II)

03.32 Civil Service
83-04.1 (I), 82-14.1 (I), 81-53 (III), 81-44 & -56 (II, III, IV, VIII, IX, X), 79-43 (I), 74-17 (II)

03.33 Insurance
80-45 (IX, XI)

03.34 Municipal
80-02 (V), 79-64 (X), 77-18, -19, -20 & -29 (III), 75-19 (IV), 75-01.2 (II), 74-18 (VIII)

03.341 Home Rule
79-64 (X), 78-16 & -20 (I), 75-19 (IV), 74-18 (VIII)

03.342 Ordinances
81-53 (III), 74-18 (VIII)

03.35 Pension
84-17 (III, IV, V, IX), 80-45 (IX, XI), 78-25 (IV)

03.36 Police and Fire
82-14.1 (I), 81-53 (III), 80-02 (V), 79-37 (II)

03.37 Workmen's Compensation
84-15 (I), 83-10.2 (II)

03.38 Unemployment Compensation
78-04 (V)

03.39 Right-To-Work

03.4 Conflict Between Labor and Other State Legislation
86-12 (III), 85-07 & -09 (VIII, IX, X, XI, XII), 85-02 (V, VI), 84-19 (II),

84-17 (III, V, IX), 83-10.2 (II, III), 82-28 (I, II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 81-44 & -56 (II, III, IV, VIII, IX, X), 80-55 (II), 79-37 (II), 79-36, -39, -45 & 47 (I), 78-23 (VI, XIV), 77-39 (I), 77-A-02.3 (IX), 76-15 (II, III), 75-24 (III), 75-19 (VIII), 75-01.2 (II), 74-17 (II, III), 74-16 (II), 74-08 (III), 73-05 (III)

03.5 Executive Orders of Governor

03.6 Attorney General's Opinions

04. FEDERAL LEGISLATION AND REGULATIONS

04.1 U.S. Constitution
88-EA-01 (V), 86-16 (IV), 86-04 (IX), 84-20 (III), 83-06 (IV), 83-A-02 (III), 82-01 (I), 81-52 (V), 81-43 (II), 81-22.2 (I), 81-22.1 (IV, VII, VIII), 80-49 (III), 80-35 & -40 (XV), 80-26 (VII), 78-34 (III), 74-17 (I), 74-08 (II)

04.2 Federal Laws and Programs
86-A-01 (II), 85-18 (V), 83-04.1 (I), 82-15, -16 & -22 (VII), 77-A-01 (I)

04.21 Civil Rights

04.212 Affirmative Action

04.213 Equal Employment Opportunity

04.22 Income Security Programs

04.23 Social Security and Retirement Programs
80-45 (XI)

04.24 Federal Employment Programs
77-A-01 (I)

04.25 Fair Labor Standards
85-19 (I, IV)

04.26 Occupational Health and Safety

04.27 Railway Labor Act

04.5 Federal Pre-Emption

04.6 Conflict with State Legislation
80-26 (VII), 74-08 (II)

05. LOCAL OPTION

05.1 Establishment of "Mini-Board"

05.11 Procedure

05.12 Substantial Equivalency of Local Ordinance

05.13 Substantial Equivalency of Local Rules

05.14 Other Considerations

05.15 Immunity From Unfair Practice Charge

05.2 State Board Review

05.3 Continuing Jurisdiction of State Board

05.4 Authority of "Mini-Board"

05.5 Termination of "Mini-Board"

06. RULES AND REGULATIONS OF STATE BOARD

06.1 Procedures for Adoption
78-01 (VI)

06.11 Timeliness

06.12 Notice
78-01 (VI)

06.13 Hearing
78-01 (VI)

06.14 Board Adoption

06.15 Review by Other Agency, Legislature or Courts

06.16 Publication
78-01 (VI)

06.2 Amendments
78-01 (VI)

06.3 Interpretation, Construction
84-28 (I), 84-20 (II, IV, V), 83-10.1 (I, II), 81-A-04 (I), 81-A-03 (V), 81-02 (II), 80-26 (IX), 80-19 (I), 80-A-02 (VIII), 79-40.1 (II, IV), 79-31 (I, II), 79-14 (VIII), 79-12.1 (I), 79-08 (V), 75-21 (I), 75-11 (I), 75-01.2 (I), 75-01.1 (I), 73-12 (II), 73-05 (IV)

06.4 Validity
78-01 (VI)

07. ROLE OF PUBLIC AND GOVERNMENTAL BODIES

07.1 Role of Legislative Bodies
85-02 (VII), 78-34 (II), 77-A-02.3 (IX)

07.12 Authority
85-02 (VII), 78-16 & -20 (I)

07.13 Enabling Legislation
85-02 (VII), 82-15, -16 & -22 (V), 78-16 & -20 (I), 77-A-02.3 (IX)

07.131 Passage
85-02 (VII)

07.132 Amendments

07.14 Review of Agreements
86-23 (V), 83-10.2 (VII), 83-07 (III), 82-11 (II), 81-28 (I, II, III, IV, V, VI), 80-28 & -32 (III), 78-25 (II, III, IV), 77-A-02.3 (IX), 75-33 (II, III), 73-08 (II), 72-A-01 (II)

07.141 Procedure
83-10.2 (VII), 83-07 (III), 81-28 (II, IV, V), 78-25 (II), 77-18, -19, -20, & -29 (III), 77-07 (I), 77-06 (I), 75-33 (II), 72-A-01 (II)

07.142 Matters Subject to Approval
78-25 (II), 77-A-02.3 (IX), 75-33 (II)

07.143 Budgetary Review
84-10 (II), 80-10 (II), 79-64 (X), 79-62 (V), 77-A-02.3 (IX), 74-18 (II)

07.15 Procedure After Legislative Review

07.151 Where Approved
73-01 (II)

07.152 Where Rejected
81-50 (II), 79-32 (II)

07.16 Impasse Resolution
81-55 (I, III), 80-22 (II), 79-22 (I, II), 77-36 (I, II), 73-08 (III)

07.19 Legislature, as Employer

07.2 Role of Budget Authority
83-10.2 (VII), 80-10 (II), 79-64 (X), 79-62 (V), 78-34 (II), 77-18, -19, -20 & -29 (III), 74-18 (II)

07.21 Power to Tax

07.22 Ability to Borrow

07.23 Supplemental/New Appropriations
79-62 (V), 78-34 (II)

07.24 Submission Dates and Procedural Factors
85-08 (I), 84-10 (II, V), 81-12 (II), 80-45 (VII), 79-62 (V), 79-10 & -18 (II, III, IV)

07.25 Fiscal Year, Impact of
85-08 (I), 84-10 (II, V), 81-12 (II), 80-45 (VII), 79-10 & -18 (II, III, IV), 78-34 (II), 77-A-03 (IV)

07.26 Deficit Financing of Collective Agreements
85-19 (IV)

07.27 Appropriation of Necessary Funds
80-10 (II), 79-62 (V), 79-32 (II, III), 78-34 (II), 73-07 (V)

07.28 Effect of Failure to Appropriate
81-50 (II), 80-10 (II), 79-64 (X), 79-62 (V), 79-32 (II, III), 73-07 (V)

07.29 Effects of Multi-Year Contracts

07.31 Budget Caps

07.4 Public Referenda
80-10 (II), 79-32 (II), 78-34 (II), 77-18, -19, -20 & -29 (III)

07.5 Public Access to Collective Bargaining
83-21 (II), 79-16 (II), 73-05 (II, III)

07.51 Public View Negotiations
83-21 (II), 80-09 (VI), 79-16 (II), 77-33 (II, III), 73-05 (II, III)

07.511 Definition
80-09 (VI), 77-27 (III)

07.512 Negotiability
80-09 (VI), 79-16 (II), 73-05 (II)

07.52 State Freedom of Information Statutes
83-04.1 (I), 82-10.1 (III), 77-33 (I), 77-A-06 (I), 73-05 (III)

07.521 Limitations on
83-04.1 (I), 82-10.1 (III), 77-33 (I), 77-A-06 (I), 73-05 (III)

07.522 Local Statutes and Ordinances

07.53 Access to Parties' Agreement
77-33 (II)

07.54 Public Meeting Law
82-10.1 (III), 77-33 (I, II), 73-05 (III)

09. GENERAL LEGAL PRINCIPLES

09.1 Agency
87-A-07 (II, III, V, IX, X, XI, XII), 87-A-01 (II), 86-22, -25 & 86-A-03 (II), 85-18 (II), 85-17 (I), 85-16 (V), 85-04 (III), 84-29 (I), 84-25 (IV), 84-08 (II), 83-24 (I), 82-35 (VII), 82-10.2 (VI), 82-08 (V), 81-40 (II), 81-A-02 (I, II, III, VIII), 80-45 (XIII), 80-35 & -40 (IX, XIV), 80-28 & -32 (IV), 80-24 (II), 80-18 (II), 80-02 (III), 79-06 (II, III), 78-28 (II), 78-25 (II), 78-A-05 (I, II, V, VII), 78-03 (I), 73-08 (II), 72-A-01 (II)

09.11 General Principles
87-A-07 (II, III, V, IX, X, XI, XII), 87-A-01 (II), 86-22, -25 & 86-A-03 (II), 85-18 (II), 85-17 (I), 85-16 (V), 85-04 (III), 84-29 (I), 84-25 (IV), 82-35 (VII), 82-10.2 (VI), 81-40 (II), 81-22.1 (I, V), 80-35 & -40 (XIV), 80-15 (V), 79-06 (II, III), 78-28 (II), 78-A-05 (I, II, V, VII), 72-A-01 (II)

09.111 Basis of Responsibility
87-A-07 (II, III, V, IX, X, XI, XII), 87-A-01 (II), 86-22, -25 & 86-A-03 (II), 86-01 (III), 85-18 (II), 85-17 (I), 85-16 (V), 84-29 (I), 83-24 (I), 82-35 (VII), 82-08 (V), 81-54 (III), 81-40 (II), 81-22.1 (V), 80-45 (XIII), 80-35 & -40 (IX), 80-28 & -32 (IV), 80-24 (II), 80-18 (II), 80-05 (I), 79-71 (II), 78-28 (II), 78-A-05 (I, V, VII), 78-03 (I), 75-25 (III)

09.112 Actual Authorization
87-A-07 (II, III), 87-A-01 (II), 85-18 (II), 82-08 (V), 81-53 (I), 80-35 & -40 (IX, XIV), 80-28 & -32 (IV), 80-15 (V), 80-02 (III), 79-40.2 (I), 78-25 (II), 78-A-05 (VII), 76-20 (I), 75-33 (II, III), 72-A-01 (II)

09.113 Implied Authorization
87-A-07 (II, III, V), 87-A-01 (II), 85-17 (I), 84-29 (I), 84-25 (IV), 84-08 (II), 83-24 (I), 82-35 (VII), 82-10.2 (VI), 81-54 (III), 80-28 & -32 (IV), 80-02 (III), 79-67 (III), 78-25 (II), 72-A-01 (II)

09.114 Subsequent Ratification
86-01 (III), 84-25 (IV), 84-08 (II), 82-35 (VII), 78-25 (II), 75-33 (III), 73-08 (II)

09.12 Responsibility of Employer for Acts or Statements of Others
87-19 (I), 86-22, -25 & 86-A-03 (II, III), 86-16 (II), 85-18 (II), 85-17 (I), 85-04 (III), 84-29 (I), 84-25 (IV), 84-20 (IV), 84-08 (II), 82-35 (VII), 82-10.2 (VI), 81-54 (III), 81-41 (V), 81-40 (II), 81-17 (II), 80-02 (III), 79-35 (I), 78-28 (II), 78-22 (II, III), 78-03 (I), 73-07 (IV), 72-A-01 (II)

09.121 Supervisory or Managerial Employees
87-19 (I), 85-18 (II), 85-17 (I), 85-04 (III), 84-29 (I), 84-25 (IV), 84-08 (II), 84-01 (III), 83-24 (I), 82-35 (VII), 81-54 (III), 81-35 (II), 81-17 (II), 80-41 (III), 80-28 & -32 (IV), 80-10 (III), 80-05 (V), 80-02 (III), 79-35 (I), 78-28 (II), 78-22 (II, III), 76-12 (II), 74-18 (III), 74-09 & -14 (II), 72-A-01 (II)

09.122 Other Employees
86-22, -25 & 86-A-03 (II, III), 85-17 (I), 83-10.1 (I), 82-10.2 (VI), 81-40 (II)

09.123 Non-Employees
84-20 (IV), 79-50 (VI), 78-25 (II), 78-03 (I), 77-24 (I), 77-02 (I)

09.13 Responsibility of Union for Acts or Statements of Others
85-16 (V), 84-20 (IV), 82-08 (V), 81-50 (I), 80-35 & -40 (IX, XIV), 80-18 (II), 74-01 (II)

09.131 Members
85-16 (V), 82-08 (V), 80-35 & -40 (XIV), 75-25 (III), 74-01 (II)

09.132 Officers
74-01 (II)

09.133 Others
84-20 (IV), 81-50 (I), 80-35 & -40 (XIV), 75-25 (III)

09.2 Contract
83-11 (II), 79-62 (I), 72-A-01 (II)

09.21 General Principles
85-01 (II, III), 81-28 (I, II, III, IV, V, VI), 80-28 & -32 (V), 79-62 (I)

09.22 Formation of a Contract
83-09 (I, III), 83-07 (II), 82-24, (I), 81-55 (III), 81-28 (II, III, IV, VI), 80-18 (III), 80-10 (I), 79-67 (I, III), 79-64 (X, XI), 77-18, -19, -20 & -29 (III), 75-33 (II), 74-22 (II), 73-08 (II), 72-A-01 (II)

09.23 Construction of Contract
87-14 & -15 (III), 86-12 (IV), 86-11 (VIII), 86-02 (II, IV), 85-19 (III), 85-16 (IV), 85-01 (II, III), 84-15 (IV), 83-10.2 (IV), 83-07 (III), 82-05 (II, III, IV, VII, VIII, IX, XI), 80-50 (I), 80-46 (I), 80-41 (VI), 80-35 & -40 (XIII), 80-29 (III), 80-15 (VIII), 80-05 (V, VII), 79-49 (III), 79-24 (III), 78-31 (IV, V), 78-19 (II), 76-16 (II, III), 76-11 (I), 75-28 (II, IV), 75-26 (I), 75-10 (I, II)

09.231 Written Terms
86-12 (IV), 86-11 (VIII), 86-02 (II), 85-16 (IV), 85-07 & -09 (II), 85-01 (II, III), 83-10.2 (IV), 83-07 (II, III), 82-05 (II, III, IV, VII, VIII), 80-41 (VI, XIX), 80-35 & -40 (XIII), 80-15 (VIII), 79-49 (III), 79-24 (III), 78-19 (II), 78-02 (I), 77-34 (IV), 76-16 (II, III), 75-10 (I, II)

09.232 Parol Evidence
87-14 & -15 (III), 86-11 (VIII), 85-01 (III), 83-10.2 (IV), 82-05 (IV), 80-15 (VIII), 78-19 (II), 76-16 (III)

09.233 Other
87-14 & -15 (III), 79-49 (III), 76-16 (III, IV)

09.24 Withdrawal from Contract
86-02 (II), 83-09 (III), 80-10 (II), 79-62 (IX), 78-31 (V)

09.25 Breach of Contract
84-15 (IV), 82-05 (XI), 80-50 (I), 80-46 (I), 80-35 & -40 (XIII), 80-29 (III), 80-10 (II), 79-62 (I), 78-19 (I, II), 78-10 (II), 75-15.2 (I), 73-11 (II)

09.3 Evidence
87-A-02 (II), 84-12 (II), 83-04.1 (I, II, III), 80-41 (I, XVII), 80-22 (I), 79-63 (IV), 79-55 (I), 79-42 (V), 79-41.2 (II), 79-29.2 (II)

09.31 Applicability of Rules of Evidence
74-10 (I)

09.32 Burden of Proof
87-A-05 (I), 86-01 (IV), 84-31.1 (II), 84-29 (II, V), 84-21 (II, III), 84-06 (I, VIII), 83-16 (II), 83-15 (II), 83-A-09 (III), 82-05 (V), 82-A-02.1 (VII), 80-42 (I), 80-30 (IV), 80-04 (I), 79-70.1 (III), 79-65 & 80-07 (IX), 79-43 (VII), 79-42 (V), 79-01 (I), 78-31 (IV), 74-18 (V)

09.33 Weight and Sufficiency
87-A-02 (II), 86-22, -25 & 86-A-03 (II), 84-29 (III), 84-21 (II), 83-04.2 (II), 82-A-03 (III), 80-52 (I), 80-30 (VI, VIII), 80-18 (I, II), 79-70.1 (III), 79-63 (IV), 79-49 (III), 79-41.2 (II), 79-37 (VI), 79-29.2 (II), 79-01 (I), 74-18 (IX), 74-10 (I)

09.34 Corroboration
87-A-02 (II), 86-22, -25 & 86-A-03 (II), 84-29 (V), 80-41 (I, VII), 80-15 (IV), 79-63 (IV), 79-22 (I), 73-15 (I)

09.35 Judicial and Official Notice
84-A-01 (II)

09.36 Witnesses
87-A-04 (II), 86-22, -25 & 86-A-03 (II), 86-04 (VI), 85-04 (IV), 84-06 (IX), 83-15 (IV), 82-10.2 (II), 82-10.1 (II), 81-54 (IV), 80-35 & -40 (XII, XIII), 80-30 (VII), 80-15 (IV), 79-63 (IV), 79-55 (I), 74-22 (I)

09.361 Appearance
83-15 (IV), 82-10.1 (II), 80-35 & -40 (XII, XIII), 79-63 (IV), 77-01 (I)

09.362 Credibility
85-04 (IV), 84-29 (III), 84-06 (IX), 83-15 (IV), 82-10.2 (II), 81-54 (IV), 80-29 (II), 80-15 (IV), 79-63 (IV), 78-22 (III), 77-31 (II)

09.37 Special Kinds of Evidence
87-A-04 (II), 87-A-02 (II)

09.371 Affidavits
88-02 & -04 (I), 87-A-04 (II), 83-15 (VI), 80-10 (V)

09.372 Best Evidence
86-11 (VIII), 85-01 (III), 80-15 (VIII), 79-29.2 (II)

09.373 Board File
84-A-01 (II), 79-65 & 80-07 (II), 78-29 (I), 78-10 (I), 77-24 (I), 75-29 (I)

09.374 Circumstantial
84-29 (III, V), 84-12 (II), 80-42 (I), 80-30 (VI), 80-26 (V), 79-70.1 (I), 79-51 (I), 79-41.2 (II, III), 79-19 & -11 (I), 79-01 (I), 78-31 (IV), 78-22 (I), 78-16 & -20 (III, IX, XI)

09.375 Expert Testimony

09.376 Hearsay
87-A-04 (II), 87-A-02 (II), 86-22, -25 & 86-A-03 (II), 74-10 (I)

09.377 Newspaper Articles

09.378 Offer of Proof
83-03 (IV), 78-03 (I)

09.379 Records
85-16 (I), 84-29 (III), 79-55 (I)

09.380 Stipulations
87-A-07 (I), 86-16 (I), 86-14 (I), 86-12 (I), 85-18 (I), 84-13 (I), 84-10 (I), 84-A-01 (II), 83-22 (I), 83-11 (I), 81-53 (II), 81-29 (I), 81-23 (I), 81-15 (I), 81-12 (I), 80-55 (I), 80-49 (I), 80-44 (I), 80-18 (III), 80-14 (I), 80-A-02 (I), 79-68 (I), 79-44 (I), 79-37 (I), 79-14 (I), 79-12.2 (I), 78-29 (I, II), 78-15 (I), 78-03 (I), 75-29 (I), 75-28 (I), 75-24 (I), 75-22 (I), 75-19 (I), 75-16 (I), 73-13 & -14 (II)

09.381 Tape Recordings
74-01 (I)

09.382 Testimony of Board Personnel
81-36 (I, III), 79-22 (I), 74-22 (I)

09.383 Evidence Included with Parties' Briefs
87-A-04 (II), 80-22 (I), 79-37 (V), 79-15 (IV), 79-14 (I)

09.39 Admissibility
84-12 (II), 83-A-09 (I), 83-A-08 (IV), 83-A-05 (II), 80-41 (I, VII, XVII), 80-22 (I), 80-14 (II), 79-63 (II), 79-55 (I), 79-14 (I)

09.391 Parol
86-11 (VIII), 85-01 (III), 82-05 (IV), 78-19 (II), 76-16 (III)

09.392 Incompetent
73-15 (I)

09.393 Privileged Evidence
81-36 (I, III), 80-49 (III), 79-55 (I), 79-50 (II), 77-A-06 (I), 74-22 (I)

09.394 Immaterial or Irrelevant Evidence
79-50 (III)

09.4 Res Judicata
87-A-01 (I), 84-28 (I), 81-A-02 (IV), 81-A-01 (VI), 79-50 (III), 79-36.1 (V), 78-A-09 (II)

09.41 Prior Decisions
87-A-01 (I), 84-28 (I), 83-A-07 (II), 81-A-02 (IV), 81-A-01 (VI), 79-50 (III), 79-41.1 (I), 79-36.1 (V), 78-A-09 (II)

09.411 Board
84-28 (I), 83-A-07 (II), 81-A-01 (VI), 79-36.1 (V), 78-A-09 (II), 75-29 (I), 73-13 & -14 (III)

09.412 Court
80-50 (II, V), 78-29 (II), 74-04, -05 & -06 (II)

09.413 Other Tribunals
87-A-01 (I), 86-09 (I), 81-A-02 (IV), 79-50 (III), 79-41.2 (III), 79-41.1 (I), 76-11 (II), 75-26 (II)

09.43 Application
87-A-01 (I), 84-28 (I), 75-29 (I)

09.5 Laches
86-11 (IX), 85-16 (V), 85-08 (III), 84-12 (I), 81-12 (II), 79-67 (III), 75-33 (I), 75-13 (I)

09.51 Elements
84-12 (I), 79-67 (III)

09.52 Defenses
80-35 & -40 (II)

09.6 Waiver
86-14 (IV), 86-12 (IV), 85-19 (III, IV, V), 85-07 & -09 (II, III, VII, X), 85-02 (III), 85-01 (II), 83-14 (IV), 83-10.2 (IV), 82-15, -16 & -22 (VIII), 82-05 (I, II, III, IV, V, VII, VIII, IX, X, XII), 81-28 (IV), 81-18 (III), 80-50 (I), 80-45 (VI, XI), 80-41 (XIX), 80-05 (V, VII), 79-57 (I), 79-49 (III), 79-32 (IV, VI), 79-29.1 (I), 79-24 (III), 79-14 (III), 79-06 (III), 78-23 (XIII), 78-A-11 (III), 78-01 (II), 78-IR-01 (V)

09.61 Form

86-12 (IV), 85-07 & -09 (II), 85-01 (II), 84-19 (III), 82-15, -16 & -22 (VIII), 82-05 (II, III, IV, V, VII, VIII, X), 81-28 (IV), 80-41 (VI), 79-24 (III), 77-34 (IV)

09.611 Oral

09.612 Written

86-14 (V), 86-12 (IV), 85-19 (III, IV), 85-02 (III), 85-01 (II), 84-19 (III), 83-10.2 (IV), 82-15, -16 & -22 (VIII), 82-05 (II, III, VII, VIII, X), 80-45 (VI), 80-41 (VI, XIX), 79-49 (III), 79-24 (III), 77-34 (IV), 76-16 (II, III, IV), 75-01.2 (IV)

09.613 Implied

86-14 (V, VI), 86-12 (IV), 85-02 (III), 85-01 (II), 84-19 (III), 83-10.2 (IV), 81-28 (IV), 81-18 (III), 79-56 (II), 79-49 (III), 78-A-11 (III), 75-33 (I)

09.62 Waiver of Board Procedures

88-01 (I), 87-A-06 [87-09] (I), 87-03 (I), 86-14 (I), 86-11 (III), 85-20 (I), 85-18 (I), 85-16 (II, V), 84-20 (II), 84-12 (I), 83-22 (I), 83-21 (I), 83-14 (IV), 83-09 (I), 83-03 (I, II), 81-39 (I), 80-36 (II), 80-30 (III), 80-14 (I), 80-A-02 (I), 79-71 (I), 79-70.2 (II), 79-68 (I), 79-67 (I), 79-43 (VI), 79-32 (IV, VI), 79-29.1 (I), 79-15 (V), 79-12.2 (I), 79-12.1 (I), 78-34 (I), 78-29 (I), 78-A-11 (II), 78-A-10 (I, III, VI), 78-04 (I), 78-01 (II), 77-34 (IV), 76-21 (IV), 76-17 (I), 76-11 (II), 75-36 (I), 75-33 (I), 75-29 (I), 75-24 (I), 75-22 (I), 74-22 (I), 73-12 (III)

09.63 Election of Remedies

86-09 (I), 85-20 (I), 83-03 (II), 76-11 (I, II), 75-28 (IV), 74-04, -05 & -06 (II, III), 73-05 (I)

09.64 Right to Bargain, Waiver by Contract

86-14 (V), 86-12 (IV), 86-11 (III, IV, VIII, IX, X, XI, XVI), 86-05 (III), 86-02 (IV), 85-19 (III, IV), 85-07 & -09 (III), 85-01 (II), 84-19 (III), 83-10.2 (VI), 83-09 (I), 82-15, -16 & -22 (VIII), 82-05 (I, II, III, IV, VII, VIII, IX, X, XII), 80-50 (I), 80-46 (III), 80-45 (VI, X), 80-41 (VI, XIX), 80-05 (V, VII), 79-32 (VI), 79-14 (III), 76-17 (II), 76-16 (II, III, IV), 75-28 (II)

09.641 Matters Not Covered by Contract

86-14 (V), 86-12 (IV), 86-11 (III, IV, VIII, IX, X, XI), 85-07 & -09 (III, VII), 85-01 (II), 84-19 (III), 82-05 (IV, X, XII), 80-45 (VI, XI), 80-41 (VI, XIX), 80-05 (V, VII), 79-24 (II, III), 76-16 (II, III, IV), 75-24 (II, III), 73-17 (II), 73-07 (VI), 73-06 (III)

09.642 Unilateral Changes During Contract Term

86-14 (V), 86-12 (IV), 86-11 (III, IV, IX, X), 86-04 (II), 86-02 (II, IV), 85-19 (II, III, IV, V), 85-07 & -09 (III), 84-19 (III), 83-10.2 (VI), 82-15, -16 & -22 (VIII), 82-05 (X, XII), 80-46 (III), 80-41 (VI, XIX), 79-49 (III), 79-24 (II), 76-16 (II, III, IV), 73-17 (II), 73-06 (III)

09.65 Right to Bargain, Waiver by Conduct

86-14 (VI), 86-11 (IX), 86-05 (III), 86-04 (II), 86-02 (III), 86-01 (I), 85-19 (V), 85-07 & -09 (X), 85-02 (III), 84-19 (III), 84-01 (III), 83-10.2 (IV), 81-28 (IV), 81-18 (III), 81-12 (II), 79-49 (III), 79-43 (VI), 79-32 (IV), 79-14 (II), 79-10 & -18 (II, III), 78-19 (III), 78-A-11 (III), 78-IR-01 (V)

09.651 Failure to Request Bargaining

86-14 (VI), 86-11 (IX), 86-05 (III), 86-04 (II), 86-02 (III), 86-01 (I), 85-19 (V), 85-18 (III), 85-07 & -09 (V, X), 85-02 (III), 84-19 (III), 84-12 (I), 84-10 (II), 84-01 (III), 81-18 (III), 81-12 (II), 81-01 (I), 79-43 (VI), 79-10 & -18 (II, III), 78-19 (IV), 78-16 & -20 (XII), 77-A-03 (IV), 76-22 (II), 75-01.3 (I, III), 73-13 & -14 (IV)

09.66 Right to Bargain, Waiver by Express Consent

86-14 (VII), 86-11 (IV, XI), 86-02 (IV), 85-19 (III), 85-01 (II), 84-19 (III), 83-10.2 (IV), 82-15, -16 & -22 (VIII), 82-05 (X, XII), 80-50 (I), 80-46 (III), 80-45 (VI), 80-41 (VI, XIX), 79-14 (III), 78-IR-01 (V), 76-16 (II, III, IV), 75-01.2 (IV), 73-17 (II)

09.661 During Negotiations

86-14 (VII), 86-11 (IV, XI), 85-19 (III), 85-07 & -09 (VII), 84-19 (III), 83-10.2 (IV), 80-45 (VI), 79-24 (II), 78-23 (V, XIII), 78-04 (I), 75-24 (II, III), 75-01.2 (IV), 73-17 (II)

09.662 During Contract Term Concerning Non-Contractual Issues

86-14 (VII), 86-11 (VIII, XI), 85-19 (III), 85-07 & -09 (II, III, VII), 84-19 (III), 83-10.2 (IV), 82-05 (X, XII), 79-24 (II), 76-16 (II, III, IV), 73-17 (II)

09.67 Waiver of Protected Rights

83-03 (I, II), 79-56 (II), 75-01.2 (IV)

09.671 Right to Approve New Representative

75-10 (II), 73-04 (II)

09.672 Right to Arbitrate

85-20 (I), 80-52 (III), 80-15 (X), 79-56 (II), 74-04, -05 & -06 (I)

09.673 Right to Assistance of Union Representation

82-08 (V), 78-16 & -20 (X), 73-04 (II)

09.674 Right to Picket

78-16 & -20 (VIII)

09.675 Right to Reinstatement

77-16 (II, III)

09.676 Right to Solicit or Distribute

09.677 Right to Strike

09.7 Estoppel

87-A-01 (I), 84-13 (III), 83-10.2 (VI), 83-09 (I), 83-A-07 (II), 81-41 (V), 81-A-01 (V), 80-14 (IV), 79-67 (III), 79-31 (III), 78-A-11 (III), 78-01 (II), 78-IR-01 (V), 77-34 (III), 75-26 (IV)

09.71 Elements of Estoppel

87-A-01 (I), 83-09 (I), 79-67 (III), 78-25 (II)

09.72 Types of Estoppel

83-A-07 (II), 81-A-01 (V), 79-67 (III), 79-31 (III)

09.73 Estoppel of Board

87-A-01 (I), 83-A-07 (II), 81-41 (V), 80-14 (IV), 79-31 (III), 76-16 (I), 76-15 (I)

09.74 Estoppel of Parties

84-13 (III), 83-10.2 (VI), 83-09 (I), 81-A-01 (V), 80-14 (IV), 79-67 (III), 79-31 (III), 79-29.1 (I), 79-15 (V), 79-12.1 (I), 79-06 (III, IV), 78-25 (II), 78-19 (III, IV), 78-A-11 (III), 78-A-10 (I, III, VI), 78-04 (I), 78-01 (II), 78-IR-01 (V), 77-37 (III), 77-36 (I, II), 77-34 (III), 77-24 (I, II), 77-16 (III), 77-02 (I), 76-21 (IV), 75-33 (I), 75-26 (IV)

11. PUBLIC EMPLOYER

87-A-07 (VI)

11.11 Definition

87-A-07 (II, V, IX, X, XI, XII), 87-A-01 (I, II), 83-A-07 (IV, V), 83-A-03 (II), 82-14.1 (I), 81-53 (I), 81-A-02 (I, II, III, VIII), 79-64 (IX, X, XI), 79-06 (II, III, IV), 78-A-05 (I, II, V, VII), 75-22 (II), 72-A-01 (I)

11.12 Determination

87-A-07 (II, III, V, VI, VIII, IX, X, XI, XII), 87-A-01 (I, II), 85-18 (II), 85-17 (I), 85-A-03.1 (II), 84-29 (I), 83-A-07 (III, IV, V), 83-A-03 (II), 82-14.1 (I), 81-A-02 (I, II, III, VIII), 79-64 (IX, X, XI), 79-06 (I, II, III, IV), 78-A-05 (I, II, V, VII), 77-18, -19, -20 & -29 (III), 72-A-01 (I)

11.13 Joint Public Employer

82-14.1 (I), 80-45 (I, XIII), 79-64 (IX, X, XI), 78-A-03 (II, III), 77-07 (IV), 77-A-02.3 (VI), 72-A-01 (I)

11.14 Employer Association

11.15 Public Officer

87-19 (I), 85-18 (II), 85-17 (I), 84-29 (I), 81-54 (III), 81-52 (IV), 80-10 (III)

11.16 Successor Employer

80-45 (X)

11.17 Entities "Acting on Behalf of" a Public Employer
87-A-07 (II, III, IV, V, VI, VIII, IX, X, XI, XII), 87-A-01 (II), 81-A-02 (I, II, III, VIII), 78-A-05 (I, II, V, VII)

11.2 Political Entities

11.21 State

11.22 County

11.23 Municipality
85-A-03.1 (II), 83-A-03 (II), 79-64 (IX, X, XI)

11.3 Agency
83-A-03 (II), 79-06 (II, III, IV), 78-A-05 (VII), 78-03 (I)

11.31 Authority

11.32 Board
82-14.1 (I)

11.33 Commission
83-A-03 (II), 82-14.1 (I)

11.34 Joint Board
83-A-03 (II)

11.35 Multi-State Agency

11.36 Special District

11.4 Courts
88-02 & -04 (I)

11.5 Educational Institution
87-A-07 (II, V, VI, XII), 85-A-03.1 (II), 79-06 (II, III, IV), 77-18, -19, -20 & -29 (III)

11.51 School District
77-18, -19, -20 & -29 (III), 75-22 (II)

11.52 Community College

11.53 College

11.54 University
78-16 & -20 (I)

11.55 Board of Regents

11.56 Community School District
78-A-03 (II, III)

11.57 School Union

11.6 Publicly Supported Organizations
87-A-07 (III, IV, V, XI, XII), 79-06 (III, IV)

11.61 Non-Profit

11.62 Charitable

11.63 Religious

11.64 Scientific

11.65 Literary

11.66 Recreational

11.67 Health
85-A-01 (II)

11.7 Rights and Responsibilities
83-09 (II), 81-06 (I, II, III, IV, V, VII, VIII), 80-49 (III), 80-02 (V), 79-64 (X), 78-25 (II), 78-23 (III, IV, XII), 78-02 (I), 78-01 (IV), 77-37 (VII), 77-18, -19, -20 & -29 (III), 75-33 (II, III), 73-01 (III)

11.8 Organizations Receiving Government Grants or Appropriations
87-A-07 (III, IV, V, XI, XII), 79-06 (III, IV), 78-A-05 (I, II, V, VII)

15. PUBLIC EMPLOYEES
80-41 (II)

15.01 Definitions
86-17 (II, III, IV), 84-04 (I), 83-14 (VI), 83-A-08 (I, II), 82-A-02.1 (V), 80-41 (II), 79-A-02 (II, III), 78-A-08 (II, III, IV, V, VI), 78-A-06 (I, II, III), 77-A-02.3 (XII), 77-A-02.4 (II), 75-22 (II, III, IV), 75-A-03 (I), 73-A-02 (I, II), 73-A-01 (I, II)

15.1 Educational Employees
82-A-03 (I), 78-A-03 (II, III), 75-22 (II, III, IV, V), 75-A-03 (I), 71-A-02 (I), 70-A-01 (II)

15.11 Administrators
83-A-09 (VIII), 73-A-01 (I)

15.111 Department Heads and Chairpersons
83-A-09 (VIII)

15.112 Coordinators
83-A-09 (VIII)

15.113 Deans, Principals and Vice Principals
83-A-09 (IV, VIII), 81-52 (IV)

15.114 Athletic Directors
84-A-05 (II, IV)

15.115 Business Manager

15.12 Professionals
77-A-02.3 (VII), 70-A-01 (III)

15.121 Teachers
77-A-02.3 (VII), 70-A-01 (III)

15.1211 Student

15.1212 Federally-Funded
83-A-08 (II), 77-A-01 (I)

15.122 Professors

15.123 Counsellors
71-A-02 (I)

15.124 Psychologists

15.125 Librarians

15.126 Medical Staff
85-A-01 (II), 70-A-01 (III)

15.127 Coaches
75-22 (II, III, IV, V)

15.128 Substitute Teachers

15.129 In-Service Instructors
71-A-02 (I)

15.13 Research and Teaching Assistants

15.131 Graduate Assistants

15.132 Research Associates

15.133 Teaching Assistants
82-A-03 (I)

15.134 Aides
82-A-03 (I)

15.14 Paraprofessionals
82-A-03 (I), 75-A-03 (I)

15.15 School Bus Drivers
77-A-01 (I)

15.16 Summer School Employees
73-A-02 (II)

15.17 Service and Maintenance
77-A-01 (I)

15.171 Custodians
77-A-01 (I)

15.172 Cafeteria Workers

15.173 Transportation Employees

15.18 Clerical and Office
82-A-02.1 (XIII), 75-A-03 (I)

15.19 Evening School and Extension Employees
73-A-02 (I)

15.2 Hospital and Health Care Service Employees
85-A-01 (II)

15.21 Professional

15.211 Registered Nurses

15.212 Licensed Practical Nurses

15.213 Graduate and Student Nurses

15.22 Interns and Residents

15.23 Non-Professional Staff

15.231 Technicians

15.232 Orderlies

15.233 Nurses Aides

15.24 Therapists

15.25 Service and Maintenance

15.251 Kitchen and Cafeteria

15.252 Laundry

15.253 Housekeeper

15.254 Transportation

15.255 Guards

15.26 Office Employees
82-A-02.2 (IV), 78-A-08 (IV, V, VI)

15.261 Clerical
82-A-02.2 (IV)

15.262 Business Office

15.27 Other Professional Employees

15.28 Volunteers

15.29 Paraprofessionals

15.3 Administrative Service Employees

15.31 State
77-A-02.4 (II)

15.32 County

15.33 Municipal

15.34 Court

15.35 Federally-Funded
83-A-08 (II), 77-A-01 (I)

15.4 Uniformed Services
84-A-04 (III), 83-A-01 (II), 80-A-05 (II), 79-A-01 (V), 78-A-06 (II, III), 77-A-03 (II)

15.41 Police
84-A-04 (III), 81-A-01 (I), 79-A-01 (V), 78-A-06 (II, III), 77-A-04 (II), 77-A-03 (II)

15.411 Capitol Police

15.412 Constables

15.413 County Sheriff
84-A-04 (III)

15.414 Municipal Police
83-A-01 (II), 81-A-01 (I), 78-A-06 (II)

15.415 National Guard

15.416 Special Police
80-A-05 (II), 77-A-04 (II)

15.417 State Police
78-A-09 (IV)

15.418 Dispatchers
81-A-01 (I), 79-A-01 (V), 77-A-03 (II)

15.42 Prison Guards
84-A-04 (III)

15.43 Firefighters

15.44 Civilian Personnel
81-A-01 (I), 79-A-01 (V), 77-A-03 (II)

15.45 Federally-Funded Employees
83-A-08 (II), 77-A-01 (I)

15.5 Transit and Transportation Employees

15.51 Operators

15.511 Bus Drivers

15.512 Truck Drivers

15.513 Equipment Operators

15.52 Dispatchers
77-A-03 (II)

15.53 Service and Maintenance

15.531 Mechanics

15.532 Warehouse

15.54 Office and Clerical Staff

15.55 Federally-Funded Employees
83-A-08 (II), 77-A-01 (I)

15.6 Public Works, Utilities and Sanitation Employees
80-A-04 (I), 79-A-02 (II, III)

15.61 Technicians

15.62 Mechanics
80-A-04 (I)

15.63 Office and Clerical

15.64 Federally-Funded Employees
83-A-08 (II), 77-A-01 (I)

15.65 Operators and Drivers
80-A-04 (I)

15.7 Other Professional Employees

15.8 Parks and Recreation Employees
80-A-04 (I)

15.81 Athletic Directors

15.82 Rangers

15.83 Maintenance
80-A-04 (I)

15.84 Office and Clerical

15.85 Federally-Funded Employees
83-A-08 (II), 77-A-01 (I)

15.9 Religious Institution Employees

15.91 Clergy

15.92 Clerical

15.93 Lay Personnel

15.931 Professionals

15.932 Office

15.933 Service and Maintenance

16. EMPLOYEES WITH LIMITED STATUTORY PROTECTION
77-A-02.3 (IX)

16.05 Department or Division Head
84-A-03 (II, III, V, VII), 77-A-02.3 (I, III), 73-A-01 (I)

16.06 Employees Appointed for Specified Term
77-A-02.3 (I), 73-A-01 (I)

16.1 Managerial Employees
86-17 (I, III), 84-04 (I), 81-06 (I, II, III, IV, V, VI, VII, VIII), 78-A-09 (III)

16.11 Definition
86-17 (III)

16.12 Indicia of Authority

16.2 Confidential Employees
86-17 (I, IV), 85-A-01 (VII), 84-04 (I), 83-A-09 (V, VI), 82-A-02.2 (III, IV, V, VI), 82-A-02.1 (V, VI, VIII, IX, X, XII, XIII), 82-A-01 (IV), 81-06 (I, II, III, IV, V, VI, VII, VIII), 78-A-09 (IV), 78-A-08 (II, III, IV, V, VI), 78-A-06 (I, II, III), 77-A-02.4 (I), 77-A-02.3 (II),

16.21 Definition
86-17 (IV), 85-A-01 (VII), 83-A-09 (V, VI), 82-A-02.2 (III, IV, V, VI), 82-A-02.1 (V, VI, VIII, IX, X, XII, XIII), 82-A-01 (IV), 78-A-09 (IV), 78-A-08 (II, V, VI), 78-A-06 (I, II, III), 77-A-02.4 (I), 77-A-02.3 (II),

16.22 Standards
86-17 (IV), 85-A-01 (VII), 83-A-09 (V, VI), 82-A-02.2 (III, IV, V, VI), 82-A-02.1 (VI, VIII, IX, X, XII, XIII), 82-A-01 (IV), 78-A-09 (IV), 78-A-08 (II, V, VI), 78-A-06 (I, II, III), 77-A-02.4 (I), 77-A-02.3 (II)

16.3 Supervisors
85-A-01 (VI), 84-A-05 (IV), 84-A-01 (V), 83-24 (I), 83-A-09 (VIII, IX), 83-A-02 (II, III), 83-A-01 (II, III), 82-A-02.2 (VI), 82-A-02.1 (VI), 82-A-01 (V), 78-A-09 (III), 78-A-06 (I), 77-A-04 (I), 77-A-02.4 (II), 75-A-03 (II), 73-A-01 (II)

16.31 Definition
83-A-01 (II, III), 82-A-02.2 (VI), 82-A-02.1 (VI), 77-A-04 (I), 77-A-02.4 (II)

16.32 Standards
84-A-05 (IV), 83-A-01 (II, III), 82-A-02.1 (VI), 77-A-04 (I), 77-A-02.4 (II), 75-A-03 (II), 73-A-01 (II)

16.4 Other Employees
86-17 (III), 82-A-02.1 (VI), 77-A-02.3 (IX), 77-A-01 (I)

16.405 Employees With Less Than 6 Months' Tenure
77-A-02.3 (IV), 75-A-03 (I), 73-A-02 (I, II)

16.41 Elected and Appointed Officials
86-17 (III), 84-A-03 (II, III, V, VII)

16.42 Consultants

16.43 Part Time Employees
86-A-01 (II, III, IV, V), 84-04 (I), 80-41 (II), 80-A-05 (I, II), 78-A-03 (II), 75-22 (II, III, IV, V), 75-A-03 (I)

16.44 Casual Employees
80-41 (II), 80-A-05 (I)

16.45 Probationary Employees
86-14 (III), 86-11 (VII), 83-14 (VI), 80-55 (II), 80-41 (II), 77-A-02.3 (IV), 74-08 (III)

16.46 Seasonal Employees
86-A-01 (II), 83-A-08 (I), 80-41 (II), 80-A-05 (I), 79-A-02 (II, III), 75-22 (II, III, IV, V), 75-A-03 (I), 73-A-02 (II)

16.47 Temporary Employees
86-A-01 (II), 83-A-08 (I, II, III), 80-A-05 (I), 79-A-01 (II, III), 77-A-02.3 (V), 75-A-03 (I)

16.48 On-Call Employees
86-A-01 (II, III, V), 83-A-08 (I), 80-A-05 (I), 75-A-03 (I)

16.49 Inactive Classification
77-A-0-2.4 (III), 77-A-02.3 (VIII)

21. EMPLOYEE RIGHTS

21.1 Definitions

21.11 Constitutional
88-EA-01 (V), 86-04 (IX), 83-22 (II), 83-06 (IV), 82-10.2 (III), 81-22.1 (IV, VII, VIII), 80-35 & -40 (XV), 78-34 (III), 76-08 (IV), 74-17 (I), 74-08 (II)

21.12 Statutory
88-EA-01 (V), 87-A-03 (II), 87-A-01 (II), 86-23 (VI), 86-17 (II), 86-16 (III), 85-18 (III), 85-16 (III), 85-08 (III), 85-04 (II), 84-29 (III), 84-25 (VI), 84-21 (II), 84-A-01 (V), 83-A-02 (II), 82-10.1 (II), 82-A-02.1 (V), 82-01 (II), 82-A-01 (V), 81-54 (V), 81-52 (IV), 81-51 (I), 81-43 (V, VI), 81-41 (V), 81-35 (III), 80-45 (VI), 80-41 (III), 80-35 & -40 (XII), 80-15 (I), 80-A-04 (II), 79-19 & -11 (I), 79-A-01 (VI), 78-31 (II, III), 78-22 (II, III), 78-19 (I), 78-02 (II), 77-A-02.3 (XII), 76-17 (II), 76-12 (II), 75-22 (II), 75-15.2 (I), 75-01.2 (IV), 75-01.1 (I), 74-16 (II), 74-08 (I), 74-04, -05 & -06 (I, II)

21.13 Contractual

85-17 (IV), 84-21 (II), 83-11 (II), 80-52 (III), 80-10 (IV), 78-31 (II, V), 78-19 (I), 78-10 (II), 77-01 (I), 76-11 (I), 75-28 (II, IV), 75-15.2 (I), 75-A-01 (II), 73-11 (II)

21.14 Common Law

88-EA-01 (V), 80-10 (IV)

21.2 Right to Self-Organization

87-A-03 (II), 86-16 (III), 84-29 (III), 84-08 (II), 84-A-01 (V), 83-24 (I), 83-A-02 (II), 81-54 (V), 81-22.1 (III), 80-41 (III, IV, VII, VIII, XVII, XX), 80-33 (II), 80-13 (I, II), 80-08 (III), 80-04 (III), 80-A-04 (II), 80-02 (VI), 79-65 & 80-07 (V), 79-A-01 (VI), 78-30 (I, II, IV), 78-22 (II, III), 78-16 & -20 (IV), 78-A-11 (I), 78-04 (IV), 78-02 (II), 77-A-03 (I, III), 76-12 (II)

21.3 Right to Form, Join, or Assist Labor Organization

86-22, -25 & 86-A-03 (I, XIII), 86-16 (III), 85-17 (IV), 85-08 (III), 84-29 (III), 84-08 (II), 84-A-01 (V), 83-24 (I), 83-A-02 (II), 82-14.1 (V), 82-10.2 (VI), 82-04 (I), 81-43 (V, VI), 81-22.1 (III), 80-33 (V), 80-30 (III), 80-26 (III), 80-13 (I, II), 79-70.1 (I), 79-65 & 80-07 (V), 79-63 (I), 79-19 & -11 (I), 78-30 (I, II, IV), 78-04 (IV), 78-A-03 (II), 78-02 (II), 77-A-03 (I, III), 77-A-02.3 (XII), 76-12 (II)

21.4 Right to Bargain Collectively

87-19 (X), 86-23 (VI), 86-14 (II), 86-12 (IV), 86-11 (XII), 86-02 (II), 85-18 (III), 84-19 (IV), 84-08 (II), 84-A-03 (IV), 84-01 (I), 83-24 (I), 83-21 (III), 83-10.2 (VI), 83-01 (I), 82-10.2 (III), 82-05 (VI), 82-01 (II), 82-A-01 (V), 81-46 (I), 81-41 (V), 81-35 (III), 80-49 (V), 80-45 (VI), 80-22 (IV), 80-08 (III), 80-05 (V, VII), 80-A-04 (II), 80-02 (VI), 79-62 (XI), 79-36, -39, -45 & -47 (X), 79-32 (III), 79-14 (II, III), 78-04 (IV), 77-A-03 (III), 77-A-02.3 (XII), 77-A-01 (I)

21.5 Right to Engage in Concerted Activity

84-21 (II), 83-24 (I), 83-16 (III), 79-19 & -11 (I), 78-16 & -20 (III, VIII, IX), 76-08 (IV)

21.51 Right to File Grievance

85-04 (II, III), 84-25 (VI), 84-21 (II), 82-10.2 (I), 82-02 (II)

21.6 Right to Refrain from Collective Activity

83-06 (IV, V), 81-52 (IV), 80-24 (II), 78-31 (III)

21.7 Right to Representation

85-16 (III), 84-01 (I), 83-14 (II), 83-03 (V, VI), 82-08 (V), 81-51 (I), 80-41 (III, IV, VII, VIII), 80-33 (II, V), 80-15 (I, III), 80-02 (VI), 79-14 (VIII), 79-A-01 (VI), 78-02 (II), 77-A-03 (III), 77-A-02.3 (XII), 77-A-01 (I), 75-22 (II), 75-15.2 (I), 74-08 (I)

21.8 Right to Strike

80-18 (I), 79-15 (II, IV)

21.9 Waiver
86-11 (XII), 84-12 (I), 83-10.2 (IV, VI), 81-A-01 (V), 80-50 (I), 80-45 (VI, X), 80-10 (IV), 79-56 (II), 79-32 (III), 79-29.1 (I), 78-IR-01 (V), 77-34 (III, IV)

21.91 By Employee Organization
84-12 (I), 83-10.2 (IV, VI), 81-A-01 (V), 80-45 (VI, X), 80-30 (III), 80-05 (V, VII), 79-56 (II), 79-49 (II), 79-32 (III), 79-24 (III), 79-14 (III), 78-31 (II), 78-04 (I, IV), 75-13 (I), 75-01.3 (I), 75-01.2 (IV),

21.92 By Employee
86-11 (XII), 84-01 (III), 83-03 (I, II), 80-15 (III, X), 80-10 (IV), 78-31 (III), 76-17 (II)

22. EMPLOYEE ORGANIZATIONS

22.1 Definition
88-EA-01 (V), 84-31.1 (III), 81-22.1 (I, V), 80-36 (III), 79-14 (VIII), 79-10 & -18 (II), 78-31 (I), 76-10 (I)

22.2 Membership
86-22, -25 & 86-A-03 (XIII), 79-36, -39, -45 & -47 (XIV)

22.21 Expulsion or Suspension
86-22, -25 & 86-A-03 (XIII), 79-40.2 (II), 79-36, -39, -45 & -47 (XIV)

22.22 Employee Member
79-36, -39, -45 & -47 (XIV)

22.23 Non-Employee Member

22.3 Duties and Responsibilities
88-EA-01 (V), 83-06 (V), 83-03 (V, VI), 82-08 (I), 81-51 (I, II, III), 81-22.1 (II, III), 80-52 (II), 80-45 (VI), 80-36 (III), 80-15 (I), 79-10 & -18 (II), 78-01 (V), 75-33 (II), 75-A-01 (II, III), 74-08 (I), 74-04, -05 & -06 (I)

22.31 Registration

22.32 Financial Disclosure
83-06 (V, VI, VII)

22.33 Fund Raising

22.34 Boycotts

22.35 Pension and Welfare Fund Operation

22.37 Presence at Grievance Procedures
83-03 (V, VI), 82-02 (II), 80-52 (III), 80-36 (III), 78-16 & -20 (X), 75-A-01 (II)

22.38 Arbitration of Internal Disputes

22.39 Legal Representation
83-03 (V, VI), 82-08 (V), 82-02 (II), 80-15 (I)

22.4 Jurisdiction
84-A-04 (III), 80-36 (III), 78-02 (I)

22.41 Exclusive Representation
84-31.1 (III), 84-A-04 (III), 84-01 (I, III), 83-03 (V), 81-51 (I), 80-36 (III), 81-43 (II, VI), 80-52 (III), 80-29 (IV), 80-15 (I), 79-49 (II), 79-40.2 (I), 79-10 & -18 (II), 78-31 (V), 77-27 (II), 76-16 (V), 75-16 (III)

22.42 Minority Representation
78-31 (II)

22.43 Successor Organizations
80-36 (III), 79-10 & -18 (II), 76-16 (V), 75-A-01 (II, III)

22.45 Merger or Affiliation

22.5 Employee Organization Activities
83-24 (I), 83-16 (III), 81-43 (V, VI), 83-41 (VI), 80-41 (III)

22.51 Release Time for Union Business
81-41 (VI), 81-35 (III), 80-35 & -40 (XI), 79-62 (IX), 77-31 (II)

22.52 Internal Affairs

22.53 Intra-Union Disputes

22.55 Public Funds, Use of

22.56 Political Activities
78-34 (III), 76-08 (IV), 75-25 (II)

22.57 Discipline of Members
79-40.2 (II), 75-25 (III)

22.6 Organization Structure
84-31.1 (III), 81-22.1 (I, V)

22.61 Constitution and By-Laws
81-22.1 (I)

22.62 Ad Hoc Rules
81-22.1 (I)

22.7 Representatives
84-31.1 (III), 84-01 (III), 81-50 (I), 80-35 & -40 (IX), 79-14 (VIII)

22.71 Officials
84-31.1 (III), 84-20 (IV), 84-01 (III)

22.72 Business Agents
81-50 (I), 80-52 (III), 80-35 & -40 (IX, XIV), 80-15 (V), 79-14 (VIII), 75-25 (III), 74-24 (II)

22.73 Shop Stewards
80-52 (III), 79-40.2 (I)

22.74 Members as Agents
84-01 (III), 82-08 (V), 75-25 (III), 74-01 (II)

22.75 Non-Members as Agents
74-24 (II)

22.8 Joint Employee Organization Committee

22.9 Capacity to Sue or Be Sued
81-22.1 (I, II), 70-A-02 (I)

23. DUTY OF FAIR REPRESENTATION
82-08 (I, III, IV, V), 81-51 (I, II, III), 80-52 (II), 80-15 (I, V)

23.1 Definition
85-16 (III), 83-03 (V), 82-08 (III, IV), 82-02 (II), 81-51 (I, II), 80-15 (III, V, VII), 74-08 (I)

23.2 Refusal to Process Grievance
85-16 (III, IV), 83-03 (V), 82-02 (II), 80-52 (III), 80-36 (III), 80-15 (II, III, IV, VII, IX, X), 75-A-01 (II)

23.21 Informing Employee of Decision Not to Process
85-16 (II)

23.22 Employee Choice of Representative in Grievance Proceedings
74-04, -05 & -06 (I)

23.23 Non-Member Grievance
85-16 (III), 80-15 (I, IV)

23.24 Refusal to Bring Grievance to Arbitration
83-03 (VI), 82-02 (II), 80-52 (III), 80-15 (III, X), 78-19 (I), 74-04, -05 & -06 (I)

23.25 Failure to Properly and Effectively Process
85-16 (III), 83-03 (V, VI), 80-52 (III), 78-19 (I)

23.26 Negligent or Irresponsible Conduct
83-03 (V), 80-15 (III, VII)

23.3 Bargaining Situations
80-45 (VI), 75-15.2 (I), 75-01.2 (IV)

23.31 Representation of Non-Member
81-51 (I), 75-15.2 (I)

23.32 Representation of Member
85-16 (V)

23.4 Non-Bargaining Situations
87-20 (I), 86-22, -25 & 86-A-03 (XIII), 85-16 (III), 83-06 (V), 83-03 (V, VI), 82-08 (IV), 81-51 (III), 80-15 (II, III, IV, VII, IX, X), 79-40.2 (II)

23.5 Access to Union Information
86-22, -25 & 86-A-03 (XIII), 83-06 (V), 75-15.2 (I)

23.6 Actions for Breach of Duty
87-20 (I, II), 85-16 (III, IV, V), 83-06 (V), 83-03 (V), 82-08 (I, II), 81-51 (I, II, III), 80-52 (II), 80-15 (I, VII), 75-15.2 (I, II), 75-01.2 (IV), 74-08 (I), 74-04, -05 & -06 (I)

23.61 Standing
85-16 (III), 83-06 (V), 83-03 (V)

23.62 Liability of Employee Organization
83-06 (V), 83-03 (V), 80-36 (III)

23.63 Liability of Employer
83-06 (VI)

23.7 Remedies
83-06 (V), 75-15.2 (I, II), 74-08 (I), 74-04, -05 & -06 (I)

24. DUES AND ORGANIZATIONAL SECURITY

24.1 Dues and Assessments
83-06 (IV, V, VI), 78-31 (III, IV, V, VI)

24.11 Payment by Employee

24.12 Nonpayment
83-06 (IV, VI), 81-22.1 (IV)

24.13 Collection
83-06 (IV, V, VI), 78-31 (VI)

24.131 Checkoff
78-31 (III, IV, V, VI)

24.132 Deduction
78-31 (III, IV, V, VI), 73-01 (V)

24.14 As Subject of Bargaining
83-06 (IV), 80-50 (II, III), 75-19 (VIII)

24.15 Authorization
83-06 (V)

24.151 By Employee
78-31 (III, IV, V), 73-01 (V)

24.152 By Statute
83-06 (IV)

24.16 Revocation
78-31 (II, III, IV, V)

24.161 By Employee
78-31 (II, III, IV, V)

24.162 As Strike Penalty

24.163 Reinstatement

24.17 Use of Dues
83-06 (IV, V)

24.18 Dues Administration
83-06 (V)

24.181 Refund Procedures
83-06 (V)

24.19 Agency Fees
83-06 (IV, V), 80-50 (II, III), 75-19 (VIII)

24.191 Allowable Charges
83-06 (IV, V)

24.192 Assessment of Employees on Leave

24.193 Assessment of Part-Time Employees

24.194 Assessment of Non-Members
83-06 (IV, V), 80-50 (II, III)

24.195 Political/Ideological Refunds
83-06 (V)

24.2 Organizational Security

24.21 Legislation and Regulations Affecting

24.211 Civil Service

24.212 Local Option

24.213 Federal Programs

24.214 State Labor Legislation
75-19 (VIII)

24.22 Union Security Provisions
80-50 (II, III)

24.221 Agency Shop
83-06 (IV, V), 80-50 (II, III), 75-19 (VIII)

24.222 Open Shop

24.223 Union Shop
78-31 (IV)

24.224 Maintenance of Membership

24.4 Escape periods
78-31 (III, V)

24.41 During Term of Contract

24.42 During No-Contract Period
78-31 (III, V)

31. RECOGNITION

31.1 Definition
76-10 (I)

31.2 Request Filed with Employer
84-29 (III), 80-A-03 (III)

31.21 Standing

31.22 Timeliness

31.23 Contents of Request

31.24 Proof of Majority Status
84-A-01 (III), 78-28 (I)

31.25 Unit Description

31.3 Employer Response
80-A-03 (III), 78-28 (I), 78-01 (IV), 76-10 (I), 72-A-01 (II)

31.4 Petition/Request Filed with State Board
86-22, -25 & 86-A-03 (X), 80-A-03 (III)

31.41 Contents
86-22, -25 & 86-A-03 (X)

31.42 Timeliness

31.43 Notice

31.44 Necessity for Hearing

31.45 Proof of Majority Status
84-A-01 (IV)

31.46 Appropriate Unit

31.47 Dismissal by State Board

31.5 Bars to Recognition
79-06 (I), 78-02 (II)

32. CERTIFICATION PROCEDURES

32.1 Filing of Petition
81-A-03 (I, III, VI), 80-A-03 (III)

32.11 Contents
86-22, -25 & 86-A-03 (X)

32.12 Standing
81-A-03 (I, III, VI), 80-A-03 (III)

32.13 Timeliness
88-EA-01 (I, II, III)

32.135 Employer Petitions
81-A-03 (I, III, VI)

32.14 Bars to Petition
88-EA-01 (I, II, III), 87-A-01 (II), 79-06 (I), 78-A-11 (I, III, IV, V), 74-09 & -14 (III)

32.141 Contract
88-EA-01 (I, II, III), 78-A-11 (I, III, IV, V), 78-02 (II), 75-A-01 (I), 73-01 (IV)

32.142 Election Within Preceding Year
81-15 (IV), 81-A-03 (VI)

32.143 Pending Unfair Labor Practice

32.144 Pending Court Case

32.15 Amendments

32.16 Withdrawal

32.17 Refiled or Reinstated

32.18 Waiver of Procedures
80-A-03 (IV), 77-37 (III), 76-10 (I)

32.2 Showing of Interest
86-22, -25 & 86-A-03 (VII, VIII, IX), 84-A-01 (IV),
84-A-01 (IV, V, VI, VII, VIII, IX), 81-54 (VIII), 80-26 (X), 77-A-06 (I, II)

32.21 Submission of List of Employees
86-22, -25 & 86-A-03 (VII), 81-54 (VIII), 80-26 (X), 77-37 (III)

32.22 Nature of Showing
86-22, -25 & 86-A-03 (VII, VIII), 84-A-01 (III, IX), 77-A-06 (II)

32.221 Authorization Cards
86-22, -25 & 86-A-03 (VII), 84-A-01 (III, IV), 77-A-06 (II)

32.222 Dues or Membership Cards
77-A-06 (II)

32.223 Employee Petition
86-22, -25 & 86-A-03 (VII)

32.224 Other Evidence of Showing of Interest

32.225 Staleness
84-A-01 (VIII)

32.226 Forgery

32.227 Coercion or Misrepresentation
86-22, -25 & 86-A-03 (VII, VIII, IX, XI, XII), 84-A-01 (V, VI, VII), 83-24 (I)

32.228 Confidentiality of Showing of Interest
77-A-06 (I)

32.23 Extent of Showing
84-A-01 (I, IV), 80-13 (VII)

32.231 Petitioner
84-A-01 (I), 77-37 (III)

32.232 Intervenor
84-A-01 (I), 77-37 (III)

32.4 Prehearing Procedures and Conduct
78-A-10 (VI)

32.41 Investigation

32.42 Discovery

32.43 Subpoenas

32.44 Stipulation

32.45 Prehearing Conference
78-01 (I)

32.5 Hearing Procedures and Conduct
85-A-03.2 (I), 85-A-03.1 (III), 83-A-09 (III), 83-A-07 (VI), 82-A-02.1 (XI), 81-A-03 (II), 78-A-10 (III, VI)

32.51 Parties
85-A-03.1 (III)

32.52 Notice
82-A-02.1 (XI)

32.53 Service

32.54 Hearing Officer

32.541 Bias, Prejudice, Conflicts of Interest

32.542 Disqualification

32.55 Subpoenas
78-A-10 (III)

32.56 Conduct of Hearing
85-A-03.2 (I), 82-A-02.1 (VII, XI)

32.561 Motion Practice
85-A-03.1 (I)

32.562 Examination of Witnesses
78-A-10 (III, VI)

32.57 Evidentiary Standards
87-A-04 (II), 87-A-02 (II), 84-A-01 (II), 83-A-09 (III), 83-A-07 (V), 82-A-02.1 (VII, XI), 78-A-06 (II), 77-A-06 (I)

32.571 Stipulations
84-A-01 (II)

32.572 Incomplete Record
85-A-03.1 (III), 82-A-02.1 (XI), 78-A-09 (V)

32.58 Continuances
85-A-03.2 (I), 85-A-03.1 (I, III), 78-A-10 (VI)

32.6 Intervention
77-A-04 (III)

32.61 Procedures
77-37 (III)

32.62 Timeliness
77-A-04 (III)

32.7 Review of Hearing Decision by State Board
87-A-07 (I, VII), 87-A-05 (I), 87-A-03 (I, IV), 86-A-02 (I), 86-A-01 (I), 85-A-03.2 (I), 85-A-03.1 (I), 85-A-01 (I), 84-A-05 (I), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (II, III), 83-A-09 (I, II), 83-A-08 (IV), 83-A-07 (I), 83-A-05 (II, III), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (I, II), 82-A-02.1 (I, II, XI), 82-A-01 (I), 81-A-02 (VI), 81-A-01 (V, VI), 80-A-04 (V), 80-A-03 (VI), 78-A-10 (I, II, III, IV, V, VI), 78-A-07 (I), 78-A-04 (I), 77-A-04 (III), 77-A-02.3 (X), 77-A-02.2 (I, II, III), 77-A-02.1 (I), 75-A-03 (III), 70-A-01 (IV)

32.705 Standing
82-A-01 (III), 81-A-03 (V), 78-A-10 (I, II)

32.71 Exceptions
87-A-07 (I), 87-A-03 (I), 82-A-01 (I), 81-A-01 (V)

32.711 Timeliness
82-A-02.1 (III), 81-A-01 (V), 78-A-04 (I)

32.712 Content
87-A-07 (I), 87-A-03 (I), 83-A-08 (IV), 83-A-05 (III), 82-A-01 (I), 78-A-04 (I)

32.713 Record on Appeal
87-A-07 (I, VII), 87-A-03 (I), 85-A-03.2 (I), 84-A-02 (II), 83-A-09 (I), 83-A-08 (IV), 83-A-05 (II), 82-A-02.2 (I), 82-A-01 (I), 79-A-02 (I), 78-A-10 (III, IV, V, VI)

32.72 Standard of Review
87-A-07 (X), 87-A-05 (I), 87-A-03 (IV), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I),

84-A-05 (I), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (II), 82-A-02.1 (II), 82-A-01 (I), 81-A-01 (VI), 80-A-04 (V), 79-A-01 (II), 78-A-10 (V), 70-A-01 (IV)

32.73 Findings of Fact
87-A-03 (IV), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I), 84-A-05 (I, II), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (II), 82-A-02.1 (II), 82-A-01 (I), 81-A-01 (VI), 80-A-04 (V), 79-A-02 (I), 78-A-10 (V), 70-A-01 (IV)

32.74 Conclusions of Law
87-A-05 (I), 87-A-03 (III, IV), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I), 84-A-05 (IV), 84-A-04 (II), 84-A-03 (I, III, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.1 (II), 82-A-01 (I), 80-A-04 (IV, V), 79-A-02 (I), 70-A-01 (IV)

32.75 Briefs
87-A-03 (I), 86-A-01 (I), 84-A-02 (I), 82-A-02.1 (I), 80-A-02 (I), 79-A-01 (I), 78-A-10 (V), 78-A-09 (I), 78-A-08 (I)

32.76 Oral Argument
87-A-03 (I), 86-A-01 (I), 82-A-02.1 (I), 80-A-02 (I)

32.8 Orders, Rulings and Decisions of Board
84-A-04 (IV), 84-A-01 (X), 83-A-09 (I), 77-A-04 (III), 77-A-02.1 (I)

32.81 Dismissal of Petition
87-A-01 (II), 85-A-03.2 (I), 85-A-02 (II), 78-A-03 (I)

32.83 Direction of Election
81-A-03 (IV), 77-A-04 (III), 77-A-02.4 (IV), 77-A-02.1 (I)

32.85 On Interlocutory Appeal
85-A-03.1 (I, III), 83-A-01 (I), 81-A-02 (VI), 78-A-04 (I)

32.86 Petitions for Rehearing/Reconsideration
78-A-09 (II)

32.87 Self-Determination Election
85-A-01 (V), 84-A-04 (IV, V), 82-A-03 (IV)

32.88 Stay
85-A-03.2 (I), 85-A-03.1 (I, III), 83-A-01 (I)

32.89 Remand to Executive Director
84-A-01 (X), 82-A-02.1 (XI), 81-A-03 (IV)

32.9 Certification
81-18 (I), 81-15 (IV), 81-12 (II), 81-A-04 (II), 80-26 (X), 80-A-02 (II), 75-A-01 (I, II)

32.91 State Board Authority
81-15 (IV), 81-A-04 (II), 80-26 (X), 80-13 (VII), 80-04 (IV)

32.92 Without Election
81-54 (VIII), 81-12 (II), 80-26 (X), 80-13 (VII), 80-04 (IV), 75-11 (II)

32.93 Timeliness

32.94 Bars to Certification

32.95 Duration
84-A-04 (V), 81-18 (I), 81-15 (II, IV), 81-12 (III), 81-09 (II, III), 80-41 (VI), 80-36 (III), 80-26 (X), 80-02 (II), 79-49 (I), 79-40.2 (I), 79-08 (I), 76-10 (I), 75-A-01 (II), 74-09 & -14 (I), 73-01 (I)

32.96 Challenge Periods
81-15 (II), 80-02 (II), 75-A-01 (I)

32.97 Amendment
81-09 (I, II)

32.98 Revocation
80-36 (III), 72-A-01 (II)

32.99 Order to Bargain
81-54 (VIII), 80-26 (X), 80-13 (VII), 80-04 (IV), 74-09 & -14 (III)

33. UNIT DETERMINATION CRITERIA

33.05 Agreement on Appropriate Unit
83-A-05 (III), 80-A-03 (II), 72-A-01 (II)

33.06 Employer Petitions
81-A-03 (II), 80-A-03 (II)

33.1 State Board Authority
87-A-01 (II), 86-17 (II), 83-08 (II), 81-09 (I, II), 78-A-09 (II), 78-A-04 (I), 77-36 (II), 77-A-02.2 (I, II), 70-A-01 (I, IV)

33.15 Duties of Parties
85-A-03.2 (I), 80-A-03 (III), 78-A-10 (I, II, VI)

33.2 Standards for Unit Determination
87-A-03 (III), 86-A-01 (IV), 85-A-01 (II, III, IV), 84-A-03 (IV), 83-A-09 (VII), 83-A-08 (I), 83-A-07 (VI), 82-A-03 (I, III), 82-A-01 (II), 81-06 (VI), 80-A-04 (IV), 79-A-01 (III, IV, V), 77-A-04 (II), 77-A-03 (I, II, III), 70-A-01 (II, III)

33.21 Appropriate Unit
87-A-03 (III), 85-A-01 (III), 83-A-09 (VII), 83-A-07 (VI), 82-A-03 (III),

82-A-01 (II), 81-06 (VI), 80-A-04 (IV), 79-A-01 (III), 77-A-01 (I), 70-A-01 (II, III)

33.22 Most Appropriate Unit
87-A-03 (III), 83-A-09 (VII), 83-A-07 (VI), 82-A-01 (II), 80-A-04 (IV)

33.3 Criteria
86-A-01 (IV), 85-A-01 (III, IV), 84-A-04 (III), 84-A-02 (V), 82-A-03 (III), 81-06 (VI), 80-A-04 (I, II), 79-A-01 (III, IV, V), 77-A-04 (II), 77-A-03 (I, II, III), 77-A-02.4 (III), 77-A-02.3 (VI, VII, VIII), 71-A-02 (I), 70-A-01 (II, III)

33.31 Historical Considerations
86-A-01 (IV), 84-A-05 (II, III), 84-A-04 (III), 81-A-01 (III), 79-A-01 (V)

33.311 Bargaining History
85-A-01 (III), 84-A-05 (II, III), 84-A-04 (III), 81-A-01 (I, III)

33.312 Established Practice
79-A-01 (V)

33.313 Prior Contract
81-A-01 (III), 80-45 (III)

33.32 Unit Size
87-A-03 (II, V), 85-A-01 (VI), 84-A-05 (IV), 84-A-04 (III), 84-A-03 (IV), 83-A-09 (VIII, IX), 82-A-03 (I, II), 81-A-01 (IV), 77-A-02.3 (VII)

33.321 Accretion

33.322 Expansion

33.323 Fragmentation/Proliferation
87-A-03 (II, V), 85-A-01 (VI), 84-A-05 (IV), 84-A-03 (IV), 84-A-02 (IV, VI, VII), 83-A-09 (VIII, IX), 82-A-03 (I, II), 81-A-01 (IV), 80-A-04 (III), 77-A-02.3 (VII), 77-A-01 (I)

33.324 Scope of Inquiry/Employees Not Included in Petition
82-A-03 (I)

33.325 Severance
85-A-03.1 (II), 84-A-04 (III), 84-A-02 (IV, V), 83-A-09 (VIII, IX), 80-A-03 (V)

33.33 Type of Employment
86-A-01 (IV), 85-A-01 (IV), 84-A-04 (III), 84-A-02 (VI), 83-08 (III), 83-A-01 (II), 81-A-01 (I), 80-A-05 (II), 80-A-04 (I), 79-A-01 (III), 78-A-06 (I, II), 77-A-04 (II), 77-A-03 (II), 71-A-02 (I)

33.331 Job Title
84-A-02 (VI), 83-A-01 (II)

33.332 Job Description
83-A-01 (II), 82-A-03 (III)

33.333 Work Activities
85-A-01 (IV), 84-A-04 (III), 83-A-09 (IV), 83-A-01 (II), 82-A-03 (III), 81-A-01 (I), 80-A-05 (II), 80-A-04 (I), 79-A-01 (III), 78-A-06 (I, II), 77-A-04 (II), 71-A-02 (I)

33.334 Skill
85-A-01 (IV), 82-A-03 (III), 80-A-04 (I), 79-A-01 (III)

33.335 Education/Prior Training
86-A-01 (IV), 85-A-01 (IV), 84-A-04 (III), 82-A-03 (III), 80-A-05 (II), 80-A-04 (I), 79-A-01 (III), 71-A-02 (I)

33.336 Professional Status
85-A-01 (V), 83-A-05 (I)

33.337 Prospective Duties
83-A-09 (V, VI), 83-A-07 (V), 83-A-05 (IV), 78-A-08 (III), 78-A-06 (II)

33.34 Community of Interest
87-A-03 (II, III), 86-A-01 (IV), 85-A-01 (III, IV), 84-A-05 (III, IV), 84-A-04 (III), 84-A-03 (IV), 84-A-02 (IV, VII), 83-A-08 (I, III), 83-A-05 (I), 83-A-01 (II, III), 82-A-03 (III), 81-06 (VI), 81-A-01 (I), 80-A-05 (I, II), 80-A-04 (I, IV), 79-A-01 (III), 78-A-03 (II), 77-A-04 (II), 77-A-03 (II), 77-A-01 (I), 71-A-02 (I), 70-A-01 (III)

33.341 Common Supervision
84-A-04 (III), 81-A-01 (I), 80-A-05 (II), 80-A-04 (I), 79-A-01 (III)

33.342 Location of Employment
87-A-05 (I), 84-A-04 (III), 81-A-01 (I), 79-A-01 (III), 71-A-02 (I)

33.343 Similar Wages, Hours, Terms and Conditions of Employment
86-A-01 (IV), 85-A-01 (IV), 84-A-04 (III), 82-A-03 (III), 80-A-05 (II), 80-A-04 (I), 79-A-01 (III), 77-A-03 (II), 77-A-01 (I), 71-A-02 (I)

33.35 Conflict of Interest
85-A-01 (VI), 86-17 (IV), 81-A-01 (III), 80-A-05 (I), 79-A-01 (III), 78-A-08 (II), 78-A-06 (I), 73-13 & -14 (III)

33.36 Public Policy Considerations
81-A-02 (V), 79-A-01 (V)

33.38 Employer Considerations
87-A-05 (I), 87-A-01 (II), 85-A-03.1 (II), 83-A-09 (VI), 83-A-07 (III, V), 82-A-01 (V), 81-A-01 (II), 80-A-04 (II), 77-A-02.3 (VI), 75-A-03 (II)

33.381 Employer Authority
83-A-07 (IV, V), 83-A-03 (II), 77-A-02.3 (VI, IX)

33.382 Employer Structure and Organization
87-A-05 (I), 84-A-04 (III), 83-A-01 (II), 81-A-01 (II), 80-A-04 (II), 79-A-01 (III), 73-13 & -14 (III), 73-A-01 (I, II)

33.383 Effect on Employer Operation
78-A-08 (V)

33.384 Joint Employers
85-A-03.1 (II), 78-A-03 (II, III), 77-A-02.3 (VI)

33.39 Other Considerations
83-A-09 (VI), 81-06 (VI)

33.391 Representation of Minority Interests

33.392 Civil Service Status

33.393 Employee Self-Determination
83-A-05 (I), 80-A-04 (II), 70-A-01 (II)

33.394 Wishes of Affected Employees
81-A-01 (I, II)

33.395 Professional Employee "Vote" on Unit Inclusion
85-A-01 (V), 83-A-05 (I)

33.4 Exclusion from Unit
86-17 (II, III, V), 86-A-01 (II, III, V), 85-A-01 (V, VII), 84-A-04 (III), 84-A-03 (II, IV, V, VII), 83-A-09 (V, VI, VIII, IX), 83-A-08 (I, II, III), 83-A-07 (III), 83-A-02 (II, III), 83-A-01 (II, III), 82-A-02.1 (V), 80-41 (II), 79-A-01 (VI), 77-A-02.4 (I), 77-A-02.3 (I, II, III, IV, V, VI, XII), 77-A-02.4 (I), 73-A-01 (I, II), 70-A-01 (III)

33.41 Managerial
86-17 (II, III), 78-A-09 (III)

33.42 Supervisory
85-A-01 (VI), 84-A-05 (III, IV), 83-A-09 (VIII, IX), 83-A-02 (II, III), 83-A-01 (II, III), 82-A-02.1 (VI), 82-A-01 (V), 78-A-08 (II, III, IV, V, VI), 78-A-06 (I), 77-A-04 (I), 77-A-02.4 (II), 75-A-03 (II), 73-A-01 (II)

33.43 Confidential
85-A-01 (VII), 83-A-09 (V, VI), 82-A-02.1 (V, VI, VIII, IX, X, XII, XIII), 82-A-02.1 (III, IV, V, VI), 82-A-01 (V), 86-17 (II, IV), 77-A-2.4 (I), 77-A-02.3 (II)

33.44 Guards

33.45 Other
86-17 (II, III), 86-A-01 (II, III, V), 85-A-01 (V), 84-A-03 (II, IV, V, VII),

83-A-08 (I, II, III), 83-A-07 (III), 82-A-02.1 (V), 80-41 (II), 77-A-02.3 (I, III, IV, V, VI), 75-22 (II, III, IV, V), 73-A-01 (I)

33.46 Inclusion of One Employee in More Than One Unit
84-A-05 (V), 83-08 (III), 78-A-03 (II)

33.47 Common Representation of Supervisors and Subordinates
83-A-02 (II, III)

34. BARGAINING UNIT

34.1 Types of Units

34.11 Blue Collar
80-A-04 (I)

34.12 Craft

34.13 Departmental
80-A-04 (I)

34.14 Multi-Employer
83-A-07 (III), 78-A-03 (III), 77-A-02.3 (VI)

34.15 Office and Clerical
87-A-05 (I), 75-A-03 (I)

34.16 Professional
85-A-01 (V), 83-A-05 (I), 77-A-02.3 (VII), 71-A-02 (I), 70-A-01 (II)

34.17 Residual
87-A-03 (II), 85-A-01 (VI)

34.18 Service and Maintenance

34.19 Supervisory
85-A-01 (VI), 84-A-05 (IV), 83-A-09 (VIII), 83-A-02 (II, III), 83-A-01 (II, III), 82-A-02.1 (VI), 78-A-06 (I), 77-A-02.4 (II), 73-A-01 (II)

34.20 Technical

34.21 Wall-to-Wall
83-A-05 (I)

34.22 White Collar

34.3 Employee Categories
83-08 (III)

34.31 Certificated
70-A-01 (II)

34.32 Classified

34.33 Probationary
80-41 (II)

34.34 Part-Time
86-A-01 (II, III, V), 80-A-05 (I, II), 78-A-03 (II), 75-22 (II, III, IV, V), 75-A-03 (I)

34.35 Federally-Funded
83-A-08 (II), 77-A-01 (I)

34.36 Retired

34.37 Laid-Off

34.38 Resigned

34.39 Temporary
86-A-01 (II), 83-A-08 (I, II, III), 80-41 (II), 80-A-05 (I), 79-A-02 (II, III), 77-A-02.3 (V), 75-22 (II, III, IV), 75-A-03 (I), 73-A-02 (I)

34.391 Seasonal
86-A-01 (II), 83-A-08 (I), 80-41 (II, IV), 80-A-05 (I), 79-A-02 (II, III), 75-22 (II, III, IV), 75-A-03 (I), 73-A-02 (II)

34.392 Casual
80-A-05 (I)

34.4 Professional
85-A-01 (V), 83-A-05 (I), 77-A-02.4 (II), 77-A-02.3 (VII), 71-A-02 (I), 70-A-01 (II)

34.41 Definition
85-A-01 (V)

34.42 Education and Prior Training
85-A-01 (V)

34.43 Discretion and Judgment
85-A-01 (V)

34.44 Intellectual and Varied Work
85-A-01 (V)

34.45 Standardized Work Results

34.5 Guards

35. ELECTION

35.1 Consent Agreements
78-01 (I)

35.11 Elements
78-01 (I)

35.12 Employer Consent

35.13 Board Review

35.14 Waiver of Procedures
83-14 (IV), 78-01 (I, II)

35.2 Refusal to Consent to Election

35.21 Employer Refusal

35.22 Employee Organization Refusal

35.3 Conduct of Elections
87-A-04 (I, II, III), 87-A-02 (I), 75-A-02 (I, II), 70-A-02 (III)

35.31 Voter Eligibility Criteria
83-14 (I, VI), 81-A-04 (I, II), 81-A-03 (II), 80-A-03 (II), 71-A-01 (I)

35.311 Discharged or Resigned Employee
81-A-04 (I, II)

35.312 Laid-Off Employee
81-A-04 (I)

35.313 Leave of Absence
81-A-04 (I)

35.314 Maternity Leave

35.315 Part-Time or Temporary Employee
75-22 (II, III, IV)

35.316 Probationary Employee
83-14 (I, VI)

35.32 Election Mechanics
88-EA-01 (III, IV, V), 87-A-04 (I, II, III), 87-A-02 (I), 84-A-04 (V), 83-14 (I, IV, VI), 81-A-04 (III), 81-A-03 (II), 77-37 (IX), 75-A-02 (I, II), 75-A-01 (I, IV), 71-A-01 (II, III, IV), 70-A-02 (III)

35.321 Eligibility Cut-Off Date
83-14 (I, VI), 78-01 (I), 75-A-02 (I)

35.322 Eligibility List
83-14 (I, II, IV, V), 81-47 (II, III, IV), 78-01 (I, II, III, V), 77-37 (IX), 75-A-02 (I), 75-A-01 (IV)

35.323 List of Names and Addresses
83-14 (I, II, IV, V), 78-01 (I, II, III, V), 77-37 (IX)

35.324 Mail or On-Site Election
78-01 (I, VII)

35.325 Notice of Election
78-A-04 (I, II), 78-01 (I), 71-A-01 (III, IV)

35.326 Physical Aspects of Voting Facilities
87-A-02 (I)

35.327 Place, Time and Date of Election
88-EA-01 (III, IV, V), 78-01 (I, VII), 71-A-01 (III)

35.328 Pre-Election Conference
78-01 (I, II, VII)

35.329 Secrecy of Ballot
87-A-02 (I), 80-A-02 (IV, VI), 75-11 (I), 71-A-01 (I)

35.330 Timeliness
88-EA-01 (III, IV, V), 83-14 (IV), 78-A-11 (I, III, IV, V), 78-01 (II, VII)

35.34 Ballot Procedures
87-A-02 (I), 84-A-04 (V), 81-A-04 (III), 80-A-02 (II, III, IV, VI, VIII), 77-37 (III), 75-A-02 (II)

35.341 Ballot Box

35.342 Ballot Construction

35.343 Ballot Marking
80-A-02 (II, III, IV, VI, VIII), 77-37 (III), 75-11 (I), 75-A-02 (II)

35.344 Illiterate or Non-English Speaking Employee

35.345 Observers

35.346 Role of Board Agent
87-A-02 (I), 86-22, -25 & 86-A-03 (VIII), 81-A-04 (III), 75-A-02 (I, II)

35.347 Tally
78-01 (I, VII), 77-37 (IV)

35.37 Challenged Ballots
83-14 (IV), 77-37 (IV), 75-11 (I), 75-A-02 (I, II)

35.371 Timeliness
83-14 (IV)

35.372 Right to Challenge

35.373 Interference

35.375 Processing Challenges
75-11 (I), 75-A-02 (I)

35.376 Right to Hearing

35.4 Election Objection Procedures
87-A-04 (I, II), 86-22, -25 & 86-A-03 (II), 83-14 (IV), 81-47 (I), 81-15 (II, IV), 81-12 (II), 79-40.1 (IV), 78-A-11 (II), 78-A-02 (I), 78-01 (V), 77-37 (II), 75-A-01 (IV), 70-A-02 (I, II, III)

35.41 Standing to File
81-54 (VII), 79-40.1 (V), 77-37 (II), 70-A-02 (I, III)

35.42 Time for Filing
83-14 (IV), 81-54 (VII), 81-47 (I), 79-40.1 (IV), 78-A-11 (II), 78-01 (II), 75-A-01 (IV), 70-A-02 (III)

35.421 Extensions

35.43 Content of Objection Petition
78-A-02 (I)

35.44 Investigation of Elections

35.45 Stipulations
86-16 (I), 80-A-02 (I)

35.46 Necessity for Hearing
86-16 (I), 80-A-02 (I), 75-11 (I)

35.47 Conduct of Hearing
87-A-02 (II)

35.48 Stay of Proceedings
83-A-01 (I), 81-15 (II)

35.49 Evidentiary Standards
87-A-04 (II), 87-A-02 (II), 86-22, -25 & 86-A-03 (II), 77-A-06 (I), 75-A-02 (II)

35.5 Objections to Election
87-A-04 (I), 81-47 (I, II, III, IV), 80-02 (II), 79-40.1 (IV), 78-A-11 (II), 78-A-02 (I), 71-A-01 (I), 70-A-02 (III)

35.51 Conduct Interfering with Election Choice
87-A-04 (I), 87-A-02 (I, II), 86-22, -25 & 86-A-03 (VIII, XI, XII), 84-08 (I), 83-14 (I, II, IV), 81-54 (I, II, III, V, VI), 81-22.1 (IV), 80-26 (I, II, III, IV, V, VI), 80-13 (I, II, VII), 80-04 (I, II, III, IV), 79-63 (III, V), 79-40.1 (IV), 78-16 & -20 (III), 78-A-02 (I), 74-10 (II), 70-A-02 (III)

35.511 Proximity in Time to Election
86-16 (IV), 84-08 (I), 80-26 (V), 80-04 (I, III)

35.512 Pre-Election Objections
78-01 (II, V), 70-A-02 (III)

35.513 Matters Considered in Other Proceedings
77-37 (I)

35.514 Effect of Election Agreement

35.515 Objections Involving Mechanics of Election
87-A-04 (I), 87-A-02 (I), 83-14 (I, II, IV), 81-47 (II, III, IV), 81-A-04 (III), 79-40.1 (IV), 78-A-02 (I), 77-37 (I), 75-11 (I), 75-A-01 (IV), 70-A-02 (III)

35.52 Conduct by Either Party
87-A-04 (I), 87-A-02 (I), 81-47 (II, III, IV), 79-40.1 (IV), 78-A-02 (I), 70-A-02 (III)

35.521 Pre-Election Propaganda
87-A-02 (II), 86-22, -25 & 86-A-03 (XII), 86-16 (II, IV, V, VI), 81-22.1 (IV), 80-49 (III), 80-26 (III, IV, V, VII, X), 80-04 (II, III), 78-A-02 (I), 77-37 (V, VIII)

35.5211 Employees' Capability of Evaluation
86-22, -25 & 86-A-03 (XII), 80-26 (V, X)

35.5212 Employer Statement
86-22, -25 & 86-A-03 (I, II), 86-16 (II, IV, V, VI), 84-25 (IV), 81-54 (I, II, III, V, VI), 81-22.1 (IV), 80-49 (III), 80-26 (III, IV, V, VII, X), 80-04 (II, III), 77-37 (VII, VIII)

35.5213 Facsimile Documents and Ballots
86-22, -25 & 86-A-03 (VIII, XII), 77-37 (V)

35.5214 Misrepresentation Concerning Material Facts
87-A-02 (II), 86-22, -25 & 86-A-03 (VIII), 81-54 (II), 80-26 (III, VII, X), 80-04 (III), 77-37 (V)

35.5215 Special Knowledge of Party Making Misrepresentation

35.5216 Timing, Opportunity to Rebut
86-16 (IV), 80-26 (V, X), 80-04 (III)

35.5217 Union Statement
87-A-02 (II), 77-37 (V)

35.5218 Other
86-22, -25 & 86-A-03 (III, XI), 80-26 (IV), 80-04 (II)

35.522 Electioneering within Restricted Time Period
87-A-02 (I, II)

35.523 Electioneering at or Near Polls
87-A-02 (I, II)

35.5231 Oral Communication to Voters
87-A-02 (I), 79-40.2 (III)

35.5232 Mere Physical Presence
87-A-02 (I)

35.5233 Physical Coercion or Threats Thereof

35.5234 Transportation of Voters to Polls

35.524 Electioneering During Mail Ballot
77-37 (V)

35.525 Gifts and Other Inducements
84-08 (I), 70-A-02 (III)

35.526 Home Visits

35.527 Appeals to Racial Prejudice

35.528 Comments and Instructions Concerning Election
87-A-02 (II), 86-22, -25 & 86-A-03 (VIII), 81-47 (II, III, IV), 77-37 (V, VII)

35.529 Defacing Election Notice
87-A-04 (I, II, III)

35.53 Conduct of Employer
86-22, -25 & 86-A-03 (I, III), 84-08 (I), 83-24 (I, II), 83-14 (I, II, III, IV, V), 81-47 (II, III, IV), 81-40 (II), 80-33 (II), 80-04 (I), 79-65 & 80-07 (V), 79-63 (III, V), 78-30 (I, II, III, IV), 70-A-02 (III)

35.531 Denial of Wage Increase or Threat Thereof
86-22, -25 & 86-A-03 (I), 86-16 (V), 78-16 & -20 (III)

35.532 Discriminatory Treatment or Threat Thereof
84-08 (I), 80-33 (III), 80-26 (I, II), 79-70.1 (I), 79-65 & 80-07 (V), 79-01 (I), 78-30 (I, II, IV), 77-37 (VIII), 74-10 (II)

35.533 Equal Access Rules
86-22, -25 & 86-A-03 (III), 83-24 (I, II), 79-65 & 80-07 (VIII), 78-16 & -20 (IV, V), 77-37 (VIII)

35.534 Favoritism or Declarations of Union Preference
86-22, -25 & 86-A-03 (III), 83-24 (I, II), 81-54 (V), 79-40.2 (I), 78-01 (IV), 77-37 (VII)

35.535 Interrogation
80-13 (I, II), 78-16 & -20 (VI, VII)

35.536 Polling Employees
80-13 (I, II)

35.537 Prediction of Detrimental Result of Unionization
86-22, -25 & 86-A-03 (I), 86-16 (V, VI), 81-54 (I, II, III, V), 81-22.1 (IV), 80-04 (II, III), 79-63 (III), 78-22 (II, III)

35.538 Rules Restricting Union Activity
84-08 (III), 83-24 (I), 79-65 & 80-07 (VIII), 78-16 & -20 (IV, V), 77-37 (VIII), 77-31 (II)

35.539 Solicitation of Grievances

35.540 Surveillance or Impression Thereof
78-16 & -20 (XI)

35.541 Conferral or Promises of Benefits
86-22, -25 & 86-A-03 (I), 84-08 (I), 80-04 (I), 79-40.2 (III), 78-22 (II), 78-16 & -20 (II), 74-10 (II), 70-A-02 (III)

35.55 Conduct by Labor Organization
87-A-02 (II), 86-22, -25 & 86-A-03 (VI, XIII), 79-40.2 (IV)

35.551 Waiver or Reduction of Initiation Fee

35.552 Other Conduct
87-A-02 (II), 86-22, -25 & 86-A-03 (XIII), 79-40.2 (IV), 77-37 (V)

35.56 Employee Conduct
87-A-02 (I), 86-22, -25 & 86-A-03 (II, VI, IX), 71-A-01 (1)

35.561 Unit Employees
87-A-02 (I), 86-22, -25 & 86-A-03 (II), 83-24 (I), 81-22.1 (IV)

35.562 Non-Unit Employees
83-24 (II), 71-A-01 (I)

35.6 Bars to Election
78-A-11 (I, III, IV, V), 70-A-02 (III)

35.61 Unfair Practices
73-01 (VI), 70-A-02 (III)

35.62 Pending Court Action

35.8 Remedy
87-A-04 (I, II), 87-A-02 (II), 86-22, -25 & 86-A-03 (II), 83-14 (V, VI), 81-54 (VIII), 81-47 (II, III, IV), 81-15 (IV), 81-12 (II), 80-26 (X), 80-04 (IV, V), 78-30 (V), 72-A-01 (III), 70-A-02 (III)

35.81 New Election
87-A-04 (I), 87-A-02 (II), 86-22, -25 & 86-A-03 (II), 83-14 (V, VI), 81-47 (II, III, IV), 81-12 (II), 80-26 (X), 80-04 (IV, V), 79-65 & 80-07 (V), 79-40.2 (I), 77-37 (V), 74-10 (IV)

35.82 Certification
81-54 (VIII), 81-15 (IV), 81-12 (II), 80-26 (X), 80-13 (VII), 80-04 (IV), 75-11 (II)

35.9 Runoff Election
77-37 (IV), 71-A-01 (III, IV)

35.91 Procedures
71-A-01 (III, IV)

35.92 Standards
71-A-01 (III, IV)

36. UNIT CLARIFICATION OR MODIFICATION

36.1 Clarification
83-A-09 (IV), 82-A-02.1 (IV), 81-06 (VI), 80-45 (III), 80-A-03 (I, IV, V), 79-A-01 (VII), 78-A-09 (II), 78-A-06 (II), 77-36 (II)

36.11 Procedures
85-A-02 (I, II), 83-A-09 (IV), 82-A-02.1 (IV, VII), 80-41 (XV), 78-A-10 (I, II, IV, VI), 78-A-03 (I), 77-36 (II)

36.111 Filing of Petition
85-A-02 (I), 84-29 (III), 82-A-02.1 (IV), 81-09 (II, III), 80-41 (XV), 78-A-03 (I)

36.112 Content
83-A-09 (III)

36.113 Need for Showing of Interest

36.114 Review by State Board
86-A-02 (I), 83-A-09 (I, II, IV), 82-A-02.2 (I, II), 82-A-02.1 (II, XI), 81-A-01 (V, VI), 80-45 (III), 79-A-02 (I), 78-A-10 (III, IV, V), 78-A-04 (I)

36.115 Timeliness
85-A-02 (I, II), 82-A-02.1 (III), 81-A-01 (V), 78-A-09 (II), 78-A-03 (I)

36.116 Intervention

36.117 Standing
85-A-03.1 (III), 78-A-10 (I, II)

36.118 Record on Appeal
83-A-09 (I), 79-A-02 (I), 78-A-10 (III, IV, V, VI)

36.12 Basis for Clarification
83-A-09 (III, IV, V, VI), 83-A-05 (IV), 82-A-02.1 (IV, VII), 81-06 (VI), 81-A-01 (II), 80-45 (III), 79-A-02 (II), 77-A-02.4 (III), 77-A-02.3 (VIII)

36.121 Change in Employee Status
83-A-09 (IV, V, VI), 83-08 (I, II), 81-06 (VI), 79-A-02 (II), 78-A-09 (II), 77-A-02.4 (III), 77-A-02.3 (VIII)

36.122 Change in Employer Operation
81-A-01 (II), 79-A-02 (II)

36.123 Other
81-06 (VI)

36.124 Substantial Change
83-A-09 (III, IV), 82-A-02.1 (IV, VII), 81-A-01 (II), 79-A-02 (II), 78-A-08 (III), 78-A-06 (II), 77-A-02.4 (III), 77-A-02.3 (VIII)

36.125 Prospective Duties
83-A-09 (V, VI), 83-A-05 (IV), 78-A-08 (III), 78-A-06 (II)

36.2 Modification of Unit
85-A-02 (I, II), 82-A-02.1 (IV), 81-09 (I, II), 81-06 (VI), 80-45 (III), 80-A-03 (I, V), 78-02 (I)

36.21 Procedures
85-A-02 (I, II), 83-A-09 (III), 82-A-02.1 (IV, VII), 80-A-03 (I, IV, V), 78-A-03 (I), 77-36 (II)

36.211 Filing of Petition
85-A-02 (I), 80-41 (XV)

36.212 Content
83-A-09 (III)

36.213 Need for Showing of Interest

36.214 Review by State Board
87-A-05 (I), 86-A-02 (I), 83-A-09 (I, II), 82-A-02.1 (II, XI), 82-A-02.2 (I, II), 78-A-04 (I)

36.215 Timeliness
85-A-02 (I, II), 78-A-09 (II), 78-A-03 (I)

36.216 Intervention

36.217 Negotiations to Change Unit Composition
85-A-02 (I, II), 81-09 (I, III), 80-45 (III), 78-02 (I), 77-36 (II)

36.22 Forms of Modification
83-A-09 (V)

36.221 Severance of Employee Group
85-A-03.1 (II), 84-A-04 (III), 84-A-02 (IV, V), 83-A-09 (VIII, IX), 81-A-01 (III), 80-A-03 (I, V), 78-02 (I)

36.222 Merger of Employee Group/Expansion
83-08 (I, II), 80-45 (IV, V, VII, X, XI), 80-41 (IV, XX), 79-A-02 (II, III)

36.223 Unit Consolidation

36.224 Exclusions From Coverage of Act
83-A-09 (V, VI), 82-A-02.2 (III, IV), 82-A-02.1 (V), 78-A-09 (II), 78-A-08 (III), 78-A-06 (II)

36.3 Effects of Clarification or Modification
87-A-05 (I), 84-A-04 (III), 81-09 (II, III), 81-A-01 (IV), 80-45 (VII, X, XI), 80-41 (IV, VI, XX), 79-49 (III)

36.31 Final Certification
84-A-04 (III)

36.32 Duration
81-09 (II), 80-45 (III), 80-41 (VI)

36.33 On Bargaining Rights
82-A-02.1 (V), 81-09 (I, II, III), 81-A-01 (IV), 80-45 (IV, V, VII, X, XI), 80-41 (IV, VI, XX), 79-49 (III), 78-02 (II)

36.34 On Subsequent Representation Rights
81-A-01 (IV), 80-45 (IV, V), 78-02 (II)

36.35 Bars to Unit Clarification
85-A-02 (I, II), 82-A-02.1 (IV), 79-A-01 (VII), 78-A-09 (II), 78-A-03 (I)

36.351 Timing of Alleged Substantial Change
85-A-02 (I, II), 82-A-02.1 (IV)

36.352 Question Concerning Representation
82-A-02.1 (IV), 80-A-03 (I, V)

37. DECERTIFICATION

37.1 Petition
86-22, -25 & 86-A-03 (X), 81-40 (II), 80-24 (II)

37.11 Contents
86-22, -25 & 86-A-03 (X)

37.12 Standards

37.13 Time for Filing
88-EA-01 (I, II, III), 81-15 (IV), 78-A-11 (I, III, IV, V), 75-A-01 (I), 73-01 (IV)

37.14 Notice

37.15 Showing of Interest
86-22, -25 & 86-A-03 (III, VII, VIII, IX), 84-A-01 (IV, V, VI, VII, VIII, IX), 77-A-06 (I), 74-09 & -14 (II)

37.16 Standing
81-A-03 (I, III, VI), 73-01 (III)

37.2 Hearing

37.21 Necessity for

37.22 Conduct of

37.3 Dismissal of Petition
73-01 (VI)

37.5 Decertification Election
88-EA-01 (III, IV, V), 84-A-04 (V), 78-31 (VI), 75-A-01 (I)

37.8 Effect on Bargaining Rights
88-EA-01 (V), 80-36 (III), 79-10 & -18 (II), 75-A-01 (II, III)

37.9 Effect on Subsequent Representation Rights
80-36 (III), 79-10 & -18 (II), 75-A-01 (II, III)

41. COLLECTIVE BARGAINING

41.1 Type of Bargaining

41.11 Bipartite
79-64 (IX, X, XI)

41.12 Tripartite
79-64 (IX, X, XI)

41.13 Coalition

41.131 Multi-Employer
80-45 (I)

41.132 Multi-Union

41.2 Negotiator
86-23 (V), 82-35 (I), 82-33 (I, IV), 82-11 (III, IV), 81-52 (VI), 81-50 (I, III), 81-35 (II, III), 81-28 (II, III, IV, V), 80-35 & -40 (VIII), 79-64 (IV, V), 79-50 (VI, VII, X), 79-36, -39, -45 & -47 (XIV), 79-35 (I, II), 78-25 (II, III, IV), 75-33 (II, III, IV), 73-08 (II), 73-04 (II)

41.21 Choice of
82-33 (IV), 81-52 (VI), 80-09 (II), 79-50 (X), 79-36, -39, -45 & -47 (XIV), 78-04 (IV), 77-27 (I, III), 76-20 (I), 76-12 (II), 76-08 (IV), 75-25 (II), 75-10 (II), 74-24 (II), 73-04 (II)

41.22 Authority
86-23 (V), 82-35 (I), 82-33 (I), 82-11 (III), 81-50 (III), 81-28 (II, III, IV, V), 80-35 & -40 (VIII), 80-28 & -32 (II), 79-64 (IV, V, X), 79-62 (XIII), 78-25 (II, III, IV), 78-04 (I, III), 77-24 (I), 76-20 (I, II), 75-33 (II, III, IV), 73-08 (II), 73-07 (V)

41.3 Bargaining Procedure
86-23 (II), 86-04 (I, XII), 83-21 (II), 83-09 (III), 83-07 (I, III), 82-33 (I), 82-25 (I), 81-55 (I, III), 80-45 (VII, VIII), 80-28 & -32 (III), 80-10 (I), 80-09 (V, VI), 79-42 (II, III, IV), 79-29.2 (I), 79-24 (II, IV, V), 79-16 (II), 77-33 (II), 75-33 (II, III), 77-A-03 (IV), 76-IR-01 (I, II, III), 75-05.2 (III), 75-A-01 (III), 74-22 (II), 73-04 (I, II)

41.31 Ground Rules
86-23 (IV), 83-21 (II), 83-09 (III), 82-35 (II), 82-25 (I), 81-28 (II, III, IV, VII), 80-55 (V, VI), 80-35 & -40 (VIII), 80-09 (V, VI), 79-64 (IV, XI), 79-62 (II), 79-50 (X), 79-16 (II), 78-25 (I, II), 78-04 (IV), 77-34 (II, VI), 77-27 (III), 77-07 (I, III), 77-06 (I), 76-20 (II), 76-08 (III), 76-IR-01 (I, II), 75-33 (II, III), 75-10 (I, II), 74-24 (II), 73-04 (I, II)

41.32 Time Limits
86-23 (II, VI), 85-08 (I), 84-10 (II, V), 83-21 (II, IV, VI), 80-45 (VII, VIII), 80-10 (I), 79-42 (II, III), 79-24 (II, IV, V), 79-10 & -18 (II, III, IV), 78-A-11 (III), 77-34 (II, VI), 77-07 (III), 77-A-03 (IV), 76-IR-01 (I, II, IV), 75-21 (II), 75-A-01 (III), 73-13 & -14 (IV, V)

41.33 Informal Agreements
82-25 (I), 80-28 & -32 (III), 79-22 (I), 78-33 (I), 77-34 (IV), 77-07 (III), 76-20 (II)

41.34 Reopening
86-11 (IV), 85-01 (II), 84-19 (III), 83-08 (I), 83-07 (III),

82-05 (II, III, IV, VII, VIII, IX, X, XII), 80-50 (III), 80-45 (IV, V, VI), 80-10 (II), 79-32 (II), 78-25 (II), 78-A-11 (III), 77-07 (I), 77-06 (I), 76-20 (II), 76-08 (III), 76-IR-01 (I, II), 75-26 (I, IV), 75-24 (II, III), 75-12 & -27 (IV), 73-15 (II)

41.35 Notification of Reopening
80-45 (VII), 80-10 (II), 78-A-11 (III), 76-IR-01 (I, II), 75-26 (IV), 73-15 (II)

41.36 Automatic Extension of Agreement
88-EA-01 (II, III), 79-62 (XII), 79-32 (VIII), 78-19 (V), 78-A-11 (III)

41.6 Meet and Consult
87-14 & -15 (V), 86-04 (II, VII), 85-07 & -09 (VI, IX, X, XI), 82-10.2 (I, VII), 82-04 (III), 80-35 & -40 (I, II, IV, V, VI, XIV), 79-44 (II), 79-42 (II, III, IV), 79-36, -39, -45 & -47 (I, II), 78-IR-01 (II), 77-39 (I), 75-19 (III), 74-17 (III)

41.61 Definition
80-35 & -40 (I, II)

41.62 Scope
82-10.2 (I, VII), 80-35 & -40 (I, II, V)

41.63 Duties and Obligations of Parties
86-04 (II), 85-07 & -09 (VI, X, XI), 82-10.2 (VII), 82-04 (III), 80-35 & -40 (I, II, IV, V, VI, XIV), 79-44 (II), 79-42 (II, III, IV), 77-27 (II)

41.64 Procedure
86-04 (II), 85-07 & -09 (X, XI), 82-04 (III), 80-35 & -40 (II), 79-42 (II, III, IV), 79-36, -39, -45 & -47 (II), 77-27 (II)

41.65 Refusal to Participate
82-10.2 (I, VII), 80-35 & -40 (I, IV, VI), 77-27 (II)

41.7 Duty to Supply Information
84-01 (V), 83-21 (II), 83-06 (VI, VII), 82-33 (I), 82-10.2 (III), 80-35 & -40 (II), 78-33 (I, II), 76-20 (I), 75-33 (II), 75-10 (II)

41.8 Duties of Successor Employer
80-45 (IV, V, X, XI)

41.9 Duties of Successor Employee Organization
79-10 & -18 (II), 75-A-01 (II, III)

42. SCOPE OF BARGAINING

42.1 Mandatory Subjects
87-19 (II), 86-12 (III), 86-11 (IV), 86-04 (IV), 83-01 (II), 82-35 (VI), 82-15, -16 & -22 (III), 81-46 (II), 81-44 & -56 (I), 81-41 (V), 80-50 (III), 80-09 (V), 79-68 (II), 79-49 (I), 79-37 (III), 79-36, -39, -45 & -47 (I), 74-17 (III), 73-06 (I)

42.11 Case Law

85-18 (V), 82-15, -16 & -22 (III), 81-46 (II), 81-44 & -56 (I), 81-41 (V), 80-09 (V), 76-15 (III), 75-19 (VI)

42.12 Statutory

86-11 (IV), 86-04 (IV), 83-10.2 (VII), 83-01 (II), 81-41 (V), 80-55 (II), 79-68 (II), 79-49 (I), 79-37 (III), 79-36, -39, -45 & -47 (I)

42.2 Permissive Subjects

86-04 (IV, V), 85-08 (I), 84-13 (II, III), 84-10 (II, V), 80-50 (III), 80-35 & -40 (I), 80-28 & -32 (V), 80-09 (V), 79-68 (II), 79-56 (I), 79-36, -39, -45 & -47 (I, VII), 79-32 (I, II, VIII), 79-16 (II), 79-14 (VI), 79-10 & -18 (III), 78-IR-01 (II, III, V), 74-08 (III), 73-06 (I)

42.21 Case Law

86-04 (IV), 84-13 (II), 80-09 (V), 79-36, -39, -45 & -47 (I, VII), 79-32 (II), 79-16 (II), 75-19 (III, VII), 73-05 (II)

42.22 Statutory

86-04 (V), 85-08 (I), 84-10 (II, V), 79-68 (II), 79-56 (I), 79-36, -39, -45 & -47 (I), 79-16 (II), 79-10 & -18 (III), 78-IR-01 (II, III, V), 74-08 (III)

42.3 Prohibited Subjects

85-02 (V, VI), 84-19 (II), 84-17 (V, IX), 83-10.2 (II, III), 82-28 (I, II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 81-44 & -56 (III, IV, VIII, IX, X), 81-41 (VI), 79-62 (I), 79-43 (V), 79-37 (II), 79-36, -39, -45 & -47 (VII), 79-32 (III), 78-23 (VI, XIV), 74-17 (II)

42.31 Case Law

81-41 (VI), 79-62 (I), 79-32 (III), 76-15 (II), 74-16 (II)

42.32 Statutory

85-02 (V, VI), 84-19 (II), 84-17 (V, IX), 83-10.2 (II, III), 82-28 (I, II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 81-44 & -56 (III, IV, VIII, IX, X), 80-55 (II), 79-37 (II), 79-36, -39, -45 & -47 (VII), 78-23 (VI, XIV), 75-19 (VIII)

42.4 Determination of Subject Status

85-18 (V), 81-41 (V), 79-37 (III), 79-36, -39, -45 & 47 (I, IV), 79-IR-01 (III, IV), 75-19 (V), 74-16 (II), 73-12 (III), 73-06 (II)

42.41 Attorney General's Opinions

42.42 Balancing Employee and Employer Rights

86-12 (III), 86-04 (IV), 84-13 (II), 79-44 (II), 79-36, -39, -45 & -47 (I), 79-IR-01 (III, IV), 78-23 (VI), 78-IR-01 (II, III, IV), 77-39 (I), 76-15 (II, III), 75-19 (III)

42.43 Budget Considerations

79-43 (V), 79-10 & -18 (II)

42.44 Conflict With Laws
84-19 (II), 84-17 (V, IX), 83-10.2 (II, III), 82-28 (II), 82-15, -16 & -22 (V), 82-10.2 (I, VII), 81-44 & -56 (III, IV, VIII, IX, X), 79-43 (V), 79-37 (II), 79-32 (III), 78-23 (XIV), 75-19 (VIII), 74-16 (II), 74-08 (III), 73-05 (III)

42.45 Custom and Practice
84-13 (III)

42.46 Past Bargaining History
84-13 (III), 80-50 (III), 79-32 (IV), 78-IR-01 (V)

42.47 Public Policy Considerations
84-10 (II), 83-06 (I), 82-15, -16 & -22 (III), 80-50 (III), 79-43 (III), 79-36, -39, -45 & -47 (I), 79-32 (III), 79-10 & -18 (II), 79-IR-01 (III, IV), 78-23 (VI, XIV), 75-19 (III), 74-17 (II), 73-05 (II)

42.48 Other
82-15, -16 & -22 (III), 80-50 (III), 79-37 (III), 79-IR-01 (III, IV)

43. SUBJECTS OF BARGAINING
79-44 (II)

43.1 Compensation
82-35 (VI), 82-15, -16 & -22 (III), 81-18 (II), 79-08 (I, II), 75-22 (II, V), 73-13 & -14 (VI), 73-07 (VI)

43.11 Wages and Salaries
86-23 (III), 86-14 (II, III), 86-04 (VII), 85-01 (II), 84-19 (I), 82-35 (VI), 81-56 (I), 81-44 & -56 (II, VI, IX, X, XI), 81-41 (VI), 81-18 (II), 81-12 (V), 81-01 (I), 80-44 (II), 80-29 (IV), 80-02 (IV), 79-14 (VII), 79-08 (I, II), 78-23 (II, X), 78-16 & -20 (I, II, III), 78-15 (II), 75-22 (II, V), 75-21 (II), 73-13 & -14 (VI), 73-07 (VI), 73-03 (II)

43.111 Decreases
82-35 (VI), 79-36, -39, -45 & 47 (VI), 75-19 (VI), 73-03 (II)

43.112 Incentive

43.113 Increases
86-23 (III), 86-11 (X), 84-19 (I), 81-12 (V), 80-29 (IV), 79-65 & 80-07 (III), 79-49 (III), 79-14 (VII), 79-08 (I, II), 78-15 (II)

43.114 Longevity
81-12 (V), 79-36, -39, -45 & -47 (X), 79-14 (VII)

43.115 Merit
85-01 (II, III), 79-08 (I)

43.116 Overtime
79-65 & 80-07 (X), 78-16 & -20 (II), 73-13 & -14 (VI)

43.117 Payment to Retirees
84-17 (III, IV, V, IX), 81-41 (VI), 75-16 (II)

43.118 Premium Pay
78-16 & -20 (II)

43.119 Red Circling
82-35 (VI), 78-15 (III)

43.120 Salary Schedule
86-14 (II, III), 81-56 (I), 81-44 & -56 (II, VI, IX, X, XI), 79-36, -39, -45 & -47 (X), 78-15 (II), 73-03 (II)

43.121 Shift Differential
78-16 & -20 (II)

43.122 Supplemental Pay
86-04 (VII), 84-19 (I), 78-23 (II, X), 75-22 (II, V)

43.123 Termination and Severance
86-02 (I, IV), 81-41 (VI), 80-41 (VI, XVIII), 78-04 (III)

43.124 Frequency or Time of Payment
80-45 (X), 80-44 (II), 78-16 & -20 (I, II, III)

43.13 Benefits
81-41 (II)

43.131 Health Insurance
83-11 (III, IV), 81-41 (II), 80-45 (X), 80-41 (VI), 80-10 (II), 79-14 (V)

43.1311 Dental Plan

43.1312 Optical

43.133 Disability Benefits
84-15 (I, II), 83-10.2 (II), 79-12.2 (I)

43.1331 On-the-Job
83-10.2 (II)

43.1332 Non-Occupational

43.134 Legal Services

43.135 Tuition Compensation

43.136 Pensions
84-17 (III, IV, V, IX), 80-45 (IX, XI), 78-25 (IV), 75-16 (II)

43.137 Retirement Benefits
84-17 (III, IV, V, IX), 78-25 (IV), 75-16 (II)

43.138 Life Insurance

43.139 Death Benefits
84-17 (IX)

43.14 Employee Services
83-22 (II), 82-15, -16 & -22 (IV, VI), 81-18 (II)

43.141 Agency Automobile
85-02 (II), 83-22 (II), 81-18 (II), 81-01 (I), 80-02 (IV), 77-16 (I)

43.142 Cafeteria Services

43.143 Parking Facilities
82-15, -16 & -22 (IV)

43.144 Rest Facilities
82-15, -16 & -22 (VI), 73-06 (I)

43.15 Holidays and Vacations
81-46 (II), 78-23 (II, X), 78-19 (II), 78-16 & -20 (II), 73-15 (II)

43.151 Legal Holidays
81-46 (II), 78-23 (II, X), 73-15 (II)

43.152 Personal Days
79-14 (V)

43.153 Accrued Vacation Credit
78-19 (II)

43.154 Vacation Compensation
80-41 (VI), 73-15 (II)

43.16 Leave
79-14 (V), 75-19 (VIII)

43.161 Administrative

43.162 Educational
83-22 (II), 79-65 & 80-07 (V), 79-14 (V)

43.163 Funeral

43.164 Maternity
76-10 (II)

43.165 Military

43.166 Personal
79-14 (V)

43.167 Sabbatical
75-19 (VIII)

43.168 Sick
84-15 (I, II), 83-10.2 (VI), 79-36, -39, -45 & -47 (XII), 79-14 (V), 79-12.2 (I), 78-19 (II), 76-10 (II)

43.2 Hiring and Dismissal
86-04 (X), 82-10.2 (VII), 81-41 (III), 80-55 (II)

43.21 Recruitment
82-10.2 (VII), 79-24 (II)

43.211 Hiring Practices
81-29 (II), 79-62 (IX), 79-24 (II), 75-19 (VI)

43.212 Residency Requirement
73-07 (VII)

43.213 Union Membership

43.214 Probationary Training
86-11 (X), 75-19 (VIII)

43.215 Training
86-11 (IX, X), 83-22 (II), 75-19 (VIII)

43.216 Polygraph Tests

43.23 Dismissal
81-41 (III), 80-55 (II), 79-36, -39, -45 & -47 (VI), 74-17 (II), 74-16 (II), 74-08 (III), 74-04, -05 & -06 (II)

43.231 Violation of Rules
86-11 (VII, XVI)

43.232 Evaluation
86-04 (XI), 79-56 (I, II, III), 79-36.1 (II), 79-14 (VI), 76-15 (II)

43.233 Termination Procedure
81-41 (III), 81-29 (II), 80-41 (XVIII), 80-28 & -32 (VI), 79-68 (III), 79-36, -39, -45 & -47 (VI), 78-04 (III), 76-15 (III), 75-24 (III), 75-19 (VI), 75-01.3 (IV), 74-17 (III), 74-16 (II), 74-08 (III), 74-04, -05 & -06 (II)

43.234 Failure to Comply With Union Security Provision

43.3 Promotion, Demotion and Transfer
79-36, -39, -45 & -47 (VI)

43.31 Promotion
84-19 (I), 75-12 & -27 (III)

43.311 Procedures
84-19 (I), 79-24 (II), 75-12 & -27 (III)

43.312 Standards
84-19 (I), 79-36.1(II)

43.3121 Seniority

43.3122 Merit
79-36.1 (II)

43.32 Demotion
81-41 (III), 79-36, -39, -45 & 47 (VI)

43.321 Procedures
79-14 (V), 75-19 (VI), 74-16 (II)

43.322 Standards
81-41 (III), 80-28 & -32 (VI), 79-68 (III), 79-56 (I, II, III), 79-36, -39, -45 & -47 (VI), 79-36.1 (II), 79-14 (V), 75-19 (VI), 74-16 (II)

43.35 Transfer
80-41 (VI)

43.351 Voluntary Transfer

43.352 Involuntary Transfer
86-04 (VII, X)

43.3521 Procedures

43.3522 Standards

43.4 Job Content and Scheduling
86-11 (IX), 78-IR-01 (II, III, IV)

43.41 Job Description
84-19 (I), 82-15, -16 & 22 (VIII), 77-16 (I)

43.42 Assignment
87-14 & -15 (II), 86-11 (IX), 86-02 (II), 84-19 (I), 83-22 (II), 78-IR-01 (II, III, IV)

43.421 Notice
79-24 (II)

43.422 Change
86-02 (II), 84-19 (I), 83-22 (II), 77-16 (I)

43.43 Scheduling
85-18 (IV), 84-01 (II, III), 81-41 (VI), 81-17 (I), 80-08 (I), 79-36, -39, -45 & -47 (VII), 79-36.1 (I), 75-19 (VII)

43.431 Shift Schedule
85-18 (IV), 84-01 (II, III), 83-16 (IV), 81-41 (VI), 81-17 (I), 80-22 (II), 80-08 (I), 80-02 (V), 79-65 & 80-07 (V), 79-43 (II), 77-16 (I)

43.432 Change of Schedule
85-18 (IV), 84-01 (II, III), 83-16 (IV), 81-29 (III), 80-22 (II), 80-08 (I), 80-02 (V), 79-65 & 80-07 (V), 79-43 (II)

43.44 Hours
87-14 & -15 (II), 85-18 (IV), 85-08 (III), 85-07 & -09 (XII), 84-13 (II), 81-41 (VI), 80-08 (I), 79-36, -39, -45 & -47 (VII), 79-36.1 (I), 78-23 (II, X), 76-15 (II), 75-19 (VII)

43.441 Rest Periods
79-65 & 80-07 (IX)

43.442 Meal Periods
81-41 (VI), 79-65 & 80-07 (IX), 79-36, -39, -45 & -47 (VIII)

43.443 Flextime
79-65 & 80-07 (V)

43.444 Change of Hours
85-18 (IV), 85-08 (III), 85-07 & -09 (XII), 84-01 (II, III), 80-08 (I), 80-02 (V), 79-65 & 80-07 (V), 78-23 (II, X), 77-39 (I), 77-16 (I)

43.445 Overtime
86-01 (II), 80-08 (I), 80-02 (V), 79-65 & 80-07 (V, X), 79-41.1 (II), 73-13 & -14 (VI)

43.45 Employee Evaluation
86-04 (VIII, XI), 79-56 (I, II, III), 79-36, -39, -45 & -47 (IX), 79-36.1 (II), 79-14 (VI), 76-15 (II), 75-19 (VIII)

43.451 Procedures
86-04 (XI), 79-36, -39, -45 & -47 (IX), 79-36.1 (II), 76-15 (II)

43.452 Standards
86-04 (XI), 80-28 & -32 (VI), 79-68 (III), 79-56 (I, II, III), 79-36, -39, -45 & -47 (IX), 79-36.1 (II)

43.453 Impact of Evaluation
86-04 (XI), 79-56 (III)

43.46 Work Load
84-19 (I), 84-15 (I, II), 83-01 (III), 78-04 (III), 76-15 (III)

43.47 Work Rules
86-12 (III), 86-11 (VII, IX, X, XVI), 85-18 (IV), 83-01 (III), 81-44 & -56 (X), 79-62 (IX), 79-56 (III)

43.471 Dress Code
81-41 (VI)

43.472 Impact of Rules
79-56 (III)

43.473 Off-Duty Conduct
86-11 (X)

43.474 Off-Duty Employment

43.475 Professional Standards
86-11 (VII, IX), 75-19 (VIII)

43.476 Safety and Health Rules
86-12 (III), 83-01 (III), 79-44 (II), 79-IR-01 (II, IV), 73-06 (I)

43.48 Materials and Supplies
86-04 (VII), 81-41 (VI), 81-01 (I), 79-IR-01 (IV)

43.481 Equipment
83-22 (II), 81-18 (II), 79-IR-01 (IV)

43.482 Safety Equipment
81-41 (VI), 79-IR-01 (II, IV)

43.483 Uniforms
87-19 (IV), 81-41 (VI), 77-16 (I)

43.5 Job Security
86-02 (I), 82-28 (I), 81-41 (III), 80-55 (II), 79-36, -39, -45 & -47 (VI), 74-08 (III)

43.51 Tenure
82-28 (I), 74-16 (II)

43.52 Elimination of Jobs
86-02 (I), 83-16 (IV), 82-28 (I), 80-41 (VI, XVIII), 78-04 (III), 76-15 (II), 75-24 (III), 75-19 (VI, VII), 75-01.3 (IV)

43.53 Reduction in Force or Lay-Off
82-28 (I), 81-29 (II), 80-41 (VI, XVIII), 76-15 (II), 75-24 (III), 75-19 (VII)

43.531 Procedure
82-28 (I), 81-29 (II), 78-04 (III), 76-15 (III), 75-24 (III), 75-19 (VI), 75-01.3 (IV)

43.532 Bumping
82-28 (I), 81-29 (II)

43.533 Seniority
82-28 (I), 81-29 (II), 78-04 (III), 76-15 (III), 75-19 (VI)

43.534 Superseniority

43.54 Subcontracting
86-02 (I, IV), 81-41 (VI), 81-29 (II), 79-50 (VIII), 78-04 (I, III)

43.541 Procedure
78-04 (III)

43.56 Minimum Manning
83-06 (I), 83-01 (III, IV, V)

43.57 Allocation of Job Grades
81-56 (I), 81-44 & -56 (II, VI, IX, X, XI)

43.6 Special Subjects

43.61 Education & Educational Policy
87-14 & -15 (IV, V), 86-12 (III), 86-04 (IV, V, VII, IX, X, XI, XII), 85-07 & -09 (VIII, IX, X, XI, XII), 84-13 (II), 82-28 (I, II), 82-04 (III), 81-29 (III), 80-55 (II), 80-35 & -40 (III), 79-68 (II, III), 79-56 (I), 79-44 (II, III), 79-36, -39, -45 & -47 (I, VII, VIII, IX), 79-36.1 (I, II), 79-14 (VI), 78-IR-01 (II, III, IV, V), 77-39 (I), 76-22 (II), 76-15 (II), 75-24 (III), 75-19 (III), 75-01.3 (II), 74-17 (II, III), 74-16 (II), 74-08 (III), 74-04, -05 & -06 (II), 73-06 (I)

43.611 Academic Freedom
86-04 (IX)

43.612 Class Size
80-35 & -40 (III)

43.613 Curriculum
87-14 & -15 (V), 80-35 & -40 (III), 76-15 (II), 75-19 (VII)

43.614 Educational Objectives
87-14 & -15 (V), 85-07 & -09 (IX, XII), 80-35 & -40 (III)

43.615 Extracurricular Activities
76-22 (II), 75-22 (II, III, IV, V)

43.616 Inservice Days
79-36, -39, -45 & -47 (VII), 79-36.1 (I), 75-19 (VI)

43.617 Length of Classroom Period
86-04 (VII), 80-35 & -40 (III)

43.618 Length of School Day
86-04 (VII), 84-13 (II), 80-35 & -40 (III), 79-36, -39, -45 & -47 (VIII), 76-22 (II), 76-15 (II), 75-19 (VII)

43.619 Non-Teaching Duties
87-14 & -15 (IV), 79-36, -39, -45 & -47 (VII, VIII), 79-36.1 (I), 78-IR-01 (III, IV), 77-39 (I), 76-22 (II), 75-22 (II, III, IV, V)

43.620 Parent-Teacher Conferences
86-04 (VII), 85-07 & -09 (XII), 75-19 (VII)

43.621 Planning Period
86-04 (VII), 84-13 (II), 79-36, -39, -45 & -47 (VIII), 76-15 (II)

43.622 School Calendar
79-36, -39, -45 & -47 (VII), 79-36.1 (I), 75-19 (VII)

43.623 School Discipline

43.624 Teacher Evaluations
86-04 (VIII, XI), 80-28 & -32 (VI), 79-68 (III), 79-56 (I, II, III), 79-36, -39, -45 & 47 (IX), 79-36.1 (II), 79-14 (VI), 76-15 (II)

43.6241 Peer Review

43.625 Textbook Selection

43.630 Impact Bargaining on Educational Policy Decisions
86-04 (II, IV, VII), 80-35 & -40 (V, XIV), 85-07 & -09 (IX, X, XI), 79-56 (III), 76-22 (II), 76-16 (II, III, IV), 75-24 (III), 75-19 (VI), 75-01.3 (I, II, III, IV), 74-17 (III)

43.64 Police and Fire
86-11 (VII, IX, X), 84-15 (I, II), 83-06 (I), 83-01 (III), 79-37 (III), 79-IR-01 (IV)

43.641 Off-Duty Performance of Duties
73-07 (VI)

43.642 Hazardous Duty Pay

43.645 Impact Bargaining, General
86-02 (I, IV), 80-41 (VI, XVIII, XIX), 79-37 (III), 79-24 (II), 78-23 (II, X), 78-04 (III)

43.7 General Agreement Provisions
81-41 (VI)

43.705 Recognition/Unit Configuration
81-09 (III), 78-02 (I, II), 77-36 (II)

43.71 Amnesty

43.72 Past Practices Clause
79-62 (IX)

43.73 Grievance/Arbitration
81-41 (III), 80-55 (III), 79-62 (IX), 79-15 (III), 79-14 (V), 76-11 (I), 75-28 (II, IV)

43.74 No-Strike Clause

43.75 Parity Clause

43.76 Duration
80-28 & -32 (V)

43.77 Retroactivity
83-10.2 (VII)

43.78 Zipper Clause
83-10.2 (IV), 80-41 (XIX), 76-16 (II, III, IV), 75-24 (II), 73-06 (III)

43.79 Management Rights Clause
79-32 (III)

43.8 Union Security
80-50 (II, III), 79-62 (I)

43.81 Closed Shop

43.82 Union Shop
79-62 (I), 78-31 (IV)

43.83 Agency Shop
83-06 (IV, VI), 80-50 (II, III), 75-19 (VIII)

43.84 Dues Check Off
81-41 (VI), 79-62 (I), 78-31 (IV)

43.841 Political/Ideological Refunds
83-06 (VI)

43.85 Maintenance of Membership

43.86 Union Access and Rights as an Organization
84-08 (III), 81-43 (II, III, IV, V, VI), 81-41 (VI), 80-05 (VII), 79-62 (IX), 73-09 (III)

43.9 Rights of Management
81-44 & -56 (X), 81-06 (I, II, III, IV, V, VII, VIII), 80-44 (III), 79-43 (III), 79-32 (III), 79-IR-01 (III, IV)

43.91 Organizational Structure
78-02 (I)

43.92 Functions and Programs
83-06 (I), 81-29 (III), 79-IR-01 (III, IV), 78-02 (I), 76-15 (II), 75-24 (III)

43.93 Standards for Employment

43.94 Standards of Performance
86-04 (XI)

43.95 Elimination of Services
86-02 (I), 83-06 (I), 80-41 (VI, XVIII, XIX), 79-37 (III), 76-15 (II), 75-24 (III), 75-19 (VII)

43.96 Overall Budget

43.97 Utilization of Technology

43.98 Selection and Direction of Personnel
86-04 (X, XI), 80-41 (XIX), 74-17 (II, III)

43.99 Discipline and Discharge
86-11 (VII, XVI), 81-41 (III), 80-55 (II), 80-41 (VI, XIX), 74-17 (II, III), 74-16 (II)

46. AGREEMENT

46.1 Type of Agreement

46.11 Master Agreement
87-14 & -15 (III), 82-35 (III), 81-28 (II), 81-23 (II), 80-10 (I)

46.12 Supplemental Agreement
81-43 (VI), 75-16 (III)

46.13 Tentative Agreement
82-35 (III), 82-11 (II, III, IV), 81-50 (III), 80-28 & -32 (II), 80-10 (I), 79-64 (VI), 79-29.2 (I, II), 78-25 (II, III), 78-04 (I), 77-07 (I), 77-06 (I), 76-08 (III), 75-33 (II, III, IV)

46.14 Sweetheart Agreement

46.15 Successor Agreement
84-13 (III), 79-64 (V), 75-A-01 (II)

46.16 Individual Employment Agreement
86-11 (XII, XVI), 82-10.2 (IV), 81-23 (II), 80-49 (IV, V), 80-29 (IV), 78-15 (II, III), 76-17 (II)

46.17 Agreements Reached During Board Proceedings
88-12 (I), 88-06 (I), 88-01 (I), 87-13 (I), 87-03 (I), 86-14 (I), 83-22 (I), 81-39 (I), 80-55 (I), 80-18 (III), 79-57 (I), 79-22 (I), 79-12.2 (I), 78-33 (I, II), 78-01 (I, II, VII), 77-24 (I), 77-18, -19, -20 & -29 (II)

46.2 Provisions Inconsistent with Statute
86-12 (III), 85-02 (V, VI), 84-19 (II), 84-17 (V, IX), 83-10.2 (III), 82-28 (I, II), 82-24 (II), 82-15, -16 & -22 (V), 81-41 (VI), 80-45 (IX, XI), 79-32 (III), 78-23 (XIV), 76-17 (II)

46.21 Conflict with Existing Legislation
86-12 (III), 85-02 (V, VI), 84-19 (II), 84-17 (V, IX), 83-10.2 (III), 82-28 (I, II), 82-15, -16 & -22 (V), 81-44 & -56 (III, IV, VIII, IX, X), 80-45 (IX, XI), 78-23 (XIV), 74-16 (II)

46.22 Conflict with Subsequent Legislation
85-02 (V, VI)

46.23 Provisions Requiring Legislative Enactment

46.24 Provisions Inconsistent with Court Interpretations
84-13 (III), 82-24 (II), 81-41 (VI), 79-62 (I)

46.3 Validity

46.31 Suit to Compel Enforcement
80-18 (III), 80-10 (IV), 75-15.2 (I), 73-07 (V)

46.4 Terms
88-EA-01 (V), 80-15 (VIII), 80-10 (I), 79-49 (III), 79-36, -39, -45 & -47 (X, XII, XVI), 79-14 (III)

46.41 Effective Date
80-10 (I), 78-A-11 (V), 77-34 (II)

46.42 Duration
88-EA-01 (V), 86-02 (II), 83-11 (II, III, IV), 80-28 & -32 (V), 79-62 (IX, XI), 79-36, -39, -45 & -47 (X, XII, XVI), 79-15 (III), 79-14 (III), 78-31 (III, V), 78-A-11 (III), 75-19 (VIII)

46.43 Retroactivity
83-10.2 (VII)

46.44 Expiration
88-EA-01 (V), 87-14 & -15 (II), 86-02 (II), 83-11 (II, III), 79-62 (IX, XI), 79-36, -39, -45 & -47 (X, XII, XVI), 79-14 (III), 78-31 (III, V), 78-A-11 (III), 75-A-01 (I, II)

46.5 Ratification
86-23 (V), 83-09 (I, III), 82-11 (II), 81-50 (I, II, III), 81-28 (II, III, IV, V),

79-32 (II), 79-29.2 (I), 78-25 (II, III), 77-18, -19, -20 & -29 (III), 75-33 (II, III), 75-15.2 (I), 73-08 (II)

46.51 By Union Membership
86-23 (V), 83-09 (I, III), 81-50 (I, II, III), 81-28 (II, III, IV, V), 79-29.2 (I), 78-25 (II, III), 75-33 (II, III), 73-08 (II)

46.52 By Employer
86-23 (V), 83-09 (III), 82-11 (II), 81-28 (II, III, IV, V), 80-28 & -32 (III), 79-64 (VI, IX, X, XI), 79-32 (II), 78-25 (II, III), 77-18, -19, -20 & -29 (III), 75-33 (II, III), 73-08 (II), 73-01 (II)

46.55 Duty to Reduce Agreements to Writing and to Sign
85-07 & -09 (XIII), 83-09 (I, III), 83-07 (I, II, III), 82-35 (III), 81-28 (I, II, IV, V, VI), 80-10 (I), 79-67 (I), 79-64 (VI), 77-18, -19, -20 & -29 (II), 74-22 (II), 73-07 (V), 73-01 (II)

46.6 Agreement Administration
88-EA-01 (V), 86-11 (XVII), 86-09 (I, II, III), 85-04 (II), 83-03 (II), 82-05 (XI), 82-02 (II), 75-A-01 (II), 74-04, -05 & -06 (II), 73-11 (II)

46.61 Interpretation
83-07 (III), 80-50 (I), 80-46 (I), 80-35 & -40 (XIII), 80-29 (III), 80-15 (VIII), 78-10 (II), 76-16 (III), 76-11 (I), 75-28 (II, III, IV), 75-26 (I, II), 75-15.2 (I), 73-11 (II)

46.62 Addenda to Agreement
83-07 (III)

46.63 Grievance Award as Authoritive Interpretation
83-07 (III), 81-39 (I), 80-50 (I), 80-29 (III), 79-56 (II), 76-11 (II)

46.64 Continuing Duty to Bargain During Contract Term
86-14 (V, VII), 86-12 (IV), 86-11 (III, IV), 86-02 (II), 85-19 (II, III, IV), 85-07 & -09 (II, III, VII), 85-01 (II), 84-19 (III), 83-10.2 (VI), 82-15, -16 & -22 (VIII), 82-05 (I, II, III, IV, VII, VIII, IX, X, XII), 80-45 (IV, V, VI, VII, XI), 79-24 (II, IV, V), 79-14 (II), 76-16 (II, III, IV), 75-28 (II, III, IV), 75-24 (II), 75-16 (III)

46.641 Concerning Contractual Terms
86-14 (V, VII), 86-11 (III, IV), 85-19 (III, IV), 85-07 & -09 (III), 85-01 (II), 83-10.2 (VI), 82-15, -16 & -22 (VIII), 82-05 (II, IV, VII, X, XII), 80-46 (III), 80-45 (IV, V, VI), 77-16 (I), 75-28 (II, III, IV)

46.642 Concerning Noncontractual Terms
86-14 (V, VII), 86-12 (IV), 86-11 (IV, XI), 86-05 (III), 85-07 & -09 (III, VII), 85-01 (II), 84-19 (III), 82-05 (X, XII), 80-45 (IV, V, VI, VII, XI), 79-24 (II, IV), 77-16 (I), 76-16 (II, III, IV), 75-24 (II), 75-16 (III)

46.643 Impact Bargaining - Management Actions Permitted by Contract
86-05 (III), 86-04 (II, III, VII), 86-02 (IV), 85-19 (III, V),

85-07 & -09 (IV, VI, IX, XI), 82-05 (VII), 80-45 (IX), 79-24 (II, IV), 76-16 (II, III, IV), 75-24 (II)

46.65 Continued Duty to Meet and Discuss
85-07 & -09 (IX, X), 79-14 (II)

46.7 Labor Management Committee

46.9 Non-Unit Employees Covered by Agreement
81-06 (I, II, III, IV, V, VII, VIII)

46.91 Professional Employees

46.92 Supervisors Doing Bargaining Unit Work

46.93 Other Special Employee Categories
83-08 (I, II)

47. GRIEVANCES/GRIEVANCE ARBITRATION
80-41 (III)

47.01 Definition and Scope
84-15 (IV), 83-03 (II), 81-41 (III), 79-56 (II), 75-28 (II, IV), 74-04, -05 & -06 (II)

47.02 Informal Grievances
74-04, -05 & -06 (II)

47.1 Formal Grievance Procedure
85-04 (II), 84-31.2 (I), 84-31.1 (III, IV), 84-25 (VI), 84-21 (II)

47.11 Steps and Time Limits
80-52 (III), 80-14 (IV), 78-10 (II), 75-28 (IV)

47.12 Conduct of Hearing

47.13 Evidentiary Submissions
78-33 (I, II)

47.14 Verbatim Record

47.15 Exhaustion of Remedies
83-03 (II), 80-14 (IV), 78-19 (I), 75-28 (II, IV)

47.16 Expiration of Agreement Affecting
86-02 (II), 83-11 (II), 79-15 (III), 79-14 (V)

47.17 Refusal to Comply with Settlement

47.18 Mandatory Submission to Arbitration
84-15 (IV)

47.2 Refusal to Process or Answer
82-02 (II), 80-15 (II, III, IV, X)

47.21 By Union
83-03 (V), 82-02 (II), 80-36 (III), 80-15 (II, III, IV), 78-19 (I), 74-04, -05 & -06 (II)

47.22 By Employer
80-36 (III), 74-04, -05 & -06 (II)

47.221 Timeliness as Basis
80-14 (II, IV)

47.222 Other Procedural Defects as Basis

47.223 Subject Matter as Basis
83-03 (V, VI), 74-04, -05 & -06 (II)

47.3 Individual Rights
86-16 (V), 85-20 (I), 85-16 (III, IV, V), 85-04 (II), 84-25 (VI), 84-21 (II), 83-03 (V, VI), 80-52 (III), 80-41 (III), 80-29 (V), 78-31 (II), 78-19 (I), 74-04, -05 & -06 (I)

47.31 Right to Representation
85-16 (III, IV, V), 80-15 (I, II, III, IV, X), 78-16 & -20 (X), 74-04, -05 & -06 (I)

47.311 In Investigatory or Disciplinary Interview
78-16 & -20 (X)

47.312 Choice of Representative at Interview

47.313 Choice of Representative at Arbitration
74-04, -05 & -06 (I)

47.32 Recourse to Outside Forums and Remedies
86-11 (III, XVII), 85-20 (I), 84-15 (IV), 83-03 (II), 79-15 (III), 78-31 (II), 78-19 (I), 75-28 (II, III, IV), 74-04, -05 & -06 (I)

47.33 Other
84-25 (VI), 84-21 (II)

47.5 Grievance Arbitration
78-19 (I)

47.51 Authority to Initiate Arbitration
82-02 (II), 80-52 (III), 74-04, -05 & -06 (II)

47.511 By Union

47.512 By Employer

47.513 By Employee
82-02 (II), 80-52 (III)

47.514 After Expiration of Agreement
86-02 (II), 83-11 (II), 79-62 (IX), 79-15 (III), 79-14 (V)

47.52 Arbitrability
74-04, -05 & -06 (II)

47.521 Scope of Arbitration
84-31.1 (IV), 80-55 (III), 79-56 (II)

47.522 Procedural Issues
81-39 (I)

47.53 Duties of Parties
85-16 (III, IV), 83-03 (V, VI), 82-02 (II), 80-52 (III), 80-15 (III), 78-33 (I, II), 78-19 (I), 75-28 (II, IV)

47.54 Deferral to Arbitration by State Agencies
88-07 (I), 88-01 (I), 86-11 (III, XVII), 86-09 (I, II, III, IV), 85-20 (I), 84-15 (IV), 83-03 (II), 82-05 (XI), 81-39 (I), 80-50 (I), 80-46 (I, II), 80-35 & -40 (XIII), 80-29 (III), 80-14 (IV), 80-05 (VII), 79-24 (I), 79-15 (III), 78-31 (II), 78-19 (I), 78-10 (II), 76-11 (I, II), 75-28 (IV), 73-05 (I)

47.55 Deferral to Arbitration by Courts

47.56 Public Policy
86-11 (XVII), 82-05 (XI), 80-46 (I), 78-19 (I), 76-11 (I), 75-28 (IV)

47.6 Arbitrator

47.61 Selection and Appointment

47.62 Authority

47.7 Grievance Arbitration Procedure

47.71 Notification of Parties

47.72 Conduct of Hearing

47.73 Time Limits
85-16 (IV, V), 80-52 (III), 80-15 (V), 80-14 (IV), 75-28 (IV)

47.74 Evidentiary Standards

47.75 Intervention

47.76 Costs

47.77 Expiration of Agreement Affecting
86-02 (II), 83-11 (II), 79-62 (IX), 79-15 (III), 79-14 (V)

47.8 Grievance Arbitration Awards
80-50 (I), 78-31 (II)

47.81 Criteria for Making Award

47.82 Limitations
79-56 (II)

47.83 Refusal to Comply

47.84 Retroactivity

47.85 Finality
76-11 (II)

47.86 Review
88-07 (I), 80-50 (I), 78-10 (III), 76-11 (II)

47.87 Enforcement

51. IMPASSE
80-09 (IV, VII), 79-62 (X), 79-43 (VII), 79-32 (I, V), 79-16 (I), 79-14 (III), 78-19 (III), 78-16 & -20 (I)

51.01 Definition
87-19 (VI, VII, IX), 84-17 (II, III), 84-10 (IV, V), 83-01 (V), 82-28 (III), 81-53 (II), 80-55 (IV, V), 79-62 (VI, X), 79-43 (VII), 79-32 (V), 79-16 (I)

51.1 Declaration of Impasse
80-09 (IV), 79-62 (VI), 79-43 (VII)

51.11 Mandated Time Limits

51.12 Procedure and Notification
79-62 (VI), 79-43 (VII)

51.3 Authority of State Board
80-09 (IV)

51.31 Authority to Impose Resolution Procedures
79-64 (VII), 76-21 (III), 75-05.1 (III), 73-09 (III), 73-08 (IV)

51.32 Statutory Limitations
75-05.2 (I)

51.4 Subsequent Negotiations
83-21 (IV), 80-09 (VIII), 76-08 (V), 76-IR-01 (III), 75-05.2 (II), 73-12 (I, III)

51.41 Effect of Subsequent Agreement
75-05.2 (III), 74-13 (I), 74-12 (I), 73-12 (I, III)

51.5 Choice of Resolution Procedures
76-08 (V), 73-12 (IV)

51.7 Special Procedures
75-05.2 (II)

51.71 Superconciliation

52. MEDIATION AND CONCILIATION

52.01 Definition

52.1 Scope of Mediation
80-55 (V, VI), 80-35 & -40 (VII)

52.11 State Board Role
80-35 & -40 (VII), 75-05.1 (III)

52.12 Mandatory Submission
82-28 (III), 82-25 (I), 80-55 (VI), 79-22 (I)

52.13 Voluntary Submission
80-09 (VIII), 75-05.1(III)

52.14 Notification of Impasse
80-55 (V)

52.15 Duties of Parties
80-55 (V, VI), 79-62 (XII), 79-22 (I), 78-33 (I, II), 76-08 (I), 76-IR-01 (III)

52.16 Refusal to Submit
79-22 (I, II), 78-33 (I, II)

52.2 Mediators
81-36 (I, III), 74-22 (I)

52.21 Authority
79-22 (I), 75-05.1 (III)

52.22 Selection and Appointment
80-35 & -40 (VII), 76-08 (V)

52.3 Procedure
82-25 (I), 80-55 (V), 79-22 (I)

52.31 Time Considerations
76-08 (V), 75-05.1 (III)

52.32 Costs

52.33 Confidentiality
81-36 (I, III), 74-22 (I)

52.34 Hearings
79-22 (I)

52.35 By-Pass
79-62 (XII)

52.4 Duties of Mediation and Conciliation Services
81-36 (II)

53. FACTFINDING
79-36, -39, -45 & -47 (III), 79-32 (V)

53.1 Scope of Factfinding
82-35 (IV), 79-62 (VII), 79-32 (V), 76-08 (II, III), 75-05.2 (I)

53.11 Submission of Non-Mandatory Subjects
79-68 (II), 79-36, -39, -45 & -47 (III), 79-32 (I, V), 77-36 (II)

53.12 Issues Arising After Impasse
77-36 (I, II), 77-24 (II)

53.2 Determination of Need
81-36 (II), 75-05.2 (I)

53.21 Duties of Parties
83-06 (III), 82-35 (IV), 79-64 (VII), 79-62 (VIII), 79-32 (V), 77-36 (I, II), 76-08 (I, II, III), 73-08 (III)

53.22 Mandatory Submission
76-21 (III), 73-09 (III)

53.23 Notification of Impasse

53.24 Refusal to Participate
82-35 (IV), 79-64 (VII), 78-33 (I, II), 76-08 (I), 73-08 (III)

53.25 Stay of Fact Finding
78-A-07 (I, II), 75-05.1 (I)

53.3 Panel
78-A-07 (I)

53.31 Selection or Appointment
81-36 (II), 78-A-07 (I), 73-08 (III, IV)

53.32 Authority
79-32 (VII)

53.4 Hearing
78-A-07 (I, II)

53.41 Conduct
75-05.2 (II)

53.42 Evidence
78-33 (I, II)

53.43 Costs
83-06 (III), 79-62 (VIII), 79-32 (IX), 79-22 (III), 78-33 (II), 77-36 (III)

53.5 Criteria Used in Findings
73-12 (IV)

53.511 Ability to Pay

53.512 Availability of Funds

53.513 Comparability

53.514 Package Offer

53.515 Cost of Living

53.516 Educational Qualifications

53.517 Employment Hazards

53.518 General Practice

53.519 Interest and Welfare of Public

53.520 Pay For Special Work

53.521 Physical Qualifications

53.7 Findings of Fact and Recommendations
79-64 (VII), 79-32 (VII), 75-26 (II), 73-12 (IV)

53.71 Notification of Parties

53.72 Time Limits

53.73 Acceptance or Rejection

53.75 Binding Effect
79-64 (VII, VIII), 79-32 (VII)

53.76 Publication

53.8 Referral of Unresolved Disputes
73-12 (IV)

53.81 Board
81-36 (II), 76-21 (III), 73-12 (IV), 73-09 (III), 73-08 (IV)

53.82 Legislative Body

55. INTEREST ARBITRATION
82-24, (I, II), 81-55 (I, III)

55.2 Types

55.21 Advisory
81-55 (III), 79-64 (VII, VIII)

55.22 Conventional
81-55 (I, III)

55.23 Final Offer

55.231 Total Package

55.232 Issue-by-Issue

55.24 Other
82-24 (I, II), 81-55 (I, III)

55.3 Duty to Proceed
83-21 (VI), 82-24, (I, II), 81-55 (I, III), 79-64 (VII), 76-08 (I), 75-05.1 (I), 73-08 (III)

55.31 Contractual

55.32 Court Ordered

55.33 Refusal to Submit
76-08 (I)

55.34 Statutory
83-21 (VI), 82-24 (I, II), 81-55 (I), 79-64 (VII), 76-08 (I), 75-05.1 (I), 73-08 (III)

55.35 Voluntary
82-24 (II), 81-55 (I, III)

55.4 Procedure
82-24, (I, II), 81-55 (I)

55.41 Time Limits
83-21 (VI)

55.42 Notification

55.43 Costs

55.44 Intervention

55.45 Expedited Procedure

55.46 Change of Final Offer

55.6 Arbitration Panel

55.61 Selection
83-21 (VI), 81-55 (I), 73-08 (IV)

55.62 Statutory Authority
82-24 (I, II), 81-55 (I, III), 79-64 (VII, VIII), 74-16 (II)

55.63 Procedural Authority

55.7 Criteria Used in Findings

55.711 Ability to Pay

55.712 Availability of Funds

55.713 Comparability

55.714 Package Offer

55.715 Cost of Living

55.716 Educational Qualifications

55.717 Employment Hazards

55.718 General Practice

55.719 Interest and Welfare of Public

55.720 Pay for Special Work

55.721 Physical Qualifications

55.8 Awards
82-24 (I, II), 77-18, -19, -20 & -29 (II)

55.81 Constitutionality

55.82 Enforcement
77-18, -19, -20 & -29 (II)

55.83 Legality
82-24 (I, II), 74-16 (II)

55.84 Limitations
82-24 (I, II), 81-55 (III), 79-64 (VII, VIII), 74-16 (II)

55.85 Retroactivity

55.86 Review
74-16 (II)

55.9 Scope of Arbitration
82-24 (I,II), 81-55 (I, III), 74-16 (II)

55.91 Submission of Mandatory Subjects
74-16 (II)

55.911 Economic Issues
81-55 (I, III), 79-64 (VII, VIII)

55.912 Non-Economic Issues

55.92 Submission of Non-Mandatory Subjects

55.93 Issues Raised After Impasse
77-34 (II, VI)

55.94 Other
82-24 (I), 79-64 (VII, VIII)

56. LEGISLATIVE RESOLUTION OF IMPASSE

56.1 Situation Requiring

56.2 Scope of Legislative Authority

56.21 Statutory Limitations

56.3 Hearing Procedures

56.4 Finality

56.5 Referendum

61. JOB ACTION
80-18 (I, II)

61.1 Definition
87-14 & -15 (I, II, III, IV, V), 80-35 & -40 (XIV), 80-18 (I), 79-50 (XI), 76-IR-02 (I)

61.2 Right to Engage in
87-14 & -15 (II, IV, V), 80-49 (IV), 80-35 & -40 (XIV), 80-18 (I), 79-64 (II, III), 79-50 (XI, XII), 79-15 (II), 76-IR-02 (I)

61.3 Provocation as Defense
79-50 (XI, XII), 79-15 (VII), 76-IR-02 (I)

61.4 Penalties
87-14 & -15 (IX), 80-35 & -40 (XIV, XVI), 79-64 (II, III), 79-50 (XII), 79-36, -39, -45 & -47 (XIII), 79-15 (IV)

61.5 Types of Job Actions
80-35 & -40 (XIV), 79-15 (II), 76-IR-02 (I)

61.51 Intermittent or Temporary Work Stoppages
87-14 & -15 (II, IV, V, X), 80-35 & -40 (XIV), 80-18 (I, II), 79-15 (II), 76-IR-02 (I)

61.52 Mass Resignations

61.53 Sick-Outs
79-36, -39, -45 & -47 (XIII)

61.54 Slowdowns
80-35 & -40 (XIV), 76-21 (II), 76-IR-02 (I)

61.55 Speedups

61.56 Working to Rule
87-14 & -15 (IV, V), 76-IR-02 (I)

61.57 Other
79-64 (II, III)

62. STRIKES
79-50 (XI)

62.1 Definition
87-14 & -15 (I, II, III, IV, V, VI), 80-35 & -40 (XIV), 79-15 (II, VII), 76-IR-02 (I)

62.2 Right to Strike
87-14 & - 15 (III, VI), 80-35 & -40 (XIV), 80-18 (I), 79-50 (XI, XII), 79-15 (II, IV)

62.21 Protected Strikes

62.22 Public Interest; Public Safety

62.23 Prohibited Strikes
79-50 (XI, XII), 79-15 (II, IV), 76-IR-02 (I)

62.231 Statutory Prohibition
80-35 & -40 (XIV), 80-18 (I, II), 79-50 (XI, XII), 79-15 (II, IV), 76-IR-02 (I)

62.232 No-Strike Clause in Contract
79-15 (III)

62.233 In Violation of Injunction

62.3 Types of Strikes
80-35 & -40 (XIV)

62.31 Economic
87-14 & -15 (VI), 79-15 (II, VII)

62.32 Emergency Services

62.33 In Response to Lockout

62.34 Jurisdictional

62.35 Sympathy

62.36 Unfair Practice

62.37 Wildcat
80-18 (II)

62.4 Strike Conduct
80-18 (I, II)

62.41 Strike Authorization

62.42 Condonation of Strike by Union
80-35 & -40 (XIV), 80-18 (II), 76-IR-02 (I)

62.43 Strike Fund

62.44 Strike Breakers

62.45 Illegal/Criminal Activity During Strike

62.5 Employer Action
87-14 & -15 (VII), 79-50 (XII)

62.51 Employer Duties

62.52 Reactions to Strikes
87-14 & -15 (VII), 79-15 (IV)

62.521 Loss of Pay
79-50 (XII)

62.522 Suspensions

62.523 Terminations
79-50 (XII)

62.524 Lockouts
87-14 & -15 (VII), 81-28 (VIII)

62.525 Other
87-14 & -15 (VII), 79-36, -39, -45 & -47 (XIII), 79-15 (IV)

62.6 Court Relief

62.61 Temporary Restraining Order

62.62 Injunction

62.63 Contempt Action

62.64 Other

62.7 Strike Penalties
87-14 & -15 (IX), 79-15 (IV)

62.71 Revocation or Suspension Certification

62.72 Revocation or Suspension of Dues Deduction/Agency Shop Fee

62.73 Fines, Individual

62.74 Fines, Employee Organization

62.75 Fines, Payment

62.76 Imprisonment

62.77 Other Penalties
87-14 & -15 (IX), 80-35 & -40 (XVI), 79-50 (XII), 79-15 (IV)

62.78 Criteria for Assessment
76-IR-02 (I)

62.781 Public Safety, Health and Welfare

62.782 Irreparable Harm

62.79 Defenses
80-18 (I, II), 79-50 (XII), 76-IR-02 (I)

62.791 Provocation
79-50 (XII), 79-15 (VII), 76-IR-02 (I)

62.792 De Minimus
79-15 (VII)

62.8 Reinstatement of Striker
79-50 (XII)

62.9 Strike Settlements
79-15 (V)

63. PICKETING

63.1 Right to Picket
78-16 & -20 (VIII, IX), 76-08 (IV)

63.11 Forfeiture of Right
78-16 & -20 (VIII)

63.12 Contract Ban

63.2 Types of Picketing

63.21 Informational
76-08 (IV), 75-25 (II)

63.22 Post-Certification

63.23 Recognitional

63.24 Rival Union

63.25 Secondary

63.26 Stranger

63.27 Other

63.3 Pickets; Picket Lines
78-16 & -20 (VIII, IX)

63.31 Criminal Conduct of Pickets

63.32 Location of Pickets; Obstructing Access
78-16 & -20 (VIII)

63.33 Mass Picketing

63.34 Pickets as Union Agents
76-08 (IV), 75-25 (II)

63.35 Picket Signs, Contents
76-08 (IV)

63.4 Refusal to Cross Picket Lines

63.41 Employees

63.42 Non-Employees

63.43 Strikers

63.44 Non-Strikers

63.45 Members of Union

63.46 Non-Members of Union

63.5 Crossing Picket Lines

64. OTHER CONCERTED ACTIVITY

64.1 Definition
80-41 (III)

64.2 Right to Engage in
84-29 (III), 84-25 (VI), 83-24 (I), 83-22 (II), 83-16 (III), 82-10.2 (I), 80-49 (IV), 80-41 (III, IV, VII, VIII), 80-13 (I, II, III), 80-08 (III), 80-04 (III, IV), 80-02 (VI), 79-41.2 (III), 78-34 (III), 78-22 (II, III), 76-08 (IV), 74-01 (II)

64.3 Organizing Activities
83-24 (I), 81-43 (II, IV, V, VI), 80-41 (III, IV, VII, VIII, XVII), 80-13 (I, II, III), 79-41.2 (III), 78-30 (I, II, III, IV), 78-16 & -20 (IV)

64.31 Boycotts

64.32 Leafletting
82-10.2 (I), 81-43 (II, IV, V), 81-22.1 (II, III, VII, VIII), 76-08 (IV)

64.33 Meetings
81-43 (II, IV, VI), 78-16 & -20 (V, VI), 76-08 (IV), 74-01 (II)

64.34 Petitioning
83-16 (III), 82-10.2 (I), 81-22.1 (VII, VIII), 80-41 (III, IV), 78-34 (II, III), 74-01 (II)

64.35 Other
83-22 (II), 82-10.2 (I), 80-41 (III), 80-33 (II), 80-13 (I), 76-08 (IV)

64.4 Professional Sanction
82-10.2 (I), 81-52 (IV), 80-35 & -40 (XV)

64.41 By Employee

64.42 By Statute

64.6 Support From Non-Employees

64.7 Political Activity
82-10.2 (I), 78-34 (III), 76-08 (IV), 74-01 (II)

71. UNFAIR PRACTICE AND APPELLATE REVIEW PROCEDURES

71.1 Filing of Charge
88-14, -15 & -16 (I), 83-25 (I), 80-06 (I), 73-05 (IV)

71.11 Contents of Charge
88-14, -15 & -16 (I), 87-20 (I), 85-16 (I), 85-01 (I), 84-31.1 (I, II), 84-24 (I, II), 84-17 (I), 84-13 (IV), 84-12 (III), 84-09 (I), 84-04 (III), 83-03 (III, IV), 82-08 (II), 82-02 (I, III), 81-52 (VII), 80-52 (I), 80-36 (I), 80-33 (I), 80-30 (III), 80-26 (IX), 80-05 (II, IV), 79-41.2 (I), 79-40.1 (II, III), 79-40.2 (III), 79-35 (I), 79-31 (II), 79-08 (V), 78-03 (I), 76-21 (IV), 75-19 (II), 75-01.2 (I), 74-03 (I, II), 74-02 (I, II), 73-12 (II), 73-07 (II), 73-05 (IV)

71.12 Notice to Other Party
86-21 (II), 84-24 (I), 81-53 (I), 80-33 (I), 80-06 (I), 80-05 (I), 79-31 (I), 79-08 (V), 77-32 (I), 75-21 (I), 73-12 (II)

71.13 Timeliness of Charge
86-11 (I, II), 85-16 (II), 84-17 (I), 84-12 (I, II), 83-21 (I), 83-03 (I, II), 82-10.2 (V), 81-47 (I), 81-02 (I, II), 80-41 (I, V, VII), 80-36 (II), 80-26 (VIII), 80-14 (II, III), 79-63 (II), 79-40.1 (IV), 79-29.1 (I), 78-A-11 (II), 78-01 (II)

71.14 Standing
86-17 (I, V), 81-54 (VII), 81-06 (VIII), 80-10 (III), 79-71 (II), 79-40.1 (V),

79-14 (VIII), 78-31 (I), 78-03 (I), 77-37 (II), 75-15.1 (I), 75-01.1 (I), 73-11 (I), 73-07 (III)

71.15 Refiling or Amending Charge
88-14, -15 & -16 (I), 85-08 (III), 84-28 (I), 84-24 (III), 84-13 (IV), 80-33 (I), 80-26 (VIII), 80-06 (I), 80-05 (II), 79-40.2 (III), 75-01.1 (I), 73-12 (II), 73-08 (I), 73-07 (II)

71.16 Service
88-14, -15 & -16 (I), 86-21 (II), 84-24 (I), 83-21 (V), 81-53 (I), 80-06 (I), 80-05 (I), 79-31 (I), 79-29 (I), 77-32 (I)

71.17 Withdrawal
88-12 (I), 88-06 (I), 88-02 & -04 (I), 86-21 (I), 86-11 (II), 85-18 (I), 85-14 (I), 85-10 (I), 85-03.2 (I), 81-53 (IV), 80-19 (I), 80-09 (II), 79-67 (II), 79-41.2 (I), 79-08 (III), 75-01.1 (I)

71.18 Non-attorney Representatives
79-14 (VIII)

71.2 Investigation and Complaint
88-14, -15 & -16 (I), 88-02 & -04 (I), 85-16 (II, VI), 83-04.1 (I, II, III), 83-03 (III, IV), 80-36 (I)

71.21 Investigation (Prehearing Conference)
88-14, -15 & -16 (I), 88-02 & -04 (I), 87-20 (I), 82-02 (I, III), 80-49 (I), 79-31 (I, II), 77-24 (I), 77-02 (I), 76-16 (I), 76-09 (I), 74-24 (I)

71.211 Burden of Proof
85-01 (I), 84-31.1 (II), 83-16 (II), 83-04.2 (II), 83-03 (IV), 81-52 (VII), 79-36, -39, -45 & -47 (XI)

71.212 Access to Investigatory Materials
84-21 (II), 79-55 (I), 73-07 (I)

71.22 Complaint
88-14, -15 & -16 (I), 87-20 (I), 84-24 (I, II), 84-12 (III), 84-09 (I), 83-03 (III, IV), 82-02 (I, III), 81-52 (VII), 80-49 (I), 80-26 (IX)

71.221 Issuance

71.222 Contents
88-14, -15 & -16 (I), 87-20 (I, II), 85-16 (I), 85-01 (I), 84-31.1 (I, II), 84-24 (II), 84-17 (I), 84-13 (IV), 84-12 (III), 84-09 (I), 83-03 (III, IV), 82-08 (II), 82-02 (I, III), 81-52 (VII), 80-33 (I), 80-30 (III), 80-26 (IX), 80-05 (II, IV), 79-41.2 (I), 79-40.2 (III), 79-40.1 (II, III), 79-35 (I), 79-31 (II), 79-08 (V), 78-03 (I), 76-21 (IV), 74-03 (II), 74-02 (II), 73-05 (IV)

71.223 Amendment
85-08 (III), 84-24 (III), 84-13 (IV), 80-33 (I), 80-05 (II), 79-40.2 (III), 73-07 (II)

71.224 Answer

86-21 (II), 80-49 (I), 79-31 (I), 79-29 (I), 75-21 (I)

71.225 New Matter in Answer

88-12 (I)

71.226 Refusal to Issue

71.227 Dismissal

88-14, -15 & -16 (I), 88-12 (I), 88-07 (I), 88-06 (I), 87-20 (I, II), 87-13 (I), 87-A-06 [87-09] (I), 86-17 (V), 86-05 (I, II, III), 85-16 (II, VI), 85-01 (I), 84-31.1 (I, II), 84-28 (I), 84-24 (II), 84-20 (VI), 84-13 (IV), 84-12 (I), 84-09 (I), 84-04 (III), 83-25 (I), 83-03 (I, III, IV), 82-10.2 (V), 82-02 (I, III), 81-52 (VII), 81-47 (III), 81-29 (IV), 81-02 (I), 80-52 (I), 80-46 (III), 80-42 (III), 80-41 (I), 80-36 (I, II), 80-33 (I), 80-28 & -32 (VIII), 80-24 (III), 80-14 (II), 80-10 (III), 80-06 (I), 80-05 (IV), 79-67 (III), 79-63 (III), 79-55 (II), 79-51 (II), 79-36, -39, -45 & -47 (XI), 79-35 (I), 79-06 (I), 79-01 (I), 78-16 & -20 (XII), 78-03 (I, II), 78-02 (I), 77-39 (I), 77-32 (I), 77-31 (II), 77-16 (III), 75-36 (I), 75-33 (V), 75-28 (II, IV), 75-26 (III), 75-15.2 (II), 75-13 (I)

71.228 Settlement and Stipulation

88-12 (I), 88-06 (I), 87-13 (I), 87-03 (I), 86-16 (I), 86-14 (I) 86-12 (I), 85-18 (I), 84-13 (I), 84-10 (I), 83-22 (I), 83-11 (I), 81-53 (II), 81-39 (I), 81-29 (I), 81-23 (I), 81-15 (I), 81-12 (I), 80-55 (I), 80-49 (I), 80-44 (I), 80-19 (I), 80-18 (III), 80-14 (I), 79-71 (I), 79-68 (I), 79-57 (I), 79-55 (II), 79-44 (I), 79-42 (I), 79-37 (I), 79-14 (I), 79-12.2 (I), 78-34 (I), 78-29 (I, II), 78-23 (I), 78-15 (I), 78-10 (I), 77-24 (I), 77-18, -19, -20 & -29 (I, II), 76-17 (I), 76-16 (I), 76-15 (I), 76-12 (I), 75-36 (I), 75-29 (I), 75-28 (I), 75-24 (I), 75-22 (I), 75-19 (I), 75-16 (I), 75-13 (I), 75-12 & -27 (I, IV), 75-03 (I), 74-16 (I)

71.229 Withdrawal

88-12 (I), 88-06 (I), 88-02 & -04 (I), 86-21 (I), 86-11 (II), 85-18 (I), 85-14 (I), 85-10 (I), 85-03.2 (I), 81-53 (IV), 81-39 (I), 80-19 (I), 80-09 (II), 79-67 (II), 79-55 (II), 79-41.2 (I), 79-37 (IV), 79-08 (III), 75-01.1 (I)

71.230 Mootness

86-16 (II), 84-17 (I), 83-21 (I), 83-09 (I), 81-53 (III), 81-40 (I), 81-29 (IV), 81-23 (II), 80-55 (VII), 80-05 (III), 79-71 (II), 79-42 (III), 79-36, -39, -45 & -47 (V), 79-29.1 (I), 77-07 (II), 76-16 (V), 75-05.2 (III), 75-01.2 (III, IV), 74-13 (I), 74-12 (I), 73-12 (I)

71.240 Default

87-A-06 [87-09] (I), 86-21 (III), 84-20 (II, III, IV, V, VI), 83-10.1 (I, II), 79-12.1 (I, II), 77-24 (I, II), 77-02 (I), 76-21 (I), 75-36 (I), 75-21 (I)

71.241 Staying Board Proceedings

85-03.1 (I), 82-14.3 (II), 79-31 (III), 78-29 (II, III)

71.25 Prehearing Conference

88-01 (I), 87-A-06 [87-09] (I), 86-21 (I, III), 86-16 (I), 85-18 (I), 85-03.1 (I), 84-31.1 (I), 84-20 (II, III, IV, V, VI), 83-11 (I), 83-10.1 (I, II), 83-04.1 (I, II, III), 82-15, -16 & -22 (I), 81-43 (I), 80-33 (I), 80-28 & -32 (I), 80-18 (III), 80-14 (I), 80-09 (I), 79-71 (I), 79-65 & 80-07 (I), 79-44 (I), 79-42 (I), 79-40.1 (I), 79-12.1 (I, II), 79-12.2 (I), 78-29 (I, II), 78-23 (I), 76-16 (I), 76-09 (I), 75-33 (I), 75-24 (I), 75-22 (I)

71.251 Prehearing Conference Memorandum & Order

88-01 (I), 87-A-06 [87-09] (I), 86-21 (I, III), 85-18 (I), 85-03.1 (I), 84-31.1 (I), 84-28 (I), 84-20 (II, IV, VI), 84-10 (I), 83-11 (I), 83-03 (III, IV), 82-15, -16 & -22 (I), 81-43 (I), 81-15 (I), 81-12 (I), 80-49 (I), 80-44 (I), 80-28 & -32 (I), 80-18 (III), 80-14 (I), 79-71 (I), 79-65 & 80-07 (I), 79-42 (I), 79-12.1 (I, II), 79-12.2 (I), 78-34 (I), 78-29 (I, II), 78-23 (I), 78-15 (I), 78-10 (I), 77-24 (I), 77-18, -19, -20 & -29 (I), 77-02 (I), 76-17 (I), 75-36 (I), 75-33 (I), 75-28 (I), 75-24 (I), 75-22 (I), 75-19 (I), 74-24 (I)

71.252 Sanctions for Non-attendance/non-compliance

87-A-06 [87-09] (I), 86-21 (III), 84-20 (II, III, IV, V, VI), 83-10.1 (I, II), 83-04.1 (I, II, III), 80-18 (III), 79-12.1 (I, II), 77-24 (I), 77-02 (I), 75-36 (I), 75-33 (I), 75-21 (I), 74-24 (I)

71.3 Hearing Officer

84-20 (II), 82-10.1 (I, II, III), 80-41 (XXIII), 79-65 & 80-07 (II), 73-17 (I), 73-13 & -14 (I)

71.31 Authority

84-20 (II), 82-10.1 (I, II, III), 80-36 (I), 79-65 & 80-07 (II), 75-10 (I), 75-01.2 (I)

71.32 Appointment

71.33 Disqualification

80-41 (XXIII), 73-13 & -14 (I)

71.34 Subpoena Power

83-04.1 (I, II, III), 80-35 & -40 (XII, XIII), 79-55 (I), 77-01 (I)

71.4 Discovery

83-04.1 (I, II, III), 79-55 (I), 73-07 (I)

71.41 Depositions

71.5 Hearings

84-20 (II), 82-10.2 (II), 82-10.1 (II, III), 80-44 (I), 80-35 & -40 (XII, XIII), 80-15 (IV), 80-14 (I), 80-09 (I), 79-68 (I), 79-63 (IV), 79-57 (I), 79-50 (II), 79-44 (I), 79-42 (I, V), 79-40.1 (I), 79-37 (I, IV, V), 79-10 & -18 (I), 78-34 (I), 78-23 (I), 78-15 (I), 78-10 (I), 78-03 (I), 77-34 (I), 77-18, -19, -20 & -29 (I), 76-16 (I), 76-09 (I), 75-12 & -27 (II), 73-17 (I), 73-08 (I)

71.51 Conduct of Hearings

84-20 (II), 82-10.1 (III), 80-09 (I), 79-55 (I), 79-42 (V), 78-34 (I), 78-23 (I), 78-15 (I), 78-03 (I), 77-34 (I), 77-18, -19, -20 & -29 (I), 76-21 (I, IV), 76-16 (I), 76-09 (I), 75-28 (I), 75-24 (I), 75-22 (I), 74-18 (VII), 74-10 (I), 73-17 (I), 73-07 (I)

71.511 Appearances

84-20 (II), 80-35 & -40 (XII, XIII), 79-14 (VIII), 73-07 (III)

71.512 Burden of Proof

86-01 (IV), 84-29 (II, V), 84-21 (II), 84-06 (I, VIII), 83-16 (II), 83-15 (II), 83-A-09 (III), 83-04.2 (II), 82-05 (V), 80-52 (I), 80-42 (I), 80-30 (IV), 80-15 (VI), 79-70.1 (III), 79-43 (VII), 79-42 (V), 79-41.2 (I), 79-36, -39, -45 & -47 (XI), 79-15 (IV), 79-01 (I), 78-31 (IV), 74-18 (V)

71.513 Collateral or Ancillary Proceedings

85-03.1 (I), 80-41 (XXIII), 79-31 (III), 78-29 (II, III), 75-05.1 (I), 73-05 (I)

71.514 Consolidation

82-15, -16 & -22 (I), 80-28 & -32 (I), 79-65 & 80-07 (I), 79-10 & -18 (I), 77-37 (I), 77-18, -19, -20 & -29 (I)

71.515 Continuances

78-29 (II, III), 75-25 (I), 75-13 (I), 75-12 & -27 (I), 73-17 (I), 73-08 (I), 73-07 (I)

71.516 Estoppel

84-12 (I, II), 80-33 (I), 79-32 (VI), 79-31 (III), 77-37 (II)

71.517 Evidentiary Standards

86-11 (VIII), 84-06 (I, VIII), 82-05 (VIII), 81-36 (I, III), 80-41 (I, VII, XVI, XVII), 80-30 (VI, VII, VIII), 80-22 (I), 80-15 (VI), 79-70.1 (III), 79-63 (IV), 79-55 (I), 79-51 (II), 79-50 (II), 79-42 (V), 79-41.2 (II), 79-37 (V), 79-01 (I), 78-31 (IV), 77-24 (II), 75-33 (I), 74-18 (IX), 74-10 (I), 73-15 (I)

71.518 Prehearing Officer's Report

76-09 (I), 74-24 (I)

71.519 Intervention

81-43 (I), 75-15.1 (I)

71.520 Motion to Reopen Hearings

80-30 (IX), 80-10 (V), 79-12.1 (II), 78-29 (III), 77-34 (I), 76-16 (I)

71.521 Severance

71.522 Waiver

85-16 (II), 84-20 (II), 81-23 (I), 80-30 (III), 79-29.1 (I), 78-34 (I), 77-18, -19, -20 & -29 (I)

71.523 Witnesses

86-04 (VI), 85-04 (IV), 84-29 (III), 84-06 (IX), 83-15 (IV), 82-10.2 (II), 82-10.1 (II), 81-54 (IV), 81-36 (I, III), 80-35 & -40 (XII, XIII), 80-30 (VII), 80-15 (IV), 79-63 (IV), 79-55 (I), 77-01 (I), 76-09 (I), 74-22 (I), 74-01 (I)

71.7 Review by State Board of Unit and Election Reports

87-A-07 (I, VII), 87-A-05 (I), 87-A-03 (I, IV), 87-A-02 (II), 86-21 (I), 86-A-02 (I), 86-A-01 (I), 85-A-03.2 (I), 85-A-03.1 (I), 85-A-01 (I), 84-A-05 (I), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (II, III), 83-A-09 (I, II), 83-A-08 (IV), 83-A-07 (I), 83-A-05 (II, III), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (I), 82-A-02.1 (II, XI), 82-A-01 (I), 81-47 (I), 81-15 (II), 81-A-03 (V), 81-A-02 (VI), 81-A-01 (V, VI), 80-A-04 (V), 80-A-03 (VI), 78-A-10 (III, IV, V, VI), 78-A-07 (I), 78-A-04 (I), 77-37 (I, II), 77-A-04 (III), 77-A-02.2 (I, II, III), 77-A-02.1 (I), 77-A-02.4 (IV), 77-A-02.3 (X), 75-11 (I), 75-A-03 (III), 72-A-01 (III), 70-A-02 (II, III), 70-A-01 (IV)

71.705 Standing to Seek Review

82-A-01 (III), 81-A-03 (V), 78-A-10 (I, II), 77-A-02.3 (X), 77-A-02.2 (I, III)

71.71 Exceptions

87-A-07 (I), 87-A-03 (I), 86-21 (I), 82-A-01 (I), 78-01 (II), 77-A-02.2 (II)

71.711 Timeliness

83-14 (IV), 82-A-02.1 (III), 81-47 (I), 81-A-01 (V), 79-40.1 (IV), 78-A-11 (II), 78-A-04 (I), 78-01 (II), 75-A-01 (IV), 72-A-01 (II), 70-A-02 (III)

71.712 Content

87-A-07 (I), 87-A-03 (I), 86-21 (I), 83-A-08 (IV), 83-A-05 (III), 82-A-01 (I), 81-A-01 (V), 77-A-02.2 (II)

71.715 Record on Appeal

87-A-07 (I, VII), 87-A-03 (IV), 85-A-03.2 (I), 84-A-02 (II), 83-A-09 (I), 83-A-08 (IV), 83-A-05 (II), 82-A-02.2 (I), 82-A-01 (I), 80-A-02 (I), 79-A-02 (I), 78-A-10 (III, IV, V, VI)

71.72 Standard of Review

87-A-07 (X), 87-A-05 (I), 87-A-03 (IV), 86-22, -25 & 86-A-03 (II), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I), 84-A-05 (I), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (II), 82-A-02.1 (II), 82-A-01 (I), 81-A-01 (VI), 80-A-04 (V), 79-A-02 (I), 79-A-01 (II), 78-A-10 (V), 77-A-02.2 (II), 75-11 (I), 70-A-01 (IV)

71.73 Findings of Fact

87-A-03 (IV), 86-22, -25 & 86-A-03 (II), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I), 84-A-05 (I, II), 84-A-04 (I, II), 84-A-03 (I, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.2 (II), 82-A-02.1 (II), 82-A-01 (I), 81-A-01 (VI), 80-A-04 (V), 79-A-02 (I), 78-A-10 (V), 75-11 (I), 70-A-01 (IV)

71.74 Conclusions of Law

87-A-05 (I), 87-A-03 (III, IV), 86-A-01 (I), 85-A-03.2 (I), 85-A-01 (I),

84-A-05 (I, IV), 84-A-04 (II), 84-A-03 (I, III, VI), 84-A-02 (III), 83-A-09 (II), 83-A-07 (I), 83-A-03 (I), 82-A-03 (IV), 82-A-02.1 (II), 82-A-01 (I), 81-A-01 (VI), 80-A-04 (V), 80-A-03 (VI), 79-A-02 (I), 70-A-01 (IV)

71.75 Briefs

87-A-03 (I), 86-A-01 (I), 84-A-02 (I), 82-A-02.1 (I), 80-A-02 (I), 79-40.1 (I), 79-A-01 (I), 78-A-10 (V), 78-A-09 (I), 78-A-08 (I), 77-34 (I), 77-24 (I, II), 77-02 (I), 76-16 (I), 75-28 (I), 75-24 (I), 75-22 (I), 75-19 (I), 75-16 (I)

71.76 Oral Arguments

87-A-03 (I), 86-A-01 (I), 82-A-02.1 (I), 80-A-02 (I), 75-28 (I), 75-19 (I)

71.8 Deferral to Arbitration

88-07 (I), 88-01 (I), 86-11 (III, XVII), 86-09 (I, II, III, IV), 85-20 (I), 84-15 (IV), 83-03 (II), 82-05 (XI), 81-39 (I), 80-50 (I), 80-46 (I, II), 80-35 & -40 (XIII), 80-29 (III), 80-14 (IV), 80-05 (VII), 79-64 (I), 79-41.1 (I, II), 79-24 (I), 79-15 (III), 78-31 (II), 78-19 (I), 75-28 (IV), 73-05 (I)

71.81 Standards for Pre-Arbitral Deferral

86-11 (XVII), 86-09 (II, IV), 85-20 (I), 80-46 (II), 80-14 (IV), 80-05 (VII), 79-64 (I), 79-43 (I), 79-24 (I), 78-31 (II), 78-19 (I), 76-11 (I)

71.811 Amenability of Issues to Deferral

86-11 (XVII), 86-09 (II), 80-50 (I), 80-29 (III), 80-05 (VII), 79-64 (I), 79-15 (III), 78-10 (II), 76-11 (I)

71.812 Authority of Tribunal Making Determination

79-41.1 (I), 76-11 (I)

71.813 Availability of Arbitration

88-01 (I), 86-11 (III, XVII), 86-09 (II, IV), 84-15 (IV), 80-46 (II), 80-14 (IV), 80-05 (VII), 79-24 (I), 79-15 (III), 78-10 (II), 76-11 (I), 75-28 (III)

71.814 Positive Assurance Test

71.815 Stage to Which Grievance Has Progressed

86-09 (II), 80-50 (I), 80-29 (III), 80-14 (IV), 78-10 (II)

71.816 Willingness of Parties to Arbitrate

88-01 (I), 86-11 (XVII), 84-15 (IV), 81-39 (I), 79-43 (I), 78-19 (I)

71.817 Other

80-14 (IV), 79-64 (I), 79-43 (I), 79-24 (I), 79-15 (III), 78-31 (II), 78-19 (I), 78-10 (II)

71.82 Standards for Deferral to Arbitration Award

88-07 (I), 80-50 (I), 78-31 (II)

71.821 Award Not to Repugnant to Act

88-07 (I), 80-50 (I), 79-41.1 (II), 78-10 (III), 76-11 (II)

71.822 Binding Nature of Award
80-50 (I)

71.823 Consideration of Unfair Practice Issues
80-50 (I), 79-41.1 (II)

71.824 Fair and Regular Nature of Proceedings
88-07 (I), 79-41.1 (I), 78-10 (III), 76-11 (II)

71.825 Other
78-31 (II), 76-11 (II)

71.83 Deferral to Court Proceedings or Other Agencies
85-03.1 (I), 79-41.1 (I, II), 79-31 (III), 78-29 (II, III), 74-16 (I), 74-04, -05 & -06 (III)

71.9 Petitions for Rehearing
88-01 (I), 86-09 (II), 85-20 (II), 78-10 (III), 76-11 (II)

72. EMPLOYER UNFAIR PRACTICES

72.1 Interference, Coercion and Restraint
87-19 (X), 87-14 & -15 (VII), 86-23 (I, VI), 86-22, -25 & 86-A-03 (I, III), 86-16 (II, III, IV, V, VI), 86-11 (XIII), 86-05 (I), 86-01 (V), 85-20 (I), 85-18 (VI), 85-17 (III, IV), 85-04 (I, V), 84.31.1 (III), 84-29 (IV, V), 84-25 (III, IV, V, VI), 84-24 (II), 84-21 (I), 84-19 (IV), 84-08 (I, II, III), 84-06 (III, V), 84-04 (I, II, IV, V), 84-01 (I, III), 83-24 (II), 83-22 (II), 83-21 (III), 83-16 (I), 83-15 (I), 83-14 (III), 83-11 (II, IV), 83-10.2 (I), 83-09 (II), 83-04.2 (II, V), 83-01 (I), 82-35 (VII), 82-14.1 (V), 82-10.2 (III, IV, VI), 82-10.1 (I, II), 82-04 (I, IV), 82-01 (I, III), 81-54 (I, II, III, V, VI), 81-52 (I), 81-47 (II, III, IV), 81-43 (II, IV, V, VI), 81-40 (II), 81-35 (I, II, III, IV), 81-34 (I), 81-23 (II), 81-17 (II), 81-06 (I, II, III, IV, V, VI, VII, VIII), 80-49 (III, V), 80-45 (II, VI), 80-42 (I, II, III), 80-41 (III, IV, VII, VIII, XVII, XX), 80-35 & -40 (X, XI, XIII), 80-33 (II, IV, V), 80-30 (I, III), 80-29 (II, V), 80-26 (I, II, III, IV, V, VI, VII), 80-24 (II), 80-22 (IV), 80-13 (I, II, III, IV, V, VI), 80-09 (VI), 80-08 (III), 80-05 (V), 80-04 (I, II, III), 80-02 (VI), 79-70.1 (I, IV, V), 79-67 (II), 79-65 & 80-07 (III, IV, V, VII, VIII, IX), 79-64 (III), 79-63 (I, II, III, V), 79-62 (XI), 79-51 (I, II), 79-41.2 (II, III), 79-40.2 (I), 79-40.1 (III), 79-37 (VI), 79-36, -39, -45 & -47 (X, XI), 79-35 (I, II), 79-19 & -11 (I), 79-14 (IV), 79-01 (I), 78-31 (III, VI), 78-30 (I, II, III, IV), 78-28 (I, II, III), 78-22 (I, II, III), 78-16 & -20 (III, IV, V, VI, VII, VIII, IX, X, XI), 78-04 (II), 78-02 (I), 78-01 (IV), 74-18 (III, IV), 74-13 (II), 74-12 (II), 74-10 (III), 74-03 (II), 74-02 (II), 73-09 (I), 70-A-02 (III)

72.11 Restrictions on Union Activity
84-08 (III), 83-24 (I), 83-22 (II), 82-10.1 (I, II), 82-04 (IV), 81-35 (II, III), 80-41 (III), 80-35 & -40 (XI), 79-65 & 80-07 (VIII), 78-16 & -20 (V, IX, XI), 77-31 (II), 73-09 (I), 73-04 (II)

72.111 Access to Employer's Property
84-08 (III), 83-24 (II), 81-43 (II, IV, VI), 78-16 & -20 (IV, V), 77-37 (VIII), 73-09 (I, II, III)

72.112 Activities of Employees on Duty
86-22, -25 & 86-A-03 (III), 83-24 (I), 81-35 (II, III), 80-35 & -40 (XI), 77-31 (II)

72.113 Areas of Work Place
86-22, -25 & 86-A-03 (III), 83-24 (I), 81-43 (IV), 78-16 & -20 (V), 73-09 (I, II, III)

72.114 During Work Hours
86-22, -25 & 86-A-03 (III), 83-24 (I), 82-10.1 (I), 82-04 (IV), 80-35 & -40 (XI), 77-31 (II)

72.115 Literature Distribution
83-24 (I), 81-43 (IV, V, VI), 80-05 (V), 79-65 & 80-07 (VIII), 78-16 & -20 (IV), 77-37 (VIII)

72.116 No Solicitation Rule
83-24 (I), 81-43 (IV, V, VI), 80-05 (V), 78-16 & -20 (IV), 73-09 (I, II, III)

72.117 Non-Employee Union Organizers
83-24 (I), 78-16 & -20 (IV), 77-27 (I, III), 73-09 (I, II, III)

72.118 Time of Adoption Rule
82-04 (IV), 80-35 & -40 (XI), 77-31 (II)

72.119 Type of Literature
80-05 (V)

72.120 Use of Internal Communications
86-22, -25 & 86-A-03 (III), 81-43 (IV, VI), 80-05 (V), 79-65 & 80-07 (VIII), 77-37 (VIII)

72.13 Benefits or Reprisals
87-19 (X), 87-14 (VII), 86-23 (I), 86-22, -25 & 86-A-03 (I), 86-16 (II, IV, V, VI), 86-01 (V), 85-18 (VI), 85-17 (IV), 84-29 (IV), 84-25 (VI), 84-21 (I), 84-19 (IV), 84-08 (I, III), 84-06 (III), 84-01 (I, III), 83-22 (II), 83-15 (I), 83-11 (II, IV), 82-35 (VII), 82-14.1 (V), 82-10.1 (I, II), 82-04 (I), 82-01 (I), 81-54 (I, II, III, V), 81-34 (I), 81-17 (II), 81-06 (I, II, III, IV, V, VI, VII, VIII), 80-49 (III, V), 80-41 (VII, XVII, XX), 80-33 (II, IV, V), 80-30 (I, III), 80-29 (II, V), 80-26 (I, II), 80-13 (V, VI), 80-08 (III), 80-04 (I, II), 79-65 & 80-07 (IV, V), 79-64 (III), 79-63 (I, III, V), 79-51 (I, II), 79-41.2 (III), 79-37 (VI), 79-36, -39, -45 & -47 (X), 79-19 & -11 (I), 78-30 (I, II, III, IV), 78-22 (II, III), 74-10 (III), 70-A-02 (III)

72.131 Threats of Reprisal
87-14 & -15 (VII), 86-23 (I), 86-22, -25 & 86-A-03 (I), 86-16 (V), 85-04 (III),

84-29 (IV, V), 84-25 (IV, V, VI), 84-08 (II), 84-06 (III), 83-22 (II), 82-35 (VII), 82-01 (I), 81-54 (I, II, III, VI), 81-35 (I, II, III), 81-34 (I), 81-17 (II), 80-49 (III, V), 80-45 (XII), 80-41 (III, IV), 80-35 & -40 (XI), 80-29 (II), 80-26 (I, II), 80-04 (II), 79-70.1 (I), 79-37 (VI), 79-01 (I), 78-28 (III), 78-22 (III), 78-16 & -20 (VIII, IX), 74-18 (III)

72.132 Promises of Benefits
86-23 (I), 86-22, -25 & 86-A-03 (I), 82-01 (I), 80-29 (V), 80-24 (II), 78-22 (II), 70-A-02 (III)

72.133 Conferral of Benefit
86-23 (VI), 84-08 (I), 80-04 (I), 79-65 & 80-07 (III), 79-36, -39, -45 & -47 (X), 78-16 & -20 (III), 75-16 (III), 74-10 (III)

72.134 Withdrawal of Benefit
87-19 (X), 86-23 (VI), 86-11 (XIII), 85-17 (IV), 84-21 (I), 84-19 (IV), 84-08 (III), 83-22 (II), 83-11 (II, IV), 82-14.1 (V), 82-10.1 (I), 82-04 (I), 81-17 (II), 80-42 (I), 80-33 (II, V), 80-30 (I, III), 80-08 (III), 80-05 (V), 80-02 (VI), 79-65 & 80-07 (V, VII, IX), 79-64 (III), 79-62 (XI), 79-41.2 (III), 78-30 (I, II, III), 78-22 (II, III)

72.14 Surveillance
85-17 (IV), 82-10.2 (VI), 81-52 (I), 80-35 & -40 (X), 78-16 & -20 (XI)

72.141 Creating Impression of Surveillance
82-10.2 (VI), 81-52 (I), 80-35 & -40 (X)

72.15 Interrogation
84-25 (V), 81-40 (II), 80-13 (I, II, III), 78-28 (I), 78-16 & -20 (VI, VII), 76-12 (II)

72.151 Of Employees
84-25 (V), 80-13 (I, II, III), 78-28 (I), 78-16 & -20 (VI, VII), 76-12 (II)

72.152 Of Applicants
83-22 (II)

72.16 Polling Employees
84-25 (V), 81-40 (II), 80-13 (I, II, III), 78-28 (I), 76-12 (II)

72.17 Direct Dealing With Employees
84-31.1. (III), 84-25 (V), 84-01 (I, III), 83-22 (II), 82-10.2 (IV), 82-01 (I, III), 81-23 (II), 80-49 (III, IV, V), 80-39 (III), 80-29 (V), 80-24 (II), 78-16 & -20 (VII), 77-27 (II), 76-17 (II), 76-12 (II), 75-16 (III)

72.171 Interference Through Treatment of Exempt Employees
86-17 (I), 84-04 (I, II, IV, V), 83-22 (II), 83-09 (II), 81-06 (I, II, III, IV, V, VI, VII, VIII)

72.18 Other Interference
87-19 (X), 87-14 & -15 (VII), 86-23 (VI), 86-22, -25 & 86-A-03 (III), 86-16 (IV),

86-11 (XIII), 86-01 (V), 85-18 (VI), 85-17 (IV), 85-04 (III), 84-29 (IV), 84-25 (IV), 84-21 (I), 84-19 (IV), 84-08 (I, III), 84-06 (III, V), 83-21 (III), 83-15 (I), 83-14 (I, II), 83-11 (II, IV), 83-10.2 (I), 83-04.2 (II, V), 83-01 (I), 82-35 (VII), 82-14.1 (V), 82-10.2 (III), 82-10.1 (II), 82-01 (I, III), 81-47 (II, III, IV), 81-40 (II), 81-34 (I), 81-23 (II), 81-17 (II), 80-45 (II), 80-42 (I), 80-41 (III, IV, VII, VIII, XVII, XX), 80-35 & -40 (XIII), 80-33 (IV), 80-29 (II), 80-26 (I, II, III, IV, V, VI, VII), 80-24 (II), 80-22 (IV), 80-09 (VI), 80-08 (III), 80-04 (III), 80-02 (VI), 79-70.1 (I), 79-67 (II), 79-65 & 80-07 (IV, V, VII), 79-64 (III), 79-63 (I, III, V), 79-62 (XI), 79-51 (I, II), 79-41.2 (II, III), 79-40.2 (I), 79-40.1 (III), 79-37 (VI), 79-36, -39, -45 & -47 (X), 79-35 (I, II), 79-19 & -11 (I), 79-14 (IV), 79-01 (I), 78-31 (III, VI), 78-16 & -20 (X), 78-04 (II), 78-03 (II), 78-02 (I), 78-01 (IV), 77-37 (VII), 77-31 (II), 74-18 (III), 74-13 (II), 74-12 (II)

72.2 Domination or Support of Employee Organization

87-14 & -15 (VIII), 86-23 (VIII), 86-22, -25 & 86-A-03 (V), 86-16 (IX), 86-11 (XIV), 86-05 (II), 86-01 (VI), 85-18 (VII), 85-04 (VII), 84-31.2 (I), 84-31.1 (IV), 84-29 (VI), 84-25 (I), 84-24 (II), 83-22 (II), 83-04.2 (VI), 81-52 (III), 80-49 (II), 80-29 (I), 80-24 (I), 80-05 (VI), 79-40.2 (I), 79-35 (III), 78-28 (III), 78-01 (IV), 74-09 & -14 (II)

72.21 Recognition Practices

87-14 & -15 (VIII), 86-23 (VIII), 86-22, -25 & 86-A-03 (V), 86-16 (IX), 86-11 (XIV), 86-01 (VI), 81-52 (III), 79-40.2 (I), 79-40.1 (III), 79-35 (III), 78-28 (III), 78-02 (I), 78-01 (IV)

72.22 Election Practices

81-40 (II), 79-40.2 (I), 79-40.1 (III), 78-01 (IV), 77-37 (VII, VIII), 74-09 & -14 (II)

72.23 Interference With Internal Union Activities

86-16 (IX), 86-11 (XIV), 86-05 (II), 84-31.2 (I), 84-31.1 (IV), 83-04.2 (VI), 81-52 (III), 80-24 (I), 80-05 (VI), 79-35 (III), 78-16 & -20 (V)

72.24 Supervisory Involvement in Union Activities

87-14 & -15 (VIII), 86-23 (VIII), 86-22, -25 & 86-A-03 (V), 86-16 (IX), 86-05 (II), 86-01 (VI), 83-04.2 (VI), 81-52 (I, III), 80-29 (I), 78-28 (III)

72.25 Administrative Assistance

87-14 & -15 (VIII), 86-23 (VIII), 86-22, -25 & 86-A-03 (V), 86-16 (IX), 86-11 (XIV), 86-05 (II), 86-01 (VI), 85-18 (VII), 85-04 (VII), 84-29 (VI), 84-25 (I), 83-04.2 (VI), 80-49 (II), 80-29 (I), 80-05 (VI)

72.26 Financial Assistance

87-14 & -15 (VIII), 86-23 (VIII), 86-22, -25 & 86-A-03 (V), 86-16 (IX), 86-11 (XIV), 86-05 (II), 86-01 (VI), 85-18 (VII), 85-04 (VII), 84-29 (VI), 84-25 (I), 83-04.2 (VI), 81-52 (III), 80-49 (II), 80-29 (I), 80-24 (I), 80-05 (VI)

72.261 Payment for Time Spent in Union Activities

77-31 (II)

72.262 Payment for Union Expenses

72.263 Use of Facilities
81-43 (II, IV, VI), 77-37 (VIII)

72.27 Sweetheart Contract

72.3 Discrimination Related to Union Membership or Concerted Activity
86-23 (VII), 86-22, -25 & 86-A-03 (IV), 86-16 (VII), 86-01 (IV), 85-18 (VI), 85-04 (VI), 85-02 (IV), 84-29 (II, III), 84-21 (II), 84-08 (III), 84-06 (I, II, III, V), 83-22 (II), 82-35 (VIII), 82-14.1 (III, IV, V), 82-10.1 (I, II), 82-04 (I), 81-52 (II), 81-43 (IV), 81-34 (II), 80-42 (I, II, III), 80-41 (III, IV, VI, VII, VIII, XVII, XX), 80-33 (III, IV, V), 80-30 (I, III), 80-26 (I, II), 80-13 (IV, V, VI), 79-70.1 (I, IV), 79-65 & 80-07 (III, IV, V, VII, IX), 79-64 (II), 79-63 (I, III, V), 79-51 (I, II), 79-41.2 (II, III), 79-37 (VII), 79-36, -39, -45 & -47 (XI), 79-19 & -11 (I), 79-08 (IV), 79-01 (I), 78-30 (I, II, III, IV), 78-04 (II), 75-01.2 (II), 74-18 (IV, V), 74-10 (II)

72.301 Wright Line Test for Violations
86-01 (IV), 84-29 (II, III), 84-21 (II), 84-06 (I, II, X), 83-16 (II), 83-15 (II), 83-04.2 (II, III, IV), 82-35 (VIII), 82-14.1 (III)

72.31 Criteria for Determining Violation
86-23 (VII), 85-02 (IV), 84-06 (I, III), 83-15 (III), 82-35 (VIII), 82-14.1 (III, IV), 82-04 (I), 80-41 (III, VII, VIII), 80-13 (V, VI), 79-70.1 (I, IV, V), 79-64 (II), 79-63 (III, V), 79-51 (I, II), 79-41.2 (II), 79-19 & -11 (I), 79-08 (IV), 79-01 (I), 78-30 (I, II, IV), 78-04 (II), 74-18 (V), 74-10 (II)

72.311 Anti-Union Animus
86-23 (VII), 85-17 (IV), 84-29 (II, III), 84-06 (I, V), 83-22 (II), 83-15 (III), 83-04.2 (II, III), 82-35 (VIII), 82-14.1 (III, IV), 82-04.2 (I), 81-52 (II), 81-34 (II), 80-42 (I), 80-41 (III, IV, VII, VIII, XVII, XX), 80-33 (II, III, V), 80-30 (I, III), 80-26 (I), 80-13 (V, VI), 79-70.1 (I), 79-65 & 80-07 (V, IX), 79-64 (II), 79-63 (I, III, V), 79-41.2 (II, III), 79-01 (I), 78-30 (I, II), 78-04 (II), 78-02 (I), 77-31 (II), 74-18 (IV, V), 74-10 (III)

72.312 Knowledge of Employee's Union Activity
86-01 (IV), 85-17 (IV), 84-29 (II, III), 84-08 (I, III), 83-16 (II), 83-15 (III), 82-14.1 (III), 82-04 (I), 80-42 (II, III), 80-26 (I), 80-13 (V, VI), 79-65 & 80-07 (IV, V), 79-63 (V), 79-51 (II), 79-41.2 (III), 79-19 & -11 (I)

72.313 Majority Status Affected by Adverse Action
80-26 (VI), 79-51 (II), 78-02 (I), 74-10 (III)

72.314 Notice; Prior Warning
86-01 (V), 85-17 (IV), 84-29 (III), 83-15 (III), 81-52 (II), 80-42 (II, III), 80-26 (I), 79-70.1 (I), 79-63 (V), 79-51 (II), 79-41.2 (III), 79-19 & -11 (I), 74-18 (V), 74-10 (II)

72.315 Prior Satisfactory Record

86-01 (V), 84-29 (III), 83-15 (III), 82-14.1 (III), 82-04 (I), 81-52 (II), 80-42 (II, III), 80-26 (I), 80-13 (V, VI), 79-70.1 (I), 79-63 (V), 79-51 (II), 79-41.2 (III), 79-19 & -11 (I), 74-18 (V), 74-10 (II)

72.316 Seniority

82-14.1 (III, IV)

72.317 Timing of Adverse Action

86-01 (IV), 85-17 (IV), 84-29 (III), 84-21 (II), 83-16 (II), 83-15 (III), 82-35 (VIII), 82-14.1 (III), 82-04 (I), 81-52 (II), 80-42 (II, III), 80-41 (IV, VII, XVII), 80-33 (II, III, V), 80-30 (III), 80-26 (I), 80-13 (V, VI), 79-65 & 80-07 (V, VII), 79-51 (II), 79-41.2 (III), 79-37 (VII), 79-01 (I), 78-30 (II), 78-04 (II), 77-31 (II), 74-18 (V), 74-10 (II)

72.318 Treatment of Similarly Situated Employees

86-01 (V), 85-17 (IV), 84-08 (III), 84-06 (III), 83-15 (III), 83-09 (II), 83-04.2 (IV), 82-35 (VIII), 82-14.1 (III), 82-10.1 (I), 82-04 (I), 81-52 (II), 80-26 (I), 80-13 (V), 79-70 (I), 79-63 (V), 79-19 & -11 (I), 79-08 (IV), 77-31 (II)

72.319 Other

86-22, -25 & 86-A-03 (IV), 85-02 (IV), 84-29 (III), 82-04 (I), 81-34 (II), 80-41 (VII), 80-33 (III), 80-30 (V), 80-13 (V), 79-70.1 (I), 79-64 (II), 79-63 (V), 79-41.2 (III), 79-19 & -11 (I), 78-02 (I)

72.32 Basis of Discrimination

86-23 (VII), 84-29 (II, III), 84-21 (II), 83-15 (III, V), 82-14.1 (III), 82-04 (I), 80-42 (I), 79-51 (I), 79-19 & -11 (I)

72.321 Organization Membership

85-17 (IV), 84-06 (I, III, V), 83-15 (III, V), 82-04 (I), 79-37 (VII), 78-04 (II)

72.322 Lack of Organization Membership

72.323 Participation in Protected Concerted Activities

84-29 (II, III), 84-21 (II), 83-16 (II), 83-04.2 (II, III), 80-41 (XX), 80-33 (III), 80-26 (I), 79-37 (VII), 79-19 & -11 (I), 79-08 (IV), 79-01 (I), 78-30 (I, II), 78-04 (II)

72.324 Participation in Union Activities

86-01 (IV), 84-08 (III), 83-22 (II), 83-16 (II), 83-15 (III, V), 83-04.2 (II, III), 82-14.1 (III), 82-10.1 (I, II), 82-04 (I), 81-52 (II), 80-42 (I), 80-41 (III, IV, VII, VIII, XVII), 80-13 (V, VI), 79-70.1 (I, IV, V), 79-65 & 80-07 (IV, V), 79-64 (II), 79-63 (V), 79-51 (II), 79-41.2 (III), 79-37 (VII), 79-19 & -11 (I), 78-04 (II), 75-01.2 (II), 74-18 (V), 74-10 (II)

72.325 Participation in Minority Union

81-43 (IV)

72.326 Other
84-21 (II), 82-10.1 (II), 80-41 (VII, VIII)

72.33 Forms of Discrimination
86-16 (VII), 83-15 (I), 82-04 (I), 81-52 (II), 80-26 (I), 79-37 (VII), 78-30 (II)

72.331 Assignment Practices
83-22 (II), 83-04.2 (I, III), 82-35 (VIII), 79-64 (II), 79-41.2 (III), 77-16 (II)

72.332 Constructive Discharge
80-42 (I), 77-16 (II)

72.333 Demotion
83-22 (II), 82-04 (I), 80-13 (V), 77-16 (II)

72.334 Discharge
85-17 (IV), 84-29 (III), 84-21 (II), 84-06 (I, II, V), 83-15 (I, V), 82-14.1 (III), 80-42 (I), 80-41 (III, VI, VII, XVII), 79-70.1 (I), 79-63 (III, V), 79-51 (II), 79-41.2 (III), 79-19 & -11 (I), 78-30 (IV), 78-04 (II), 74-18 (V), 74-10 (II)

72.335 Discipline
86-01 (IV), 80-26 (I)

72.336 Layoff
86-16 (VII), 82-14.1 (III)

72.337 Permanent Layoff
82-14.1 (III), 78-04 (II)

72.338 Promotion Practices
82-04 (I), 79-65 & 80-07 (IV), 79-08 (IV)

72.339 Refusal to Hire
80-42 (I), 80-41 (VIII, XVII), 79-65 & 80-07 (IV), 79-08 (IV)

72.340 Scheduling Changes
80-33 (II, III), 79-65 & 80-07 (V, IX), 79-41.2 (III), 79-01 (I), 77-16 (II)

72.341 Suspension

72.342 Other
85-18 (VI), 84-08 (III), 83-22 (II), 83-04.2 (I), 82-10.1 (I, II), 81-52 (II), 80-33 (V), 80-13 (V), 79-65 & 80-07 (V), 79-37 (VII), 79-36, -39, -45 & -47 (XI), 78-30 (II), 78-04 (II), 77-31 (II), 74-18 (V)

72.35 Defenses Against Charge of Discrimination
86-22, -25 & 86-A-03 (IV), 86-01 (IV), 85-02 (IV), 84-29 (II, III), 84-06 (I, XI), 83-15 (V), 83-04.2 (II, IV), 82-35 (VIII), 82-14.1 (III), 81-52 (II), 81-34 (II),

80-42 (II), 80-33 (IV), 80-30 (I, III, V), 80-26 (II), 80-13 (VI), 79-65 & 80-07 (III, IV, V, VII, IX), 79-64 (II), 79-63 (I, III), 79-51 (I, II), 79-41.2 (II), 79-37 (VII), 79-08 (IV), 79-01 (I)

72.351 Attendance

72.352 Changes in Operation
83-04.2 (IV), 79-01 (I), 78-02 (I)

72.3521 Subcontracting or Contracting Out
78-04 (II)

72.3522 Discontinuance of Operation
80-41 (VI)

72.3523 Automation, Change of Technology
85-18 (VI)

72.3524 Transfer of Department

72.353 Change in Work Assignment
83-04.2 (IV), 79-01 (I)

72.354 Criminal Record

72.355 Discourtesy to Public
84-29 (III)

72.356 Dishonesty, Theft
84-06 (I), 83-15 (V)

72.357 Disloyalty

72.358 Economic Reasons
83-04.2 (IV), 82-14.1 (III), 79-08 (IV), 79-01 (I), 78-30 (I, II), 78-04 (II), 74-10 (II)

72.359 Efficiency of Operation
85-18 (VI), 80-33 (IV), 77-31 (II)

72.360 Incompetence
84-21 (II), 81-34 (II)

72.361 Insubordination
84-29 (III), 83-04.2 (IV), 80-42 (II), 79-63 (III), 79-51 (II), 78-30 (IV)

72.362 Lack of Knowledge of Union Activity
85-02 (IV), 83-16 (II), 82-35 (VIII), 80-42 (II, III), 79-65 & 80-07 (IV)

72.363 Low Productivity
81-52 (II), 80-33 (IV), 79-63 (III)

72.364 Outside Activity, Moonlighting

72.365 Unprotected Activity

86-23 (VII), 86-01 (IV), 84-29 (II, III), 84-21 (II), 84-06 (I), 83-15 (II, V), 83-04.2 (II, IV), 82-14.1 (III), 81-52 (II), 80-42 (II), 80-33 (IV), 80-30 (I), 80-26 (II), 80-13 (VI), 79-64 (II), 79-63 (I, III), 79-51 (II)

72.366 Other

86-22, -25 & 86-A-03 (IV), 86-01 (IV), 85-02 (IV), 83-09 (II), 82-35 (VIII), 81-43 (IV), 81-34 (II), 80-30 (III, V), 79-65 & 80-07 (III, V, VII, IX), 79-64 (II), 79-51 (II), 79-37 (VII), 79-08 (IV), 78-30 (III), 77-16 (II)

72.4 Discrimination for Recourse to State Board or Court

86-17 (I), 86-01 (VII), 85-20 (I), 84-31.1 (V), 84-29 (VII), 84-25 (II), 84-24 (II), 84-06 (IV, VI), 84-04 (I, II, IV, V), 83-16 (V), 83-15 (III), 82-33 (I), 82-10.1 (II), 80-41 (III, IV, VII, VIII, XX), 80-35 & -40 (XII, XIII), 80-30 (II), 79-65 & 80-07 (VI), 77-16 (II), 77-01 (I), 75-01.2 (II)

72.5 Refusal to Bargain in Good Faith

87-19 (II), 86-23 (III), 86-16 (VIII), 86-12 (III), 86-04 (XII), 86-02 (II), 86-01 (I), 85-18 (III), 85-08 (I, II, III), 85-07 & -09 (XI, XII), 85-02 (I), 84-19 (I, IV), 84-17 (II), 84-15 (I), 84-01 (I, III, V), 83-22 (II), 83-21 (II), 83-10.2 (VI), 83-08 (I, II), 83-01 (I), 82-35 (I, II, IV, V), 82-33 (I), 82-15, -16 & -22 (II), 82-11 (I), 82-10.2 (III, IV), 82-05 (VI, XI), 82-01 (II), 81-41 (I, V), 81-28 (VIII), 80-55 (VI), 80-50 (III), 80-49 (IV), 80-44 (II), 80-35 & -40 (IV, VI, VIII), 80-29 (IV), 80-28 & -32 (II, III, V, VI), 80-22 (II, IV), 80-10 (I, II), 80-09 (III, V, VI, VII, VIII), 80-08 (I), 80-05 (VII), 80-02 (I, II, IV, V), 79-68 (II), 79-67 (III), 79-64 (IV, V, VI, IX, X, XI), 79-62 (IX, X, XI, XII), 79-56 (IV), 79-50 (IV, V, VI, VII, IX, X), 79-49 (I, II, III), 79-44 (II, III), 79-43 (II, VIII), 79-42 (II, III, IV), 79-40.2 (I), 79-37 (III), 79-36, -39, -45 & -47 (III, V, XVI), 79-36.1 (III), 79-32 (I, II, III), 79-29.2 (I), 79-24 (II, IV, V), 79-22 (I, II), 79-16 (II), 79-14 (II, IV), 79-12.2 (I), 79-08 (I), 78-33 (I), 78-25 (IV), 78-23 (II, VII, X), 77-33 (II, III), 77-27 (I, II), 77-24 (I), 76-08 (I), 74-13 (I), 74-12 (I), 73-13 & -14 (III), 73-05 (II, III)

72.51 Continuous Duty to Negotiate

86-14 (V), 86-12 (IV), 86-11 (IV), 86-02 (II), 85-19 (II), 85-08 (I), 85-07 & -09 (I, II), 85-01 (II), 84-19 (I), 83-10.2 (IV), 82-15, -16 & -22 (VIII), 82-05 (IV, VII, IX, X, XII), 81-46 (I), 81-41 (I), 81-18 (I), 81-15 (II, IV), 81-12 (III), 81-09 (I, II, III), 80-45 (VI), 80-41 (XVIII, XIX), 80-09 (VIII), 80-08 (I), 80-02 (I), 79-56 (IV), 79-24 (II, IV, V), 79-14 (II), 79-08 (I), 77-31 (I), 76-10 (I), 75-24 (II), 75-16 (III), 74-22 (II), 74-09 & -14 (I)

72.511 Subjects Not Covered By Agreement

86-14 (V, VI, VII), 86-11 (IV, IX, X), 85-19 (II), 85-07 & -09 (III, VII), 85-01 (II), 84-19 (III), 83-10.2 (IV, VI), 82-05 (II, III, IV, VII, X), 80-46 (III), 80-45 (IV, V, VI, VII, XI), 80-41 (VI, XVIII, XIX), 80-05 (VII), 79-24 (II, IV), 75-24 (II), 75-16 (III), 73-07 (VI), 73-06 (III)

72.52 Bargaining Demand

86-23 (II, IV), 86-16 (VIII), 86-14 (VI), 86-12 (II), 86-04 (I, II, III),

86-02 (III), 85-19 (V), 85-08 (III), 85-07 & -09 (V, X, XI, XII), 83-21 (II, IV), 82-35 (VI), 82-33 (II), 81-18 (III), 81-01 (I), 80-45 (VII, VIII), 80-10 (II), 80-09 (VIII), 79-56 (IV), 79-44 (III), 79-42 (II, III, IV), 79-24 (II, IV, V), 79-10 & -18 (II, III, IV), 78-23 (V, XIII), 78-19 (IV), 78-A-11 (III), 77-A-03 (IV), 76-IR-01 (I, II, III, IV), 75-21 (II), 73-13 & -14 (IV, V)

72.521 Introduction Subsequent to Factfinding
80-09 (VIII), 77-24 (II), 76-IR-01 (III)

72.53 Indicia of Good/Bad Faith and Surface Bargaining
87-19 (VIII), 86-23 (IV), 83-21 (II), 82-35 (V), 82-33 (I), 82-11 (I, III, IV), 81-41 (IV), 81-28 (V, VII), 80-35 & -40 (IV, VI, VIII), 80-28 & -32 (VI), 79-62 (II, III, IV, VI, VII, IX, X, XII), 79-50 (V, VI, VII, IX, X), 79-32 (II, III), 79-29.2 (I), 79-14 (IV), 78-25 (IV), 78-04 (I), 75-05.2 (III), 75-05.1 (II), 74-13 (I), 74-12 (I), 73-07 (IV)

72.530 Authority of Representative
86-23 (V), 82-35 (I), 82-33 (I), 82-11 (III, IV), 81-28 (V, VII), 80-35 & -40 (VIII), 80-28 & -32 (II), 79-64 (IV, V, IX, X, XI), 79-62 (XIII), 78-25 (II, III, IV), 78-04 (III), 76-20 (I), 75-33 (II, III), 73-08 (II)

72.531 Evasive Tactics and Delay
87-19 (VIII), 86-23 (IV), 83-21 (II), 82-35 (V), 82-33 (I), 82-11 (I), 81-41 (IV), 81-28 (V, VII), 80-35 & -40 (VI, VIII), 80-28 & -32 (III), 79-62 (II), 77-34 (VI), 77-18, -19, -20 & -29 (II), 77-07 (I), 77-06 (I), 76-22 (I), 76-IR-01 (I, II)

72.532 Failure to Make Counterproposals
87-19 (VIII), 86-23 (IV), 82-11 (I), 81-28 (V, VII), 79-64 (V), 79-62 (IV), 79-50 (VI), 78-04 (I), 75-05.1 (II), 73-07 (IV)

72.533 Imposing Conditions
82-33 (I), 81-09 (III), 79-50 (X), 79-16 (II), 77-33 (II), 77-27 (III), 73-13 & -14 (III), 73-05 (II)

72.534 Inconsistency of Position
79-14 (IV), 77-07 (I), 77-06 (I), 76-20 (II)

72.535 Reasonableness, Legality and Sufficiency of Proposals
87-19 (VIII), 86-23 (IV), 86-12 (II), 82-35 (V), 82-33 (I, II), 82-11 (I), 81-41 (IV), 80-45 (IX), 80-35 & -40 (VIII), 80-28 & -32 (V), 80-09 (III, VI, VII), 79-64 (V), 79-62 (III, IV), 79-50 (V, VI), 79-36, -39, -45 & -47 (III), 79-32 (I, II, III), 77-34 (II, VI), 77-02 (I), 75-19 (IX), 73-07 (IV)

72.536 Right to Reject Proposals
87-19 (VIII), 82-11 (II, III, IV), 79-64 (V), 79-50 (VI), 78-25 (II, III, IV), 77-34 (II, VII), 76-08 (III), 75-33 (II, III), 75-05.1 (II)

72.537 Time and Place of Meeting
87-19 (VIII), 86-23 (IV), 83-21 (II, IV), 82-11 (I), 80-45 (VIII), 80-09 (VIII), 79-56 (IV), 79-42 (II, III, IV), 76-22 (I), 76-IR-01 (I, II), 73-07 (IV)

72.538 Totality of Conduct
87-19 (VIII), 86-23 (IV), 83-21 (II, VI), 82-33 (I), 82-11 (I), 81-41 (IV), 81-28 (V, VII), 80-35 & -40 (IV, VI, VIII), 79-50 (IV, VI), 77-34 (VI), 75-05.2 (III), 73-07 (IV)

72.539 Withdrawal of Proposals
82-35 (I, V), 82-11 (I), 80-35 & -40 (VIII), 79-64 (VI), 79-29.2 (I), 78-25 (II, IV), 77-07 (I), 77-06 (I)

72.54 Adherence to Ground Rules
87-19 (VIII), 83-21 (II), 82-35 (II), 82-11 (I), 81-28 (VII), 80-50 (III), 79-62 (II), 77-34 (II, VI), 77-27 (III), 76-20 (II), 76-08 (III), 75-10 (I, II), 73-05 (II)

72.541 Insistence to Impasse on Non-Mandatory Subject
86-12 (II), 86-04 (XII), 84-17 (II), 83-06 (III, VII), 83-01 (I), 82-10.2 (I), 81-44 & -56 (V), 80-28 & -32 (VI), 80-09 (III, VII), 79-68 (II), 79-36, -39, -45 & -47 (III), 79-36.1 (III), 79-32 (I, II, III, V), 79-16 (II), 79-10 & -18 (V), 77-18, -19, -20 & -29 (III), 76-15 (I), 75-19 (IX)

72.55 Direct Communications With Employees
84-01 (I, III), 83-22 (II), 82-33 (IV), 82-10.2 (IV), 82-01 (I, II), 81-23 (II), 80-49 (III, IV, V), 80-29 (IV), 79-50 (VII), 79-49 (II), 79-40.2 (I), 78-15 (II), 77-27 (II), 73-06 (IV)

72.56 Direct Communication to Legislative Body/End-Run Bargaining
82-33 (IV)

72.57 Failure to Ratify
86-23 (V), 83-09 (III), 82-11 (II, III), 81-55 (III), 79-64 (IX, X, XI), 78-25 (II, III, IV), 75-33 (II, III), 73-08 (II)

72.571 Refusal to Reduce to Writing
85-07 & -09 (XIII), 83-09 (III), 83-07 (I, II, III), 82-35 (III), 81-28 (I, II, III, IV, VI), 80-10 (I), 79-67 (I), 79-64 (VI, X), 74-22 (II), 73-01 (II)

72.572 Refusal to Execute
83-09 (III), 83-07 (III), 81-28 (VI), 80-10 (I), 79-67 (I), 79-64 (VI, X), 77-18, -19, -20 & -29 (II), 73-01 (II)

72.575 Granting Negotiated Benefits to Excluded Employees
83-09 (II), 81-06 (I, II, III, IV, V, VII, VIII)

72.58 Defenses to Refusal To Bargain Charge
86-05 (III), 86-04 (II), 85-08 (I), 85-02 (III), 85-01 (II), 84-13 (II, III), 82-10.2 (I), 80-36 (III), 79-64 (V), 79-37 (III), 79-36, -39, -45 & -47 (V), 79-29.2 (I), 79-29.1 (I), 79-IR-01 (III, IV), 78-IR-01 (V), 77-A-03 (IV), 75-05.2 (III), 74-22 (II), 74-13 (I), 74-12 (I)

72.581 Budget Approval
84-10 (II), 80-10 (II), 79-32 (II), 79-10 & -18 (II, III), 77-A-03 (IV), 75-21 (II), 73-13 & -14 (IV)

72.582 Change of Employer
80-45 (X)

72.583 Change of Union
80-36 (III), 79-10 & -18 (II), 77-31 (I)

72.584 De Minimis
82-15, -16 & -22 (IV), 79-37 (III)

72.585 Fiscal Condition
79-32 (II)

72.586 Impasse
83-21 (IV), 81-53 (II), 80-44 (III), 80-09 (VIII), 79-62 (VI, VII)

72.587 Lack of Knowledge
83-07 (II)

72.588 Loss of Majority Status of Union
81-A-03 (I), 77-31 (I)

72.589 Non-Mandatory Subject
86-12 (II), 86-11 (XVI), 86-04 (II), 85-08 (I), 85-07 & -09 (IX), 84-13 (II, III), 84-10 (II), 83-01 (I), 82-28 (I), 82-10.2 (I, VII), 82-04 (III), 81-44 & -56 (III, IV, VIII, IX, X), 80-50 (III), 80-45 (IX), 79-68 (II), 79-37 (III), 79-36, -39, -45 & -47 (IV), 79-32 (II), 79-16 (II), 79-10 & -18 (II, III, V), 79-IR-01 (III, IV), 78-23 (VI, XII, XIV), 78-IR-01 (V), 77-39 (I), 77-A-03 (IV), 76-15 (II), 75-22 (V), 75-19 (IX), 74-17 (II), 74-16 (II), 74-08 (III), 73-06 (I)

72.590 Waiver
86-14 (V, VI, VII), 86-12 (IV), 86-11 (III, IV, IX, XI), 86-05 (III), 86-04 (II), 85-19 (III, IV, V), 85-07 & -09 (II, III, IV, VII, X), 85-02 (III), 85-01 (II, III), 84-01 (III), 83-10.2 (IV, VI), 83-09 (I), 81-01 (I), 82-05 (II, III, IV, V, VII, VIII, IX, X, XII), 82-15, -16 & -22 (VIII), 80-45 (IV, V, VI, X, XI), 80-41 (VI, XIX), 79-67 (III), 79-49 (III), 79-29.1 (I), 79-24 (II, III, IV), 79-10 & -18 (II, III), 78-23 (III, V, XIII), 78-A-11 (III), 78-04 (I), 76-22 (I, II), 76-17 (II), 76-16 (II, III, IV), 75-24 (II), 75-21 (II), 75-01.3 (I), 73-17 (II), 73-04 (II)

72.591 Other
86-11 (VI), 85-08 (I), 84-10 (II), 83-09 (I), 83-08 (I, II), 83-07 (II), 82-35 (VI), 82-15, -16 & -22 (V), 81-44 & -56 (III, IV, VIII), 81-15 (II, IV), 80-55 (VI, VII), 80-49 (III), 80-45 (XII), 79-67 (III), 79-64 (V), 79-36, -39, -45 & -47 (V), 79-29.1 (I), 79-29.2 (I), 79-14 (IV), 79-10 & -18 (II, III), 79-IR-01 (III, IV), 77-31 (I), 77-07 (II), 77-A-03 (IV),

75-28 (IV), 75-26 (III), 75-22 (V), 75-05.2 (III), 75-05.1 (II), 75-01.3 (I), 74-22 (II), 74-13 (I), 74-12 (I)

72.6 Unilateral Change in Term or Condition of Employment

87-19 (III, IV, X), 86-23 (III, VI), 86-16 (VIII), 86-14 (II), 86-11 (III, IV, V, IX), 86-02 (II), 86-01 (I), 85-19 (II), 85-18 (III, IV), 85-08 (II), 85-07 & -09 (V), 85-02 (I), 84-19 (I, IV), 84-15 (I, II), 83-22 (II), 83-16 (IV), 83-11 (II), 83-10.2 (I), 82-15, -16 & -22 (II), 82-05 (VI), 81-53 (II), 81-46 (I, II), 81-41 (I, II, IV), 81-18 (II, III), 81-12 (III), 81-01 (I), 80-44 (II), 80-41 (VI, XVIII), 80-22 (II, III), 80-10 (II), 80-08 (I), 80-05 (VII), 80-02 (I, II, IV, V), 79-62 (IX, X, XI, XII), 79-49 (I, III), 79-44 (II), 79-43 (II, IV, V, VI, VII, VIII), 79-36, -39, -45 & -47 (X, XII, XIII, XVI), 79-14 (II, III, VII), 79-12.2 (I), 79-08 (I), 78-23 (II, VII, X), 78-19 (II, III, IV), 78-16 & -20 (I, II), 77-31 (I), 74-09 & -14 (I), 73-13 & -14 (VI), 73-09 (III), 73-03 (I)

72.611 What Constitutes Change

87-19 (III, IV), 86-23 (III), 86-14 (II), 86-11 (V), 86-01 (I), 85-18 (III), 84-19 (I, IV), 84-15 (I), 83-16 (IV), 83-11 (II, III), 83-10.2 (I, II), 81-46 (II), 81-41 (II), 81-18 (I, II), 81-17 (I), 81-01 (I), 80-45 (XII), 80-41 (VI, XVIII), 80-35 & -40 (I, V), 80-10 (II), 80-08 (I), 80-05 (VII), 80-02 (I), 79-43 (VIII), 79-36, -39, -45 & -47 (XVI), 79-14 (III), 79-08 (I), 78-23 (VII, X), 78-19 (II), 78-15 (II), 77-31 (I), 77-16 (I), 76-22 (II), 75-12 & -27 (III)

72.612 Established Practice

87-19 (III, IV), 86-23 (III), 86-11 (V, VIII, IX, X), 86-01 (I, II), 85-18 (III, IV), 85-08 (II), 84-19 (I), 84-15 (I, II), 83-16 (IV), 83-11 (III), 81-46 (II), 81-41 (II), 81-18 (I, II), 81-17 (I), 81-12 (IV, V), 81-01 (I), 80-08 (I), 80-05 (VII), 80-02 (I, IV), 79-62 (IX), 79-49 (III), 79-14 (III), 79-08 (I), 78-30 (II), 78-23 (II), 77-16 (I), 76-10 (II), 75-12 & -27 (III), 73-17 (II), 73-09 (III), 73-07 (VI)

72.613 Adequacy of Notice of Change

87-19 (IV), 86-23 (III), 86-14 (II), 86-11 (V, IX), 86-02 (II, III), 86-01 (I), 85-18 (III), 85-07 & -09 (V, X), 84-19 (I), 84-15 (I), 84-01 (III), 83-16 (IV), 81-41 (II), 81-18 (II, III), 81-01 (I), 80-41 (VI, XVIII), 80-10 (II), 80-08 (I), 76-22 (II)

72.614 Union Request for Bargaining

86-14 (VI), 86-04 (III), 86-02 (III), 85-07 & -09 (X), 81-18 (III), 81-01 (I), 80-45 (VII), 79-44 (III), 79-43 (VI), 78-23 (V, XIII), 78-19 (IV), 76-22 (II), 76-10 (II)

72.615 Adequacy of Bargaining

83-10.2 (II), 78-19 (III)

72.616 Changes Favorable to Employees

86-23 (III), 81-46 (I), 78-23 (II), 78-16 & -20 (II), 78-15 (II), 76-22 (II), 74-09 & -14 (I), 73-03 (I)

72.617 Bargaining Over Effects of Change

86-05 (III), 86-04 (II, III), 86-02 (IV), 85-19 (V), 85-07 & -09 (IV, VI, IX, XI), 80-45 (IX), 80-41 (VI, XVIII, XIX), 80-35 & -40 (V), 79-56 (III, IV), 79-37 (III), 78-23 (II, VII, X), 76-22 (II), 76-16 (II, III, IV), 75-28 (III)

72.618 Dynamic v. Static Status Quo

86-02 (II), 85-08 (II), 83-11 (II), 81-41 (II), 81-12 (IV, V), 79-36, -39, -45 & -47 (X, XVI), 79-14 (VII), 79-08 (I)

72.62 Changes Prior to Bargaining Obligation

86-02 (II), 85-07 & -09 (III), 81-18 (I), 80-35 & -40 (V), 80-02 (II), 79-49 (I), 78-30 (II), 78-16 & -20 (III), 77-31 (I)

72.63 Changes During Bargaining

87-19 (IV, VI), 86-23 (III), 86-02 (II), 86-01 (I), 85-08 (II), 81-41 (II, IV), 81-01 (I), 80-22 (II), 80-08 (I), 79-62 (IX, X, XI, XII), 79-49 (III), 79-43 (VI), 79-24 (II, IV), 79-14 (II, III), 79-12.2 (I), 79-08 (I), 78-23 (II, X), 78-19 (III, IV), 78-16 & -20 (I), 78-15 (II), 74-09 & -14 (I), 73-17 (II), 73-13 & -14 (VI), 73-07 (VI), 73-03 (II)

72.64 Changes After Expiration of Contract

86-02 (II, IV), 83-11 (II, III, IV), 79-62 (IX, XI, XII), 79-36, -39, -45 & -47 (X, XII, XVI), 79-14 (III), 79-12.2 (I), 79-08 (I), 73-07 (VI)

72.641 Continuation of Contract Terms After Expiration

86-02 (II), 83-11 (II, III, IV), 79-62 (IX), 79-36, -39, -45 & -47 (X, XII, XVI), 79-32 (VIII), 79-14 (III), 79-12.2 (I), 78-19 (II, V)

72.642 Other Changes in Working Conditions

79-14 (III), 73-13 & -14 (VI), 73-07 (VI)

72.65 Changes During Term of Contract

86-14 (V, VI, VII), 86-12 (IV), 86-11 (III, IV, VIII, IX, X), 86-02 (IV), 85-19 (II, III, IV, V), 85-07 & -09 (II, III, IV, VII), 84-19 (III), 84-15 (I), 84-01 (IV), 83-16 (IV), 83-10.2 (IV), 82-15, -16 & -22 (VIII), 82-05 (III, VII, IX, X, XI, XII), 80-46 (III), 80-45 (VII, X, XI), 80-41 (VI, XIX), 80-10 (II), 80-05 (VII), 78-15 (II), 75-28 (III), 75-24 (II)

72.651 Change Not Covered by Contract

86-14 (V, VII), 86-12 (IV), 86-11 (IV, VIII), 85-19 (III), 85-07 & -09 (III), 84-19 (III), 84-15 (I), 83-10.2 (IV, VI), 82-05 (X, XII), 80-46 (III), 80-41 (VI, XIX), 80-05 (VII), 75-24 (II), 73-17 (II), 73-13 & -14 (VI), 73-06 (III)

72.652 Repudiation of Contract

83-16 (IV), 80-10 (II), 77-16 (I), 73-15 (II)

72.66 Defenses to Unilateral Change

87-19 (V), 86-14 (IV), 86-01 (II, III), 85-18 (IV), 85-02 (V, VI), 84-01 (III, IV), 81-29 (III), 81-18 (III), 81-17 (I), 80-45 (VII, IX, X, XII, XIII), 80-44 (III), 80-22 (II, III), 80-08 (II), 79-49 (III), 79-43 (III, IV, V, VI, VII, VIII), 79-37 (III), 79-36, -39, -45 & -47 (XII, XIII), 78-23 (III, IV, V, VI, XII, XIV), 74-22 (III)

72.661 De Minimis

86-01 (III), 82-15, -16 & -22 (IV), 79-37 (III)

72.662 Fiscal Necessity

87-19 (V), 86-14 (IV), 86-02 (V), 84-01 (IV), 81-01 (II), 80-22 (III), 80-10 (II), 80-08 (II), 80-02 (I), 79-43 (V), 79-14 (III), 78-23 (III, IV)

72.663 Impasse

87-19 (V, VI, VII, IX), 86-14 (IV), 83-11 (II), 81-53 (II, III), 80-44 (III), 80-22 (II), 80-02 (I), 79-62 (X), 79-43 (VII), 79-36, -39, -45 & 47 (XII), 79-14 (III), 79-08 (I, VI), 78-23 (III), 78-19 (III), 78-16 & -20 (I)

72.664 Permitted by Contract

86-14 (IV, V), 86-12 (IV), 86-11 (III, IV, X, XVI), 86-05 (III), 86-02 (IV), 85-19 (II, III, IV), 84-19 (III), 83-10.2 (VI), 82-15, -16 & -22 (VIII), 82-05 (III, VII), 80-46 (III), 80-45 (IV, V, X), 80-41 (VI, XIX), 78-23 (III), 73-06 (III)

72.665 Management Prerogative

86-11 (VI, XVI), 84-19 (III), 83-01 (IV), 80-46 (III), 80-44 (III), 80-02 (V), 79-43 (III), 79-IR-01 (III), 78-23 (XII), 78-16 & -20 (I), 73-06 (III)

72.666 Waiver

87-19 (V), 86-14 (IV), 86-12 (IV), 86-11 (IV, VIII, IX, X, XI), 86-05 (III), 86-02 (III, IV), 85-19 (III, IV, V), 85-08 (III), 85-07 & -09 (II, III, V, VII), 85-02 (III), 84-19 (III), 84-15 (I), 84-01 (III), 83-10.2 (IV), 82-05 (II, III, V, VII, VIII, IX, X, XII), 81-18 (III), 81-01 (I), 80-45 (IV, V, VI, XI), 80-41 (VI, XIX), 80-05 (VII), 80-02 (I), 79-49 (III), 79-43 (VI), 79-14 (III), 78-23 (III, V, XIII), 78-19 (IV), 76-22 (II), 76-16 (II, III, IV), 75-24 (II), 73-17 (II)

72.667 Other

87-19 (V), 86-14 (IV), 86-01 (II, III), 85-18 (IV), 85-02 (V, VI), 83-16 (IV), 83-10.2 (II), 82-15, -16 & -22 (V), 81-29 (III), 81-18 (III), 81-17 (I), 81-01 (II), 80-45 (IX, XIII), 80-02 (I), 79-49 (III), 79-43 (III, IV, V, VIII), 79-37 (III), 79-36, -39, -45 & -47 (XIII), 79-14 (III), 78-23 (III, IV), 78-16 & -20 (II), 77-39 (I), 76-22 (II), 75-28 (IV), 74-22 (III)

72.7 Other Unfair Practices

80-18 (III)

72.71 Refusal to Accept Grievance Arbitration

72.72 Refusal to Accept Mandatory Interest Arbitration
83-21 (VI), 81-55 (I, III), 79-64 (VII), 77-18, -19, -20 & -29 (II), 76-08 (I)

72.73 Refusal to Comply with Statute or Regulation
75-21 (II)

72.74 Refusal to Meet and Consult
86-04 (II), 85-07 & -09 (VI, X), 82-04 (III), 80-35 & -40 (I, IV, VI), 77-27 (II)

72.75 Failure to Participate in Impasse Proceedings in Good Faith
86-23 (IV), 83-21 (VI), 83-06 (III), 82-35 (IV), 82-24 (I), 81-55 (III), 80-55 (VI), 79-22 (I, II), 78-33 (I, II), 78-04 (IV), 77-36 (I, II), 77-24 (II), 76-08 (I, III), 75-05.1 (I), 73-08 (III, IV)

72.76 Refusal to Process Grievance
84-31.1 (IV)

72.77 Refusal to Supply Information
84-01 (V), 83-21 (II), 82-10.2 (III), 78-33 (I, II), 75-10 (II)

72.78 Blacklisting
84-29 (VIII), 81-41 (VI)

73. UNION OR EMPLOYEE UNFAIR PRACTICES

73.1 Interference With or Restraint of Employees' Rights
87-A-02 (I), 86-22, -25 & 86-A-03 (VI, VII, VIII, IX,, XI, XII, XIII), 83-06 (IV), 83-03 (V, VI), 82-10.2 (I), 82-08 (I), 81-52 (IV), 81-51 (I), 81-2.2 (I), 81-22.1 (II, III, IV), 80-52 (II), 80-45 (VI), 80-15 (I, II, III, IV, V, VII, IX, X), 79-40.2 (IV), 75-19 (VIII), 75-15.2 (I)

73.111 Accepting Assistance From Employer

73.112 Accepting Improper Recognition

73.113 Breach of Duty of Fair Representation
85-16 (III, IV, V), 83-06 (V), 83-03 (V, VI), 82-08 (I, II, III, IV, V), 81-51 (I, II, III), 80-52 (II), 80-45 (VI), 80-36 (III), 80-15 (I, II, III, IV, V, VII, IX), 75-15.2 (I), 74-08 (I), 74-04, -05 & -06 (I)

73.114 Discrimination for Seeking Recourse to State Board or Courts

73.1141 Attending or Testifying at Hearing

73.1142 Filing Charge or Petition

73.1143 Announcing Intention

73.115 Illegal Campaign Practices
87-A-02 (I), 86-22, -25 & 86-A-03 (VI), 81-22.1 (II, III, IV, VII), 77-37 (III, V)

73.116 Violence Against Employees

73.117 Threats
87-A-02 (II), 81-22.1 (IV)

73.2 Outstanding Outside Support

73.21 Student

73.22 Institutional

73.23 Client

73.3 Unfair Practices of Individual Employees
76-21 (II)

73.31 Dissident Group Activity
86-22, -25 & 86-A-03 (VII, VIII, IX), 81-22.2 (I), 81-22.1 (II, III, IV), 80-18 (I, II), 79-40.2 (II, IV)

73.32 Support of Rival Union
79-40.2 (II, IV)

73.33 Refusal to Join Union
81-22.1 (II, III)

73.4 Refusal to Bargain in Good Faith
87-19 (II), 87-14 & -15 (VI), 86-04 (XII), 84-17 (II), 84-10 (II, III, V), 83-21 (VI), 83-01 (I, V), 82-35 (I, II, V), 82-33 (I, IV), 82-28 (I, III), 82-25 (I), 82-10.2 (I), 81-50 (I, III), 80-55 (IV), 80-50 (III), 80-35 & -40 (IV, VI, VIII), 80-28 & -32 (II, III, V, VI), 80-10 (I), 80-09 (III, VII, VIII), 79-68 (II), 79-64 (IV, V, VI), 79-50 (IV, V, VI, VII, IX, X), 79-36, -39, -45 & -47 (III), 79-36.1 (III), 79-32 (I), 79-29.2 (I), 79-24 (II, IV), 79-16 (II), 78-34 (II, III), 78-33 (I), 77-33 (II), 76-08 (I)

73.41 Bargaining Demand
86-12 (II), 84-10 (II), 82-33 (I, II), 82-10.2 (I), 80-55 (IV), 80-09 (VIII), 79-24 (II, IV, V), 79-10 & -18 (II, III, V), 76-IR-01 (I, II, III, IV), 75-21 (II), 73-13 & -14 (IV, V)

73.411 Introduction Subsequent to Factfinding
80-09 (VIII), 76-IR-01 (III)

73.43 Indicia of Good/Bad Faith and Surface Bargaining
87-19 (VIII), 83-21 (VI), 82-35 (V), 82-33 (I), 82-25 (I), 82-11 (I), 80-35 & -40 (VIII), 80-28 & -32 (VI), 79-50 (IV, V, IX), 79-29.2 (I), 75-05.2 (III), 75-05.1 (II)

73.431 Authority of Representative
86-23 (V), 82-35 (I), 82-33 (I), 82-11 (II, III, IV), 81-50 (III),

81-28 (III, IV, VII), 80-35 & -40 (VIII), 80-28 & -32 (II), 79-64 (IV, V), 76-20 (I), 75-33 (II, III)

73.432 Evasive Tactics and Delay
87-19 (VIII), 83-21 (VI), 82-35 (V), 82-33 (I), 80-35 & -40 (VI, VIII), 80-28 & -32 (III), 77-07 (I), 77-06 (I), 76-IR-01 (I, II)

73.433 Failure to Make Counterproposals
87-19 (VIII), 82-25 (I), 82-11 (I), 81-28 (V, VII), 79-64 (V), 79-50 (VI), 75-05.1 (II)

73.434 Imposing Conditions
79-50 (X), 79-16 (II), 77-33 (II)

73.435 Inconsistency of Position
77-07 (I), 77-06 (I), 76-20 (II)

73.436 Reasonableness, Legality and Sufficiency of Proposals
86-12 (II), 84-10 (II, III, V), 82-35 (V), 82-33 (I, II), 82-28 (I), 82-11 (I), 81-50 (I), 80-55 (IV), 80-35 & -40 (VIII), 80-28 & -32 (V), 80-09 (III, VII), 79-64 (V), 79-50 (V, VI), 79-36, -39, -45 & -47 (III), 79-32 (I), 76-15 (I), 75-19 (IX), 75-05.1 (II)

73.437 Right to Reject Proposals
87-19 (VIII), 82-11 (II, III, IV), 81-50 (I, III), 79-64 (V), 79-50 (VI), 76-08 (III), 75-33 (II, III), 75-05.1 (II)

73.439 Time and Place of Meeting
87-19 (VIII), 82-25 (I), 82-11 (I), 80-09 (VIII), 76-IR-01 (I, II)

73.440 Totality of Conduct
87-19 (VIII), 87-14 & -15 (VI), 83-21 (VI), 82-33 (I), 82-11 (I), 81-28 (V, VII), 80-35 & -40 (IV, VI, VIII), 79-50 (IV), 75-05.2 (III)

73.441 Withdrawal of Proposals
82-35 (I, V), 82-11 (I), 81-50 (I, III), 80-35 & -40 (VIII), 79-64 (VI), 79-29.2 (I), 77-07 (I), 77-06 (I)

73.442 Adherence to Ground Rules
87-19 (VIII), 82-35 (II), 82-25 (I), 82-11 (I), 81-28 (V, VII), 80-50 (III), 76-20 (II), 76-08 (III), 75-10 (II)

73.45 Insistence to Impasse on Non-Mandatory Subject
86-12 (II), 86-04 (XII), 84-17 (II), 84-10 (III, V), 83-06 (II, III), 83-01 (I, V), 82-28 (I, III), 82-10.2 (I), 81-56 (I), 81-44 & -56 (V), 80-55 (IV), 80-28 & -32 (VI), 80-09 (III, VII), 79-68 (II), 79-36, -39, -45 & -47 (III), 79-36.1 (III), 79-32 (I, II, V), 79-16 (II), 79-10 & -18 (V), 76-15 (I), 75-19 (IX)

73.46 Failure to Ratify
86-23 (V), 83-09 (III), 82-11 (II), 81-50 (I, II, III), 75-33 (II, III)

73.461 Refusal to Reduce to Writing
85-07 & -09 (XIII), 83-09 (III), 83-07 (I, II, III), 82-35 (III), 81-28 (I, II, III, IV, VI), 80-10 (I), 79-67 (I), 79-64 (VI)

73.462 Refusal to Execute
83-09 (III), 83-07 (III), 81-28 (VI), 80-10 (I), 79-67 (I), 79-64 (VI)

73.47 Defenses to Refusal to Bargain Charge
80-36 (III), 80-35 & -40 (IX), 79-64 (V), 79-36, -39, -45 & -47 (V), 79-29.1 (I), 79-29.2 (I), 78-IR-01 (V), 75-05.2 (III)

73.471 Change of Employer

73.472 Change of Union
80-36 (III)

73.473 De Minimis

73.474 Impasse
87-19 (IX), 80-09 (VIII)

73.475 Lack of Knowledge
83-07 (II)

73.476 Loss of Majority Status of Union

73.477 Non-Mandatory Subject
84-13 (II, III), 84-10 (II, V), 83-06 (VI), 83-01 (I), 80-50 (III), 79-68 (II), 79-32 (II, V), 79-16 (II), 78-IR-01 (V)

73.478 Waiver
86-12 (IV), 86-11 (VIII, XI), 82-05 (II, III, V, VII, VIII, IX, X, XII), 80-45 (IV, V, VI), 79-67 (III), 79-29.1 (I), 79-24 (II, III), 78-A-11 (III), 78-04 (I), 75-24 (II)

73.479 Other
83-07 (II), 80-55 (VII), 80-35 & -40 (IX), 79-67 (III), 79-64 (V), 79-36, -39, -45 & -47 (V), 79-29.2 (I), 79-29.1 (I), 77-07 (II), 75-26 (III), 75-05.2 (III), 75-05.1 (II)

73.5 Other Unfair Practices

73.51 Refusal to Accept Grievance Arbitration

73.52 Refusal to Accept Mandatory Interest Arbitration
83-21 (VI), 79-64 (VII), 76-08 (I)

73.53 Refusal to Comply with Statute or Regulation
75-21 (II)

73.54 Refusal to Meet and Discuss
80-35 & -40 (IV, VI)

73.55 Failure to Participate in Impasse Proceedings in Good Faith
83-21 (VI), 83-06 (III), 82-35 (IV), 82-25 (I), 82-24 (I), 78-33 (I, II), 77-36 (I, II), 76-08 (I, III), 75-05.1 (I), 73-08 (III, IV)

73.56 Refusal to Supply Information
83-06 (VI), 78-33 (I, II), 75-10 (II)

73.57 Interference with Employer's Selection of its Representative
83-21 (V), 82-33 (IV), 81-52 (VI), 80-35 & -40 (XV), 80-09 (II), 79-50 (X), 79-36, -39, -45 & -47 (XIV), 78-34 (II, III), 78-04 (IV), 76-08 (III), 75-25 (II, III)

73.58 Unlawful Work Stoppages, Slowdowns, Strikes, or Blacklisting of Employees
87-14 & -15 (II, III, IV, V, VI), 80-35 & -40 (XIV), 80-18 (I, II), 79-50 (XI, XII), 79-15 (I, II, III, IV), 76-21 (II)

74. UNFAIR PRACTICE REMEDIES

74.11 Nature or Purpose
87-19 (XI), 83-15 (VI), 83-14 (IX), 82-14.3 (I), 80-41 (IX, XXI), 80-10 (IV), 79-62 (XIV), 79-36.1 (V), 78-16 & -20 (XII), 77-34 (VII), 74-18 (X), 74-13 (III), 74-12 (III)

74.12 Authority of Board
86-17 (I, II, V), 85-17 (II), 84-06 (XI), 83-21 (VII), 83-14 (IX), 82-14.3 (II), 81-54 (VIII), 81-22.2 (II), 80-46 (I), 80-41 (XXI), 80-36 (II), 80-28 & -32 (VII), 80-14 (II, III), 80-13 (VII), 79-70.2 (I), 79-64 (VIII), 79-57 (I), 79-50 (XVI, XVII), 79-36, -39, -45 & -47 (XVII, XVIII), 78-A-07 (II), 78-03 (I), 77-34 (VII), 76-21 (IV), 75-19 (II), 75-15.2 (I, II), 74-18 (I, VI, X), 73-17 (I), 73-12 (II), 73-11 (II)

74.13 Scope of Orders
83-21 (VII), 83-14 (IX), 81-22.2 (II), 81-22.1 (VII), 80-35 & -40 (IX, XVI), 79-36, -39, -45 & -47 (XVIII), 77-34 (VII), 74-18 (X), 73-12 (II)

74.14 Persons Bound by Order
87-19 (XI), 83-16 (VI), 82-33 (V), 82-28 (IV), 82-15, -16 & -22 (IX), 82-10.2 (VIII), 82-01 (IV), 81-35 (V), 81-22.1 (VI), 81-18 (IV), 81-17 (III), 81-15 (V), 81-12 (VI), 81-01 (III), 80-55 (VIII), 80-50 (IV), 80-49 (VI), 80-45 (XIV), 80-44 (V), 80-41 (XIII), 80-35 & -40 (IX, XVI), 80-33 (VII), 80-29 (VI), 80-28 & -32 (VIII), 80-26 (XI), 80-22 (V), 80-13 (VIII), 80-10 (III, V), 80-09 (IX), 80-08 (V), 80-05 (VIII), 80-02 (VII), 79-71 (II), 79-70.1 (II), 79-65 & 80-07 (XI), 79-62 (XIV), 79-56 (V), 79-50 (XIII), 79-44 (IV), 79-43 (IX), 79-42 (VI), 79-41.2 (IV), 79-36, -39, -45 & -47 (XV), 79-36.1 (IV), 79-32 (IX), 79-24 (VI), 79-22 (III), 79-19 & -11 (II), 79-16 (III), 79-14 (IX), 79-10 & -18 (VI), 79-08 (VI), 78-33 (III), 78-28 (IV), 78-25 (V), 78-23 (VIII),

78-22 (IV), 78-19 (V), 78-16 & -20 (XII), 78-15 (III), 78-04 (VI), 78-03 (I), 77-36 (III), 77-27 (IV), 77-24 (III), 77-18, -19, -20 & -29 (IV), 77-16 (III), 77-07 (IV), 77-06 (II), 77-02 (II), 77-01 (II), 76-21 (III), 76-20 (III), 76-12 (III), 75-25 (IV), 73-12 (II)

74.15 Individual Liability of Officers, Agents and Representative

84-25 (VII), 80-44 (V), 80-35 & -40 (XVI), 80-33 (VII), 80-29 (VI), 80-28 & -32 (VIII), 80-13 (VIII), 80-10 (III), 80-05 (VIII), 79-71 (II), 79-62 (XIV), 77-27 (IV), 76-21 (III), 76-12 (III)

74.16 Time Limitation of Order

87-19 (XI), 85-17 (V), 85-08 (IV), 84-25 (VII), 83-21 (VII), 83-15 (VI), 83-11 (V), 82-14.2 (I), 82-14.1 (VI), 82-10.2 (VIII), 82-01 (IV), 81-41 (VII), 81-18 (IV), 81-17 (III), 81-15 (V), 81-12 (VI), 81-01 (III), 80-50 (IV), 80-49 (VI), 80-45 (XIV), 80-41 (XIII), 80-33 (VII), 80-28 & -32 (VIII), 80-26 (XI), 80-13 (VIII), 80-10 (V), 79-70.2 (I), 79-65 & 80-07 (XI), 79-24 (VI), 79-22 (III), 79-15 (VI), 79-14 (IX), 79-12.2 (II), 79-10 & -18 (VI), 78-30 (V), 78-28 (IV), 78-25 (V), 78-16 & -20 (XII), 78-10 (III), 78-04 (VI), 77-36 (III), 77-27 (IV), 77-24 (II), 77-18, -19, -20 & -29 (IV), 77-16 (III), 77-07 (IV), 77-06 (II), 77-02 (II), 77-01 (II), 76-21 (III), 76-20 (III), 76-15 (IV), 76-12 (III), 76-11 (III), 76-10 (III), 75-33 (V), 75-25 (IV), 75-24 (IV), 75-22 (VI), 75-21 (III), 75-19 (X), 75-16 (IV), 75-12 & -27 (IV), 73-07 (VIII)

74.17 Considerations in Fashioning Remedy

87-19 (XI), 86-23 (IX), 86-22, -25 & 86-A-03 (II, XIV), 86-11 (XV), 86-04 (XIII), 86-02 (V), 84-19 (V), 84-17 (VI), 84-06 (III, IV, VI), 83-21 (VII), 83-15 (VI), 83-14 (IX), 83-10.1 (I, II), 82-35 (IV), 82-33 (III), 82-14.3 (II), 81-22.2 (II), 81-22.1 (VII), 80-41 (IX, XI, XXI, XXII), 80-35 & -40 (XIV, XVI), 80-28 & -32 (VII), 80-13 (VII), 80-10 (IV), 80-09 (VII), 80-08 (IV), 79-65 & 80-07 (X), 79-63 (V), 79-50 (I, XII), 79-36, -39, -45 & -47 (XVII), 79-36.1 (V), 79-32 (IX), 79-14 (IX), 78-33 (II), 78-15 (III), 77-34 (VII), 75-13 (I), 74-18 (X), 74-13 (III), 74-12 (III), 73-12 (II)

74.18 Exhaustion of Remedies

73-17 (II)

74.19 Election of Remedies

80-14 (IV), 76-11 (III), 73-17 (II)

74.20 Dual Remedies

85-17 (II), 80-44 (IV), 80-10 (IV), 73-17 (II), 73-07 (VIII)

74.21 Other

80-10 (IV), 79-64 (VIII), 79-32 (IX), 75-33 (V)

74.3 Types of Orders

85-16 (VI)

74.31 Cease and Desist

87-19 (XI), 87-14 & -15 (IX), 86-23 (IX), 86-16 (X), 86-14 (VIII), 86-12 (V),

86-11 (XV), 86-04 (XIII), 86-02 (V), 85-17 (V), 85-08 (IV), 85-07 & -09 (XIV), 85-04 (VIII), 84-25 (VII), 84-19 (V), 84-17 (VI), 84-15 (III), 84-10 (VI), 84-08 (IV), 84-06 (II), 84-01 (VI), 83-22 (III), 83-21 (VII), 83-16 (VI), 83-15 (VI), 83-11 (V), 83-10.2 (V), 83-01 (VI), 82-35 (IV), 82-33 (V), 82-28 (IV), 82-15, -16 & -22 (IX), 82-14.1 (VI), 82-10.2 (VIII), 82-10.1 (I, II), 82-04 (II), 82-01 (IV), 81-56 (II), 81-54 (VIII), 81-46 (III), 81-41 (VII), 81-35 (V), 81-22.2 (II), 81-22.1 (VII), 81-18 (IV), 81-17 (III), 81-15 (V), 81-12 (VI), 81-01 (III), 80-55 (VIII), 80-50 (IV), 80-49 (VI), 80-45 (XIV), 80-44 (V), 80-41 (IX, XIII), 80-35 & -40 (XVI), 80-33 (VII), 80-29 (VI), 80-28 & -32 (VIII), 80-26 (XI), 80-22 (V), 80-13 (VIII), 80-10 (V), 80-09 (IX), 80-08 (V), 80-05 (VIII), 80-04 (V), 80-02 (VII), 79-70.1 (II), 79-65 & 80-07 (XI), 79-62 (XIV), 79-57 (I), 79-56 (V), 79-50 (XII, XIII), 79-49 (IV), 79-44 (IV), 79-43 (IX), 79-42 (III, VI), 79-41.2 (IV), 79-36, -39, -45 & -47 (XV), 79-36.1 (IV, V), 79-32 (IX), 79-24 (VI), 79-22 (III), 79-19 & -11 (II), 79-16 (III), 79-15 (VI), 79-14 (IX), 79-12.2 (II), 79-10 & -18 (VI), 79-08 (VI), 78-33 (III), 78-30 (V), 78-28 (IV), 78-25 (V), 78-23 (VIII), 78-22 (IV), 78-19 (V), 78-16 & -20 (XII), 78-15 (III), 78-04 (VI), 77-36 (III), 77-34 (VII), 77-27 (IV), 77-24 (III), 77-18, -19, -20 & -29 (IV), 77-16 (III), 77-07 (IV), 77-06 (II), 77-02 (II), 77-01 (II), 76-21 (III), 76-20 (III), 76-15 (IV), 76-12 (III), 76-10 (III), 75-25 (IV), 75-19 (X), 75-10 (III), 74-18 (VI), 74-17 (IV), 74-10 (IV)

74.32 Restoration of Status Quo Ante

87-19 (XI), 86-23 (IX), 86-12 (V), 85-17 (V), 85-08 (IV), 85-07 & -09 (XIV), 84-19 (V), 84-15 (III), 84-08 (IV), 83-22 (III), 83-16 (VI), 83-15 (VI), 83-11 (V), 83-10.2 (V), 82-15, -16 & -22 (IX), 82-14.3 (I), 82-14.1 (VI), 82-04 (II), 81-18 (IV), 81-17 (III), 81-12 (V, VI), 81-01 (III), 80-49 (VI), 80-41 (IX, XI, XIII, XXI, XXII), 80-33 (VI, VII), 80-28 & -32 (VII, VIII), 80-13 (VIII), 80-10 (V), 80-08 (V), 80-05 (VIII), 80-02 (VII), 79-70.2 (II), 79-70.1 (II), 79-65 & 80-07 (XI), 79-62 (XIV), 79-50 (XII, XIII, XVII), 79-49 (IV), 79-44 (IV), 79-41.2 (IV), 79-36, -39, -45 & -47 (XV), 79-14 (IX), 79-12.2 (II), 79-08 (VI), 78-30 (V), 78-25 (V), 78-19 (V), 77-36 (III), 77-34 (VII), 77-16 (III), 77-01 (II), 75-16 (IV), 74-18 (VI, X), 74-10 (III), 73-09 (III), 73-07 (VI, VIII), 73-03 (III), 73-01 (II)

74.33 Reinstatement

85-17 (V), 84-06 (II, VI, XI), 83-22 (III), 83-15 (VI), 82-14.3 (I), 82-14.1 (VI), 81-17 (III), 80-41 (X, XIII, XXII), 80-13 (VIII), 79-70.1 (II, VI), 79-63 (V), 79-50 (XII, XIII, XVI, XVII), 79-19 & -11 (II), 74-18 (VI), 74-10 (IV)

74.331 Entitlement

84-06 (II, VI, XI), 83-15 (VI), 81-17 (III), 79-70.1 (VI), 79-50 (XII, XVI)

74.332 Disqualifying Conduct of Employee

84-06 (II, VI, XI), 83-15 (VI), 79-70.1 (VI), 79-50 (XII, XVI), 78-30 (IV), 77-16 (III)

74.333 Condition of Employer Operations

74.3331 Availability of Work

80-41 (X), 79-70.1 (II)

74.3332 Reduction in Force

74.3333 Elimination of Job
80-41 (X)

74.334 Validity of Reinstatment Offer
81-17 (III), 80-45 (XIV), 80-13 (VIII), 74-10 (IV)

74.335 Reinstatement to Former/Substantially Equivalent Position
85-17 (V), 84-06 (II), 83-15 (VI), 82-14.3 (I), 82-14.1 (VI), 81-17 (III), 80-41 (X, XIII), 80-13 (VIII), 79-70.1 (II), 79-19 & -11 (II), 74-18 (VI), 74-10 (IV)

74.336 Reinstatement Without Prejudicing Privileges and Benefits
85-17 (V), 83-15 (VI), 82-14.3 (I, III), 82-14.1 (VI), 80-41 (X, XIII), 80-13 (VIII), 79-70.1 (II), 79-19 & -11 (II), 74-18 (VI), 74-10 (IV)

74.337 Reinstatement of Strikers
79-50 (XII, XIII)

74.338 Expunging Employee Records
86-12 (V), 86-11 (XV), 85-17 (V), 83-16 (VI), 80-49 (VI), 80-35 & -40 (XVI), 80-26 (XI), 79-44 (IV)

74.34 Restitution
87-19 (XI), 87-14 & -15 (IX), 86-02 (V), 85-17 (V), 85-08 (IV), 83-15 (VI), 83-11 (V), 82-35 (IV), 82-15, -16 & -22 (IX), 82-14.3 (I), 82-14.1 (VI), 82-04 (II), 81-41 (VII), 81-18 (IV), 81-12 (V, VI), 81-01 (III), 80-45 (XIV), 80-41 (XI, XIII, XXI, XXII), 80-35 & -40 (XVI), 80-33 (VI, VII), 80-28 & -32 (VII, VIII), 80-10 (V), 79-70.1 (II), 79-70.2 (II), 79-65 & 80-07 (XI), 79-62 (XIV), 79-50 (XVIII), 79-49 (IV), 79-15 (VI), 79-14 (IX), 79-12.2 (II), 79-08 (VI), 78-04 (VIII), 77-34 (VII), 77-24 (III), 73-03 (III)

74.341 Liability for Back Pay
85-17 (V), 85-08 (IV), 84-06 (II, VI), 83-15 (VI), 82-14.3 (I), 82-14.1 (VI), 82-04 (II), 80-41 (X, XI, XXI, XXII), 80-35 & -40 (XVI), 80-33 (VI, VII), 79-70.1 (II), 79-65 & 80-07 (XI), 79-63 (V), 79-41.2 (IV), 79-14 (IX), 79-12.2 (II), 79-08 (VI), 78-04 (VI, VIII), 77-34 (V, VII), 77-01 (II), 74-18 (VI, X), 74-10 (IV), 73-03 (III)

74.342 Joint Liability for Back Pay

74.343 Duty to Mitigate Demages
84-06 (II), 83-15 (VI), 82-14.1 (VI), 79-70.1 (II), 79-41.2 (IV), 78-04 (VIII), 74-18 (VI, X), 74-10 (IV)

74.344 Computation of Backpay
85-17 (V), 83-15 (VI), 82-14.1 (VI), 82-14.3 (I), 81-12 (V, VI), 80-41 (XI, XIII, XXII), 79-70.2 (II), 79-70.1 (II), 78-04 (VIII), 77-34 (V, VII)

74.345 Interest

85-17 (V), 85-08 (IV), 84-06 (II, VI), 83-21 (VII), 83-15 (VI), 83-11 (V), 82-14.3 (III), 82-14.1 (VI), 82-04 (II), 81-41 (VII), 81-18 (IV), 81-12 (VI), 81-01 (III), 80-41 (XII, XIII), 80-35 (XVI), 80-33 (VI, VII), 80-28 & -32 (VIII), 79-70.2 (III), 79-70.1 (II), 79-65 & 80-07 (X, XI), 79-50 (XVIII), 79-15 (VI), 79-14 (IX), 79-12.2 (II), 79-08 (VI), 77-34 (V), 77-24 (III), 77-01 (II), 73-03 (III)

74.346 Loss of Overtime Opportunities

79-65 & 80-07 (X, XI)

74.35 Punitive Damages

79-50 (XVIII), 77-34 (VII)

74.351 Fines and Penalties

79-50 (XVIII), 79-32 (IX), 77-34 (VII)

74.352 Attorney's Fees

86-22, -25 & 86-A-03 (XIV), 83-21 (VII), 83-10.1 (II), 82-14.3 (IV), 81-22.1 (VI), 80-18 (III), 79-62 (XIV), 79-50 (XVIII), 79-22 (III), 79-15 (VI), 78-25 (V)

74.353 Other

83-21 (VII)

74.355 Compensatory Damages for Harm Attributable to Violation of Act

87-19 (XI), 87-14 & -15 (IX), 83-22 (III), 83-15 (VI), 83-11 (I), 83-10.1 (II), 83-06 (III), 82-35 (IV), 81-18 (IV), 81-01 (III), 80-45 (XIV), 80-41 (X, XI, XIII, XXI), 80-33 (VII), 80-28 & -32 (VIII), 80-18 (III), 80-10 (V), 79-70.2 (II), 79-70.1 (II), 79-65 & 80-07 (X, XI), 79-62 (XIV), 79-49 (IV), 79-32 (IX), 79-22 (III), 79-15 (VI), 79-14 (IX), 79-08 (VI), 78-33 (II), 78-25 (V), 78-04 (VI, VIII), 77-36 (III), 77-34 (V), 77-24 (III)

74.36 Notice to Employees

85-17 (V), 84-25 (VII), 84-19 (V), 84-06 (II), 82-14.1 (VI), 82-10.2 (VIII), 82-01 (IV), 81-41 (VII), 81-15 (V), 80-41 (XIII), 80-28 & -32 (VIII), 80-26 (XI), 80-13 (VIII), 80-08 (V), 80-04 (V), 79-22 (III), 79-14 (IX), 79-12.2 (II), 78-28 (IV), 77-36 (III)

74.361 Posting

85-17 (I), 84-25 (VII), 84-19 (V), 84-06 (II), 83-21 (VII), 82-14.1 (VI), 82-10.2 (VIII), 82-01 (IV), 81-41 (VII), 81-22.1 (VII), 81-15 (V), 80-41 (XIII), 80-28 & -32 (VIII), 80-26 (XI), 80-13 (VIII), 80-08 (V), 80-04 (V), 79-57 (I), 79-22 (III), 79-14 (IX), 79-12.2 (II), 78-28 (IV), 77-36 (III), 76-12 (III)

74.362 Mailing

81-22.1 (VII)

74.363 Speech to Employees

74.37 Interim Relief
82-10.1 (I, II), 80-44 (IV), 78-A-07 (II)

74.371 Application by Administrative Agency to Judiciary
84-06 (VII)

74.372 Ability to Grant

74.373 Likelihood of Success
80-44 (III)

74.374 Irreparable Nature of Harm

74.375 Absence of Substantial Harm to Respondent/Public Interest

74.376 Injunctive Relief and Arbitration Matters

74.3761 Arbitrability
74-16 (II)

74.3762 Negotiability Considerations
74-16 (II)

74.38 New Election
87-A-04 (I), 87-A-02 (II), 86-22, -25 & 86-A-03 (II), 83-14 (V, IX), 81-47 (II, IV), 80-04 (IV, V), 74-10 (IV)

74.39 Bargaining Orders
81-54 (VIII), 81-15 (IV, V), 80-26 (XI), 80-13 (VII), 80-04 (IV), 80-02 (VII), 74-09 & -14 (III)

74.40 Submission to Impasse Procedures
82-35 (IV), 79-64 (VIII), 79-22 (III), 78-A-07 (II), 76-21 (III), 75-12 & -27 (IV), 73-09 (III), 73-08 (IV)

74.41 Rescinding Certification

74.42 Consent Orders
87-13 (I), 87-03 (I), 83-22 (I, III), 81-39 (I), 79-71 (I), 79-57 (I), 79-41.2 (IV), 76-17 (II), 76-12 (I), 75-29 (I), 74-16 (I)

74.43 Deferral to Contractual Grievance/Arbitration Mechanism
88-01 (I), 86-09 (II, IV), 85-20 (I, II), 80-46 (I), 78-10 (III), 76-11 (III)

74.44 Orders to Execute Agreements
79-64 (VIII), 77-34 (V, VII), 77-18, -19, -20 & -29 (IV)

74.45 Posting by Union
79-15 (VI)

81. ENFORCEMENT OR REVIEW OF BOARD ORDERS

81.1 Enforcement
85-17 (II), 84-06 (X), 83-15 (VII), 83-14 (VIII), 82-10.1 (III), 80-41 (XXI, XXII), 80-15 (VI), 79-50 (XVII), 78-23 (IX), 74-18 (IX)

81.11 Jurisdiction
85-17 (II), 84-17 (VIII), 82-14.2 (I), 70-A-02 (II)

81.111 Standing
81-A-03 (V), 80-A-02 (VII), 78-23 (IX), 76-16 (V), 70-A-02 (I)

81.112 Board
85-17 (II), 81-44 & -56 (VII), 80-A-02 (VII), 78-23 (IX)

81.113 Charging Party
70-A-02 (I)

81.114 Intervenors

81.12 Standards
87-14 & -15 (X), 86-A-01 (V), 84-21 (III), 84-06 (VIII), 84-A-03 (VI), 83-15 (VII), 83-03 (III, VII), 81-A-02 (VIII), 80-41 (XIV, XXI, XXII), 80-15 (VI), 80-A-02 (V, IX), 79-70.1 (III), 79-50 (XVII), 78-A-05 (III, IV, VI), 77-A-02.3 (XI), 74-18 (IX)

81.13 Timeliness
84-17 (VIII), 82-14.2 (I), 82-A-02.1 (III, XIV, XV), 73-13 & -14 (VII)

81.14 Service
82-14.2 (I)

81.15 Venue

81.17 Summary Enforcement

81.18 Enforcement by State Board
85-17 (II), 82-14.3 (II), 82-14.1 (VI), 81-44 & -56 (VII), 78-23 (IX)

81.19 Enforcement by Courts
87-14 & -15 (X), 84-21 (III), 84-06 (VIII), 83-15 (VII), 82-14.3 (II), 82-14.2 (I), 79-50 (XVIII), 79-36.1 (V), 78-23 (IX), 77-A-02.3 (XI)

81.191 Court Procedure
86-A-01 (V), 84-21 (III), 84-17 (VII), 83-14 (VII, VIII), 83-03 (III, VII), 82-14.2 (I), 82-14.3 (II), 81-15 (II, III), 81-A-02 (VII), 79-50 (XVIII), 78-23 (IX), 78-A-05 (VI), 74-18 (IX, XI), 73-13 & -14 (VII)

81.20 Non-Judicial Enforcement
85-17 (II)

81.3 Review

87-A-07 (VII, VIII, IX, X), 84-21 (III), 83-15 (VII), 83-01 (VII), 80-15 (VI), 79-36, -39, -45 & -47 (IV), 78-23 (IX), 78-A-05 (III, IV, VI), 77-A-02.3 (XI), 70-A-02 (II)

81.31 Jurisdiction

82-14.2 (I), 76-21 (IV), 70-A-02 (II)

81.33 Standards for Appeal

87-A-07 (VII, VIII, IX, X), 86-A-01 (V), 84-21 (III), 84-06 (VIII, X), 84-A-03 (VII), 83-15 (VII), 83-14 (VII), 83-03 (III, VII), 83-01 (VII), 82-A-02.1 (XIV, XV), 81-A-02 (VIII), 80-41 (XVI), 80-15 (III), 80-A-02 (V, IX), 79-36, -39, -45 & 47 (IV), 78-A-05 (III, IV, VI), 77-A-02.3 (XI), 73-13 & -14 (VIII)

81.331 Unfair Practice Orders

84-21 (III), 84-06 (VIII, X), 83-15 (VII), 83-14 (VII), 83-03 (III, VII), 83-01 (VII), 80-41 (XIV, XVI, XXI, XXII), 80-30 (IV, V, VI, VII, VIII), 80-15 (III), 79-70.1 (III), 79-50 (XIV), 79-36, -39, -45 & -47 (IV), 78-23 (XIII), 78-A-05 (VI), 74-18 (IX), 73-13 & -14 (VIII)

81.332 Final Orders

83-14 (VII), 82-A-02.1 (XIV, XV), 80-41 (XXI, XXII), 70-A-02 (II)

81.333 Election and Representation Orders

87-A-07 (VII, VIII, IX, X), 86-A-01 (V), 84-A-03 (VII), 83-14 (VII), 81-15 (II, III), 81-A-02 (VIII), 80-A-02 (V, IX), 79-50 (XIV), 78-A-05 (III, IV, V, VI), 77-A-02.3 (XI), 73-13 & -14 (VIII), 70-A-02 (II)

81.334 Other Orders

81.34 Timeliness of Appeal

84-17 (VIII), 82-14.2 (I), 82-A-02.1 (III, XIV, XV), 73-13 & -14 (VII), 70-A-02 (II)

81.35 Notice of Appeal

82-14.2 (I)

81.351 Contents

81.352 Service

81.36 Venue

81.37 Parties

81-44 & -56 (VII), 80-A-02 (VII), 78-23 (IX), 70-A-02 (I)

81.371 Standing to Appeal

84-17 (VIII), 76-16 (V), 70-A-02 (I)

81.372 Aggrieved Parties
70-A-02 (I)

81.373 Prevailing Parties

81.374 Necessary or Indispensable Parties
78-23 (IX)

81.375 Board
81-44 & -56 (VII), 80-A-02 (VII), 78-23 (IX)

81.376 Intervention

81.4 Issues Common to Appeal or Enforcement Proceeding
82-14.3 (II),

81.41 Consolidation of Appeal and Enforcement Petition
83-15 (VII), 82-14.3 (II)

81.42 Pleadings

81.43 Board Modification of Order While Review/Enforcement Pending
82-14.3 (II), 80-30 (IX)

81.44 Briefs and Oral Argument

81.45 Motions
80-30 (IX)

81.46 Stay of Board Order While Court Proceedings Pending
84-06 (VII), 82-14.3 (II), 81-15 (II, III), 74-18 (XI), 74-09 & -14 (I)

81.461 Criteria for Granting Stay
74-18 (XI)

81.47 Record
84-17 (VII), 83-14 (VIII), 83-03 (VII), 80-15 (VI)

81.471 Contents

81.472 Correction

81.48 Additional Evidence
84-17 (VII)

81.49 General Principles
84-17 (VIII), 83-14 (VII, VIII), 77-A-02.3 (XI)

81.491 Review Confined to Record
84-17 (VII), 80-41 (XVI), 80-30 (VIII), 80-15 (VI)

81.492 Waiver of Arguments Not Raised Before Board
76-21 (IV)

81.493 Deference to Board Expertise
87-A-07 (IX, X), 84-20 (I), 84-06 (IX), 83-03 (VII), 83-01 (VII), 82-14.2 (II), 81-A-03 (V), 80-41 (XXI), 80-A-02 (VIII), 79-36, -39, -45 & -47 (XVII), 78-23 (XI), 78-A-05 (V), 77-A-02.3 (XI)

81.494 Expeditious Review
83-14 (VII), 79-50 (XIV), 74-18 (XI)

81.50 Standards for Review
87-A-07 (VII, VIII, IX, X), 86-A-01 (V), 84-21 (III), 84-06 (VIII), 84-A-03 (VII), 83-15 (VII), 83-14 (IX), 83-03 (III, VII), 83-01 (VII), 81-A-03 (VII), 81-A-02 (VIII), 80-41 (XVI), 80-15 (VI), 80-A-02 (V, IX), 78-A-05 (III, IV, VI), 77-A-02.3 (XI)

81.502 Findings of Fact
87-A-07 (VII, IX, X), 87-14 & -15 (X), 86-A-01 (V), 84-21 (III), 84-06 (VIII, IX, X), 83-15 (VII), 83-01 (VII), 81-A-03 (VII), 81-A-02 (VIII), 80-41 (XIV, XVI), 80-30 (VI, VII, VIII), 80-15 (VI), 80-A-02 (V, IX), 79-70.1 (III), 79-50 (XV), 78-23 (XIII), 78-A-05 (III, IV, VI), 77-34 (VI), 77-A-02.3 (XI), 76-16 (III), 74-18 (IX)

81.503 Conclusions of Law
87-14 & -15 (X), 87-A-07 (VIII, IX, X), 86-A-01 (V), 84-A-03 (VII), 83-15 (VII), 83-03 (III, VII), 83-01 (VII), 81-A-03 (VII), 81-A-02 (VIII), 80-41 (XVI), 80-30 (V), 80-15 (VI), 80-A-02 (VIII), 79-70.1 (IV, V), 79-36, -39, -45 & -47 (IV), 78-23 (XI), 78-A-05 (IV, VI), 77-34 (VI), 77-A-02.3 (XI), 74-18 (IX)

81.504 Mixed Questions of Law and Fact
87-A-07 (IX), 84-A-03 (VII), 80-41 (XVI), 77-A-02.3 (XI)

81.505 Interpretation of Statutes
84-20 (I), 84-A-03 (VII), 83-14 (IX), 83-03 (VII), 83-01 (VII), 82-14.2 (II), 80-15 (VII), 79-70.1 (V), 78-23 (XI), 77-A-02.3 (XI)

81.506 Interpretation of Administrative Regulations
81-A-03 (V), 80-A-02 (VIII)

81.507 Contract Construction
80-41 (XIX), 80-15 (VIII), 79-70.1 (VI), 76-16 (III)

81.508 Particular Board Decisions
87-A-07 (IX, X), 86-A-01 (V), 83-14 (VII), 81-A-02 (VIII), 79-36, -39, -45 & -47 (XVIII)

81.5081 Bargaining Orders
78-23 (X)

81.5082 Board Deferral to Arbitration

81.5083 Cease and Desist Orders
84-06 (X), 79-36, -39, -45 & -47 (XVII), 79-36.1 (V), 77-34 (VII), 74-18 (IX)

81.5084 Conduct of Elections
83-14 (VII), 81-15 (II, III), 80-A-02 (VIII), 70-A-02 (II)

81.5085 Impasse Procedure Compliance

81.5086 Interest Arbitration Awards
74-16 (II)

81.5087 Reinstatement and Back Pay
84-06 (X), 83-15 (VII), 80-41 (XIV, XXII), 79-50 (XVII), 78-04 (VII), 77-34 (VII), 74-18 (IX, X)

81.5088 Strike Relief and Penalty Orders
79-50 (XVII), 76-21 (IV)

81.5089 Unfair Practice Decisions
87-14 & -15 (X), 84-21 (III), 84-06 (VIII), 83-15 (VII), 83-03 (VII), 83-01 (VII), 82-14.2 (I), 82-10.1 (III), 80-41 (XIV, XVI), 80-15 (VI), 78-A-05 (VI), 77-34 (VII), 74-18 (IX)

81.5090 Unit Determinations
87-A-07 (VII, VIII, IX, X), 86-A-01 (V), 84-A-03 (VII), 81-A-02 (VIII), 78-A-05 (III, V, VI), 77-A-02.3 (XI)

81.5091 Other Decisions and Orders
84-A-03 (VII), 79-36, -39, -45 & -47 (XVII, XVIII)

81.51 Default Judgment

81.52 Judgment

81.521 Affirmance of Appeal or Enforcement of Order
87-A-07 (VIII), 86-A-01 (V), 84-21 (I, II), 84-A-03 (VII), 83-15 (VII), 80-41 (XXI, XXII), 80-15 (VI), 79-50 (XVII), 78-23 (X), 78-A-05 (V), 77-34 (VI), 77-A-02.3 (XII), 74-18 (IX)

81.522 Reversal or Modification
83-03 (III, VII), 81-22.1 (VII), 80-50 (V), 80-41 (XIV), 79-36, -39, -45 & 47 (IV), 78-23 (X), 77-34 (VII), 74-16 (II)

81.523 Remand to Board
81-22.1 (VII), 78-04 (VII)

81.524 Restraining Orders and Injunctions

81.525 Penalties

81.526 Dismissal of Appeal or Enforcement
87-14 & -15 (X), 86-A-01 (V), 81-A-03 (VII), 76-21 (IV), 74-16 (II), 70-A-02 (II)

81.527 Other Judgments

81.53 Rehearing or Reconsideration
80-30 (IX)

81.54 Costs and Fees

81.6 Appeal to Higher Court
84-17 (VII, VIII), 83-14 (VIII), 83-03 (VII), 80-41 (XVI), 76-16 (V)

81.61 Procedure
84-21 (III), 84-17 (VII, VIII), 83-14 (VII, VIII), 83-03 (VII), 80-41 (XVI)

81.62 Stay of Lower Court Decision
81-15 (II, III), 79-70A (I)

81.63 Grounds for Certification or Certiorari

81.64 Intervention

81.65 Remand

82. CONTEMPT OF COURT JUDGEMENT
79-50 (XVIII)

82.1 Procedure

82.2 Actions Constituting Contempt of Judgments

82.3 Defenses

82.4 Sanctions to Enforce Judgment

83. ACTIONS ANCILLARY TO BOARD PROCEEDINGS

83.1 Subpoena Enforcement Proceedings
83-04.1 (I, II, III)

83.11 Court Jurisdiction

83.12 Scope of Court Inquiry

83.121 Pendency of Proceeding Before Board

83.122 Administrative Regularity of Issuance of Subpoena

83.123 Exhaustion of Administrative Remedies to Quash Subpoena
83-04.1 (I, II, III)

83.124 Relevance of Subpoenaed Documents or Testimony
83-04.1 (I)

83.14 Materials Sought By Subpoena

83.15 Persons Whose Testimony Sought

83.16 Defenses to Compliance
83-04.1 (I, II, III)

83.161 Attorney/Client Privilege

83.162 Infringement of Constitutional Rights

83.163 Other
83-04.1 (I, II, III)

83.2 Injunctive Relief
80-44 (IV)

83.21 Court Procedure

83.211 Notice and Service

83.212 Venue

83.213 Parties

83.214 Intervention

83.215 Other Procedures

83.23 Temporary Restraining Order
80-44 (IV), 76-21 (IV)

83.231 Ex Parte

83.232 On Notice

83.233 Standards
80-44 (IV)

83.234 Duration
80-44 (IV)

83.24 Hearing

83.25 Scope of Court Inquiry

83.26 Criteria for Relief

83.27 Scope of Relief
80-44 (IV)

83.28 Higher Court Review

84. ACTIONS COLLATERAL TO BOARD PROCEEDINGS

84.1 Proceedings to Enjoin or Mandate Board Action

84.11 Standards

84.12 Venue

84.14 Parties

84.15 Intervention

84.16 Jurisdiction of Court
82-A-02.1 (XV)

84.17 Court Procedure
82-A-02.1 (XV)

84.18 Board Actions Sought to be Enjoined

84.181 Representation Proceedings

84.182 Unfair Practice Proceedings

84.19 Board Action Sought to be Mandated

84.191 Representation Proceedings

84.192 Unfair Practice Proceedings

84.2 Proceedings to Enjoin or Mandate General Counsel Action

84.21 Venue

84.22 Standing

84.23 Parties

84.24 Jurisdiction of Court

84.25 Court Procedure

84.3 Actions for Declaratory Judgment

84.4 Suits for Damages Against Board or Its Agents

84.5 Proceedings by Board to Protect Its Jurisdiction

MAINE LABOR RELATIONS BOARD

DECISION ABSTRACTS

Printed under Appropriation No. 1431.1

TABLE OF CONTENTS

Year	Initial Case Decided	Page
1973	No. 73-01	1
1974	No. 74-01	9
1975	No. 75-01	18
1976	No. 76-08	32
1977	No. 77-01	39
1978	No. 78-01	50
1979	No. 79-01	68
1980	No. 80-02	109
1981	No. 81-01	150
1982	No. 82-01	174
1983	No. 83-01	190
1984	No. 84-01	206
1985	No. 85-01	223
1986	No. 86-01	234
1987	No. 87-03	252
1988	No. 88-01	257

Alphabetical Listing of Cases by Complainant

Abbott v. MSEA 81-51
AFSCME v. Augusta 73-01
AFSCME v. Augusta 77-33
AFSCME v. Augusta City Council . . . . . 74-09 & -14
AFSCME v. Augusta City Manager 73-09
AFSCME v. Bangor 80-41
AFSCME v. Bangor 80-50
AFSCME v. Bangor City Council 75-13
AFSCME v. Bangor Water District 80-26
AFSCME v. Bangor Water District 81-15
AFSCME v. Bangor Water District 81-46
AFSCME v. Bath 81-09
AFSCME v. Bath Board of Education 86-21
AFSCME v. Biddeford 75-33
AFSCME v. Biddeford Mayor 74-03
AFSCME v. Brunswick 85-08
AFSCME v. Cumberland County Commissioners 83-09
AFSCME v. Ellsworth School Committee 81-41
AFSCME v. Gardiner Water District 75-11
AFSCME v. Jay Selectmen 74-02
AFSCME v. Maine, State of 78-01
AFSCME v. Maine, State of. 83-24
AFSCME v. Maynard . . . . . 86-22, -25 & 86-A-03
AFSCME v. Millinocket 80-13
AFSCME v. MSAD #1 80-04
AFSCME v. MSAD #1 81-12
AFSCME v. MSAD #34 Board of Directors 82-24
AFSCME v. Old Town City Council . . . . . 75-12 & -27
AFSCME v. Richardson 83-22
AFSCME v. Richardson 84-04
AFSCME v. South Portland City Council . . . . . 73-13 & -14
AFSCME v. Westbrook 81-53
Arbour v. Biddeford and AFSCME 80-36
Arundel Teachers Assn. v. Arundel School Comm. 73-08
Associated Faculties of the U of Me. v. Assn. of Independent Professionals 81-22
Associated Faculties of the U of Me. v. Assn. of Independent Professionals
(Decision & Order on Remand) 81-22
Associated Faculties of the U of Me. v. University of Maine 79-55
Associated Faculties of the U of Me. v. University of Maine . 82-15, -16 & -22
Auburn Firefighters Assn. v. Morrison (Interim Order) 83-10
Auburn Firefighters Assn. v. Morrison 83-10
Auburn Firefighters Assn. v. Valente 87-19
Auburn Teachers Assn. v. Auburn School Comm. 88-12
Augusta Firefighters Assn. v. Augusta 75-16

Bangor v. Bangor Firefighters Assn. 83-06
Bangor Education Assn. v. Bangor School Comm. 73-12
Bangor Education Assn. v. Bangor School Comm. 76-11
Bangor Education Assn. v. Bangor School Comm. 83-11
Bangor Firefighters Assn. v. Bangor 84-15
Bath Firefighters Assn. v. Bath 80-44

Biddeford Support Staff Assn. v. Biddeford School Comm. 81-47
Biddeford Teachers Assn. v. Biddeford Board of Ed. 74-12
Boothbay Region Teachers Assn. v. Boothbay School Comm. . . . 74-04, -05 & -06
Bradbury v. Washburn Teachers Association 82-08
Brewer School Comm. v. Brewer Ed. Assn. of Non-Teaching Personnel 81-36
Bridgton Federation of Public Employees v. Hamill 81-54
Brunswick School Board v. Brunswick Teachers Assn. 75-19
Brunswick Teachers Assn. v. Brunswick School Board 82-28

Cape Elizabeth School Board v. Cape Elizabeth Teachers Assn. 79-68
Cape Elizabeth Teachers Assn. v. Cape Elizabeth School Board 75-24
Caribou Board of Ed. v. Caribou Teachers Assn. 74-01
Caribou School Dept. v. Caribou Teachers Assn. 76-15
Caribou Teachers Assn. v. Caribou School Dept. 76-22
Caribou Teachers Assn. v. Caribou School Dept. 77-34
Caribou Teachers Assn. v. Caribou School Comm. 79-44
Charles v. Waterville 78-19
Coulombe v. South Portland 86-11

East Millinocket Teachers Assn. v. East Millinocket School Comm. 79-24
Easton Teachers Assn. v. Easton School Comm. 79-14
Erskine Academy Teachers Assn. v. Erskine Academy Board of Trustees . . . 79-06

Fox Island Teachers Assn. v. MSAD #8 Board of Directors 81-28
Freeport Police Benefit Assn. v. Freeport 74-18

Galaska v. MSAD #47 79-63
Geroux v. Old Town 84-24
Geroux v. Old Town (Interim Order) 84-31
Geroux v. Old Town 84-31
Glover v. MSAD #68 Board of Directors & Foxcroft Academy Board 77-07
Gray-New Gloucester Teachers Assn. v. MSAD #15 Board of Directors 85-01
Greenville Teachers Assn. v. MSAD #2 Board of Directors 73-17

Holmes v. MSEA 80-52
Holmes v. Old Orchard Beach 82-14
Holmes v. Old Orchard Beach (Supplemental Decision & Order) 82-14

IAFF, Local 1599 v. Bangor 80-24
IAFF, Local 785 v. Lewiston 88-01
IAFF, Local 740 v. Portland 78-02
IAFF, Local 1601 v. Rumford Board of Selectmen 73-07
Ingerson v. Millinocket School Comm. 77-39
IBPO, Local 545 v. Lewiston 79-64
IBPO, Local 545 v. Lewiston 88-06

Kittery Employees Assn. v. Strahl 86-16
Kittery Employees Assn. v. Strahl 86-23
Kittery Teachers Assn. v. Kittery School Comm. 73-03
Kittery Teachers Assn. v. Kittery School Comm. 75-21

Lake Teachers Assn. v. Mount Vernon School Comm. 78-15
Lamiette v. Auburn (Executive Director Action) 83-25
Lewiston Eduational Directors Unit v. Lewiston (Prehearing Order) 85-03

Lewiston Educational Directors Unit v. Lewiston 85-03
Lewiston Firefighters Assn. v. Lewiston (Executive Director Action) . . . 85-20
Lewiston Teachers Assn. v. Lewiston Board of Education 73-11
Lewiston Teachers Assn. v. Lewiston School Comm. 80-45
Lewiston Teachers Assn. v. Lewiston School Comm. 83-08
Lewiston Teachers Assn. v. Lewiston School Comm. 86-04
Limestone v. AFSCME 82-25
Lisbon Education Assn. v. Lisbon School Comm. 80-19
Lombard v. AFSCME (Executive Director Action) 87-20
Lombard v. Dresser 87-03
Lord v. MSAD #41 Board of Directors 76-12
Lord v. MSAD #41 Board of Directors 76-17
Lord v. MSAD #41 Board of Directors 77-01
Lord v. MSAD #41 Board of Directors 77-02
Lord v. MSAD #41 Board of Directors (Default Judgment) 77-24
Lundrigan v. Personnel, State Dept. of 83-03

Maine, State of v. MSEA (Reclassification/Reallocation) (D & O on Remand) 81-56
Maine Teachers Assn. v. Saco School Comm. 84-10
Maine Teachers Assn. v. Sanford School Comm. . . . . 77-18, -19, -20 & -29
Maine Teachers Assn. v. Sanford School Comm. 81-55
Maine Teachers Assn./NEA v. State Board of Ed. 86-14
Maranacook Community Staff Assn. v. Harrison 79-49
Medway Teachers Assn. v. Medway School Comm. 80-10
MSAD #5 Federation of Teachers v. Sternberg 81-43
MSAD #6 Board of Directors v. Saco Valley Teachers Assn. 81-39
MSAD #22 Non-Teachers Assn. v. MSAD #22 Board of Directors 79-32
MSAD #22 Board of Directors v. Tri-22 Teachers Assn. 82-33
MSAD #23 Teachers Assn. v. MSAD #23 Board of Directors 73-04
MSAD #24 Board v. Van Buren Custodian/Bus Driver/Maintenance Assn. 79-16
MSAD #38 Board of Directors v. MSAD #38 Teachers Assn. 76-20
MSAD #43 Board of Directors v. MSAD #43 Teachers Assn. 74-24
MSAD #43 Board of Directors v. MSAD #43 Teachers Assn. 79-31
MSAD #43 Board of Directors v. MSAD #43 Teachers Assn. . . 79-36, -39, -45 & -47
MSAD #43 Board of Directors v. MSAD #43 Teachers Assn. (Remand) 79-36
MSAD #43 Teachers Assn. v. MSAD #43 Board of Directors 79-42
MSAD #44 Admin. Assn. v. MSAD #44 Board of Directors 77-27
MSAD #45 Teachers Assn. v. MSAD #45 Board of Directors 78-10
MSAD #45 v. MSAD #45 Teachers Assn. (Interim Order) 82-10
MSAD #45 v. MSAD #45 Teachers Assn. 82-10
MSAD #49 Teachers Assn. v. MSAD #49 Board of Directors 80-49
MSAD #52 v. AFSCME (MSAD #52 Unit) 80-18
MSAD #54 Education Assn. v. MSAD #54 Board of Directors 75-10
MSAD #54 Education Assn. v. MSAD #54 86-12
MSAD #61 Teachers Assn. v. MSAD #61 Board of Directors 76-09
MSAD #68 Teachers Assn. v. MSAD #68 Board of Directors 79-22
MSEA v. Bangor Mental Health Inst. & State of Maine (Direct Bargaining) . 84-01
MSEA v. Baxter State Park Authority (Default) 84-20
MSEA v. Baxter State Park Authority (Dismissals With Prejudice) 84-28
MSEA v. Development Office, State (Dual-Motive Discharge Case) 84-21
MSEA v. Human Services, Dept. of (Deferral) 88-07
MSEA v. Human Services, Dept. of (Rights of Bargaining Team Members) . . . 81-35
MSEA v. Inland Fisheries & Wildlife, Dept. of (Prescribed or Controlled) . 85-02
MSEA v. Judicial Dept. of the State of Me. (P.P.C. Procedure/

Judicial Act) . . . . . 88-02 & -04
MSEA v. Lewiston 83-14
MSEA v. State of Maine (Deferral Doctrine) 86-09
MSEA v. State of Maine (Election Objections) 77-37
MSEA v. State of Maine (Flier Case) 82-01
MSEA v. State of Maine (Non-Standard Work Week & "Garcia") 85-19
MSEA v. State of Maine (Note-Taking During Negotiations) 80-09
MSEA v. State of Maine (Pre-Election Period) 77-31
MSEA v. State of Maine (Reclassification/Reallocation) . . . . . 81-44 & -56
MSEA v. State of Maine (Retirement Negotiability) 84-17
MSEA v. State of Maine (Tracking Unit Benefits for Exempt Employees) . . . 81-06
MSEA v. State of Maine (Unilateral Change re: Reclassification Procedure) 84-19
MSEA v. State of Maine (Zipper Clause Case) 82-05
MSEA v. State of Maine & Alcoholic Beverages (Prescribed or Controlled) . 78-23
MSEA v. State and Bureau of Mental Retardation (Unilateral Change Rule) . 79-43
MSEA v. State of Maine and Dept. of Transportation (Interference, Restraint & Coercion) 81-34

Northern Aroostook Teachers Assn. v. MSAD #27 Board of Directors 81-52

Ohler v. MSAD #41 Board of Directors 76-10
Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Assn. (Me. Super. Ct., York Cty., CV-82-613; see Holmes v. Old Orchard Beach, 82-14) (Page 182)
Old Town v. AFSCME 75-25
O'Neil v. MSAD #64 Board of Directors 77-06
Oxford Hills Teachers Ass'n v. MSAD #17 Board of Directors 73-06

Palermo Teachers Assn. v. Palermo School Comm. 81-29
Pembroke Ed. Assn. v. Pembroke School Comm. 87-13
Portland v. IAFF, Local 740 76-21
Portland v. Portland Firefighters Assn. 85-10
Portland Firefighters Assn. v. Portland 83-01
Portland Police Benev. Assn. v. Portland 74-22
Portland Teachers Assn. v. Portland School Comm. 74-13
Portland Transit District v. Amalgamated Transit Union, Div. 714 77-32
Portland Transit District v. Amalgamated Transit Union, Div. 714 78-29
Prentiss v. Sandy River Education Assn. (Interim Order) 75-15
Prentiss v. Sandy River Education Assn. 75-15
Prescott v. MSEA 82-02
Pullen v. Winthrop 85-17

Quamphegan Teachers Assn. v. MSAD # 35 Board of Directors 73-05
Quintal v. Transportation, State of Maine, Dept of 87-A-06

Richards v. Veazie School Comm. (2nd Interim Decision; see Veazie, 75-01) 75-01
Richards v. Veazie School Comm. 75-01
Ritchie v. Hampden 83-15
Rosebush v. AFSCME (Executive Director Action) 88-14
Rosebush v. Bangor Water District (Executive Director Action) . . . 88-15 & -16
Ross v. Portland School Committee (Motion to Quash Subpoena) 83-04
Ross v. Portland School Committee 83-04
Rumford School Dept. v. Rumford Teachers Assn. 79-15

Sabattus Teachers Assn. v. Sabattus School Comm. 79-35
Saco Valley Teachers Assn. v. MSAD #6 Board of Directors 79-56

Saco Valley Teachers Assn. v. MSAD #6 Board of Directors 82-04
Saco Valley Teachers Assn. v. MSAD #6 Board of Directors . . . . . 85-07 & -09
Sanford Federation of Teachers v. Sanford School Comm. 84-13
Sanford Firefighters Assn. v. Sanford 83-07
Sanford Firefighters Assn. v. Sanford 84-12
Sanford Firefighters v. Sanford Fire Commission 79-62
Sanford Highway Unit v. Sanford 79-50
Sanford School Comm. v. Sanford School Custodian Unit 78-33
Sanford School Comm. v. Sanford Teachers Assn. 78-34
Sanford Teachers Assn. v. Sanford School Comm. 76-16
Sanford Teachers Assn. v. Sanford School Comm. 77-36
Sewall v. Portland Water District 86-17
Single v. Sanford 85-04
Single v. Sanford (Executive Director Action) 85-14
Slavick v. Associated Faculties of the U of Me. 85-16
Southern Aroostook CSC v. Southern Aroostook Teachers Assn. (Interim Dec.) 75-05
Southern Aroostook CSC v. Southern Aroostook Teachers Assn 75-05
Southern Aroostook Teachers Assn. v. Southern Aroostook CSC . . . . 80-35 & -40
South Portland Mun. Employees Assn. v. South Portland 73-15

Teamsters v. Auburn (Interim Order) 79-41
Teamsters v. Auburn 79-41
Teamsters v. Augusta Board of Education 78-04
Teamsters v. Baker Bus Service (Consent Decree) 79-57
Teamsters v. Baker Bus Service 79-70
Teamsters v. Baker Bus Service (Compliance Order) 79-70
Teamsters v. Bangor (Interim Order) 79-29
Teamsters v. Bangor 79-29
Teamsters v. Bangor 80-46
Teamsters v. Bar Harbor 81-01
Teamsters v. Bar Harbor 82-35
Teamsters v. Biddeford Police Dept. 78-31
Teamsters v. Boothbay/Boothbay Harbor Community School District 86-02
Teamsters v. Bucksport School Dept. 81-18
Teamsters v. Calais 80-29
Teamsters v. Dixfield 80-42
Teamsters v. Eastport School Dept. 85-18
Teamsters v. Ellsworth 78-03
Teamsters v. Ellsworth 81-17
Teamsters v. Fairfield 79-01
Teamsters v. Falmouth . . . . . 79-10 & -18
Teamsters v. Fort Fairfield 86-01
Teamsters v. Jay . . . . . 79-19 & -11
Teamsters v. Jay 80-02
Teamsters v. Jay 80-08
Teamsters v. Kennebunk 80-30
Teamsters v. Kittery 84-25
Teamsters v. Lewiston-Auburn Water Pollution Control Authority . . 79-65 & 80-07
Teamsters v. Livermore Falls 80-22
Teamsters v. Machias 79-51
Teamsters v. Millinocket (Interim Order) 79-40
Teamsters v. Millinocket 79-40
Teamsters v. Oakland 78-22
Teamsters v. Oakland 78-30

Teamsters v. Oakland 79-67
Teamsters v. Rockland City Council 77-16
Teamsters v. Rumford/Mexico Sewerage District 84-08
Teamsters v. South Portland 86-05
Teamsters v. University of Maine . . . . . 78-16 & -20
Teamsters v. University of Maine 79-08
Teamsters v. University of Maine 79-37
Teamsters v. University of Maine 80-06
Teamsters v. Waterville 78-28
Teamsters v. Waterville 80-14
Teamsters v. Waterville 80-33
Teamsters v. Waterville (Executive Director Action) 81-02
Teamsters v. Waterville 81-40
Teamsters v. Wells 84-29
Teamsters v. Winthrop 84-06
Trafton v. Gardiner Water District Board of Trustees 74-10
Tri-22 Teachers Assn. v. MSAD #22 Board of Directors 75-28

Union #37 Teachers Assn. v. Richards 79-71
Union River Valley Teachers Assn. v. Trenton School Comm. . . . . 80-28 & -32
Upper Kennebec Valley Teachers Assn. v. MSAD #13 Board 75-36

Van Buren Education Assn. v. MSAD #24 Board of Directors 76-08
Veazie Teachers Assn. v. Veazie School Comm. (1st Interim Decision;
(see Richards, 75-01) 75-01

Washburn Teachers Assn. v. Barnes 83-21
Washburn Teachers Assn. v. Barnes (Executive Director Action) 84-09
Waterville Teachers Assn. v. Waterville Board of Ed. 75-22
Waterville Teachers Assn. v. Waterville Board of Ed. (Interim Order) . . . 79-12
Waterville Teachers Assn. v. Waterville Board of Ed. 79-12
Waterville Teachers Assn. v. Waterville Board of Ed. 82-11
Waterville Teachers Assn. v. White 81-23
Westbrook v. AFSCME 81-50
Westbrook Police Unit v. Westbrook 78-25
Westbrook Prof. Firefighters Assn. v. Westbrook 75-26
Westbrook Teachers Assn. v. Westbrook School Comm. 74-17
Whitzell v. Merrymeeting Educators' Assn. 80-15
Windham School Comm. v. Windham Educators Assn. . . . . 87-14 & -15
Windsor Teachers Assn. v. Windsor School Comm. 74-08
Winslow Education Assn. v. Winslow School Comm. 75-03
Winslow Education Assn. v. Winslow School Comm. 75-29
Winslow Education Assn. v. Winslow Super. School Comm. 74-16
Winthrop Educators Assn. v. Winthrop School Comm. 80-05
Woodward v. Yarmouth 83-16
Woolwich School Comm. v. Woolwich Teachers Assn. 80-55

Alphabetical Listing of Cases by Respondent

AFSCME (& Biddeford); Arbour v. 80-36
AFSCME; Limestone v. 82-25
AFSCME; Lombard v. (Executive Director Action) 87-20
AFSCME (MSAD #52 Unit); MSAD #52 v. 80-18
AFSCME; Old Town v. 75-25
AFSCME; Rosebush v. 88-14
AFSCME; Westbrook v. 81-50
Alcoholic Beverages, Dept. of (& State of Maine); MSEA v. (Prescribed or Controlled) 78-23
Amalgamated Transit Union, Div. 714; Portland Transit District v. 77-32
Amalgamated Transit Union, Div. 714; Portland Transit District v. 78-29
Arundel School Comm.; Arundel Teachers Assn. v. 73-08
Associated Faculties of the U of Me.; Slavick v. (Executive Director Order) 85-16
Assn. of Independent Professionals; Associated Faculties of the U of Me. v. 81-22
Assn. of Independent Professionals; Associated Faculties of the U of Me. v. (Decision & Order on Remand) 81-22
Auburn; Lamiette v. (Executive Director Action) 83-25
Auburn; Teamsters v. (Interim Order) 79-41
Auburn; Teamsters v. 79-41
Auburn School Comm.; Auburn Teachers Assn. v. 88-12
Augusta; AFSCME v. 73-01
Augusta; AFSCME v. 77-33
Augusta; Augusta Firefighters Assn. v. 75-16
Augusta Board of Education; Teamsters v. 78-04
Augusta City Council; AFSCME v. . . . . 74-09 & -14
Augusta City Manager; AFSCME v. 73-09

Baker Bus Service; Teamsters v. (Consent Decree) 79-57
Baker Bus Service; Teamsters v. 79-70
Baker Bus Service; Teamsters v. (Compliance Order) 79-70
Bangor; AFSCME v. 80-41
Bangor; AFSCME v. 80-50
Bangor; Bangor Firefighters Assn. v. 84-15
Bangor; IAFF, Local 1599 v. 80-24
Bangor; Teamsters v. (Interim Order) 79-29
Bangor; Teamsters v. 79-29
Bangor; Teamsters v. 80-46
Bangor City Council; AFSCME v. 75-13
Bangor Firefighters Assn.; Bangor v. 83-06
Bangor Mental Health Inst. (& State of Maine); MSEA v. (Direct Bargaining) 84-01
Bangor School Comm.; Bangor Education Assn. v. 73-12
Bangor School Comm.; Bangor Education Assn. v. 76-11
Bangor School Comm.; Bangor Education Assn. v. 83-11
Bangor Water District; AFSCME v. 80-26
Bangor Water District; AFSCME v. 81-15
Bangor Water District; AFSCME v. 81-46
Bangor Water District; AFSCME v. (Executive Director Action) . . . . 88-15 & -16
Bar Harbor; Teamsters v. 81-01
Bar Harbor; Teamsters v. 82-35

Barnes; Washburn Teachers Assn. v. 83-21
Barnes; Washburn Teachers Assn. v. (Executive Director Action) 84-09
Bath; AFSCME v. 81-09
Bath; Bath Firefighters Assn. v. 80-44
Bath Board of Education; AFSCME v. 86-21
Baxter State Park Authority; MSEA v. (Default) 84-20
Baxter State Park Authority; MSEA v. (Dismissals with Prejudice)
(Interim Order) 84-28
Biddeford; AFSCME v. 75-33
Biddeford (& AFSCME); Arbour v. 80-36
Biddeford Board of Ed.; Biddeford Teachers Assn. v. 74-12
Biddeford Mayor; AFSCME v. 74-03
Biddeford Police Dept.; Teamsters v. 78-31
Biddeford School Comm.; Biddeford Support Staff Assn. v. 81-47
Boothbay School Comm.; Boothbay Region Teachers Assn. v. . . . 74-04, -05 & -06
Boothbay/Boothbay Harbor Community School District; Teamsters v. 86-02
Brewer Ed. Assn. of Non-Teaching Personnel; Brewer School Comm. v. 81-36
Brunswick; AFSCME v. 85-08
Brunswick School Board; Brunswick Teachers Assn. v. 82-28
Brunswick Teachers Assn.; Brunswick School Board v. 75-19
Bucksport School Dept.; Teamsters v. 81-18

Calais; Teamsters v. 80-29
Cape Elizabeth School Board; Cape Elizabeth Teachers Association v. . . . 75-24
Cape Elizabeth Teachers Assn.; Cape Elizabeth School Board v. 79-68
Caribou School Comm.; Caribou Teachers Assn. v. 79-44
Caribou School Dept.; Caribou Teachers Assn. v. 76-22
Caribou School Dept.; Caribou Teachers Assn. v. 77-34
Caribou Teachers Assn.; Caribou Board of Education v. 74-01
Caribou Teachers Assn.; Caribou School Dept. v. 76-15
Cumberland County Commissioners; AFSCME v. 83-09

Development Office, State; MSEA v. (Dual-Motive Discharge Case) 84-21
Dixfield; Teamsters v. 80-42
Dresser; Lombard v. 87-03

East Millinocket School Comm.; East Millinocket Teachers Assn. v. 79-24
Easton School Comm.; Easton Teachers Assn. v. 79-14
Eastport School Department; Teamsters v. 85-18
Ellsworth; Teamsters v. 78-03
Ellsworth; Teamsters v. 81-17
Ellsworth School Comm.; AFSCME v. 81-41
Erskine Academy Board of Trustees; Erskine Academy Teachers Assn. v. . . . 79-06

Fairfield; Teamsters v. 79-01
Falmouth; Teamsters v. . . . . 79-10 & -18
Fort Fairfield; Teamsters v. 86-01
Foxcroft Academy Board (& MSAD #68 Board of Directors); Glover v. 77-07
Freeport; Freeport Police Benefit Assn. v. 74-18

Gardiner Water District; AFSCME v. 75-11
Gardiner Water District Board of Trustees; Trafton v. 74-10

Hamill; Bridgton Federation of Public Employees v. 81-54
Hampden; Ritchie v. 83-15

Harrison; Maranacook Community School Staff Assn. v. 79-49
Human Services, Maine Dept. of; MSEA v. (Deferral) 88-07
Human Services, Dept. of; MSEA v. (Rights of Bargaining Team Members) . . 81-35

Inland Fisheries & Wildlife, Maine Dept. of; MSEA v. (Prescribed or Controlled) 85-02
IAFF, Local 740; Portland v. 76-21

Jay; Teamsters v. . . . . 79-19 & -11
Jay; Teamsters v. 80-02
Jay; Teamsters v. 80-08
Jay Selectmen; AFSCME v. 74-02
Judicial Dept. of the State of Me.; MSEA v. (P.P.C. Procedure/Judicial Act) (Executive Director Action) . . . . . 88-02 & -04

Kennebunk; Teamsters v. 80-30
Kittery; Teamsters v. 84-25
Kittery School Comm.; Kittery Teachers Assn. v. 73-03
Kittery School Comm.; Kittery Teachers Assn. v. 75-21

Lewiston; IAFF, Local 785 v. (Prehearing Conference Order) 88-01
Lewiston; IBPO, Local 545 v. 79-64
Lewiston; IBPO, Local 545 v. 88-06
Lewiston; Lewiston Educational Directors Unit v. (Prehearing Order) . . . 85-03
Lewiston; Lewiston Educational Directors Unit v. 85-03
Lewiston; Lewiston Firefighters Assn. v. (Executive Director's Order) . . 85-20
Lewiston; MSEA v. 83-14
Lewiston-Auburn Water Pollution Control Authority; Teamsters v. . 79-65 & 80-07
Lewiston Board of Ed.; Lewiston Teachers Assn. v. 73-11
Lewiston School Comm.; Lewiston Teachers Assn. v. 80-45
Lewiston School Comm.; Lewiston Teachers Assn. v. 83-08
Lewiston School Comm.; Lewiston Teachers Assn. v. 86-04
Lisbon School Comm.; Lisbon Education Assn. v. 80-19
Livermore Falls; Teamsters v. 80-22

Machais; Teamsters v. 79-51
Maine, Judicial Dept. of the State of; MSEA v. (Deferral) (Executive Director Action) . . . . . 88-02 & -04
Maine, State of; AFSCME v. 78-01
Maine, State of; AFSCME v. 83-24
Maine, State of; MSEA v. (Deferral Doctrine) (Interim Order) 86-09
Maine, State of; MSEA v. (Election Objections) 77-37
Maine, State of; MSEA v. (Flier Case) 82-01
Maine, State of; MSEA v. (Non-Standard Work Week & "Garcia") 85-19
Maine, State of; MSEA v. (Note-Taking During Negotiations) 80-09
Maine, State of; MSEA v. (Pre-Election Period) 77-31
Maine, State of; MSEA v. (Reclassification/Reallocation) . . . . . 81-44 & -56
Maine, State of; MSEA v. (Retirement Negotiability) 84-17
Maine, State of; MSEA v. (Tracking Unit Benefits for Exempt Employees) . . 81-06
Maine, State of; MSEA v. (Unilateral Change re: Reclassification Procedure) 84-19
Maine, State of; MSEA v. (Zipper Clause Case) 82-05
Maine, State of (& Alcoholic Beverages); MSEA v. (Prescribed or Controlled) 78-23

Maine, State of (& Bangor Mental Health Inst.); MSEA v. (Direct Bargaining) 84-01
Maine, State of (& Mental Retardation); MSEA v. (Unilateral Change Rule) . 79-43
Maine, State of (Dept. of Personnel); Lundrigan v. 83-03
Maine, State of (Dept. of Transportation); MSEA v. (Interference, Restraint & Coercion) 81-34
Maine, State of (Dept. of Transportation); Quintal v. 87-A-06
Maine, University of (see University of Maine)
Maynard; AFSCME v. . . . . 86-22, -25 & 86-A-03
Medway School Comm.; Medway Teachers Assn. v. 80-10
Mental Retardation, Bureau of (& State of Maine); MSEA v. (Unilateral Change Rule) 79-43
Merrymeeting Educators' Assn.; Whitzell v. 80-15
Millinocket; AFSCME v. 80-13
Millinocket; Teamsters v. (Interim Order) 79-40
Millinocket; Teamsters v. 79-40
Millinocket School Comm.; Ingerson v. 77-39
Morrison; Auburn Firefighters Assn. v. (Interim Order) 83-10
Morrison; Auburn Firefighters Assn. v. 83-10
Mount Vernon School Comm.; Lake Teachers Assn. v. 78-15
MSAD #1; AFSCME v. 80-04
MSAD #1; AFSCME v. 81-12
MSAD #2 Board of Directors; Greenville Teachers Assn. v. 73-17
MSAD #6 Board of Directors; Saco Valley Teachers Assn. v. 79-56
MSAD #6 Board of Directors; Saco Valley Teachers Assn. v. 82-04
MSAD #6 Board of Directors; Saco Valley Teachers Assn. v. . . . . 85-07 & -09
MSAD #8 Board of Directors; Fox Island Teachers Assn. v. 81-28
MSAD #13 Board; Upper Kennebec Valley Teachers Assn. v. 75-36
MSAD #15 Board of Directors; Gray-New Gloucester Teachers Assn. v. 85-01
MSAD #17 Board of Directors; Oxford Hills Teachers Assn. v. 73-06
MSAD #22 Board of Directors; MSAD #22 Non-Teachers Assn. v. 79-32
MSAD #22 Board of Directors; Tri-22 Teachers Assn. v. 75-28
MSAD #23 Board of Directors; MSAD #23 Teachers Assn. v. 73-04
MSAD #24 Board of Directors; Van Buren Education Assn. v. 76-08
MSAD #27 Board of Directors; Northern Aroostook Teachers Assn. v. 81-52
MSAD #34 Board of Directors; AFSCME v. 82-24
MSAD #35 Board of Directors; Quamphegan Teachers Assn. v. 73-05
MSAD #38 Teachers Assn.; MSAD #38 Board of Directors v. 76-20
MSAD #41 Board of Directors; Lord v. 76-12
MSAD #41 Board of Directors; Lord v. (Consent Decree) 76-17
MSAD #41 Board of Directors; Lord v. 77-01
MSAD #41 Board of Directors; Lord v. 77-02
MSAD #41 Board of Directors; Lord v. (Default Judgment) 77-24
MSAD #41 Board of Directors; Ohler v. 76-10
MSAD #43 Teachers Assn.; MSAD #43 Board of Directors v. 74-24
MSAD #43 Teachers Assn.; MSAD #43 Board of Directors v. 79-31
MSAD #43 Teachers Assn.; MSAD #43 Board of Directors v. . 79-36, -39, -45 & -47
MSAD #43 Teachers Assn.; MSAD #43 Board of Directors v. (Remand) 79-36
MSAD #43 Board of Directors; MSAD #43 Teachers Assn. v. 79-42
MSAD #44 Board of Directors; MSAD #44 Admin. Assn. v. 77-27
MSAD #45 Board of Directors; MSAD #45 Teachers Assn. v. 78-10
MSAD #45 Teachers Assn.; MSAD #45 v. (Interim Order) 82-10
MSAD #45 Teachers Assn.; MSAD #45 v. 82-10
MSAD #47; Galaska v. 79-63

MSAD #49 Board of Directors; MSAD #49 Teachers Assn. v. 80-49
MSAD #54; MSAD #54 Education Assn. v. 86-12
MSAD #54 Board of Directors; MSAD #54 Education Assn. v. 75-10
MSAD #61 Board of Directors; MSAD #61 Teachers Assn. v. 76-09
MSAD #64 Board of Directors; O'Neil v. 77-06
MSAD #68 Board of Directors; MSAD #68 Teachers Assn. v. 79-22
MSAD #68 Board of Directors (& Foxcroft Academy Board); Glover v. 77-07
MSEA; Abbott v. 81-51
MSEA; Holmes v. 80-52
MSEA; Maine, State of v. (Decision & Order on Remand) 81-56
MSEA; Prescott v. (Executive Director Action) 82-02

Oakland; Teamsters v. 78-22
Oakland; Teamsters v. 78-30
Oakland; Teamsters v. 79-67
Old Orchard Beach; Holmes v. 82-14
Old Orchard Beach; Holmes v. (Supplemental Order) 82-14
Old Orchard Beach Police Patrolmen's Assn.; Old Orchard Beach v. (Me. Super. Ct., York Cty., CV 82-613; see Holmes v. Old Orchard Beach, 82-14) . . .
Old Town; Geroux v. 84-24
Old Town; Geroux v. (Interim Order) 84-31
Old Town; Geroux v. 84-31
Old Town City Council; AFSCME v. . . . . 75-12 & -27

Palermo School Comm.; Palermo Teachers Assn. v. 81-29
Pembroke School Comm.; Pembroke Education Assn. v. 87-13
Personnel, State Dept. of; Lundrigan v. 83-03
Portland; IAFF, Local 740 v. 78-02
Portland; Portland Firefighters Assn. v. 83-01
Portland; Portland Police Benev. Assn. v. 74-22
Portland Firefighters Assn.; Portland v. 85-10
Portland School Comm.; Portland Teachers Assn. v. 74-13
Portland School Comm.; Ross v. (Order on Motion to Quash Subpoena) 83-04
Portland School Comm.; Ross v. 83-04
Portland Water District; Sewall v. 86-17

Richards; Union #37 Teachers Assn. v. 79-71
Richardson; AFSCME v. 83-22
Richardson; AFSCME v. 84-04
Rockland City Council; Teamsters v. 77-16
Rumford Board of Selectmen; IAFF, Local 1601 v. 73-07
Rumford/Mexico Sewerage District; Teamsters v. 84-08
Rumford Teachers Assn.; Rumford School Dept. v. 79-15

Sabattus School Comm.; Sabattus Teachers Assn. v. 79-35
Saco School Comm.; Maine Teachers Assn. v. 84-10
Saco Valley Teachers Assn.; MSAD #6 Board of Direcors v. 81-39
Sandy River Education Assn.; Prentiss v. (Interim Order) 75-15
Sandy River Education Assn.; Prentiss v. 75-15
Sanford; Sanford Firefighters Assn. v. 83-07
Sanford; Sanford Firefighters Assn. v. 84-12
Sanford; Sanford Highway Unit v. 79-50
Sanford; Single v. 85-04
Sanford; Single v. 85-14

Sanford Fire Commission; Sanford Firefighters v. 79-62
Sanford School Comm.; Maine Teachers Assn. v. . . . . 77-18, -19, -20 & -29
Sanford School Comm.; Maine Teachers Assn. v. 81-55
Sanford School Comm.; Sanford Federation of Teachers v. 84-13
Sanford School Comm.; Sanford Teachers Assn. v. 76-16
Sanford School Comm.; Sanford Teachers Assn. v. 77-36
Sanford School Custodian Unit; Sanford School Comm. v. 78-33
Sanford Teachers Assn.; Sanford School Comm. v. 78-34
Southern Aroostook CSC; Southern Aroostook Teachers Assn. v. . . . . 80-35 & -40
Southern Aroostook Teachers Assn.; Southern Aroostook CSC v.
(Interim Dec.) 75-05
Southern Aroostook Teachers Assn.; Southern Aroostook CSC v. 75-05
South Portland; Coulombe v. 86-11
South Portland; South Portland Mun. Employees Assn. v. 73-15
South Portland; Teamsters v. 86-05
South Portland City Council; AFSCME v. . . . . 73-13 & -14
State Board of Education; Maine Teachers Assn./NEA v. 86-14
State Development Office; MSEA v. (Dual-Motive Discharge Case) 84-21
State of Maine (see Maine, State of)
Sternberg; MSAD #5 Federation of Teachers v. 81-43
Strahl; Kittery Employees Assn. v. 86-16
Strahl; Kittery Employees Assn. v. 86-23

Transportation, State of Maine, Dept. of; MSEA v. (Interference, Restraint
& Coercion) 81-34
Transportation, State of Maine, Dept. of; Quintal v. 87-A-06
Trenton School Comm.; Union River Valley Teachers Assn. v. . . . . 80-28 & -32
Tri-22 Teachers Assn.; MSAD #22 Board of Directors v. 82-33

University of Maine; Associated Faculties of the U of Me. v. 79-55
University of Maine; Associated Faculties of the U of Me. v. . 82-15, -16 & -22
University of Maine; Teamsters v. . . . . 78-16 & -20
University of Maine; Teamsters v. 79-08
University of Maine; Teamsters v. 79-37
University of Maine; Teamsters v. 80-06

Valente; Auburn Firefighters Assn. v. 87-19
Van Buren Custodian/Bus Driver/Maintenance Assn.; MSAD #24 Board v. . . . 79-16
Veazie School Comm.; Richards v. (2nd Interim Decision) 75-01
Veazie School Comm.; Richards v. 75-01
Veazie School Comm.; Veazie Teachers Assn. v. (1st Interim Decision) . . . 75-01

Washburn Teachers Assn.; Bradbury v. 82-08
Waterville; Charles v. 78-19
Waterville; Teamsters v. 78-28
Waterville; Teamsters v. 80-14
Waterville; Teamsters v. 80-33
Waterville; Teamsters v. (Executive Director Action) 81-02
Waterville; Teamsters v. 81-40
Waterville Board of Ed.; Waterville Teachers Assn. v. 75-22
Waterville Board of Ed.; Waterville Teachers Assn. v. (Interim Order) . . 79-12
Waterville Board of Ed.; Waterville Teachers Assn. v. 79-12
Waterville Board of Ed.; Waterville Teachers Assn. v. 82-11
Wells; Teamsters v. 84-29

Westbrook; AFSCME v. 81-53
Westbrook; Westbrook Police Unit v. 78-25
Westbrook; Westbrook Professional Firefighters Assn. v. 75-26
Westbrook School Comm.; Westbrook Teachers Assn. v. 74-17
White; Waterville Teachers Assn. v. 81-23
Windham Educators Assn.; Windham School Comm. v. . . . . 87-14 & -15
Windsor School Comm.; Windsor Teachers Assn. v. 74-08
Winslow School Comm.; Winslow Education Assn. v. 75-03
Winslow School Comm.; Winslow Education Assn. v. 75-29
Winslow Super. School Comm.; Winslow Education Assn. v. 74-16
Winthrop; Pullen v. 85-17
Winthrop; Teamsters v. 84-06
Winthrop School Comm.; Winthrop Educators Assn. v. 80-05
Woolwich Teachers Assn.; Woolwich School Comm. v. 80-55

Yarmouth; Woodward v. 83-16

Pine Tree Council 74, AFSCME v. City of Augusta, PELRB No. 73-01 (Feb. 7, 1973), Aff'd City Council of Augusta v. Pine Tree Council #74, AFSCME, No. 1583-73 (Me.Super.Ct., Ken.Cty., July 11, 1973)

I § 967(2): Certified bargaining agent which has not concluded a collective bargaining agreement is not automatically decertified, after one year.

32.95

II § 965(1)(D): Where the public employer reached final agreement and did not reject the same in the ratification process, the Board ordered the employer to sign and implement said agreement.

07.151 72.571
46.52 72.572
46.55 74.32

III § 967(2): A public employer may not start the decertification process. This may only be done by petition of a public employee, who is a member of the appropriate bargaining unit and within the appropriate time sequence.

11.7
37.16

IV § 967(2): The "window period," during the course of a collective bargaining agreement when a petition to decertify the bargaining agent would be appropriate, shall be not more than 90 days nor less than 60 days prior to the expiration of the agreement.

32.141
37.13

V REMEDY: Without showing that requests of proper dues deduction authorization were made, there is no showing of prejudice or undue financial deprivation to union; therefore, Board will not order employer to make bargaining agent whole for dues not collected.

24.132
24.151

VI REMEDY: An employee petition for decertification was dismissed because, but for the employer's unlawful refusal to execute the collective bargaining agreement, said agreement would have been in force and the employee's petition would have been untimely.

35.61
37.3

Kittery Teachers Ass'n v. Kittery School Committee, PELRB No. 73-03 (Mar. 15, 1973)

I § 965(1)(C): The statutory duty to negotiate over the mandatory subjects of bargaining prohibits employers from making unilateral changes in such subjects, even if such changes are beneficial to unit employees. Such changes plainly frustrate the statutory objective of establishing working conditions through collective bargaining.

72.6
72.616

II § 965(1)(C): School Committee violated duty to bargain in good faith when, while negotiations for a successor contract were being conducted after the expiration of the prior contract, it unilaterally rolled back the wages of teachers with greater than 11 years to precontract levels without malice or subjective bad faith.

43.11 72.63
43.111
43.120

III § 968(5)(C): REMEDIES: As a remedy for an unlawful unilateral change, reducing the wages of bargaining unit employees, the Board ordered the employer to reinstate the former salary schedule and to make the employees whole for wages lost as a result of the unlawful change, together with interest on the amount of back-pay due, starting to run 10 days after the date of the order.

74.32 74.345
74.34
74.341

M.S.A.D. #23 Teachers Ass'n v. M.S.A.D. #23 Board of Directors, PELRB No. 73-04 (Mar. 15, 1973)

I §§ 961 & 965(1)(C): The statutory goal of improving the relationship between public employees and their employers by determining terms and conditions of employment through collective bargaining is fostered through negotiating parties' agreement to ground rules for their collective negotiations. Such ground rules provide a sound basis upon which parties effectively and efficiently conduct their negotiations.

41.3
41.31

II § 965(1)(C): A party's insistence on adhering to the negotiated ground rules concerning the composition of the other party's bargaining team does not constitute a failure to bargain in good faith.

09.671 41.21 72.11
09.673 41.3 72.590
41.2 41.31

Quamphegan Teachers Ass'n v. Board of Directors, S.A.D. No. 35, PELRB No. 73-05 (Apr. 20, 1973)

I § 968(5): The Board is not divested of jurisdiction by a claim that the case should be settled through the statutory impasse resolution procedures especially where, as here, the request for the intervention of fact-finders was not made until after the filing of the prohibited practices complaint.

01.1 47.54
01.28 71.513
09.63 71.8

II § 965(1)(C): It is a per se violation of the duty to bargain in good faith for a party to insist on public negotiations sessions. Looking to Massachusetts, Connecticut and Wisconsin public sector bargaining cases, the Board noted that bargaining in public, or presence of the media, or use of a stenographer or recording device during bargaining have the inherent result of shifting the emphasis of negotiators away from reaching agreement to making a record for their constituents and the public.

07.5 42.21 72.533
07.51 42.47 72.54
07.512 72.5

III § 965(1)(C): The Freedom of Access Law, 1 MRSA § 404, contemplates that public employers may conduct collective negotiations in executive session, away from the public and the media, so long as the public employer votes to go into executive session and that no final action is taken in executive session. [Final ratification of the negotiated agreement by the employer must, therefore, occur in public session.] It is a per se violation of the duty to bargain in good faith for the public employer to refuse to conduct negotiations in executive session.

03.4 07.52 42.44
07.5 07.521 72.5
07.51 07.54

IV Rule 4.03(3): The complainant's failure to include a copy of the parties' current collective bargaining agreement with its complaint did not require dismissal of the complaint because

both parties, obviously, were aware of the agreement's provisions and none of said provisions were involved in the matter in controversy.

06.3 71.222
71.1
71.11

Oxford Hills Teachers Ass'n v. Board of Directors of M.S.A.D. #17, PELRB No. 73-06 (Apr. 20, 1973)

I § 965(1)(C): During the term of a collective bargaining agreement, the employer unilaterally imposed a ban on smoking during the school day for all employees. Despite receiving a demand to negotiate thereon, the employer refused to bargain and to rescind the smoking ban. A smoking ban applied to teachers on school premises or in classrooms is a matter of educational policy and is not subject to mandatory bargaining; however, in areas from which student access is restricted and are not normally visited by or visible to students, regulation of employee smoking is a term and condition of employment.

42.1 43.476
42.2 43.61
43.144 72.589

II § 965(1)(C): When a unilateral change is alleged to be in a matter of educational policy and, hence, not unlawful, the Board must hear and decide the negotiability status of the area at issue.

01.26
42.4

III § 965(1)(B): Although the zipper clause in the parties' collective bargaining agreement stated that: (1) the agreement represented the full agreement between the parties and it could only be modified by mutual, written consent and (2) the employer reserved the right to establish all terms and conditions of employment not provided for in the parties' collective agreement, the Board held that the employer could not lawfully unilaterally establish a new term or condition of employment mid-term, since said new working condition was not covered in the collective agreement nor was it bargained during pre-agreement negotiations.

09.641 72.511 72.665
09.642 72.651
43.78 72.664

IV § 965(1)(C): An employer's discussion of a proposed change in a mandatory subject with individual unit employees and without notice of said change being given to the certified bargaining agent does not satisfy the employer's statutory duty to negotiate over said change with the certified bargaining agent.

72.55

Local 1601, IAFF v. Rumford Board of Selectmen, PELRB No. 73-07 (Aug. 30, 1973)

I § 968(6): The Board granted a request at hearing for a subpoena, directing that transcripts of Board of Selectmen meetings be made and delivered to both parties and to the Board. Costs of preparing the transcripts were ordered to be shared by the parties. The hearing was continued until the transcripts could be prepared and distributed.

71.212 71.515
71.4
71.51

II § 968(6): Upon receipt of the transcripts of Board of Selectmen meetings and the discovery of new evidence therein, the Board permitted the complainant to amend its complaint, based on such new evidence.

71.11
71.15
71.223

III § 968(6): Although the allegations only concern conduct performed in their official capacities, individuals named as respondents in prohibited practice complaints may be represented by their own separate counsel in proceedings before the Board.

71.14
71.511

IV § 965(1)(C): In considering an allegation of failure to negotiate in good faith, the Board concluded that the charged party had not violated its statutory duty because it had: made proposals and counterproposals, made concessions, met several times for bargaining, and participated in impasse resolution procedures. Negative statements by employer representatives who are not involved in bargaining, while undermining public trust, did not amount to violation of the duty to bargain.

09.12 72.535
72.53 72.537
72.532 72.538

V §§ 965(1)(D)&(C) & 968(5)(C): The parties had reached agreement; however, the agreement was not reduced to writing and signed by the parties because the bargaining agent did not believe that the employer's duly authorized bargaining representative, the Public Service Commission, had authority and capability to implement the agreed-to pension plan. The Board ordered the parties to reduce their agreement to writing and to execute the same within 30 days of the date of the Board's order. Should the employer then fail to implement the agreement, the union may bring an action to enforce the same.

07.27 46.31
07.28 46.55
41.22

VI § 965(1)(C): Even though the parties' expired agreement was silent thereon, the established past practice had been for off-duty firefighters to be compensated, if they were called in to help fight fires. Since such compensation constitutes a working condition, the employer's unilateral discontinuance thereof violated the statutory duty to bargain. The prohibition against unlawful unilateral changes embodied in the statutory duty to bargain may be violated, even in the absence of subjective bad faith. As a remedy for this violation, the Board ordered the employer to reinstitute the past practice, unless or until any change therein is negotiated with the bargaining agent.

09.641 43.641 72.63 74.32
43.1 72.511 72.64
43.11 72.612 72.642

VII § 965(1)(C): A residency requirement for public employees is a condition of employment; therefore, such a requirement can only be established or altered through collective bargaining. Here, the change, from requiring employees to live within 10 miles of the town hall to requiring them to maintain a legal residence in the town but exempting current employees therefrom, was, because of the "grandfather clause," held not to constitute an unlawful unilateral change.

43.212

VIII § 968(5)(C): In addition to requiring the employer to reinstate the status quo ante in connection with payment of call-back pay to the unit employees and to ordering the parties to reduce their agreement to writing and to execute the same within 30 days of the date of the Board's order, the Board ordered the parties to notify the Board in writing, within 30 days of the date of its decision, of the steps taken in compliance with said decision and order.

74.16
74.20
74.32

Arundel Teachers Ass'n v. Arundel School Committee, PELRB No. 73-08 (May 22, 1973)

I § 968(6): If new and unexpected evidence surfaces at the hearing before the Board, the Board may allow the complainant to amend its complaint to charge additional violations based on

said new evidence. In that case, the respondent may be allowed reasonable time, including a continuance if necessary, to conduct research and defend against the new charges.

71.15
71.5
71.515

II § 965(1)(C): Unless they represent otherwise to the other party, negotiators merely act as agents for their principal parties and such principals are not bound by the agreement tentatively reached at the table until they have ratified the same.

07.14 09.22 46.5 72.530
09.1 41.2 46.51 72.57
09.114 41.22 46.52

III § 965(1)(E): The duty to bargain in good faith includes the obligation to participate in good faith in the statutory impasse resolution procedures. Both parties violated the duty to engage in good faith fact finding by: (1) attempting to cancel the scheduled hearing unilaterally, (2) their "on-again-off-again" attitude to tentatively arranged hearing dates, and (3) the manner in which the fact finding hearing was shuffled from one process to another.

07.16 53.31 72.75
53.21 55.3 73.55
53.24 55.34

IV § 968(5)(C): Since both parties failed to participate in fact finding in good faith, the Board ordered them to negotiate a successor collective bargaining agreement for the next school year within 10 days of the date of the Board's order and, if such agreement was not reached within 10 days, to each select their own "partisan" arbitrator and the two individuals thus selected were to pick a third, neutral, arbitrator who would chair the arbitration panel to settle the parties' outstanding differences.

51.31 55.61 74.40
53.31 72.75
53.81 73.55

Pine Tree Council 74, AFSCME v. City Manager of Augusta, PELRB No. 73-09 (July 23, 1973)

I § 964(1)(A): The employer cannot legally interfere with the organizational activities of its employees during their non-working time, unless said activities interfere with production or discipline.

72.1 72.113
72.11 72.116
72.111 72.117

II § 964(1)(A): The employer allegedly had a broad rule excluding all non-employees from its premises; however, said rule was not posted, was not a matter of common knowledge, and had never been previously enforced against union representatives, vending machine servicemen, or deliverymen. In the circumstances, the Board held that, if the employer had a no-solicitation rule, it was discriminatorily enforced against a union representative and tended to interfere with the employees' free exercise of rights protected by the Act.

72.111 72.117
72.113
72.116

III § 964(1)(C): The established past practice had been to allow union representatives access to unit employees during the latter's non-working time. Since the Board held that such access was a mandatory subject, the employer could not change the same unilaterally without first negotiating any such change with the bargaining agent. In such negotiations, the legitimate needs of both the union (for access to service its members) and of the employer (to discourage theft and to insure the safety of the premises) should be considered in drafting reasonable limitations on access. The Board ordered the parties to negotiate such rules and, if the negotiations were unsuccessful, to submit the matter to the statutory impasse resolution procedures.

43.86 53.81 72.116 72.612
51.31 72.111 72.117 74.32
53.22 72.113 72.6 74.40

Lewiston Teachers Ass'n and Lewiston Board of Education, PELRB No. 73-11 (Apr. 20, 1973)

I § 968(5)(B): Teachers union complained that the employer violated their bargaining agreement by failing to post a vacancy for 30 days prior to filling it. The employer had elevated a school principal to the position of assistant to the superintendent. Since the principal was explicitly excluded from the complainant's unit and was in a separate unit, the Board dismissed the union's complaint for lack of standing.

71.14

II § 968(5)(B): The 30-day posting requirement allegedly violated by the respondent was provided by a collective bargaining agreement. Having agreed to submit disputes arising out of the collective agreement to the contract grievance procedure for resolution, the parties should do so. Violation of the collective bargaining agreement, if any, is not a violation of the Act. (Only sections of the Act plead were Sec. 964(1)(A) & (B) and not 964(1)(E)).

01.28 46.6
09.25 46.61
21.13 74.12

Bangor Education Ass'n v. Bangor School Committee, PELRB No. 73-12 (May 18, 1973)

I § 965(1)(C): The subsequent execution of a collective bargaining agreement by the parties in a prohibited practice action makes it a "virtual impossibility" that the charged party failed to negotiate in good faith.

51.4
51.41
71.230

II Rule 4.03: The complaint was dismissed because it failed to state the names of the persons who allegedly engaged in prohibited practices. Such names are necessary, if the Board concludes that a violation was committed, in order to fashion the appropriate remedy and direct it against the perpetrators of the violation. No amendment of the complaint was permitted because it was dismissed on other grounds.

01.28 71.11 74.12 74.17
01.29 71.12 74.13
06.3 71.15 74.14

III § 965(1)(E): The Board has no authority to decide whether a party's insistence on the inclusion of a particular clause in a successor agreement amounts to a refusal to bargain in good faith, if the parties have agreed on the inclusion of the clause at issue in their ultimate agreement.

01.26 09.62 51.41
01.28 42.4
01.312 51.4

IV § 965(1)(E): Insistence on inclusion of the fact-finders' recommendations into the parties' collective bargaining agreement should be decided upon by the interest arbitrator(s) rather than constitute a viable prohibited practice.

51.5 53.8
53.5 53.81
53.7

Local 1828, Council 74, AFSCME v. City Council of South Portland, PELRB Nos. 73-13 & -14 (Sept. 28, 1973); aff'd sub nom. Gendron v. Local 1828, Council 74, Nos. 73-946, -990, & -1011 (Me.Super.Ct., Cum.Cty., Jan. 27, 1975)

I § 968(6): Respondents filed a motion requesting that the chairman of the Board recuse himself. The respondents claimed that the chairman was biased against their attorney. The motion was based on a unanimous fact-finding report two years earlier which had castigated the attorney for lack of preparation and for demonstrating disdain for the fact-finding process. Before the Board, the attorney admitted the facts cited in the report on which the fact-finders had based their conclusion that the attorney had been disrespectful towards that panel. A quorum of the Board heard and denied the motion. The chairman, against whom the motion was directed, did not participate in hearing or deciding the merits of the motion.

71.3
71.33

II § 968(5)(C): The parties entered into a stipulation of some of the relevant facts and said agreement served as part of the basis for adjudication of a violation of the Act.

09.380

III § 965(1)(C): The employer refused to negotiate with the bargaining agent because, in the city's view, the same bargaining agent should not represent supervisory employees and the employees whom they supervise, albeit in separate units. The units at issue were constituted by a unit determination report and the bargaining agent was certified through a Board-supervised election. Neither the unit report nor the election were appealed by the employer. The employer's failure to exhaust said appeal procedures is no justification for its refusal to bargain with the certified bargaining agent.

09.411 72.5
33.35 72.533
33.382

IV §§ 965(1)(E) & (C): The concept of a "no prejudice" letter--served by a union prior to its becoming the bargaining agent--to preserve the 120-day notice requirement is untested and is not binding on the Board. Although the bargaining agent did not serve a timely 120-day notice, the employer was nevertheless obligated over any item not requiring the appropriation of money.

09.651 72.581
41.32 73.41
72.52

V § 965(1)(B): A telegram is sufficient "written notice" for the purpose of invoking the 10-day rule so long as it requests a meeting for collective bargaining purposes.

41.32
72.52
73.41

VI § 965(1)(C): Overtime pay falls within the ambit of the mandatory subjects of wages, hours, and working conditions. A unilateral change in overtime policy by the employer, after negotiations for an initial collective bargaining agreement have been requested by the bargaining agent, constitutes a failure to bargain in good faith.

43.1 43.445 72.642
43.11 72.6 72.651
43.116 72.63

VII SUPERIOR COURT:

§ 968(5)(F): Since the employer merely filed a notice of appeal without further action, the appeal was dismissed for want of prosecution.

81.13
81.191
81.34

VIII § 968(5)(F): The employer challenged the Board's decision and order by alleging that §§ 966 and 968(5)(C) and (6) were unconstitutional in that they did not provide appropriate standards

to guide the administrative officers in the exercise of the authority delegated to them. Under even the most restrictive view espoused in Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973), all that is constitutionally required is a primary standard or intelligible principle, adequate procedural safeguards, and opportunity for judicial review. Section 966 sets forth applicable criteria for unit determination decisions, § 968 provides a procedure for adjudication, based on a preponderance of the evidence, for adjudication of violations of § 964, and judicial review of both processes is provided for in the Act. Further, over 40 years of NLRB precedent exists to guide the executive director in his unit determination function. The Act's unit determination and prohibited practice enforcement sections, therefore, pass constitutional muster.

01.21 01.32 81.33
01.24 03.12 81.331
01.28 03.23 81.333

South Portland Municipal Employee Ass'n v. City of South Portland, PELRB No. 73-15 (Sept. 21, 1973)

I § 968(6): A party's collective bargaining proposals, which were never communicated to the other party, were excluded from evidence in a hearing before the Board as self-serving.

09.34
09.392
71.517

II § 965(1)(C): The parties had agreed to reopen the vacations and holidays articles of their collective bargaining agreement, once the employer completed surveys of its job classifications, personnel practices, vacations, and holidays, by a date specified. The employer's delay of over eight months beyond the date agreed-to for completion of the surveys was extraordinarily long, unreasonable, and was in no way due to the bargaining agent. Under these facts, the employer's refusal to honor the bargaining agent's request to reopen negotiations on the articles subject to reopener violated the duty to negotiate in good faith.

41.34 43.151
41.35 43.154
43.15 72.652

Greenville Teachers Ass'n v. Board of Directors, MSAD #2, PELRB No. 73-17 (Jan. 14, 1974)

I § 968(6): A party moved to continue the hearing because only two Board members were present. Since there was precedent for a quorum (2 of 3) of the Board conducting hearings, the Board denied the motion to continue.

01.28 71.51
71.3 71.515
71.5 74.12

II § 965(1)(C): During the course of negotiations for a successor collective bargaining agreement and during the term of the expiring agreement, the employer unilaterally discontinued the established practice of providing free meals to teachers performing lunch supervision. Neither the expiring nor the successor agreement mentioned free lunches and both contained a broad zipper clause, precluding mid-term negotiations over matters covered in the agreements, matters raised and abandoned during the negotiations which resulted in the collective bargaining agreements, and matters which could have been raised during such negotiations. The bargaining agent did attempt to raise the free lunches issue during the negotiations which resulted in the successor collective bargaining agreement, no agreement was reached on that issue, and the parties executed the successor agreement containing the broad zipper clause. Without comment, the Board denied respondents' motion to dismiss on grounds that: (1) the complaint failed to state a claim upon which relief could be granted, (2) the remedies sought were beyond the jurisdiction of the Board, and (3) the complaint was untimely, since the bargaining agent had failed to pursue its contractual administration remedies.

09.641 09.661 72.612 72.666 74.20
09.642 09.662 72.63 74.18
09.66 72.590 72.651 74.19

NOTE: No hearing on the merits was ever conducted since the complainant moved to withdraw its complaint, prior to such hearing.

Caribou Board of Education v. Caribou Teachers Ass'n, PELRB No. 74-01 (Aug. 17, 1973)

I § 968(6): The Board admitted into evidence a video tape of a session of the Caribou City Council. Once the Board had viewed the tape and the hearing was completed, the tape was returned to the party offering it.

09.381
71.523

II § 964(2)(B): In Caribou, the City Council appropriates the overall budget for the school department and the Board of Education then decides how the budget will be spent. While negotiations were in progress with the Board of Education for a successor collective bargaining agreement, a delegation of members of the bargaining agent appeared before the City Council, seeking reinstatement of $16,000 which the Council had cut from the school department budget for the following year. The requested reinstatement was not tied to any particular item in the school department budget. The employees had informed members of the Board of Education of their plans to go to the City Council and were told "good luck" by the Board of Education members. Since the bargaining agent representatives in no way attempted to negotiate with the City Council and since, had they been successful, there was no guarantee that the budget reinstatement would inure to the benefit of the employees, the employees' actions, in the circumstances, did not violate the bargaining agent's duty to bargain.

09.13 22.74 64.34
09.131 64.2 64.7
09.132 64.33

Council 74, AFSCME v. Selectmen of the Town of Jay, PELRB No. 74-02 (Aug. 14, 1973)

I § 968: Complainant alleged a violation of 26 M.R.S.A. Sec. 941(1)(E). There being no such section in Title 26, the relevant portion of the prohibited practices complaint is dismissed.

01.28 71.11
01.32
03.22

II §§ 964(1)(E) & 964(1)(A): The substance of the prohibited practices complaint at issue is an allegation of the employer's violation of the duty to bargain. If established, such allegation would constitute a violation of Sec. 964(1)(E). Since the only section of the Act alleged to have been violated in the complaint is Sec. 964(1)(A) and since there are no allegations that the employer interfered with the rights protected by Sec. 963, the Board will dismiss the complaint.

01.28 71.11
01.32 71.222
03.22 72.1

Council 74, AFSCME v. Mayor of the City of Biddeford, PELRB No. 74-03 (Aug. 14, 1973)

I § 968: Rule 4.03(4) of the Prohibited Practice Complaint Rules requires complaints to mention the specific sections of the Act allegedly violated by the Respondent. Complainant alleged a violation of 26 M.R.S.A. Sec. 941(1)(E). There being no such Section in Title 26, the relevant portion of the complaint is dismissed.

01.28 71.11
01.32
03.22

II §§ 964(1)(E) & 964(1)(A): The substance of the prohibited practice complaint at issue is an allegation of the employer's violation of the duty to bargain. Since the only section of the Act alleged to have been violated in the complaint is Sec. 964(1)(A) and since there are no allegations that the employer interfered with the rights guaranteed by Sec. 963, the Board will dismiss the complaint.

01.28 71.11
01.32 71.222
03.22 72.1

Boothbay Region Teachers Ass'n v. Boothbay School Committee, PELRB Nos. 74-04, -05, & -06 (Apr. 30, 1975)

I § 968(5): The Act empowers the Board to prevent any of the prohibited acts contained in § 964. Section 967(2) gives each public employee the right to invoke contractural grievance procedures, even if his/her bargaining agent fails to pursue a claim on his/her behalf. Section 967(2) also requires the bargaining agent to fairly represent each member of the bargaining unit. Should the bargaining agent fail to discharge its responsibility, the aggrieved party must turn to Superior Court for injunctive relief to compel the bargaining agent's compliance with its statutory duty. To the extent that the instant complaint alleges violations of §§ 961 and 967, it will be dismissed because § 964 does not define non-compliance with the former sections to be prohibited acts.

01.1	03.22	22.3	23.6	47.31	73.113
01.28	09.672	23.22	23.7	47.313	
01.32	21.12	23.24	47.3	47.32	

II § 965(1)(C): The bargaining agent charged that the employer violated this section by failing to "negotiate a grievance" concerning non-renewal of a tenured teacher. The complainant simultaneously filed the prohibited practice complaint and invoked the contractual arbitration procedure. The employer moved to stay the arbitration in the Superior Court and the parties decided to suspend action before the Board until after the Court had issued its decision. Before the Court, the bargaining agent argued that non-renewal was arbitrable because it constituted a reduction of rank or compensation without just cause in violation of the collective bargaining agreement. The Court held that "[i]n the absence of any clear delegation of authority in non-renewal and dismissal decisions to an arbitration panel, the provisions of the Education statute must apply. See 20 M.R.S.A. § 161(5), 473(4)." The Education Act provides that any teacher receiving notice of non-renewal may, within 15 days, request a hearing before the school committee, and such hearing must be held within 30 days, subject to Superior Court review under Rule 80-B. The non-renewed employee did not exercise her § 161 rights and the complainant did not appeal the Superior Court decision. While stating that, in some circumstances, non-renewal of a teacher might violate the Act and not be an educational policy decision, the Board held that there is no requirement in the Act for the "negotiation of grievances."

03.31	21.12	43.61	47.02	47.223
09.412	43.23	46.6	47.21	47.51
09.63	43.233	47.01	47.22	47.52

III § 968(5): The Board discourages "forum shopping" because it results in repeated attempts to litigate the same issues for the purpose of getting more favorable results and because it results in unnecessarily prolonging the proceedings. The delay of over 8 months, after the parties' receipt of the Superior Court decision, before reactivating the case before the Board was deemed unconscionable.

09.63
71.83

Windsor Teachers Ass'n v. Windsor School Committee, PELRB No. 74-08 (Feb. 11, 1974)

I § 968(5): The Act empowers the Board to prevent any of the prohibited acts enumerated in § 964. To the extent that the instant complaint alleges violations of §§ 961 & 967, it will be dismissed because § 964 does not define non-compliance with the former sections to be prohibited acts.

01.1	01.32	21.7	23.6
01.2	03.22	22.3	23.7
01.28	21.12	23.1	73.113

II § 968(5): The complainant raised several due process arguments based on the 14th Amendment of the U.S. Constitution. To the extent that conduct complained of could not be brought within the prohibitions of § 964 of the Act, the Board declined to rule on the constitutional issues raised and suggested that the Federal Courts were the proper forum in which to raise such questions.

04.1
04.6
21.11

III § 965(1)(C): While 20 M.R.S.A. § 161(5) provides "just cause" protection for "tenured" teachers (those who have been employed for 3 years or more), that section does not exclude "probationary" teachers (those employed for less than 3 years) from coverage under the Municipal Public Employees Labor Relations Law. While not protecting "probationary" teachers, § 161 does not preclude employers from negotiating "just cause" protection for such individuals. Since the topic of "just cause" for "probationary" teachers is a permissive subject, the Board cannot find that the employer violated the statutory duty to bargain by failing to negotiate thereon.

03.31 42.2 43.23 43.61
03.4 42.22 43.233 72.589
16.45 42.44 43.5

Local 1458, Council 74, AFSCME v. City Council of Augusta, PELRB Nos. 74-09 & -14 (Apr. 22, 1974)

I § 965(1)(C): A Board-supervised election was held and the complainant was certified as the bargaining agent. The employer argued that, since no collective bargaining agreement was concluded within 1 year, the complainant was no longer the bargaining agent and the employer refused to participate in further negotiations. In Case No. 73-01, the Board held against the employer's position and that matter was on appeal in the Superior Court. While the appeal was pending and without notice to the bargaining agent, the employer unilaterally increased the wages of the unit employees. The Board held that the unilateral wage increase violated the statutory duty to bargain.

32.95 72.616
72.51 72.63
72.6 81.46

II § 964(1)(C): A unit employee approached his supervisor, the Public Works Director, to secure a Board Decertification Petition form. The employer provided the form and prepared a "petition-type" showing of interest document to be circulated in support of the decertification petition. Once it had been circulated by a unit employee, the showing of interest was taken to the City Manager's office where the Manager's secretary drafted and typed the Decertification Petition form. While there was no evidence that the employer had initiated the decertification effort, considering the employer's past violations of the Act, the Board held that the employer's actions in connection with the decertification petition violated § 964(1)(C). In dicta, the Board stated that bargaining unit employees seeking decertification of their certified agent should get their information from Board staff, private counsel, or from public management advocacy organizations with whom they do not have a superior-subordinate relationship.

09.121 72.22
37.15
72.2

III § 968(5)(C): As a remedy for the unlawful unilateral wage increase given to the unit employees, the Board ordered that said increase be incorporated into the parties' collective bargaining agreement, unless higher wages are negotiated in which case the latter would control. As a remedy for the employer's violation of § 964(1)(C), the Board ordered that the complainant remain as the certified bargaining agent for 6 months, that there be a moratorium on the filing of any decertification petition for the unit at issue for 6 months, and that the parties meet forthwith and bargain for a collective agreement for the unit involved in this case.

32.14
32.99
74.39

Trafton v. Board of Trustees for Gardiner Water District, PELRB No. 74-10 (Apr. 1, 1974)

I § 968(6): Although the formal rules of evidence are not applicable in Board hearings, the form of the evidence presented will affect the weight accorded to. While hearsay is not inadmissible, testimony of direct observations carries much more weight. Testimony in a witness' own words is more persuasive than are responses to leading questions.

09.31 71.51
09.33 71.517
09.376

II § 964(1)(B): An employee who was a leader in the union organizing effort was discharged within a few days of the beginning of that activity. None of the circumstances ordinarily surrounding a discharge for cause was present: There was no history of complaints about the employee's performance, there was no prior disciplinary action, and no incident occurred at or near the time of the discharge to which it might reasonably be related. Three other employees were also discharged, allegedly because the employer had no funds with which to pay them. Despite this latter claim, the employer announced the institution of a new retirement plan, a new insurance program with broader coverage, and a general wage increase, on the same day as the discharges were announced. In the circumstances, the Board held that the discharges were solely in retaliation for the discharged employees' union activity and, therefore, violated § 964(1)(B).

35.532 72.31 72.317 72.358
35.541 72.314 72.324
72.3 72.315 72.334

III § 964(1)(A): The discharges were intended to and did have a chilling effect on union activity. Eleven employees, including the 4 who were discharged, signed the showing of interest in support of the union's petition for bargaining agent election. At the election, conducted after the discharges, the six voting employees unanimously opposed union representation. In the circumstances, the results of the bargaining agent election cannot stand.

35.51 72.133
72.1 72.311
72.13 72.313

IV § 968(5)(C): As remedies for the above violations, the Board ordered: (1) the four employees unjustly discharged were to be offered re-employment forthwith, (2) the four were to be made whole for the difference between the earnings and benefits which each had earned during the period of the discharge and those which each would have earned but for the discharge, (3) the results of the bargaining agent election, tainted by the employer's misconduct, were ordered set aside and a new election held, and (4) the employer was ordered to cease and desist from engaging in unlawful interference, restraint or coercion and to cease and desist from unlawful discrimination.

35.81 74.33 74.336 74.38
74.31 74.334 74.341
74.32 74.335 74.343

Biddeford Teachers Assn. v. Biddeford Board of Education, PELRB No. 74-12 (Feb. 14, 1974)

I §§ 964(1)(E) & 968: Complaint alleges employer violated duty to bargain in good faith. The parties' execution of collective bargaining agreement subsequent to the filing of the complaint indicates there has been good faith bargaining and the contract items in dispute have been satisfactorily resolved by the parties. Execution of the collective agreement, therefore, renders the complaint moot.

51.41 72.53
71.230 72.58
72.5 72.591

II § 964(1)(A): Complaint pleads violation of duty to bargain under both 964(1)(E) & (A). Bare allegation that failure to bargain interfered with Sec. 963 rights is insufficient to properly allege a violation of Sec. 964(1)(A) and will, therefore, be dismissed.

72.1
72.18

III § 968(5)(C): Complaint sought: (1) cease and desist order against respondent's refusal to bargain in good faith, (2) an order requiring good faith bargaining, and (3) an order that all affected employees receive retroactive pay and be paid at the correct step. Since the collective bargaining agreement addresses all of these areas and since the Board has no injunctive power to prevent future prohibited acts, until they have actually occurred, the purposes of the Act (promotion of labor peace and establishment of a uniform basis for recognizing the right of public employees to join labor organizations of their own choosing

and for these organizations to enter into collective negotiations with the public employer) have been fulfilled here by execution of the collective bargaining agreement and the complaint was dismissed.

01.29
74.11
74.17

Portland Teachers Assn. v. Portland School Committee, PELRB No. 74-13 (Feb. 14, 1974)

I §§ 964(1)(E) & 968: Complaint alleges employer violated duty to bargain in good faith. The parties' execution of collective bargaining agreement subsequent to the filing of the complaint indicates there has been good faith bargaining and the contract items in dispute have been satisfactorily resolved by the parties. Execution of the collective agreement, therefore, renders the complaint moot.

51.41 72.53
71.230 72.58
72.5 72.591

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72.1
72.18

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01.29
74.11
74.17

Winslow Education Ass'n v. Superintending School Committee of the Town of Winslow, PELRB No. 74-16 (Apr. 18, 1974) [includes abstract of related case of Superintending School Committee of the Town of Winslow v. Winslow Education Ass'n, 363 A.2d 229 (Me. 1976)]

I § 968: The parties settled the prohibited practice case by executing a collective bargaining agreement in the presence of the Board. While signing the agreement the employer expressly retained the right to challenge in the courts the portion of the interest arbitration award which ordered the insertion of a "just cause" provision into the parties' agreement. The parties collective bargaining agreement was incorporated into the Board's order.

71.228
71.83
74.42

II SUPREME JUDICIAL COURT
§§ 965(4) & 965(1)(C): The Law Court concluded that the "just cause" provision should not have been made part of the interest arbitration award. In determining whether a matter is a proper subject for interest arbitration, the Court engaged in a two-step examination: (1) whether the topic at issue is within the statutorily defined scope of bargaining and, if so, (2) whether the matter is limited by any other existing statutory enactments. The Court held that 20 M.R.S.A. § 473(4), which provides that the school commitee may dismiss teachers who are unfit or which it deems to be unprofitable, demonstrates that, as regards dismissal, the Legislature has vested sole authority in the school committee, subject only to judicial

review. The Court noted that the Legislature had recently amended 20 M.R.S.A. § 161(5) to provide that just cause for dismissal of non-probationary teachers was a "negotiable item in accordance with the procedure set forth in Title 26, c. 9-A." Since this enactment did not take effect until after this appeal was filed, it was not given retroactive effect.

03.22	42.4	43.322	55.62	55.91	81.522
03.31	42.44	43.51	55.83	72.589	81.526
03.4	43.23	43.61	55.84	74.3761	
21.12	43.233	43.99	55.86	74.3762	
42.31	43.321	46.21	55.9	81.5086	

Westbrook Teachers Ass'n v. School Committee of the City of Westbrook, PELRB No. 74-17 (Aug. 21, 1974)

I § 968(5): A discharged employee claimed that her discharge violated constitutional due process guarantees. The Board declined to rule on this claim, stating that it does not view itself as the proper forum for the litigation of constitutional issues.

01.28
04.1
21.11

II § 965(1)(C): In Biddeford (304 A.2d 387), the Law Court established two tests for determining whether a subject was a matter of educational policy: (1) whether the matter is one involving value choices so fundamental that binding decisions concerning them should be made by persons directly responsible to the people, or (2) whether, although involving a substantial interweaving of judgments, the matter transcends teacher employment interests and embraces important interests of the citizens. The Board held that the school committee policy, requiring that no spouse or child of any school committee member, administrator, director, supervisor or foreman hold any position with the school department where their relative had a voice in their terms or conditions of employment, was one involving a fundamental value judgment to an even greater degree than those matters held to be educational policy in Biddeford.

03.31	42.3	43.61	72.589
03.32	42.47	43.98	
03.4	43.23	43.99	

III § 965(1)(C): The Board held that the impact of the application of an educational policy upon working conditions--as contrasted from the educational policy decision itself--is mandatorily negotiable. The impact of the discharge decision (type and length of notice, severance pay and the like) is negotiable and requires that the employer, in addition to meeting and consulting over the educational policy decision, negotiate with the bargaining agent over the circumstances of the discharge.

03.31	42.1	43.630
03.4	43.233	43.98
41.6	43.61	43.99

IV § 968(5)(C): As a remedy for the employer's failure to negotiate over the impact of an educational policy decision, the Board ordered the parties to do so and to report to the Board within 30 days on the steps taken in compliance with the Board's order.

74.31

Freeport Police Benefit Ass'n v. Town of Freeport, PELRB No. 74-18 (Dec. 18, 1974), aff'd sub nom Campbell v. Town of Freeport, No. CV-75-621 (Me. Super. Ct., Ken. Cty., Sept. 2, 1976)

I § 968(5)(C): The Board may not order reinstatement of or payment of back pay to any individual suspended or discharged "for cause." The Board held and the Superior Court affirmed that the "for cause" limitation contemplates a valid cause and determination of such cause is a function for the Board. In determining whether the discipline was based on "cause," the Board is not bound by the findings of a hearing conducted by the employer.

01.28	03.22
01.29	74.12
01.32	

II § 964(1)(A), (B), (C) & (E): Insufficient evidence was presented to establish that the purpose of submitting to the Town Council and subsequently releasing recommended wage increases in an adjustable town budget was a prohibited act.

07.143
07.2

III § 964(1)(A): In determining whether this section was violated, the Board examines the totality of the charged party's conduct. The Board held that the employer had engaged in unlawful interference, restraint or coercion because the Chief of Police had: discharged the union president, characterized the union's contract proposals as "trash" and "too big and too ambitious," expressed dislike for labor unions, told an employee that the proposed departmental budget was cut because of the union's contract proposal, requested loyalty oaths several times, and cancelled a training program for one employee. One employee testified that he feared he would lose his job because of his union activity.

09.121 72.18
72.1
72.131

IV § 964(1)(A) & (B): The above holding, that the employer engaged in unlawful interference, restraint or coercion, served as a basis for concluding that the employer harbored anti-union animus.

72.1
72.3
72.311

V § 964(1)(B): Once the employee establishes anti-union animus, the burden is on the employer to establish that the discipline or discharge were motivated by legitimate objectives. Here, the discharged employee had had a clean record and a good working relationship with the police chief until union activity intensified, there was an unexplained delay between the time of the occurrence allegedly justifying the dismissal and the dismissal, the grounds for dismissal were relatively minor and did not justify dismissal, some of the grounds alleged were not established in the record, and the employer harbored anti-union animus. The Board adopts as the standard for determining whether a discharge is unlawful discrimination the "in-part" test. Under this standard, the discharge was unlawful if one of the motivating factors was the employee's union activitiy.

09.32 72.31 72.315 72.334
71.512 72.311 72.317 72.342
72.3 72.314 72.324

VI § 968(5)(C): The Board held and the Superior Court affirmed that the statutory limitation prohibiting the Board from ordering reinstatement of or payment of back pay to persons discharged for cause contemplates valid cause as determined by the Board. As remedies for violations of § 964(1)(A) and (B), the Board ordered the employer: to cease and desist from interfering with, intimidating or discriminating against employees engaging in the exercise of rights protected by the Act; to forthwith offer reinstatement to the discharged employee and to pay the employee compensatory damages attributable to the unlawful discharge.

01.28 03.22 74.32 74.336
01.29 74.12 74.33 74.341
01.32 74.31 74.335 74.343

VII SUPERIOR COURT:
State Constitution: The delegation of legislative authority to administrative agencies is proper, under the more exacting standard articulated in City of Biddeford, 304 A.2d 387 (Me. 1973), where the statute sets forth a guiding primary standard or intelligible principle, where adequate procedural safeguards exist, and where there is an opportunity for effective judicial review. The guiding primary standards here are found in the § 961 "purpose" clause, § 963 which sets forth the rights protected by the Act, and § 964 which enumerates particular unlawful practices. Adequate procedural safeguards and an opportunity for meaningful judicial review are provided in § 968.

01.28 03.1 71.51
01.29 03.12
01.32 03.23

VIII State Constitution: A second constitutional question is whether application of the Act conflicts with or invades the power of a municipality to conduct its own administrative affairs. Under Article 8, Part 2, Section 1 of the Maine Constitution and implementing legislation, municipal home rule means that a municipality, through its charter, has a wide range of authority; however, in no instance may charter provisions be effective beyond matters which are "local or municipal in nature" nor may they extend to matters "prohibited by constitution or general law." Since enactment of the M.P.E.L.R.L., 26 M.R.S.A. ch. 9-A, relations between municipal public employers and their employees are not "local or municipal in nature" and the M.P.E.L.R.L. is a "general law" which may not be contravened by the provisions of a municipal charter. Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154 (Me. 1976).

01.28 03.1 03.34
01.29 03.12 03.341
01.32 03.23 03.342

IX § 968(5)(D): Under Rule 80B review, the Court is to accept the Board's factual findings unless they are clearly erroneous. Although in some instances different findings could reasonably have been made, those reached by the Board were far from clearly erroneous and the preponderance of the evidence, required by § 968(5)(C), supported the Board's conclusion that the employer had violated the Act. The Court affirmed the Board's decision.

09.33 81.12 81.502 81.5087
71.517 81.191 81.503 81.5089
81.1 81.331 81.5083 81.521

X § 968(5)(C): The Board is empowered by this section to exercise wide discretion in fashioning remedies "to effectuate the policies of the Act." Here, "a compensatory damages" award in an amount equal to net lost pay and lost vacation, holiday and bonus pay was within the Board's remedial authority. Back pay awards need not always contain all of these elements, depending on the circumstances of the case.

01.28 03.22 74.13 74.341
01.29 74.11 74.17 74.343
01.32 74.12 74.32 81.5087

XI § 968(5)(F): The filing of an appeal from a decision of the Board, in the absence of a showing of "substantial and irreparable injury . . . or that there is a substantial risk of danger to the public health or safety," does not stay the effect of the Board's decision. Balancing the interests of public employers, public employees, and in light of the limitations on employee self-help imposed by the Act, the legislature has decided that, in most instances, the need for an expeditious remedy to cure violations of the Act overrides the potential problems to public employers flowing from the general rule against staying of the Board's orders.

81.191 81.494
81.46
81.461

Portland Police Benevolent Ass'n v. City of Portland, PELRB No. 74-22 (Aug. 19, 1974)

I § 965(2)(G): This section provides that "[a]ny information disclosed by either party to a dispute to the [mediator during the mediation process] shall be privileged." Both parties waived the statutory privilege and the Board allowed the mediator to testify as to matters disclosed by either party during the mediation process.

09.36 09.62 71.523
09.382 52.2
09.393 52.33

II § 965(1)(C) & (D): Collective bargaining is a continuing process which terminates only when all the terms of an agreement have been finally settled. If, during the course of bargaining, an agreement is reached on a specific issue, that agreement remains tentative and subject to reopening at any time until all issues have been resolved. Here, due to inadequate and ineffective communications between the parties, each made an erroneous assumption that the other had modified their stance on a particular issue; in fact, neither party had modified

its position thereon. Since there was no meeting of the minds on that issue, there was no obligation to execute a collective bargaining agreement addressing that question.

09.22 72.51 72.591
41.3 72.571
46.55 72.58

III § 965(1)(C): The past practice was for the employer to implement wage increases and other economic benefits upon final agreement on the terms of the successor collective bargaining agreement, without waiting for the formal execution of the written contract. The employer delayed implementation of the economic benefits when a dispute arose as to what had been verbally agreed to. The employer was under no legal or contractual obligation to implement the economic benefits in the circumstances and its failure to do so did not constitute unlawful self-help to improperly influence the bargaining process.

72.66
72.667

MSAD #43 Board of Directors v. MSAD #43 Teachers Ass'n, PELRB No. 74-24 (Dec. 12, 1974)

I § 968(5)(B): At the prehearing conference, the union representatives agreed to search for the union constitution and bylaws and minutes of the union executive committee meetings and to notify the Board and the complainant employer of the existence or non-existence thereof. Although the union failed to locate its constitution and by-laws, such failure did not prejudice the employer's rights; therefore, the Board did order sanctions against the union for its failure to comply with the prehearing order.

71.21 71.518
71.251
71.252

II § 965(1): The parties' expiring collective bargaining agreement contained an article controlling the negotiations for the successor agreement. The Negotiating Procedure article provided: (1) the parties will present certificates identifying bargaining team members to the other party on or before the first negotiating session, (2) one spokesman for each group would be the chief negotiator for that team, and (3) each party may have one "revolving chair" to allow each of them to bring in one professional advisor into executive sessions; however, if possible, notice of the identity of the revolving chair person and the subjects to be discussed should be given to the other party at least two days before the session at which such revolving chair would be occupied. These provisions indicate that the parties contemplated the possibility of changes in their teams during the course of bargaining. Further, the selection of the chief negotiator is a purely internal matter for each party and inclusion of the "revolving chair" for the purpose of allowing each team access to outside professional advice during negotiations permits the teams to select the outside professional as their chief negotiator. The union's conduct, in naming a professional labor consultant as its chief negotiator, did not violate the parties' groundrules and, therefore, did not violate the duty to bargain in good faith.

22.72 41.31
22.75
41.21

Veazie Teachers Ass'n v. Veazie School Committee, PELRB No. 75-01, 1st Interim Decision (Jan. 21, 1975)

I § 968(5)(B): The complainant union moved to withdraw its prohibited practice complaint and the respondent, refusing to accede to the complainant's request, insisted that the withdrawal be with prejudice. Rule 4.09 of the Board's Rules provides "[t]he complaint may be withdrawn by the complaining party with the approval of the Board. If the withdrawal is without the approval of the other party, the withdrawal shall be with prejudice." The complaint sought to protect the rights of the union and the separate and distinct rights of two of the union's members. Up to this time, the complainant had not been represented by counsel. With the advent of representation, the complainant sought, by motion, to substitute the two unit employees in place of the union as the complainant. In the interests of justice and seeking to cause the least prejudice to all parties, the Board declined to permit withdrawal of the original complaint and allowed the parties to argue, through a briefing schedule established by the Board, over the propriety of the motion to substitute the individual employees for the union as the complainant.

01.28 71.14 71.229
06.3 71.15
21.12 71.17

Richards v. Veazie School Committee, PELRB No. 75-01, 2d Interim Decision (Apr. 28, 1975)

I § 968(5)(A): This section sets forth the Board's jurisdiction to hear and decide prohibited practice cases. Since the complaint alleged that the complainant was a public employee, that the respondent was a public employer (both within the definitions of § 962), and that the acts complained of violated § 964, it was incumbent upon the Board to conduct a fact hearing to determine the status of the parties and the accuracy of the alleged unfair labor practices, as contemplated in § 968(5).

01.1 03.22 71.31
01.28 06.3
01.32 71.11

II § 965(1)(C): Title 20 M.R.S.A. § 161 confers exclusive authority to school superintendents to employ and to terminate teachers, thus rendering these topics beyond the scope of mandatory negotiations. While constituting educational policy, this authority may not be used in derogation of the Act's prohibitions against discrimination for engaging in activities protected by the Act and against retaliating against employees for their filing petitions or complaints with or giving testimony before the Board.

03.31 72.324
03.4 72.4
72.3

III § 968(5)(C): While the subsequent execution of a collective bargaining agreement renders moot a charge that either the bargaining agent or the employer failed to negotiate in good faith, the execution of a successor agreement here was not dispositive of the issues raised by the two individual public employee complainants. In the circumstances, the complaint, that the employer had failed to negotiate over the termination of the two employees and the impact flowing therefrom, was not rendered moot by execution of the successor agreement.

71.230

IV §§ 965(1)(C) & 967(2): The individual public employee complaints charged that the employer had violated the statutory duty to bargain by failing to negotiate over prior notice and other procedures for non-renewal of their employment. During the negotiations which resulted in the parties' latest collective bargaining agreement, the bargaining agent opted to concentrate on higher wages for unit employees and explicitly told the employer that they would not seek to negotiate over such teacher rights issues as non-renewal notice and procedures. The Board held that the bargaining agent had waived the employees' rights in these areas; therefore, the charges relating to occurrences after the bargaining agent communicated its position to the employer were dismissed as moot. Since it was not raised in the pleadings, the Board did not reach the question of whether the bargaining agent's conduct violated the duty of fair representation.

01.312 09.661 21.91 71.230
09.612 09.67 23.3
09.66 21.12 23.6

Richards v. Veazie School Committee, PELRB No. 75-01 (Oct. 10, 1975)

I § 965(1)(C): The complaint charged the employer with violating the duty to bargain by failing and refusing to negotiate over the impact of the employer's decision to eliminate a music teacher position. Since the bargaining agent had never demanded negotiations over said impact, the Board dismissed the portion of the complaint charging that the employer had violated the duty to bargain in connection therewith.

09.651 72.590
21.91 72.591
43.630

II § 965(1)(C): The decisions of whether a particular subject will be taught and approval of nominations for teaching positions are matters of educational policy and are, therefore, not subject to mandatory bargaining. The duty to bargain does require negotiations when there is a change of responsibilities and added duties are assigned to bargaining unit employees. Since art had previously been taught by the regular classroom teachers, the creation of a new art education position and the hiring of an art instructor could only lessen the responsibilities of the regular classroom teachers and, therefore, have no adverse impact on them. Since the employer's actions have no adverse impact on the bargaining unit employees, the statute does not require negotiations thereon.

03.31
43.61
43.630

III § 965(1)(C): The employer eliminated the librarian position and the teaching of library science then became the responsibility of the regular classroom teachers. The decision itself is a matter of educational policy; however, the adverse impact on the other unit employees (a greater work load) must be negotiated with the employees' bargaining agent. Here, the employer and the bargaining agent negotiated and executed a successor collective bargaining agreement, giving the parties ample opportunity to negotiate over the impact of elimination of the librarian position and the Board held that such negotiations satisfied the statutory duty to bargain over the impact.

03.31
09.651
43.630

IV § 965(1)(C): Among the mandatorily negotiable impacts of educational policy decisions to terminate a position are: effects on remaining employees, severance, length of notice of termination, and order of discharge and recall. The nonrenewal of an individual teacher, in accord-ance with 20 M.R.S.A. § 161(5), does not require negotiation on severance, length of notice, or, because there was only one employee in the position eliminated, the order of discharge. The parties should have negotiated over recall, in the event the position is reinstituted, and they were ordered to do so by the Board.

03.31 43.531
43.233 43.630
43.52

Winslow Education Ass'n v. Winslow School Committee, PELRB No. 75-03, (Aug. 28, 1974)

I By stipulation of the parties, the Board's decision in Case No. 74-16, issued April 18, 1974, was dispositive herein.

71.228

Southern Aroostook Community School Committee v. Southern Aroostook Teachers Ass'n, PELRB No. 75-05, Interim Decision (Nov. 21, 1974)

Facts: Employer and bargaining agent were negotiating for an initial collective bargaining agreement, the union filed for fact finding, and the employer filed a prohibited practice complaint charging a failure to bargain in good faith. The employer then filed a motion to stay fact finding, pending disposition of its complaint.

I § 965(3): Absent a clear and unequivocal abuse of the obligation to bargain in good faith (e.g., refusal to attend a negotiations meeting or to meet at reasonable times), the Board is very reluctant to permit the filing of a prohibited practice complaint to stay the dispute resolution procedures mandated by the Act. The staying of fact finding in response to the filing of a complaint might establish an automatic mechanism for a party to stall the negotiations process by merely interposing one or more complaints. Such a result runs counter to one of the main purposes of the Act--encouraging parties to settle bargaining disputes through negotiations.

53.25 71.513
55.3 72.75
55.34 73.55

II § 965(1)(C): The statutory duty to bargain in good faith does not require a party to change its stance on any given issue; however, a refusal to change one's position on a number of issues is evidence of a failure to satisfy the statutory obligation.

72.53 72.591 73.436
72.532 73.43 73.437
72.536 73.433 73.479

III § 965(2): Mediation services are available to the parties at any time prior to arbitration, upon the request of either of them. Such services are available at any time, including after arbitration, upon motion of the Board or its Executive Director.

51.31 52.21
52.11 52.31
52.13

Southern Aroostook Community School Committee v. Southern Aroostook Teachers Ass'n, PELRB No. 75-05 (June 13, 1975)

I § 965(3): The statute provides that parties may resort to fact finding, if they "are unable to effect a settlement of their controversy." The Board held that this provision means that impasse is not a prerequisite to fact finding, the requirement being that the parties attempt and fail to resolve their differences at the table, prior to invoking fact finding.

51.32
53.1
53.2

II § 965(3): With the assent of the parties, the fact finding panel engaged in informal mediation of the parties' dispute and, when either party expressed dissatisfaction with this approach, the fact finders adopted the more conventional procedure. The Board held that such continuation of negotiations during impasse resolution procedures was proper; however, major contract items should be discussed at the bargaining table, prior to inception of impasse resolution procedures.

51.4
51.7
53.41

III §§ 968(5)(B) & 965(1)(C): Since the parties discussed each item in the proposed initial agreement, exchanged proposals thereon, and resolved a substantial majority (78 of 90) of the items on the table, the Board held that the parties had cured any violation of the duty to bargain, rendering moot a complaint charging violation of the duty to bargain in good faith.

41.3 72.53 72.591 73.47
51.41 72.538 73.43 73.479
71.230 72.58 73.440

M.S.A.D. #54 Education Ass'n. v. M.S.A.D. #54 Board of Directors, PELRB No. 75-10 (Mar. 18, 1975)

I §§ 968(5)(B) & 965(1)(C): Since the parties' expiring collective bargaining agreement contained a negotiating procedures article, controlling the bargaining of a successor agreement, the Board had to interpret that contract article to determine whether one of the parties had violated the ground rules--a failure to negotiate in good faith.

01.27 41.31
09.23 71.31
09.231 72.54

II § 965(1)(C): The ground rules provided that each party could independently select five members of its own team, whose identities would be revealed at the first session. In addition to the ten members so selected, the joint negotiating committee could also have a "consultant," defined in the agreement as "[a] resource person qualified by training and experience to advise on matters being considered by the Joint Negotiating Committee." Since the parties ground rules were clear and unambiguous, the Board could neither add to nor subtract from them. The bargaining agent team sought to name a "consultant," which it stipulated before the Board had no qualifications within the definition of consultant in the parties' agreement, as a member and chief negotiator for its team. This was done subsequent to the first session where five association members had been designated as comprising the union team. At the table, the union refused to disclose the "consultant's" qualifications and the management team refused to continue bargaining until the "consultant" left the table. The Board held that the failure to disclose the "consultant's" qualifications is a violation of the duty to bargain because, as contemplated in the agreement, the consultant was to be qualified and to render advice to both teams. Without knowing his/her qualifications, a party has no basis for determining what weight to give to the consultant's advice. Further, the consultant was not to become a sixth member of one team under the agreement; therefore, the attempt to make him so violated the ground rules and, hence, the duty to negotiate in good faith.

09.23 41.21 72.54 73.56
09.231 41.31 72.77
09.671 41.7 73.442

III § 968(5)(C): As remedies for the above violations of the duty to bargain in good faith, the Board ordered the parties to resume their collective negotiations with the "consultant" at issue, without any similarly unqualified person present, and with the teams as duly constituted pursuant to the parties' ground rules.

74.31

Council 74, AFSCME, AFL-CIO v. Gardiner Water District, PELRB No. 75-11 (Dec. 12, 1974)

Facts: A representation election was held, pursuant to the Board's order in Case No. 74-10, setting aside the results of a representation election and ordering a new election. In the second election: 7 employees were eligible to vote, 7 ballots were cast, 3 favored the proposition that the union be certified as the bargaining agent, 3 opted for no representation, and 1 ballot was marked with an "X" in the box indicating support for the union's certification and, either previously or subsequently, the same box was entirely shaded in. The Executive Director ruled that the intent of the ballot was ambiguous; therefore, the ballot was deemed "spoiled and not counted."

I § 968(4) & Rule 3.06: Since ballot at issue was outcome-determinative, the Board considered the validity of the Executive Director's ruling invalidating said ballot. The policy of the Maine Courts has been to construe ballots as valid expressions of voter intent, to the greatest extent possible. Ballots with too many marks or with distinguishing marks should be set aside, unless the surplus marks are merely redundant or where the "distinguishing" marks are such as to make the ballot in question stand out from others and where the mark was intentionally made as a distinguishing mark. Under Maine cases, determination of whether a mark is "distinguishing" is within the discretion of the tribunal counting the ballots. The Board held that the additional mark was merely redundant and that it did not constitute a distinguishing mark; therefore, the ballot was counted, giving the union the requisite majority of the ballots cast in order to be certified as the bargaining agent.

01.22 35.343 35.46 71.72
06.3 35.37 35.515 71.73
35.329 35.375 71.7

II § 968(4): Pursuant to its holding, the Board ordered: (1) that the ballot at issue be counted as supporting the proposition that the union be certified as the bargaining agent, (2) that the election report be amended to reflect that interpretation, and (3) that the Executive Director certify the union as the bargaining agent, pursuant to the results of the election.

32.92
35.82

Council 74, AFSCME, AFL-CIO v. Old Town City Council, PELRB Nos. 75-12 & -27 (July 9, 1975); Includes Supplemental Order of Sept. 25, 1975

I § 965(1)(C): At the hearing before the Board, the parties announced that they were close to final settlement of a collective bargaining agreement which would resolve the issues which were the subject of the complaint in Case No. 75-12. The Board deferred consideration of those charges to accord the parties time to settle the agreement.

71.228
71.515

II § 968(6): A party's failure to honor an agreement reached before the Board to file briefs was deemed most unprofessional, especially where the party was represented by counsel. In its order, the Board upbraided the party for such conduct.

71.5

III § 965(1)(C): On the last twelve occasions when promotional vacancies occurred, promotions were made internally within the department. The Board held that such internal promotions policy had developed into an established past practice and that the employer's departure therefrom in this instance, without having first negotiated over said change with the bargaining agent, constituted a unilateral change in a mandatory subject in violation of the statutory duty to bargain.

43.31 72.612
43.311
72.611

IV § 968(5)(C): For the above violation, the Board ordered the parties to either file an executed collective bargaining agreement with the Board within 30 days or, if they failed to do so, either party could re-open negotiations over the department's promotional policy, including eventual submission of said issue to the statutory impasse resolution procedures. Within 45 days of the date of the Board's order, the parties were to notify the Board of the steps taken in compliance with its order. On September 9, 1975, the parties submitted the executed collective bargaining agreement to the Board and the complaints were dismissed.

41.34 74.40
71.228
74.16

Council 74, AFSCME, AFL-CIO v. Bangor City Council, PELRB No. 75-13 (July 9, 1975)

Facts: The employer had voluntarily recognized the union as the bargaining agent for its public works employees some years earlier. The public works department was comprised of two divisions, the operations division and the motor pool. At the outset of negotiations for a successor collective agreement for the public works unit, the employer, allegedly in response to a petition signed by a majority of the motor pool employees expressing a desire to no longer be represented by the union as their bargaining agent, withdrew its recognition of the union as the bargaining agent for the motor pool employees. Although willing to negotiate a successor agreement for the operations employees, the employer refused to do the same for the motor pool employees. The union's complaint charged that the employer's conduct violated the duty to bargain and constituted unlawful interference, restraint or coercion.

I § 968(6): After extensive negotiations during a 4 hour recess of the Board hearing, the parties agreed to continue the prohibited practice case to allow them to conduct further collective

tive negotiations and to allow the bargaining agent the opportunity to file a unit determination petition, so that the Executive Director could determine the appropriateness of either one unit or two units. Negotiations continued, resulting in a successor collective bargaining agreement for the operations employees. Four months after the Board hearing, the bargaining agent had not filed any unit petition and the employer filed a motion to dismiss the complaint with prejudice. Since granting the employer's motion could result in a deprivation of statutory rights for the motor pool employees, the Board ordered that the complaint be dismissed without prejudice.

09.5 71.228
21.91 71.515
71.227 74.17

Prentiss v. Sandy River Education Ass'n, PELRB No. 75-15, Interim Order (May 8, 1975)

Facts: After negotiating a final tentative agreement with the employer, the bargaining agent refused to discuss the terms of said proposed contract with a unit employee who was not a member of the bargaining agent and refused to allow said employee to vote on the ratification of said agreement. The employee filed a prohibited practice complaint charging that the bargaining agent had violated the statutory duty of fair representation and the employer moved to intervene in the action.

I § 968(6): In examining the employer's standing to participate in this matter, the Board noted that the instant conflict could seriously impair any agreement between the employer and the bargaining agent. The Board allowed the employer to participate; however, such intervention was limited to permitting the employer to submit briefs on questions of law. The Board outlined a policy of considering requests to intervene on an individual basis, weighing the parties' needs and the importance of the public policy to be served by granting such requests.

71.14
71.519

Prentiss v. Sandy River Education Ass'n, PELRB No. 75-15 (Aug. 8, 1975)

I §§ 967(2) & 968(5)(A): After negotiating a final tentative agreement with the employer, the bargaining agent refused to discuss the terms of said proposed contract with a unit employee who was not a member of the union and refused to allow said employee to vote on the question of ratification. The final tentative agreement provided that it was subject to ratification by both the employer and the "teachers of School Administrative District No. 9." The same agreement defined "teachers" as being "all certified personnel" employed by the employer, with certain exceptions not relevant hereto. While it appeared that the bargaining agent had violated the terms of the agreement, such violation may be redressed either through a court action for breach of contract or through the contractual grievance procedure. Neither of these falls within the prohibited acts enumerated in § 964 and the Board refused to process grievances pursuant to the contractual grievance procedure or to define breaches of contract as unfair labor practices merely to make them actionable before the Board.

01.27 03.22 21.7 23.6 46.61
01.28 09.25 23.3 23.7 73.1
01.29 21.12 23.31 46.31 73.113
01.32 21.13 23.5 46.5 74.12

II §§ 967(2) & 968(5)(A): Following its own precedent, the Board held that alleged violations of the duty of fair representation created by § 967(2) are not actionable through the prohibited practice complaint process and dismissed the complaint.

01.28 71.227
23.6 74.12
23.7

Augusta Uniformed Firefighters Ass'n v. City of Augusta, PELRB No. 75-16 (May 13, 1975)

I § 968(6): Since there were no relevant facts in dispute, the parties entered into a stipulation of facts and the Board received the parties' legal arguments through their submission of written briefs.

09.380
71.228
71.75

II § 965(1)(C): The topic of pensions is a mandatory subject of bargaining.

43.117
43.136
43.137

III § 965(1)(B) & (C): The duty to bargain imposed by § 965(1) is a continuing obligation. The collective bargaining agreement is silent on the issue of pensions, it contains neither a management rights clause nor a zipper clause, and the employer and the bargaining agent never negotiated over the topic of pensions. By reaching an individual agreement with a bargaining unit employee on the topic of pensions, without prior notice to the bargaining agent, the employer violated the duty to negotiate over the mandatory subjects. Private agreements between the employer and bargaining unit employees represented by a bargaining agent, whether resulting in benefit or detriment to the employees, are inherently destructive of the collective bargaining process. Such individual contracts cannot be used as a means of frustrating the negotiating process nor should they run counter to the collective bargaining agreement. Where individual unit employees have special problems, the proper way to address such problems is for the employer and the bargaining agent to meet and reach a mutually acceptable accommodation.

22.41 46.642 72.51
46.12 72.133 72.511
46.64 72.17

IV § 968(5)(B): Having held that the individual agreement at issue violated the statutory duty to bargain, the Board ordered: (1) that the individual contract was void, (2) that, within 15 days of the date of the Board's order, the employer and the bargaining agent meet and negotiate over the special circumstances which gave rise to the individual agreement, and (3) that the parties notify the Board, within thirty days of the date of the Board's order, of the steps taken in compliance therewith.

74.16
74.32

Brunswick School Board v. Brunswick Teachers Ass'n, PELRB No. 75-19 (Jan. 16, 1976); appeal docketed, Kennebec Superior Court, Docket Nos. CV-76-44 & -42, Dismissed by agreement of the parties (Feb. 1, 1982)

I § 968(5)(B): At the prehearing conference, the parties were unable to identify any material issue of fact; therefore, the prehearing order directed that the parties submit their dispute to the Board on the basis of memoranda of law. Oral argument before the Board was neither requested nor granted.

09.380 71.75
71.228 71.76
71.251

II § 968(5)(A): When one party alleges that § 964 has been violated and the other challenges the Board's jurisdiction to hear and decide the matter, the Board must conduct a hearing to determine whether the matter comes within the Board's jurisdiction.

01.1
71.11
74.12

III § 965(1)(C): While the statute requires public employers to negotiate with their employees' bargaining agents over wages, hours, working conditions and contract grievance arbitration, the employers of teachers shall meet and consult but not negotiate with the teachers' bargaining agent over educational policy matters. In Biddeford, 304 A.2d 387, 418 (Me. 1973), Justice Wernick stated that "'educational policies' and 'working conditions' may be reasonably conceived as categories defining areas with essential purity at the extremities,

but with intermediate zones of substantial intermixture." Characterization of a topic as either educational policy or working condition requires the balancing of the rights and interests of the teachers with the desirability of reserving appropriate management discretion and control in officials responsible to the public.

03.31 42.42
41.6 42.47
42.21 43.61

IV STATE CONSTITUTION: As creations of the Legislature, municipalities' authority is derived from that body. With enactment of the Municipal Public Employees Labor Relations Law, 26 M.R.S.A. ch. 9-A, the Legislature has required municipalities to bargain collectively with their public employees; therefore, such sharing of power cannot constitute unlawful delegation of municipal authority.

03.1
03.34
03.341

V § 965(1)(C): In defining the mandatory subjects, the Legislature used the expansive term "working conditions," rather than enumerating each topic to be negotiated. Consistent with this statutory language, the Board interprets the mandatory subjects broadly.

01.26
03.22
42.4

VI § 965(1)(C): The following are working conditions and, therefore, mandatory subjects:

1. Just cause as grounds for discipline, reprimand, reduction in rank or compensation, dismissal, non-renewal, loss of any benefits for teachers;
2. Once a decision has been made to lay off or recall teachers in particular subject areas, procedures to determine who will be laid off or recalled (e.g., by seniority, within particular qualifications or subject areas;
3. Procedures for filling vacancies (e.g., proposal that vacancies be first offered to unit employees);
4. Teacher attendance at school when students are not present; and
5. The impact of educational policy decisions on wages, hours, or working conditions; however, such impact bargaining need not occur prior to implementation of the educational policy.

42.11 43.233 43.52 43.616
43.111 43.321 43.531 43.630
43.211 43.322 43.533

VII § 965(1)(C): The following are matters of educational policy and, therefore, are not mandatory subjects:

1. What subjects are to be taught;
2. The decision to lay off or to recall teachers in particular subject areas;
3. The length of the school year;
4. The length of the school day;
5. Interviewing of administrative candidates;
6. Summer institutes for teachers;
7. Evaluation of Administrators; and
8. The time, place and frequency of parent-teacher conferences.

03.31 43.44 43.613 43.622
42.21 43.52 43.618 43.95
43.43 43.53 43.620

VIII § 965(1)(C): The following topics are controlled by existing statutes; therefore, they are illegal subjects:

1. Selection of department heads, 20 M.R.S.A. § 161(5);
2. Leaves of absence longer than 1 year, 20 M.R.S.A. § 473(a);
3. Selection of prospective practice teachers and substitutes, 20 M.R.S.A.

§ 161(5);
4. Payment of an agency fee equal in amount to union dues, as a condition of continued employment, 26 M.R.S.A. § 964(1)(B);
5. Certification requirements to fill professional positions, 20 M.R.S.A. § 161(5); and
6. Any provision to take effect more than 3 years after the date of the agreement, 26 M.R.S.A. § 965(1)(D).

03.4 24.214 42.44 43.214 43.475 73.1
24.14 24.221 43.16 43.215 43.83
24.19 42.32 43.167 43.45 46.42

IX § 965(1)(C): A refusal to remove an illegal subject from the bargaining table constitutes a failure to negotiate in good faith.

72.535 73.436
72.541 73.45
72.589

X § 968(5)(C): As remedies for the union's insistence on negotiating over matters of educational policy and over illegal subjects, the Board ordered: (1) the union to cease and desist from insisting on negotiating over such subjects, (2) the parties were to negotiate over the mandatory subjects and (3) the parties were to notify the Board, in writing within 30 days of the date of the Board's order, of the steps taken in compliance with the Board's order.

74.16
74.31

Kittery Teachers Ass'n. v. Kittery School Committee, PELRB No. 75-21 (June 26, 1975)

I § 968(5)(B) & Rule 4.05: The complaint was properly served upon the respondent who delivered it to its counsel within 15 days of its receipt. While aware that § 968(5)(B) permits respondents to file answers to prohibited practice complaints, counsel was unaware that Rule 4.05 requires the filing of such answers within 15 working days of the filing of the complaint with the Board. The respondents did not file their answer until 28 working days after the filing of the complaint with the Board, 1 day after the complainant filed a motion for default. An untimely response may be treated as a nullity and a default is appropriate, unless the Board determines the untimeliness was due to excusable neglect. Such a determination will be made on a case-by-case basis and, in the circumstances, the Board held that the neglect was excusable and denied the motion for default.

06.3 71.240
71.12 71.252
71.224

II § 965(1)(E): The relevant portion of this section requires that "[w]henever wages, rates of pay or any other matter requiring appropriation of money by any municipality are included as a matter of collective bargaining . . . , it is the obligation of the bargaining agent to serve written notice of request for collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget." The Board held that the bargaining agent had satisfied this requirement by sending a letter through ordinary mail, postage prepaid, with the return address of the sender on the envelope, and addressed to the Superintendent of Schools, a proper agent to receive service on behalf of employer. Although the Superintendent never received the letter, it was never returned to the sender. The Board held that service was completed when the above letter was deposited in the U.S. Mail; therefore, the employer was obligated to negotiate with the bargaining agent over "money items."

41.32 72.581 73.41
43.11 72.590 73.53
72.52 72.73

III § 968(5)(C): Since the required 120-day notice had been given, the Board ordered the parties to begin negotiations as required by § 965, and within 30 days of the date of the Board's order the parties were to notify the Board, in writing, of the steps taken in compliance with the Board's order.

74.16

Waterville Teachers Ass'n v. Waterville Board of Education, PELRB No. 75-22 (June 26, 1975)

I § 968(5)(B) & (6): At the prehearing conference, the parties were unable to identify any material issues of fact. The parties reached a stipulation of relevant facts and presented the legal question at issue through memoranda of law.

09.380 71.25 71.75
09.62 71.251
71.228 71.51

II § 962(6): The Act covers public employees in their employment relationship with public employers. Persons performing supervisory duties for extra-curricular activities in the public schools are compensated for such work, such compensation is derived from public funds paid by a public employer, and the interaction between the persons performing such duties and the public employer is more of a relationship than a convenience, thereby constituting public employment within the meaning of the Act.

01.28 15.1 21.12 34.39 43.11
11.11 15.127 21.7 34.391 43.122
11.51 16.43 33.45 35.315 43.615
15.01 16.46 34.34 43.1 43.619

III § 962(6)(G): "Temporary" employees, within the meaning of this section, are individuals who are substituting for another employee and whose tenure of employment is less than 6 months' duration. To hold otherwise would mean that employees could be deprived their statutory rights by merely designating their job as "temporary," a result inconsistent with the purposes of the Act set forth in Sections 961 and 963.

15.01 16.43 34.34 35.315
15.1 16.46 34.39 43.615
15.127 33.45 34.391 43.619

IV § 962(6)(G): "Seasonal" employees, within the meaning of this section, and as applied to supervisors of public school extracurricular activities, are those whose activities are "seasonal" in nature, lasting less than 6 months, and have no other employment ties with the public employer which would establish a term of employment of greater than 6 months' duration.

15.01 16.43 34.34 35.315
15.1 16.46 34.39 43.615
15.127 33.45 34.391 43.619

V § 965(1)(C): In the event that public school extracurricular supervisory positions are held by either full-time personnel already within a bargaining unit or by persons falling within the statutory definition of "public employee," the compensation for such extracurricular services constitute wages and are mandatorily negotiable.

15.1 16.46 43.1 43.615 72.591
15.127 33.45 43.11 43.619
16.43 34.34 43.122 72.589

VI § 968(5)(C): The employer was ordered to negotiate over the extracurricular duties compensation for those persons performing such duties who fall within the statutory definition of "public employee" and the parties were ordered to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16

Cape Elizabeth Teachers Ass'n v. Cape Elizabeth School Board, PELRB No. 75-24 (Oct. 16, 1975); appeal docketed and dismissed by plaintiff, Ken. Super. Ct. No. CV-75-1079 (Jan. 14, 1977)

I § 968(5)(B) & (6): At the prehearing conference, the parties were unable to identify any material issues of fact. The parties reached a stipulation of relevant facts and presented the legal issues to the Board through memoranda of law.

09.380 71.25 71.75
09.62 71.251
71.228 71.51

II § 965(1)(B): In instances where the collective bargaining agreement in effect does not contain a "zipper clause," the obligation to bargain continues with respect to new issues which arise during the course of administration of the collective bargaining agreement when the new issues are neither contained in the terms of the agreement nor were they negotiated away during the bargaining for that agreement or a successor contract.

09.641 43.78 46.643 72.590 72.666
09.661 46.64 72.51 72.65 73.478
41.34 46.642 72.511 72.651

III § 965(1)(C): The school board determined that, due to a financial shortfall, a number of teacher positions would have to be eliminated and teachers terminated. These decisions are matters of educational policy so long as such decisions are not made in violation of § 964. The parties' collective bargaining agreement did not contain a "zipper clause" and was silent on the questions of (1) order of discharge, (2) order of recall, (3) severance, and (4) impact on working conditions, all in connection with a fiscally-required reduction in force. These issues were not negotiated away in any bargaining between the parties. Since these four issues constitute impact of implementation of educational policy decisions on the working conditions of the employees affected, the employer's refusal to honor a 10-day request to negotiate thereon, in the circumstances, violated the duty to bargain in good faith.

03.31 09.661 43.52 43.61 43.95
03.4 41.34 43.53 43.630
09.641 43.233 43.531 43.92

IV § 968(5)(C): As a remedy for the employer's violation of the duty to negotiate in good faith, the Board ordered that, within 15 days of the date of the Board's order, the parties were to meet and negotiate over the four union proposals and the parties were to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16

City of Old Town v. Council 74, AFSCME, AFL-CIO, MLRB No. 75-25 (July 27, 1976)

FACTS: During the course of negotiations for an initial collective bargaining agreement, the employer hired a police sergeant from outside the police department and the bargaining agent raised the employer's promotional hiring practices as an issue at the bargaining table. The union field representative called individual members of the City Council, seeking reversal of the hiring decision. In efforts to convince the employer to reverse its decision, unit employees picketed the city hall and circulated a petition seeking recall of 4 City Councilors, including the City Council representative at the bargaining table. A unit employee appeared at a public meeting and advocated resignation or removal of the City Manager, the employer's chief negotiator and the final step of the grievance procedure.

I § 968(6): The evidentiary hearing in this matter was continued twice by the Executive Director, once upon motion of one of the parties, and once by agreement of the parties.

71.515

II § 964(2)(A): This section prohibits public employees, public employee organizations, and their agents and members from interfering with the public employer in its selection of representatives for collective bargaining or the adjustment of grievances. The Board held that the course of conduct engaged in by the bargaining agent members and the union field representative violated this section of the Act because removal of the City Councilor and the City Manager from those positions would necessarily affect their status as employer represen-

tatives at the bargaining table and the Manager's position as the final step in the grievance procedure.

22.56 63.34
41.21 73.57
63.21

III § 964(2): The bargaining agent is responsible for the actions of its members and its field representative because it knew or should have known of their actions and it did not disclaim such actions. Since no disclaimer was made, the bargaining agent was held to have violated § 964(2)(A).

09.111 22.57 73.57
09.131 22.72
09.133 22.74

IV § 968(5)(C): The Board ordered the bargaining agent, the union field representative, and the bargaining unit employees involved in this case to cease and desist from engaging in any acts which would interfere with the public employer's selection of its representative for purposes of collective bargaining or the adjustment of grievances and the parties were ordered to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14
74.16
74.31

Westbrook Professional Fire Fighters Ass'n v. City of Westbrook, PELRB No. 75-26 (July 22, 1975)

I § 965(1)(B): The parties' collective bargaining agreement contained a "reopener" clause which provided that, on a certain date, the salary and State Retirement provisions of the agreement would be open for renegotiation, "but not including any other fringe benefits." In order to determine the scope of the duty to bargain pursuant to said "reopener," the Board was required to interpret said article of the contract.

01.27 46.61
09.23
41.34

II §§ 965(3) & 968(5): In interpreting the parties' collective bargaining agreement, the Board recognized that the meaning which it ascribed to the article in dispute might be inconsistent with that reached by a fact finding panel, made pursuant to the statutory impasse resolution procedures. In such instances, the determinations of the Board are preemptive over the recommendations of the fact finding panel.

09.413
46.61
53.7

III § 964(1)(E): Since the employer repeatedly stated, before the Board, that it was ready to continue negotiations over the topics mentioned in the "reopener" clause, once the Board interpreted said clause, the negotiations could continue. Since the negotiations impasse was due, in part, to the union's conduct, the Board dismissed the union's failure-to-bargain charge against the employer.

71.227
72.591
73.479

IV § 965(1)(B): Since the bargaining agent's mid-term "reopener" bargaining demand had placed a liberal construction on the scope of bargaining contemplated in the "reopener," the Board held that the union was estopped from claiming that the "reopener" clause should be narrowly construed in response to an employer proposal thereunder.

09.7 41.35
09.74
41.34

Tri-22 Teachers Ass'n v. S.A.D. No. 22 Board of Directors, PELRB No. 75-28 (Sept. 9, 1975)

I § 968(6): At the prehearing conference, the parties were unable to identify any material issue of fact and they entered into a stipulation of relevant facts. The legal question at issue was presented to the Board through memoranda of law. Oral argument before the Board was neither requested nor granted.

09.380 71.51
71.228 71.75
71.251 71.76

II § 965(1)(C): After giving notice to the bargaining agent, the employer interpreted the sick leave article of the parties' collective bargaining agreement as it relates to circumstances where sick leave is taken on the day before and the day after a storm day. Since there was no established practice on the policy at issue and since the employer was merely interpreting an ambiguous provision in the collective agreement, the proper forum for resolving such contract administration issues is the contractual grievance procedure; therefore, the Board was not the proper forum therefor.

01.27 09.64 46.61 47.01 47.53
01.28 21.13 46.64 47.15 71.227
09.23 43.73 46.641 47.32

III § 965(1)(C): This case should be distinguished from one where there is a "concerted, unilateral change in working conditions." In the latter situation, both the change and its impact are subject to mandatory negotiations under § 965(1)(C). Such an instance would arise where no collective bargaining has been negotiated or where such agreement does not provide an effective grievance procedure.

01.27 46.641 72.617
46.61 47.32 72.65
46.64 71.813

IV § 965(1)(C): In instances where a dispute could be settled either through an effective grievance procedure or through mid-term negotiations, a party should first attempt to pursue the matter as a grievance before charging a refusal to negotiate in good faith. Otherwise, an employee could sidestep the negotiated grievance procedure in favor of a lawsuit and would deprive the bargaining agent and the employer of the ability to establish a uniform method for settlement of grievances. Since the entire grievance procedure was, by its terms, exhausted within 3 months, requiring parties to first exhaust that procedure would not prejudice the employees' rights under the Act, in light of the Act's 6 months statute of limitations. As a matter of policy, the Board encourages the parties to resolve their disputes through their agreed upon grievance procedure; therefore, in the circumstances, the Board dismissed the complaint.

01.27 21.13 46.641 47.32 47.73 72.667
01.28 43.73 47.01 47.53 71.227
09.23 46.61 47.11 47.54 71.8
09.63 46.64 47.15 47.56 72.591

Winslow Education Ass'n v. Winslow School Committee, PELRB No. 75-29 (May 30, 1975)

I § 968(5)(A) & (B): Prior to the prehearing conference, the parties agreed that the Board could decide the issues presented herein on the basis of the precedent established by a prior Board case between the parties and filed their agreement with the Board. Accordingly, the Board issued an order identical to that in said earlier case.

09.373 09.43 74.42
09.380 09.62
09.411 71.228

Biddeford Unit, Council 74, AFSCME, AFL-CIO v. City of Biddeford, PELRB No. 75-33 (Dec. 10, 1975)

I § 968(5)(B): The purpose of the prehearing conference is to define the facts and issues of law in controversy. Although a particular factual issue was not raised by either party at

the conference, it was clear to the Board that both parties understood the relevant facts at that time and there was no issue thereon. The Board did not allow one party to raise the issue at the hearing.

09.5 09.74 71.252
09.613 71.25 71.517
09.62 71.251

II § 965(1)(C): A principal party may, consistent with the duty to negotiate in good faith, reserve the right to ratify tentative agreements reached at the table and, in the absence of evidence to the contrary, the reservation of such right will be presumed. While reserving the right to ratify, the principal party must clothe its negotiators with sufficient knowledge, guidelines, and authority to reach a final tentative agreement. At the outset of negotiations, the sound practice is for each party to reveal the steps required for its ratification of the final tentative agreement. If such information is not volunteered, the other party should request it in order to avoid misunderstandings later in the process.

07.14 09.22 41.22 46.13 72.530 73.437
07.141 11.7 41.3 46.5 72.536 73.46
07.142 22.3 41.31 46.51 72.57
09.112 41.2 41.7 46.52 73.431

III § 965(1)(C): The power to ratify necessarily implies the power to reject the final tentative agreement; however, repeated rejection of final tentative agreements reflects the failure to clothe the negotiator with proper guidelines to reach final tentative agreement and is evidence of failure to negotiate in good faith.

07.14 41.2 46.13 72.530 73.437
09.112 41.22 46.5 72.536 73.46
09.114 41.3 46.51 72.57
11.7 41.31 46.52 73.431

IV § 965(1)(C): If a negotiator reaches a final tentative agreement, she/he has the obligation to support it, including explaining and advocating ratification to the principal party. The only justifications for a failure to do so are a change in circumstances or where the negotiator misunderstood the agreement and the misunderstanding was not entirely due to the negligence of the negotiator. Since the negotiator charged herein was not present when the final tentative agreement was reached, she had no duty to support it.

41.2
41.22
46.13

V § 968(5)(B): The Board held that the record failed to establish violation of the duty to negotiate in good faith and dismissed the complaint. Nevertheless, the parties were ordered to negotiate in good faith and to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

71.227
74.16
74.21

Upper Kennebec Valley Teachers Ass'n v. Board of Directors, SAD #13, PELRB No. 75-36 (Oct. 16, 1975)

I § 968(5)(B): The complaint charged the employer with failure to negotiate the impact of educational policy decision. At the prehearing conference, the parties agreed that the bargaining agent would submit written impact bargaining proposals within 5 days of this issuance of the prehearing conference memorandum and order. That order was issued 13 days later, incorporating the parties' agreement. As a result of the bargaining agent's failure to carry out its agreement, in compliance with the prehearing conference memorandum and order, the Board granted the employer's motion to dismiss the complaint without prejudice. Parties bringing complaints should be prepared to pursue the allegations contained therein or face sanctions for their failure or refusal to do so.

09.62 71.240
71.227 71.251
71.228 71.252

Van Buren Education Ass'n v. M.S.A.D. No. 24 Board of Directors, MLRB No. 76-08 (Oct. 14, 1976)

I § 965(1): The duty to bargain in good faith means the mutual obligation of the public employer and the bargaining agent: to confer and negotiate with respect to wages, hours, working conditions, and contract grievance arbitration and to participate in good faith in mediation, fact-finding, and arbitration.

52.15 55.3 72.5 73.4
53.21 55.33 72.72 73.52
53.24 55.34 72.75 73.55

II § 965(3) & Rule 5.05: The Rule requires submission of a brief on the unresolved issues at least 5 working days prior to the date of the fact-finding hearing and allows the non-invoking party the right to include "any new issues to be raised by the respondent to the fact-finding proceeding."

53.1
53.21

III § 965(1)(C): The parties' negotiating ground rules provided that a tentative agreement was not final and was open to change. Furthermore, neither party closed the bargaining agenda and both sides reopened negotiations. While good faith participation in the statutory impasse resolution procedures usually encompasses a prohibition against negating or repudiating tentative agreements and submitting issues tentatively agreed-to to the fact-finders, the parties' ground rules' definition of the effect of a tentative agreement should prevail. Since the parties' ground rules provided that tentative agreements were not final and could be unilaterally withdrawn, the repudiation of a tentative agreement and submission of the underlying issue to the fact-finders is neither a failure to negotiate in good faith nor a failure to participate in good faith in the statutory impasse resolution procedures.

41.31 53.1 72.54 73.442
41.34 53.21 72.75 73.55
46.13 72.536 73.437

IV § 964(2)(A): The bargaining unit employees: picketed a televised school committee meeting, picketed the superintendent's office, took out an ad in the local newspaper, and distributed a handbill in the local area. The purpose of these activities was to arouse public support for the bargaining agent's bargaining positions, and recall or removal of school committee members or the superintendent of schools was neither urged nor mentioned in any of the union's propaganda. The Board held that the employee activity did not interfere with the employer's selection of its representatives for collective bargaining and, therefore, did not violate § 964(2)(A).

21.11 41.21 63.34 64.32 64.7
21.5 63.1 63.35 64.33 73.57
22.56 63.21 64.2 64.35

V § 965(2)(B): Mediation services are available upon the request of either party prior to arbitration or, at any time, upon motion of the Board or its Executive Director. The union's request for mediation, after the fact-finding hearing had been scheduled, did not delay the scheduled hearing and is permitted by the Act; therefore, the union's request violated neither the duty to negotiate in good faith nor the duty to participate in good faith in the statutory impasse resolution procedures.

51.4 52.31
51.5
52.22

M.S.A.D. #61 Teachers Ass'n v. M.S.A.D. #61 Board of Directors, MLRB No. 76-09, Interim Order (Apr. 8, 1976)

I § 968(5)(B): The Board considered the respondent's motion to dismiss the prohibited practice complaint and, determining that there may be real issues of fact, remanded the matter to the Executive Director to conduct a prehearing conference. The purpose of the conference is to identify the specific issues of fact, to seek stipulations thereon, to identify the number of

witnesses and the nature of their testimony, and to determine whether a fact hearing is necessary.

71.21 71.51
71.25 71.518
71.5 71.523

Ohler v. M.S.A.D. #41 Board of Directors, MLRB No. 76-10 (Sept. 10, 1976)

I § 967(1): Once a bargaining agent is voluntarily recognized, a request for election does not alter the status as bargaining agent.

22.1 32.18
31.1 32.95
31.3 72.51

II § 965(1)(C): The established past practice was for the employer to grant maternity leave as sick leave. After the union was voluntarily recognized as the bargaining agent, the employer changed this policy without notice to or negotiations with the bargaining agent. The Board held that the employer's refusal to bargain over the maternity leave policy violated the duty to bargain.

43.164 72.614
43.168
72.612

III § 968(5)(C): As remedies for the above unlawful unilateral change, the Board ordered: (1) that the employer, its representatives, servants and agents, cease and desist from violating § 964(1); (2) that the parties immediately convene negotiations on a maternity leave policy; and (3) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16
74.31

Bangor Education Ass'n v. Bangor School Committee, MLRB No. 76-11 (July 31, 1976)

I §§ 965(1)(C) & 968(5)(B): In instances where the subject of a prohibited practice complaint involves a substantial claim of contract right and resolution of the contract dispute is likely to resolve the controversy underlying the prohibited practice complaint, the Board will defer processing the dispute until the contractual grievance/arbitration process has had an opportunity to resolve the dispute. In adopting this deferral policy the Board: (1) recognized that the N.L.R.B. has opted for a similar course and (2) stated that, as a matter of public policy, the Board encourages parties to establish, through collective negotiations, mechanisms of the resolution of disputes and urges parties to use such negotiating procedures to resolve their disputes.

01.27 21.13 47.54 71.811
09.23 43.73 47.56 71.812
09.63 46.61 71.81 71.813

II §§ 965(1)(C) & 968(5)(B): Either party or the Board, on its own motion, may reopen deferred cases if: (1) the dispute has not, with reasonable promptness, either been resolved by settlement in the grievance procedure or been submitted promptly to arbitration, or (2) the grievance or arbitration procedures have not been fair and regular or have reached a result repugnant to the Act.

09.413 46.63 47.86 71.825
09.62 47.54 71.821 71.9
09.63 47.85 71.824

III § 968(5)(B): Since resolution of the contractual dispute would, in all likelihood, resolve the issue underlying the prohibited practice complaint, the Board deferred the matter to the contractual grievance/arbitration procedure, while retaining jurisdiction over the case until

it has been settled or decided by the grievance arbitrator and until the parties have had the opportunity to secure Board review of the grievance/arbitration process or result. The parties were ordered to submit a copy of the settlement or arbitration decision, within 5 days of the attainment or receipt thereof, and to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16
74.19
74.43

Lord v. M.S.A.D. #41 Board of Directors, MLRB No. 76-12 (June 15, 1976)

I § 968(5)(C): After a full evidentiary hearing before the Board, the parties agreed to a consent order, incorporating findings of fact and an order. Three days after the issuance of said order, the respondent alleged that the consent order did not accurately reflect the parties' settlement agreement. The Board then rescinded the consent order and issued a full decision and order.

71.228
74.42

II § 964(1)(A): The Board held that the employer had engaged in unlawful interference, restraint or coercion when the Superintendent of Schools interviewed 28 unit employees, asking whether they thought an "outside negotiator" could better represent their union than could a union member, asking if the employees had had an opportunity to vote on the "outside negotiator," and asking what working conditions could be improved to encourage greater employee satisfaction.

09.121	21.3	72.151
21.12	41.21	72.16
21.2	72.15	72.17

III § 968(5)(C): As remedies for the employer's unlawful conduct, the Board ordered the employer, its representatives, servants and agents: to cease and desist from engaging in any act in violation of § 964(1)(A), specifically to cease and desist from interviewing and making inquiries of unit employees, and to post a notice, for a period of 60 days, advising unit employees that the employer will not engage in unlawful interference, restraint or coercion in the employees' free exercise of the rights protected by the Act.

74.14	74.31
74.15	74.361
74.16	

Caribou School Department v. Caribou Teachers Ass'n, MLRB No. 76-15 (Jan. 19, 1977), appeal docketed, Caribou Teachers Ass'n v. Caribou School Department, No. CV-76-88 (Me. Super. Ct., Ken. Cty.) [No activity in the case since Feb. 4, 1982]

I §§ 965(1)(C) & 968(5)(B): The parties' stipulation that their bargaining proposals were submitted in good faith does not preclude the Board from concluding that one or both of them failed to negotiate in good faith. A party violates the duty to bargain by refusing to remove non-negotiable (illegal) subjects from the table after demand is made for such removal.

09.73	73.436
71.228	73.45
72.541	

II § 965(1)(C): Applying the City of Biddeford, 304 A.2d 387, 421 (Me. 1976), test the Board held that the following were matters of educational policy:

1. Planning periods for teachers--because such proposals shorten the school day and the length of the school day is intimately related to the quality of education;
2. Frequency and form of teacher evaluations;
3. Decision of whether a particular subject will be offered; and
4. Decisions to reduce staff in a particular discipline.

01.26 42.42 43.451 43.613 43.92
03.31 43.232 43.52 43.618 43.95
03.4 43.44 43.53 43.621 72.589
42.31 43.45 43.61 43.624

III § 965(1)(C): Applying the Biddeford test, the following are mandatory subjects:

1. The use of specialists (e.g., music, art, physical ed.), once the decision is made to offer instruction in particular subjects; and
2. Seniority proposals governing layoff or recall, once the decision is made to reduce or to expand staffing in a particular discipline.

01.26 42.11 43.46
03.31 42.42 43.531
03.4 43.233 43.533

IV § 968(5)(C): As remedies for the parties' failure to negotiate in good faith, the Board ordered: (1) the union to cease and desist from failing to negotiate in good faith by failing to remove non-mandatory subjects from the table on demand; (2) the parties to negotiate over the mandatory subjects; and (3) the parties to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16
74.31

Sanford Teachers Ass'n v. Sanford School Committee, MLRB No. 76-16 (Oct. 26, 1976); aff'd No. CA-76-600 (Me. Super. Ct., Ken. Cty., Nov. 9, 1978), vacated as moot, 409 A.2d 244 (Me. 1979)

FACTS: During the term of a collective bargaining agreement, the employer decided, for budgetary reasons, to eliminate 6 teaching positions. The bargaining agent sought negotiations over a proposal establishing a method for selection of the individuals who would be terminated as a result of the employer's decision. The employer declined to negotiate, the union requested fact-finding and the fact-finders directed that the parties negotiate over the impact of the educational policy decision. The "zipper" clause of the parties' agreement stated: "All matters not dealt with herein shall be treated as having been brought up and disposed of and the Committee shall be under no obligation to discuss with the Association any modifications or additions to this agreement which are to be effective during the term thereof."

BOARD:

I § 968(5)(B) & (6): At the prehearing conference, the parties agreed that there were no material issues of fact; therefore, the matter could be decided by the Board on the basis of the parties' written arguments. After meeting to deliberate the case, the Board concluded that additional facts were necessary before a decision could be rendered. A limited fact hearing was conducted and a decision was issued.

09.73 71.25 71.520
71.21 71.5 71.75
71.228 71.51

II § 965(1)(B) & (C): Mid-term bargaining on the impact of an educational policy decision is appropriate where: (1) the subject at issue is not included in the current agreement, (2) the subject was not raised in the parties' prior negotiations, and (3) the parties' agreement does not contain a "zipper" clause which is sufficiently broad to preclude such impact bargaining. The Board held that the "zipper" clause in this case was sufficiently broad to preclude mid-term impact bargaining.

01.26 09.231 09.642 43.78 72.590
01.27 09.612 09.66 46.64 72.617
03.31 09.64 09.662 46.642 72.666
09.23 09.641 43.630 46.643

SUPERIOR COURT:

III §§ 968(5)(F) & 965(1)(B): The Board's findings that the "zipper" clause at issue is unambiguous and precludes mid-term impact bargaining are not clearly erroneous; therefore, the same will be affirmed. If a contract provision is ambiguous on its face so as to present a genuine issue of material fact, the Board should explore the parties' intent, past practice, and bargaining history in interpreting such provisions.

01.26	09.232	09.64	09.662	46.64	72.617
01.27	09.233	09.641	43.630	46.642	72.666
09.23	09.391	09.642	43.78	46.643	81.502
09.231	09.612	09.66	46.61	72.590	81.507

IV §§ 968(5)(F) & 965(1)(B): The bargaining agent challenged the Board's decision on the grounds that allowing broad "zipper" clauses to preclude mid-term impact bargaining was contrary to the public policy embodied in the Act. The Court noted that, in the private sector, at least two United States Courts of Appeals have specifically approved of broad zipper clauses and concluded that their existence effectively waived a party's right to mid-term bargaining, NLRB v. Southern Materials Co., 447 F.2d 15 (4th Cir. 1971); NLRB v. Auto Crane Co., 536 F.2d 310 (10th Cir. 1976); therefore, a party may relinquish its statutory right to bargain, if it elects to do so and uses clear and unmistakable language to indicate such intent.

09.233	09.641	09.662	46.64	72.590
09.612	09.642	43.630	46.642	72.617
09.64	09.66	43.78	46.643	72.666

SUPREME JUDICIAL COURT:

V § 968(5)(F): During the two years that the matter was pending in the Superior Court, the appellant was decertified as the bargaining agent for the unit involved in the appeal. Since the relief being sought, an order directing the employer to negotiate over the impact of an educational policy decision, would violate the statutory provision requiring the employer to negotiate exclusively with the newly-certified bargaining agent, no effective relief could be granted herein by the Court. The appellant was asking the Court to decide a question which had lost its controversial vitality and the Court will not decide moot questions or abstract propositions. Furthermore, the Court determined that the question presented did not fall within the exception to the mootness rule for frequently recurring questions which would otherwise escape review because of their fleeting or determinate nature. Finally, the Court pointed out that, had the parties invoked the expedited procedure for judicial review required by § 968(5)(F), this matter would not have been moot by the time it reached the Law Court.

01.312	71.230	81.6
22.41	81.111	
22.43	81.371	

Lord v. M.S.A.D. #41 Board of Directors, MLRB No. 76-17, Consent Decree (Apr. 6, 1976)

I § 968(5)(B): Parties settled their dispute at the prehearing conference and entered into a consent decree issued by the prehearing officer, on behalf of the Board. The parties were to notify the Board, in writing, of their assent to and approval of said consent decree, within 5 days of the date thereof.

09.62
71.228
71.251

II § 965(1)(C): The parties agreed that a clause in an individual contract of employment, providing that a particular topic shall be non-negotiable by the employee or by the bargaining agent, has "no legal effect" and the parties agreed to negotiate over said topic, to the extent required by the Act.

09.64	46.16	72.590
21.12	46.2	74.42
21.92	72.17	

M.S.A.D. No. 38 Board of Directors v. M.S.A.D. No. 38 Teachers Ass'n, MLRB No. 76-20 (July 23, 1976)

I § 965(1)(C): The obligation to negotiate in good faith requires the parties to each select competent negotiators and to clothe them with sufficient authority to effectuate the policies of the Act. Once the authority of a negotiator is established, it is incumbent upon the principal party to inform the other party immediately of any subsequent change in such authority. A change of bargaining authority requires notification, actual or constructive, to the other party before it may become effective. The bargaining agent's change of its negotiator's bargaining authority, without notice to the employer until a significant time after said change, violated the bargaining agent's obligation to negotiate in good faith.

09.112 41.7
41.21 72.530
41.22 73.431

II § 965(1)(C): The parties did not have written ground rules for the negotiation of a successor collective bargaining agreement; however, the established negotiating practice followed by the parties was for tentative agreements to be honored until the final tentative agreement was submitted to the principal parties for ratification. The bargaining agent's attempt to reopen a matter previously withdrawn from the table was harmful to the bargaining process and violated the duty to negotiate in good faith.

41.22 41.34 73.435
41.31 72.534 73.442
41.33 72.54

III § 968(5)(C): As remedies for the bargaining agent's violation of the duty to negotiate in good faith, the Board ordered: (1) that the bargaining agent, its representatives, servants, and agents, cease and desist from failing to negotiate with the employer as required by § 965, (2) that the parties immediately convene negotiations on only those items not previously agreed to or withdrawn, and (3) that within 30 days from the date of the Board's order, the parties notify the Board, in writing, of the steps taken in compliance with said order.

74.14
74.16
74.31

City of Portland v. Local 740, IAFF, AFL-CIO, MLRB No. 76-21 (Apr. 21, 1976); appeal declared moot, Local 740, IAFF, AFL-CIO v. Maine Labor Relations Board and City of Portland, No. CA-76-208 (Me.Super.Ct., Ken.Cty., Sept. 9, 1976)

BOARD:

I § 968(5)(B): Due notice of the scheduled evidentiary hearing was given to the respondents who failed to appear thereat. Despite said failure to participate by the respondents, the Board convened the evidentiary hearing, received oral testimony and documentary evidence, considered the same, and issued a decision and order.

71.240
71.51

II § 964(2)(C)(2): The employer brought a prohibited practice complaint charging that the bargaining agent and the individual bargaining unit employees were engaging in an unlawful work slowdown. While continuing to perform their primary task of extinguishing fires, the unit employees had stopped performing duties normally discharged in the course of business, such as conducting inspections, cleaning and maintaining equipment and facilities, testing alarms, submitting paperwork and reports, and conducting training. The Board held that the employees' conduct constituted an unlawful slowdown which was destructive of the bargaining process.

01.23 73.58
61.54
73.3

III § 968(5)(C): As remedies for the unlawful slowdown, the Board ordered: (1) that the bargaining agent and each of the unit employees cease and desist from engaging in the unlawful slowdown, (2) that the parties immediately return to the bargaining table, (3) that

if, after returning to the table, an impasse exists for more than 14 days, either or both of the parties will petition to initiate fact-finding proceedings, and (4) that the parties are to notify the Board of the steps taken in compliance with the Board's order, within 14 days of the date thereof.

51.31 74.14 74.31
53.22 74.15 74.40
53.81 74.16

SUPERIOR COURT:

IV § 968(5)(F): Before the Court, the bargaining agent argued that the proceedings before the Board were a nullity because of several procedural deficiencies, including: (1) the prohibited practice complaint had not been notarized, (2) it contained no jurat, and (3) the hearing was held prior to the expiration date for the filing of an answer to the complaint. The Court held that the proper course would have been for the bargaining agent or the unit employees to appear before the Board and move to dismiss the complaint on the basis of the grounds alleged. Since the Superior Court had already conducted an evidentiary hearing on the employer's Motion for Temporary Restraining Order and held that an unlawful slowdown had occurred, the essential findings made by the Board and underlying its order had been adjudicated before the Superior Court; therefore, the appeal was deemed moot.

01.28 71.11 74.12 81.5088
09.62 71.222 81.31 81.526
09.74 71.51 81.492 83.23

Caribou Teachers Ass'n v. Caribou School Department, MLRB No. 76-22 (Nov. 10, 1976)

I § 965(1)(A): The cancellation of two negotiating sessions, after notification to the bargaining agent, did not constitute violation of the duty to negotiate in good faith by the employer where: (1) the employer's chief negotiator was unable to attend such sessions due to inclement weather, (2) four sessions were held during the same two-month period, (3) subsequent meetings were arranged at the time of cancellation, and (4) the bargaining agent team did not demand that negotiations proceed without the employer's chief negotiator.

72.531
72.537
72.590

II § 965(1)(C): A unilateral change occurred when the employer requested that teachers accept the scheduling of extra-curricular activities during the normal school day. This change was unilateral even though it was discussed with the unit employees because the employer did not notify the bargaining agent thereof.* The change itself was not unlawful because, since it affected the length of the school day, it was an educational policy decision and the employer was not obligated to negotiate thereon. Since there was no request that the employer negotiate over the impact of the educational policy decision, the complaint charging a violation of the duty to negotiate in good faith was dismissed.

09.651 43.618 72.590 72.614 72.666
43.61 43.619 72.611 72.616 72.667
43.615 43.630 72.613 72.617

*Even if the change was beneficial to the unit employees, i.e. a shorter work day, the employer would be required to negotiate thereon if it concerned one or more of the mandatory subjects.

Lord v. M.S.A.D. #41 Board of Directors, MLRB No. 77-01 (Jan. 19, 1977); appeal docketed but dismissed by appellant, M.S.A.D. No. 41 Board of Directors v. Maine Labor Relations Board, No. CV-77-92 (Me.Super.Ct., Ken.Cty., June 9, 1977)

I § 964(1)(D): Two bargaining unit employees appeared and gave testimony before the Board in response to a subpoena issued at the request of the bargaining agent. The Personal Leave Article of the parties' collective bargaining agreement provided: "Five (5) days of leave with full pay will be granted annually for personal reasons when previously reported to the Superintendent. Personal reasons shall include such considerations as marriage, death or illness of immediate family, legal requirements and religious holidays." The two employees requested personal leave, prior to being absent in order to testify before the Board. The employer denied the requests, deducted a day's pay for each day that the employees appeared before the Board, and deducted from each employee the amount of sick leave which would have been accrued during the days in question. The Board held that a subpoena to testify before the Board was a "legal requirement" that, by granting personal leave for all legal requirements while denying such leave to persons subpoenaed to testify before the Board, tends to discriminate against employees who testify or give information in proceedings before the Board and violates § 964(1)(D) of the Act.

01.27 71.34
09.361 71.523
21.13 72.4

II § 968(5)(C): As remedies for the employer's unlawful discrimination, the Board ordered: (1) that the M.S.A.D. No. 41 Board of Directors, its representatives, servants, and agents cease and desist from discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition, or complaint or given any information or testimony under the Act; (2) that the employer pay both unit employees involved the pay deducted from them for the days spent testifying before the Board, plus 6% interest thereon from the date the money was deducted, and to make said employees whole for the sick leave accrual for said days, and (3) the parties were to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.32
74.16 74.341
74.31 74.345

Lord v. M.S.A.D. No. 41 Board of Directors, MLRB No. 77-02 (Oct. 29, 1976)

I § 968(5)(B): At the prehearing conference, the parties were unable to identify any material issue of fact; therefore, the matter was to be submitted to the Board on the basis of briefs, which were to be filed on or before a date specified in the prehearing order. Neither party complied with the prehearing order and the Board notified them that, unless they filed their briefs on or before a date specified, the Board would consider either dismissal or default, pursuant to Rule 4.08. The complainant complied with the Board's request and the respondent failed to file a brief. The Board held that, by not submitting a brief as required by the prehearing order and after being warned and having received an extension of time in order to do so, the respondent was in default. The Board then ruled that the facts alleged in the complaint, as modified by the pre-hearing order, were sufficient to establish a failure to negotiate in good faith. During collective negotiations and based on alleged economic necessity, the employer had proposed reducing annual salaries by $2000 and eliminating employee health insurance coverage. Since the complaint alleged that the school district electorate had voted to fund an increase in the instructional salaries account and the respondent had failed to show sufficient justification for the proposed reduction and since further inquiry was foreclosed by the respondent's default, the Board held that the employer's action at the table violated the duty to negotiate in good faith.

09.123 71.240 71.75
09.74 71.251 72.535
71.21 71.252

II § 968(5)(C): As remedies for the employer's failure to negotiate in good faith, the Board ordered: (1) that the employer was in default in the action before the Board; (2) that the M.S.A.D. No. 41 Board of Directors, its representatives, servants, and agents cease and desist from refusing to bargain collectively as required by § 965; and (3) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14
74.16
74.31

O'Neil v. M.S.A.D. #64 Board of Directors, MLRB No. 77-06 (Feb. 7, 1977)

I § 965(1)(C): Absent ground rules to the contrary, a tentative agreement once reached may not be unilaterally withdrawn. To negotiate and renegotiate items without some finality on the items discussed would result in fruitless marathon bargaining sessions and would transgress the policy of promoting agreement through the collective bargaining process. Without ground rules, there is a strong presumption that tentative agreements are binding on the parties. The employer's unilateral withdrawal of certain tentative agreements and its attempt to reopen negotiations on the topics of said agreements violated the duty to negotiate in good faith.

07.141 46.13 72.539 73.441
41.31 72.531 73.432
41.34 72.534 73.435

II § 968(5)(C): As remedies for the employer's violation of the duty to negotiate in good faith, the Board ordered: (1) that the M.S.A.D. No. 64 Board of Directors, its representatives, servants, and agents cease and desist from refusing to bargain collectively as required by § 965; and (2) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14
74.16
74.31

Glover v. M.S.A.D. #68 Board of Directors and Joint Board of Directors of Foxcroft Academy, MLRB No. 77-07 (Feb. 7, 1977)

I § 965(1)(C): Absent ground rules to the contrary, once reached, a tentative agreement may not be unilaterally withdrawn. To negotiate and renegotiate items without some finality on the items discussed would result in fruitless marathon bargaining sessions and would transgress the policy of promoting agreement through the collective bargaining process. Without ground rules, there is a strong presumption that tentative agreements are binding on the parties. The employer's unilateral withdrawal of certain tentative agreements and its attempt to reopen negotiations on the topics of said agreements violated the duty to negotiate in good faith.

07.141 46.13 72.539 73.441
41.31 72.531 73.432
41.34 72.534 73.435

II § 965(1)(C): Revived good will between the parties does not negate prior unlawful conduct.

71.230
72.591
73.479

III § 965(1)(C): The parties' only "ground rule" was an oral agreement limiting the duration of negotiating sessions to 2 hours each.

41.31
41.32
41.33

IV § 968(5)(C): As remedies for the employer's violation of the duty to negotiate in good faith, the Board ordered: (1) that the M.S.A.D. No. 68 Board of Directors and the Joint Board of Directors of Foxcroft Academy, their representatives, servants, and agents cease and desist from refusing to bargain collectively as required by § 965; and (2) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

11.13 74.31
74.14
74.16

Truck Drivers, Warehousemen and Helpers Union, Local No. 340 v. Rockland City Council, MLRB No. 77-16 (Aug. 9, 1977)

I § 964(1)(E): The employer unilaterally changed the working conditions of the detective position, effectively reducing that position to that of patrolman, by requiring the employee: to work a fixed shift, to work in uniform, to complete certain daily reports, and to use the vehicle issued to him only during scheduled work hours. The obligation to bargain collectively requires the employer and the bargaining agent to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration . . ." The parties' collective bargaining agreement specifically called for the detective position with accompanying rights and benefits. If the employer wished to change any of the rights or benefits granted to the detective through the agreement or through past practice, it should have negotiated said changes with the bargaining agent. Its failure to do so violated § 964(1)(E).

43.141 43.431 46.641 72.612
43.41 43.444 46.642 72.652
43.422 43.483 72.611

II § 964(1)(A), (B) & (D): The bargaining agent alleged that, since the employer's unilateral changes in the detective's working conditions led to his resignation, the employer "constructively discharged" the detective in violation of the Act. Although the changes in working conditions followed the detective's giving an affidavit in a grievance arbitration proceeding, supporting a grievance against the employer, and although the detective was an active union supporter and shop steward, the Board concluded that the employer's action did not constitute a "constructive discharge" in violation of the Act. The Board based its holding on the following: (1) when he tendered his resignation, the City Manager asked the detective to reconsider his decision and then reluctantly accepted the resignation, and (2) the detective resigned for personal reasons.

09.675 72.333 72.4
72.331 72.340
72.332 72.366

III § 968(5)(C): As remedies for the employer's unlawful unilateral changes in the detective's working conditions, the Board ordered: (1) that the City of Rockland, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent as required by § 965; (2) that the employer retain the position of detective with the rights and benefits enjoyed by that position prior to the unlawful unilateral changes at issue; (3) that the employer bargain collectively with the bargaining agent with respect to any changes in the working conditions of the detective classification; (4) that the ordered return to the status quo ante does not require the employer to rehire the former detective since he voluntarily resigned from that position; and (5) that the balance of the complaint, alleging violation of § 964(1)(A), (B) and (D), be dismissed.

09.675 74.14 74.32
09.74 74.16 74.332
71.227 74.31

Maine Teachers Ass'n v. Sanford School Committee, MLRB Nos. 77-18, -19, -20 & -29 (June 13, 1977)

I § 968(5)(B): The bargaining agent filed four separate prohibited practice complaints, with each complaint alleging violations of the Act in connection with the employer's conduct toward a separate bargaining unit of its employees. At the prehearing conference, the presiding officer determined that the complaints all involved identical factual and legal issues and ordered that the complaints be consolidated for purposes of hearing and decision by the Board.

71.228 71.51
71.251 71.514
71.5 71.522

II §§ 968(5)(B) & 965(1)(C): The parties' collective negotiations went through all of the statutory impasse resolution techniques, including interest arbitration, and neither party appealed the arbitrators' award and recommendations on wage, insurance and pension issues. At the prehearing conference, the employer's representative agreed to execute in writing the binding portions of the interest arbitration award by a specified date. The employer failed to honor its agreement. The Board held that agreements made during the course of Board proceedings must remain inviolate, since the effectiveness and integrity of the process depends upon such treatment and the dilatory tactics resorted to by the employer are to be condemned.

46.17 55.82 72.572
46.55 71.228 72.72
55.8 72.531

III §§ 965(1)(C) & 962(7): The employer of the municipal school department employees involved in this case was the local school committee. The employer attempted to require the bargaining agent to negotiate over a proposal that the final tentative agreement reached at the table be subject to ratification by the Warrant Committee and the Town Meeting, as well as by the school committee. The subject of ratification of the final tentative agreement by a body other than the public employer does not come within the ambit of the mandatory subjects of bargaining--wages, hours, working conditions, and contract grievance arbitration; therefore, insistence on such a proposal was an attempt by the public employer to abrogate its duty to bargain collectively and violated § 964(1)(E).

03.31 07.2 11.12 11.7 72.541
03.34 07.4 11.5 46.5
07.141 09.22 11.51 46.52

IV § 968(5)(C): As remedies for the above violations, the Board ordered: (1) that the Sanford School Committee, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent as required by § 965; (2) that the employer execute the written document reflecting the binding portion of the interest arbitration award; and (3) that the employer notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.44
74.16
74.31

Lord v. M.S.A.D. #41 Board of Directors, MLRB No. 77-24 Default Judgment (Mar. 25, 1977)

I § 968(5)(B): At the prehearing conference, the presiding officer ascertained that there were no material issues of fact in dispute and the prehearing order directed that the matter be submitted to the Board through briefs, which were to be filed on or before a date specified. The employer failed to file its brief as ordered and the Board granted the complainant's motion for default judgment, as authorized by Rule 4.08.

09.123 46.17 71.240 71.75
09.74 71.21 71.251
41.22 71.228 71.252

II §§ 964(1)(E) & 968(5)(C): The prohibited practice complaint charged that the employer had violated the duty to negotiate in good faith by introducing five new topics at the end of the last bargaining session prior to the employer's requesting fact-finding. The employer defaulted in the proceeding before the Board and the Board, basing its findings of fact on the pleadings, the prehearing conference memorandum, and its own records, held the employer in default and concluded that the employer had violated § 964(1)(E).

09.373 71.240 72.521
09.74 71.517 72.75
53.12 71.75

III § 968(5)(C): As remedies for the employer's violation of the duty to negotiate in good faith, the Board ordered: (1) that the M.S.A.D. #41 Board of Directors, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent as required by § 965; (2) that the employer forthwith pay to the bargaining agent compensatory damages in the amount of $233.24, together with legal interest (the amount

of damages was based on the proportion of the union's fact-finding costs attributable to the employer's violation of the Act--its introduction of 5 of 26 issues at the end of the last session prior to the employer's requesting fact-finding); and (3) that the employer notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.34
74.16 74.345
74.31 74.355

M.S.A.D. #44 Administrators Ass'n v. M.S.A.D. #44 Board of Directors, MLRB No. 77-27 (June 20, 1977)

I § 965(1)(C): Expressions by the Superintendent of Schools, to unit employees, and by the employer's labor consultant, at the bargaining table, outlining dismay and concern over the bargaining agent's retaining a consultant, who was a former Superintendent in the school district, does not violate the duty to bargain since the employer continued to negotiate with the union's consultant.

41.21
72.117
72.5

II § 965(1)(C): The obligation to meet and consult over educational policy matters is co-equal with the duty to negotiate in good faith and the procedural requirements associated with the latter, e.g. duty to meet at reasonable times and 10-day notice, apply equally to the obligation to meet and consult. The bargaining agent is the exclusive representative of the unit employees for collective bargaining purposes, including the meet and consult process. The employer's scheduling of a meet and consult session with unit employees without affording the bargaining agent the opportunity to be present is a technical violation of § 965(1)(C).

22.41 41.65 72.55
41.63 72.17 72.74
41.64 72.5

III § 965(1)(C): The parties' only ground rule was that their negotiations were to occur in "executive session." Such a rule could not be used to preclude one or both parties from utilizing outside negotiators or consultants during bargaining. The employer's chief negotiator, who delayed negotiations by demanding removal of the union's consultant, even though there was no ground rule concerning the number or qualifications of consultants, and who later left the table with the rest of the employer's negotiating team, to attempt to effect removal of the union consultants, constituted a failure to bargain in good faith.

01.27 41.31 72.54
07.511 72.117
41.21 72.533

IV § 968(5)(C): As remedies for the employer's failure to negotiate in good faith, the Board ordered: (1) that the M.S.A.D. #41 Board of Directors, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent as required by § 965; (2) that the parties commence negotiations forthwith as required by § 965; and (3) that the respondents, including two individually-named respondents, notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.31
74.15
74.16

Maine State Employees Ass'n v. State of Maine, MLRB No. 77-31 (Aug. 30, 1977); appeal docketed and voluntarily dismissed, No. CV-77-588 (Me.Super.Ct., Ken.Cty., Nov. 5, 1979)

I § 979-C(1)(E): While state unit determination petitions were pending (a period of approximately 2 years) and before a bargaining agent election was held, the employer changed its administrative leave and vacation policies as such policies applied to attendance at state employee organization functions. Where there is no certified or recognized bargaining agent

in place, the employer is under no obligation to bargain collectively; therefore, the employer's actions did not violate the duty to negotiate in good faith.

72.51 72.591 72.62
72.583 72.6
72.588 72.611

II § 979-C(1)(A), (B), (C) & (D): During the formation of bargaining units and the selection of a bargaining agent, a public employer must exercise caution to avoid violating the Act. A change in working conditions by the employer during the organizational process may violate the Act, if the change tends to discourage the organizational efforts. In this case, the bargaining unit process alone took approximately two years and it is unrealistic to think the employer cannot make any changes during that time period. Thus, it is necessary to balance the interests of the employer in continuing his operations while considering the adverse impact the employer's conduct has on employee organizational efforts. We find that the employer did not act with an anti-union animus in formalizing the administrative leave policy or in altering the vacation leave policy with respect to organization meetings. The valid concerns of the employer in the changing organizational activity required changes in the administrative leave policy and in the vacation leave policy with respect to organization meetings. The changes were made in anticipation of an increase in leave requests for such activities. We credit the testimony of the employer with respect to its motivation. We also find that the respondents' conduct did not discriminate against the members of any employee organization. Therefore, the complaint with respect to alleged violation of 26 M.R.S.A. § 979-C(1)(A), (B), (C) and (D) was dismissed.

09.362 71.227 72.114 72.261 72.318
22.51 72.11 72.118 72.311 72.342
35.538 72.112 72.18 72.317 72.359

Greater Portland Transit District v. Division 714, Amalgamated Transit Union, MLRB No. 77-32 (Dec. 29, 1977)

I § 968(5)(B): This section requires that prohibited practice complaints be served on the respondents, prior to being filed with the Board. Rule 4.04 requires that "[p]roof of service in the form of either a certified mail receipt or other appropriate form shall be furnished to the Board." The complaint at issue was sent to the respondent's agent by certified mail but the complaint was never received and no certified mail receipt was filed with the Board. A copy of the complaint was sent to the respondent's attorney. Under the general rule of law, service of a document is completed when it is deposited in the U.S. Mail; however, due process before the Board requires that service of a prohibited practice complaint be by mail, in which case a signed return receipt or a statement that acceptance was refused must be filed with the Board, or by personal service. Service of a complaint upon the respondent's attorney, who was not authorized to accept service, was not legally sufficient. Although the respondent did review the copy of the complaint received by its attorney, the Board nevertheless dismissed the complaint on the grounds of improper service of process.

01.28 71.227
71.12
71.16

Council #74, AFSCME, AFL-CIO v. City of Augusta, MLRB No. 77-33 (Aug. 9, 1977)

I § 965(1)(C): Title 1 M.R.S.A. § 408 (the Maine Freedom of Access Law) does not require release of bargaining proposals to the press or public since such proposals fall within the 1 M.R.S.A. § 402(3)(D) exclusion from the definition of public records.

07.52
07.521
07.54

II § 965(1)(C): Collective negotiations should take place in executive session, unless public sessions are mutually agreed upon. The bargaining process requires a free exchange of positions and frank discussion beyond the eyes and ears of the public and the press to avoid turmoil and unnecessary delay. To create an atmosphere which is most conducive to meaningful bargaining, the Board concluded that the unilateral public release of bargaining proposals,

during the negotiating process and prior to final agreement, disrupts the bargaining process and constitutes a violation of the obligation to negotiate in good faith.

07.51 41.3 73.4
07.53 72.5 73.434
07.54 72.533

III § 965(1)(C): In the factual record before the Board, the respondent did not release the complainant's bargaining proposals to the press but merely expressed an intention to do so. Considering the unsettled state of the law in this area, the mere expressed intention to release proposals to the press, without actually releasing such proposals, did not violate the duty to bargain in good faith.

07.51
72.5

Caribou Teachers Ass'n v. Caribou School Department, MLRB No. 77-34 (Feb. 1, 1978); aff'd in part, rev'd as to remedy, Caribou School Department v. Caribou Teachers Ass'n, 402 A.2d 1279 (Me. 1979)

BOARD:

Facts: The established practice between the parties had been the negotiation of a series of one-year agreements, effective from August 1st of one year through July 31st of the following year. They met on January 6, 1976, to begin negotiations for a successor agreement for that which would expire on July 31, 1976. At the first session, the parties agreed to ground rules and exchanged initial proposals. Later in the process, the bargaining agent requested mediation and the employer requested fact-finding. The effective date of the agreement being negotiated was not mentioned as an outstanding issue in either party's initial proposal, in the request for mediation, or in the fact-finding request. Seven months into the negotiations and after the conclusion of fact-finding, the employer first introduced the effective date of the agreement being negotiated as an outstanding issue between the parties. The parties' dispute was later submitted to interest arbitration, when the employer pressed the "effective date/retroactivity" issue. The interest arbitration report, issued December 31, 1976, rejected the employer's view and made the effective date of the agreement August 1, 1976. Neither party sought judicial review of the arbitration award. On February 18, 1977, the parties executed a collective bargaining agreement which was effective on December 31, 1976; however, the bargaining agent explicitly reserved in the agreement any legal right it might have to challenge the effective date of the agreement.

I § 968(5)(B): An evidentiary hearing on the merits of the case was held, a briefing schedule was established, and written memoranda were duly filed by the parties. The Board deliberated the matter and determined that additional relevant facts were required to decide the questions at issue; therefore, an additional evidentiary hearing was held.

71.5 71.75
71.51
71.520

II § 965(1)(C): The parties' negotiating ground rules provided that "[o]nce the packages of items for negotiations are exchanged, no other item may be submitted unless mutually agreed." The employer's initial proposal did not include a proposal concerning the effective date of the contract being negotiated. The employer did not attempt to change the effective date of the agreement being negotiated until after fact-finding and, as contemplated in the ground rules, the bargaining agent refused to negotiate thereon. The Board held that, by introducing a new item in violation of the ground rules, the employer violated the duty to negotiate in good faith, unless the bargaining agent waived its right to object to said violation of the ground rules.

41.31 55.93 72.54
41.32 72.535
46.41 72.536

III § 968(5)(B): The execution of a collective bargaining agreement containing a caveat that the bargaining agent was explicitly reserving the right to challenge the employer's bargaining conduct in connection with the effective date of the agreement did not constitute a clear and unmistakable waiver of the right, if any, to have the effective date of the agreement be determined by the parties' ground rules.

01.27 21.9
09.7
09.74

IV § 965(1): The parties executed an informal "memorandum of agreement" in the process of settling their successor agreement. Each party testified to a different interpretation of the relevant part of the agreement and the language of the memorandum was ambiguous on the question of waiver. To be effective, a waiver must be clear and unmistakable; therefore, the Board held that the bargaining agent did not waive its right to object to the effective date of the agreement by executing the "memorandum of agreement."

01.26 09.61 21.9
01.27 09.612 41.33
09.231 09.62

V § 968(5)(C): As a remedy for the employer's violation of the duty to negotiate in good faith, it was deemed appropriate that the employer not benefit from its violation; therefore, the employer was ordered to implement the agreement on the date on which it would have been implemented, had there been no violation - August 1st. The employer had to pay the difference between the contract wage rate and the former rate to each of the unit employees, for the period from August 1st through December 31st, together with legal interest thereon. Nota bene: The Law Court held that this order was beyond the Board's statutory authority and vacated the same.

01.28 74.344 74.44
01.29 74.345
74.341 74.355

LAW COURT:

VI § 968(5)(F): The Superior Court had reversed the Board's decision, that the employer had violated the duty to bargain, on the grounds that said decision was without evidentiary support. The Superior Court held that the Board had based its conclusion solely on the employer's violation of a ground rule and had, in effect, made violation of a ground rule a per se violation of the Act. Reviewing the Board's decision, the Law Court determined that the Board had not applied a per se rule but, rather, had based its holding on: the employer's 8-month delay in raising the issue of the effective date of the agreement; the parties' history of negotiating a series of 1-year agreements; the employer's initial proposal, which stated that any agreement article not mentioned therein would be carried over into the successor agreement, and the employer's failure to mention the effective date issue in its initial proposal; as well as the employer's violation of the ground rule closing bargaining agendas. Together, such evidence established that the employer had engaged in dilatory tactics, a violation of the duty to negotiate in good faith. The Court therefore affirmed the Board's holding without reaching the issue of whether the Board has the authority to promulgate a per se rule for violations of the duty to bargain.

41.31 72.531 72.54 81.521
41.32 72.535 81.502
55.93 72.538 81.503

VII § 968(5)(F): In § 968(5)(C), the Board is authorized to issue orders that parties cease and desist from engaging in the prohibited practice established by the record and to take "such affirmative action . . . as will effectuate the policies of [the Act]." The "policies" of the Act are substantially the same as those embodied in the parallel sections of federal law found in the National Labor Relations Act. The purpose of Board remedies is to rectify the harm done to the injured workers, not to provide punitive measures against errant employers. A properly designed remedial order seeks a restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice. Since the "policies" of the Act include the principle that bargaining in good faith does not require either party to agree to a proposal or to make a concession, this clarification on the duty to negotiate in good faith also serves as a limitation on the Board's remedial authority. The U.S. Supreme Court has held that, in providing remedies for violation of the duty to negotiate in good faith, "the Board cannot fashion remedies on the basis of an assumption as to what the parties would have agreed to, absent an employer's failure to bargain in good faith." Such an order would not only be based on speculation but would also, in effect, require a party to make a concession on a particular topic. Adopting the Supreme Court's analysis, the Law Court vacated the portion of the Board's order requiring that the parties' entire successor agreement be given an effective date of August 1, 1976, and, hence,

requiring payment of back pay and interest to the unit employees based on the salary scale in the parties' new agreement. All provisions of the parties' successor agreement which were not in dispute were given retroactive effect to August 1, 1976.

01.28	72.536	74.13	74.32	74.344	74.44	81.5089
01.29	74.11	74.17	74.34	74.35	81.5083	81.522
01.32	74.12	74.31	74.341	74.351	81.5087	

Sanford Teachers Ass'n v. Sanford School Committee, MLRB No. 77-36 (Sept. 14, 1977)

I §965(1)(E): In addition to the issues raised in its pre-fact-finding Summary of Position document, the employer raised nine new issues for the first time at the fact-finding hearing. Contrary to Rule 5.05 of the Board's Rules, the employer failed to send the bargaining agent a copy of the Summary of Position on behalf of the employer. The Board held that raising new issues at the fact-finding hearing without having mentioned said issues in the fact-finding brief confuses and lengthens the fact-finding process unnecessarily and violates the duty to participate in fact-finding in good faith.

07.16	53.21
09.74	72.75
53.12	73.55

II § 965(1)(E): One of the proposals first raised by the employer at the fact-finding hearing could, if accepted, change the composition of the bargaining unit; therefore, said proposal raised a question concerning the appropriateness of the unit. Other statutory mechanisms exist for the Board to resolve controversies concerning the composition of bargaining units; therefore, the employer's submission of this issue to the fact-finders violated the duty to participate in fact-finding in good faith.

07.16	36.1	36.217	53.12	73.55
09.74	36.11	43.705	53.21	
33.1	36.21	53.11	72.75	

III § 968(5)(C): As remedies for the employer's violation of the duty to engage in fact-finding in good faith, the Board ordered: (1) the Sanford School Committee, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent of its employees as required by § 965; (2) the employer pay to the bargaining agent compensatory damages in the sum of $332.43, the proportion of the bargaining agent's fact-finding costs directly attributable to the employer's violation of the duty to participate in fact-finding in good faith, together with legal interest thereon; (3) the employer to sign, date, post and keep posted for a period of 60 consecutive days a notice provided by the Board; and (4) the employer to notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

53.43	74.31	74.36
74.14	74.32	74.361
74.16	74.355	

Maine State Employees Ass'n v. State of Maine, MLRB No. 77-37 and Objections to Institutional Services Unit Election (Aug. 9, 1977); appeal docketed but voluntarily dismissed by appellant, Maine State Employees Ass'n v. Maine Labor Relations Board, No. CV-77-528 (Me.Super.Ct., Ken.Cty., Nov. 5, 1979)

I §§ 979-G(2) & 979-H(2): An employee organization which failed to win a bargaining agent election filed both a timely objection to the election and a prohibited practice complaint challenging the conduct of other parties to the election. The employer moved that the two matters be consolidated and that the Board expedite handling of the cases to avoid confusion among the unit employees and the employer. The requests were granted.

01.22	35.513	71.514
01.311	35.515	71.7

II §§ 979-G(2) & 979-H(2): The motion of an employee organization, which was not a proper party to an election, to intervene in the Board review of an objection to the election and in a prohibited practice proceeding, challenging the conduct of the parties to the election, was

denied. The Board did allow said organization amicus curiae status, permitting the organization to observe the Board hearing and to file briefs on the relevant issues of law.

35.4 71.14 71.7
35.41 71.516

III §§ 979-F(2) & 979-C(2)(A): There is no provision in a bargaining agent election for "write-in" votes and the voters are not permitted to widen the choices beyond those appearing on the ballot. In order to appear on the ballot, an employee organization must either be the petitioner or be an intervenor, providing the Board with the appropriate showing of interest in either case. An employee organization which did not provide any showing of interest to the Board may not benefit from its failure to do so; therefore, any ballots opting for a "write-in" candidate are deemed to be spoiled and are void, under Rule 3.06(B).

09.74 32.231 35.34
32.18 32.232 35.343
32.21 32.61 73.115

IV § 979-F(2): In determining whether any option on the ballot has received the statutorily required majority in a bargaining agent election, the required majority is a majority of the valid ballots cast by eligible voters. The Board held that void ballots should not be counted in the universe of ballots used in determining majority status in Board elections.

35.347
35.37
35.9

V §§ 979-F(2) & 979-C(2)(A): The Board condemns the use of its official ballot, displaying the Seal of the State of Maine, in election propaganda. The use of such official election material, if altered or added to other material, could confuse or mislead the electorate by giving the impression that the Board approves of the altered form or additional material. If official election material is improperly used by a successful party, the Board, upon proper objection, will set aside the results of the election and order that a new election be conducted. Since the rule was violated by an employee organization which was neither the successful party nor a proper party to the election, the results of the election were not set aside.

35.521 35.5214 35.524 35.552 73.115
35.5213 35.5217 35.528 35.81

VI §§ 979-F(2), 979-G & 979-H: The Board is an agency of limited statutory jurisdiction. The Board acts in response to prohibited practice complaints or requests for interpretive rulings. The Act does not require the Board to act sua sponte to correct prohibited election practices.

01.11 01.28
01.12 01.32

VII §§ 979-F(2) & 979-C(1)(A) & (C): Regardless of its subjective good faith, the employer's actions can easily interfere with the free exercise of rights protected by the Act or interfere with the formation of employee organizations during the sensitive pre-election period; therefore, the employer must exercise extreme caution during this period. To avoid violation of the Act, the employer correctly refused to correct alleged misconduct of any employee organization seeking certification through the election and properly left such corrective action to the Board.

11.7 35.528 72.18
35.5212 35.534 72.22

VIII §§ 979-F(2) & 979-C(1)(A) & (C): Guidelines promulgated by the employer, restricting the posting of purely informational materials by employee organizations to bulletin boards and requiring prior employer approval therefor, were applied equally to all employee organizations involved in the pending election and did not constitute unlawful interference, restraint or coercion.

35.521 35.532 35.538 72.115 72.22
35.5212 35.533 72.111 72.120 72.263

IX §§ 979-F(2) & 979-C(1)(A): A 3.5% inaccuracy in the addresses of eligible employees in the Excelsior list supplied by the employer is not sufficient to set aside the results of the election. Any resulting problems could be corrected through the toll-free call-in procedure for employees to receive replacement ballots; however, in the future, employee organizations with knowledge of inaccuracies in the Excelsior list should present the same to the employer so that the latter may make the necessary corrections.

35.32 35.323
35.322

Ingerson v. Millinocket School Committee, MLRB No. 77-39 (Oct. 19, 1977)

Facts: The employer unilaterally instituted pre-school and noon playground supervisory duty for its teachers. Claiming that its decision was a matter of educational policy, the employer agreed and did in fact meet and consult thereon but refused to negotiate over said decision with the bargaining agent. The bargaining agent demanded negotiations over the decision at issue but did not demand impact bargaining thereon.

I § 965(1)(C): Under the balancing test outlined in Biddeford, 304 A.2d 387, 421-422 (Me. 1973), teacher attendance at school at times when students are present is a matter of educational policy while their attendance at other times is a working condition. Applying this test, pre-school and noon playground supervisory duties relate to teacher attendance at times when students are present and, hence, are matters of educational policy. On the other hand, the use of teacher aides or others to perfom such duties--an issue not before the Board--is a mandatory subject of bargaining. Since the matter in dispute was a question of educational policy, the employer was not obligated to bargain thereon; therefore, the bargaining agent's complaint, charging a failure to negotiate in good faith, was dismissed.

03.31 41.6 43.444 43.619 72.589
03.4 42.42 43.61 71.227 72.667

Council 74, AFSCME, AFL-CIO v. State of Maine, MLRB No. 78-01 and Objections to Operations, Maintenance and Support Unit Election (Oct. 31, 1977)

I § 979-F(2): Because of the size of the units involved in the elections at issue (the State employee Operations, Maintenance and Support Services and the Professional and Technical Services bargaining units), a pre-election conference was held. At the conference, the parties reviewed and agreed to the mechanics of the mail ballot procedure which would be utilized in the election, including: the format of the ballots, envelopes, notices and letters of instruction to voters; the toll-free call-in procedure for replacement ballots and for voters omitted from the Excelsior list to receive ballots; the availability date for the Excelsior list; the timing of each phase; and the tallying procedures.

32.45	35.14	35.323	35.327	46.17
35.1	35.321	35.324	35.328	
35.11	35.322	35.325	35.347	

II §§ 979-G(2) & 979-H(2): By agreeing to the availability date for the Excelsior list at the pre-election conference and by failing to raise the issue prior to the election, the complainant waived the right to object to the untimeliness of the Excelsior list and was estopped from raising the issue after the election was held.

09.6	09.74	35.323	35.42	71.13
09.62	35.14	35.328	35.512	71.71
09.7	35.322	35.330	46.17	71.711

III § 979-F(2): The omission of 3.5% of the eligible voters from the Excelsior list and an error of 1.6% in the voters' addresses therein was not sufficient to warrant setting aside the results of the election, unless it is shown that the errors were either intentional or were due to the gross negligence of the employer. Neither was established in the record and any resulting harm was minimized through the toll-free call-in procedure.

35.322
35.323

IV §§ 979-F(2) & 979-C(1): The employer voluntarily recognized an employee organization as the bargaining agent for one unit, while a bargaining agent election involving the same employee organization and others was pending for other units of the employer's employees. The voluntary recognition was not shown to have had an adverse effect on the competing organizations in the pending election nor to have been intended to have any such effect; therefore, the Board held that the voluntary recognition did not violate the Act.

11.7	35.534	72.18	72.21
31.3	72.1	72.2	72.22

V § 979-F(2): In the absence of a proper complaint or objection, there is no affirmative obligation for either the Executive Director or the Board to ascertain the accuracy of the Excelsior list. Prior to the election, competing employee organizations should examine the voter list prepared by the employer and attempt to correct any errors therein. The Board's Rules establish a procedure for resolving disputes over the voting list and said procedures were followed here.

01.28	35.322	35.4
22.3	35.323	35.512

VI § 979-G(1): The Complainant alleged that one of the Board's Election Rules, Rule 3.05(C), was improperly promulgated. The record established that the Rule at issue was promulgated after published notice of the intention to issue the Rule (including a draft copy of the proposed rule) was given, after actual notice thereof was given to practitioners before the Board (including the Complainant), and after a public hearing attended by the Complainant was held; therefore, the Board held that the objection was without merit.

06.1	06.13	06.2
06.12	06.16	06.4

VII § 979-F(2): Under the agreement reached at the pre-election conference, ballots received at the Augusta Post Office after a certain date and time would not be counted. The Post Office

misplaced approximately 1,000 ballots, which it had received prior to the agreed-to cut-off date. The Board held that, since the Augusta Post Office received the ballots within the period agreed to, the Executive Director properly tabulated the same upon their discovery and delivery to the Board.

35.324 35.328 35.347
35.327 35.330 46.17

Local 740, I.A.F.F., AFL-CIO v. City of Portland, MLRB No. 78-02 (Jan. 25, 1978)

Facts: For financial reasons, the employer created a new municipal department and, after offering to negotiate thereon with the bargaining agent, shifted two employees' classifications from the unit represented by the bargaining agent to the new department. The bargaining agent did not challenge the employer's right to create a new department nor to move the two positions to that department; however, the bargaining agent charged that the employer violated § 964(1)(A), (B) and (C) by the employer's refusal to recognize the rights and benefits set forth in the parties' collective bargaining agreement for the two classifications at issue.

I § 964(1)(A), (B) & (C): The testimony before the Board established that the reorganization was motivated by legitimate economic needs. The employer's offer to negotiate over the change prior to the execution of the parties' current agreement helped to show that the change was made in good faith and was not motivated by anti-union animus. The change was not so extensive as to be inherently destructive of union activities. The employee rights at issue flowed exclusively from the parties' collective bargaining agreement which, by its terms, only applied to employees within the department represented by the bargaining agent. Since the two employees were lawfully removed from that unit and assigned to a different department, the employer's refusal to accord the employees the contractual rights was proper and did not violate the Act. Accordingly, the Board dismissed the complaint.

01.27 22.4 36.221 43.92 72.18 72.313
09.231 36.2 43.705 71.227 72.21 72.319
11.7 36.217 43.91 72.1 72.311 72.352

II § 963: The employees of the new municipal department, created as a result of the reorganization, were free to create a new bargaining unit, to select a bargaining agent and, thereby, to secure the rights guaranteed by the Act. Since the collective bargaining agreement between the parties in the instant action did not apply to employee classifications in the new department, the contract bar would not preclude such organizational activity.

01.27 21.2 21.7 32.141 36.34
21.12 21.3 31.5 36.33 43.705

Teamsters Local Union No. 48 v. City of Ellsworth, MLRB No. 78-03 (Oct. 12, 1977)

I § 968(5)(B): For a person or body to fall within the in personam jurisdiction of the Board, that person or body must either be a public employer, within the definition of § 967(2), or be a representative or agent of a public employer. No facts were alleged supporting the contention that a newspaper, charged as a respondent in a prohibited practice case, was an agent of the public employer. Rule 4.03(4) requires that a complaint contain "a clear and concise statement of the facts constituting the complaint." For the Board to conduct an evidentiary hearing, the material facts relating to the charge must be in dispute. Since the pleadings and stipulation of facts did not allege sufficient facts to establish that the newspaper was an agent of the public employer, the Board dismissed the complaint against the newspaper without convening an evidentiary hearing.

01.1 09.1 09.378 71.14 71.51
01.28 09.111 09.380 71.222 74.12
01.29 09.12 11.3 71.227 74.14
01.32 09.123 71.11 71.5

II § 964(1): The complaint charged that the municipal employer had violated the Act by supplying public information, including the names and addresses of the unit employees, to a newspaper, which later published said information in an anti-union article. Such allegations do not, as a matter of law, establish a violation of the Act; therefore, the Board dismissed the complaint.

71.227
72.18

Teamsters Local Union No. 48 v. City of Augusta Board of Education, MLRB No. 78-04 (June 7, 1978); remanded, No. CV-78-499 (Me.Super.Ct., Ken.Cty., Nov. 10, 1978); MLRB No. 78-04, Supplemental Decision and Order on Remand, 1 NPER 20-10000 (Dec. 30, 1978); appeal dismissed per stipulation, No. CV-78-499 (Apr. 9, 1981)

Facts: During collective negotiations with the bargaining agent, the employer sub-contracted all of the unit work. The parties had mutually agreed to table negotiations on the right to sub-contract unit work and the employer, after hearing the union's proposals concerning the impact of the sub-contracting decision, rejected the same because the employer's negotiators were not authorized to reach agreement on any such impact proposals.

I Labor Relations Board:
§ 965(1)(C): The decision to sub-contract bargaining unit work is a mandatory subject of bargaining. The duty to negotiate in good faith requires an exchange of bargaining positions as well as a willingness to discuss the proposals and a give-and-take in the process. A "take it or leave it" attitude or intransigence in the discussion can be either bad faith bargaining or evidence of bad faith. Here, the parties took diametrically opposed views on the subject of sub-contracting, neither party evidenced flexibility in its position, and the subject was tabled by mutual consent. Since the union decided not to pursue the question of sub-contracting at the bargaining table, it cannot claim before the Board that the employer refused to negotiate in good faith thereon.

09.62 21.91 46.13 72.590
09.661 41.22 72.53 73.478
09.74 43.54 72.532

II § 964(1)(A) & (B): The bargaining agent charged that the employer subcontracted all of the unit work because the employer did not want to negotiate with the union, in violation of § 964(1)(A) and (B). While the employer's decision was in part based on economic factors, one of the motivating factors for the action was to discourage activity protected by the Act. The Board based its conclusion of unlawful employer motivation on the following: (1) the employer had solicited and rejected sub-contract bids the year before the union was certified as the employees' bargaining agent; (2) the sub-contract decision followed shortly after the union was certified and the beginning of negotiations; (3) the one member of the Board of Education, whose presence was required to create a quorum necessary to authorize action, stated that he voted for the sub-contracting because of "increased problems with the bus drivers." Considering all of the circumstances, the Board interpreted that comment as referring to the certification of the union and the on-going collective negotiations. The Board explicitly adopted the "in-part" test for unlawful employer discimination. Under that test, the employer engages in unlawful discrimination if one of the motivating factors for its action was to discourage activity protected by the Act. Sub-contracting unit work in order to avoid negotiating with a bargaining agent clearly interferes with the rights of the employees affected to join and participate in the activities of organizations of their own choosing for purposes of collective bargaining, in violation of § 964(1)(A), and the decision to sub-contract, based in part on an unlawful motive, discourages membership in an employee organization by discriminating with regard to the terms and conditions of employment, in violation of § 964(1)(B).

72.1 72.31 72.321 72.334 72.3521
72.18 72.311 72.323 72.337 72.358
72.3 72.317 72.324 72.342

III § 965(1)(C): The employer is required to negotiate over the impact or effects of its actions on the mandatory subjects of bargaining for the employees affected by such actions. Among the mandatorily negotiable effects of a decision to sub-contract bargaining unit work are: the order of layoff, severance pay, workload for remaining employees, and retroactive benefits. Although the employer met with the bargaining agent to receive the latter's impact bargaining proposals, the employer violated the duty to negotiate in good faith because its negotiators were not authorized to reach agreement on any impact bargaining subject.

41.22 43.46 43.533 43.645
43.123 43.52 43.54 72.530
43.233 43.531 43.541

IV § 965(1)(C) & (E): Absent an express provision in the ground rules, one need not be a member of the bargaining unit or even be a public employee in order to serve on the employee bargaining team. The employer violated the duty to participate in mediation in good faith by refusing to participate in a mediation session while a part-time employee was present on the union team. No ground rule limited membership on the union team to full-time employees. Absent express agreement in the ground rules, neither may attempt to dictate the composition of the other party's negotiating team.

21.2 21.91 72.75
21.3 41.21 73.57
21.4 41.31

V § 964(1)(A): The employer's statement to the Employment Security Commission, that the bus drivers had a reasonable assurance of reemployment for the next academic year, after the employer had solicited bids to sub-contract the drivers' work, did not violate the Act since the employer had solicited and rejected such bids in the past.

03.38

VI § 968(5)(C): As remedies for the prohibited practices established in the record, the Board ordered: (1) that the Board of Education, and its representatives and agents, cease and desist from refusing to bargain collectively with the bargaining agent, as required by § 965; (2) that the employer remunerate each employee adversely affected by the decision to sub-contract that employee's weekly salary, from the start of the 1977 school year through the date on which the employee began substantially equivalent employment, less any compensation earned through other employment during said period; (3) that the employer negotiate with the bargaining agent over the issues of severance pay and retroactive benefits for all members of the bargaining unit; and (4) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.31 74.355
74.16 74.341

VII SUPERIOR COURT:
§ 968(5)(F) & (C): The Court remanded the matter to the Board with the instruction that the Board define or clarify the term "substantially equivalent employment" in paragraph 2 of the Board's order.

81.5087
81.523

VIII Board, On Remand:
§ 968(5)(C): "Substantially equivalent employment," within the context of the Board's original order, means employment which compensates the employee at a weekly rate of 95% (or more) of the employee's gross weekly salary at the time of termination, plus the employer's weekly out-of-pocket costs for fringe benefits for the employee. By "weekly salary" and "compensation" the Board means gross weekly salary earned, before taxes and deductions, plus the employer's out-of-pocket costs for fringe benefits, including retirement, medical, and personal liability insurance premiums. When such payment is made, the employer remains responsible for assuming the necessary withholding to satisfy current requirements of the Internal Revenue Code and the State of Maine. If the employee has not met the 95% test, the employer is to compensate the employee at the 100% level of what the latter was receiving at the time of termination, less any sums actually earned by the employee during the period of time in question. Each employee is required to attempt to mitigate the damages, suffered as a result of the employer's action, by actively seeking employment in good faith. Having fulfilled the requirement of the Superior Court Order, all other paragraphs of the Board's original order remain in effect.

74.34 74.343 74.355
74.341 74.344

MSAD #45 Teachers Ass'n v. MSAD #45 Board of Directors, MLRB No. 78-10 (Jan. 24, 1978)

I § 968(5)(B): Since no material issues of fact were identified at the prehearing conference, the Board based its decision on the uncontroverted allegations of fact in the pleadings and on the prehearing conference memorandum and order.

09.373 71.5
71.228
71.251

II § 968(5)(B): The parties' collective bargaining agreement provided a grievance procedure, culminating in final and binding arbitration. Although no grievance had been filed, resolution of the contractual dispute would in all likelihood resolve the prohibited practice complaint. The case was deemed appropriate for deferral, until the arbitration process was concluded or until it became apparent that delay in the grievance and arbitration process would substantially deny the rights guaranteed the Complainant.

09.25 47.11 71.813
21.13 47.54 71.815
46.61 71.811 71.817

III § 968(5)(C): The Board ordered: (1) that the parties' dispute be deferred to the arbitration process, unless the Board was notified by either party in a motion for further consideration or the Board reopened the case on its own motion; the case would be reopened if (a) the dispute was not promptly settled or submitted to arbitration or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result repugnant to the purposes of the Act; (2) the parties were to furnish the Board with a copy of any settlement or arbitration decision, within 5 days from the date thereof; and (3) the parties were to notify the Board of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

47.86 71.9
71.821 74.16
71.824 74.43

Lake Teachers Ass'n v. Mount Vernon School Committee, MLRB No. 78-15 (May 3, 1978)

I § 968(5)(B): No material issues of relevant fact were identified at the prehearing conference; therefore, the parties were ordered to submit their dispute to the Board through written argument.

09.380 71.5
71.228 71.51
71.251

II § 965(1)(C): An employer who changes wages, hours, or working conditions for unit employees without negotiating the change with the employees' certified bargaining agent violates the duty to negotiate in good faith, regardless of whether the change at issue is beneficial or harmful to the employees affected thereby. The employer hired an individual to fill a bargaining unit position at a salary above the applicable salary in the collective bargaining agreement. The agreement had not expired and the parties were negotiating for its successor. The employer's action violated the duty to negotiate in good faith.

43.11 46.16 72.616
43.113 72.55 72.63
43.120 72.611 72.65

III § 968(5)(C): As remedies for the employer's unlawful unilateral change in the wages paid to a newly-hired bargaining unit employee, the Board ordered: (1) the School Committee, its representatives, servants and agents cease and desist from refusing to bargain collectively with the bargaining agent, as required by § 965; and (2) since the employee receiving the higher wages was merely an innocent beneficiary of the unlawful conduct, she was to continue receiving the individually negotiated salary, until the entry level salary scale collectively negotiated reflects the individually negotiated level; however, the individual employee will be eligible for all longevity increases.

43.119 74.17
46.16 74.31
74.14

Teamsters Local Union No. 48 v. University of Maine, MLRB Nos. 78-16 & -20 (June 29, 1978), 1 NPER 20-10021; appeal dismissed per stipulation, University of Maine v. Teamsters Local Union No. 48, No. CV-79-405 (Me.Super.Ct., Ken.Cty., June 16, 1980)

I § 1027(1)(E): The topic of pay periods (the frequency of salary payment to employees) involves working conditions and is a mandatory subject of bargaining. Unilateral changes in wages, hours, or working conditions during negotiations for a collective bargaining agreement violate the duty to negotiate in good faith. The employer contended that the frequency of payment to employees was a management prerogative about which it need not negotiate. Noting that there is no management prerogative clause in the Act, the Board held that the University must exercise its statutory authority to plan and govern its affairs within the limitations created by the bargaining law. The employer's unilateral change from weekly to bi-weekly pay periods, during collective negotiations and prior to a bona fide impasse, violated the duty to negotiate in good faith.

03.3	07.13	43.124	72.63
03.341	11.54	51.	72.663
07.12	43.11	72.6	72.665

II § 1027(1)(E): Due to technical and administrative problems, bargaining unit employees did not receive their night differential, overtime or holiday pay on a regular basis with their paychecks for the week in which such premium pay was accrued. A unilateral change in the frequency of payment of such premium pay constitutes a violation of the duty to bargain. Here, the employer merely corrected past problems, thereby making payment of premium pay in a timely fashion and did not intentionally change the frequency of such payments; therefore, its conduct did not violate the duty to negotiate in good faith.

35.541	43.118	43.15	72.667
43.11	43.121	72.6	
43.116	43.124	72.616	

III § 1027(1)(A): The employer unilaterally implemented a change from weekly to bi-weekly pay periods, during a union organizational campaign and prior to the certification of a bargaining agent for the employees affected by the change. The change in question had been contemplated for over one year and the employer's intention to implement the same had been communicated to the employees before the onset of any organizational activity. The test for unlawful interference, restraint or coercion is whether the employer engaged in conduct which, in may reasonably be said, tends to interfere with the free exercise of employee rights protected by the Act. The long-planned nature of the change and the notice thereof to the employees prior to any protected activity as well as the economic justification for the change establish that no reasonable unit employee could conclude that the change was implemented in retaliation for the exercise of rights protected by the Act.

09.374	35.531	72.1
21.5	43.11	72.133
35.51	43.124	72.62

IV § 1027(1)(A): The employer established a soliciation and distribution policy which prohibited non-employee organizers from speaking to employees during coffee breaks but which permitted employee organizers to discuss organizational concerns at that time. Non-solicitation rules which encompass non-working times are presumptively unlawful; however, there is a substantial distinction between the rules applicable to employee organizers and those applicable to non-employees. In the former case, the employer may not lawfully prohibit self-organization discussions during non-working time, unless such restriction is necessary to maintain production or discipline. The employer may limit non-employee access if such non-employee organizers have other reasonable channels of communicating with the employees and the non-solicitation rule is not discriminatorily applied against the union. Here, non-employee organizers were allowed access during non-working times, including lunch and before and after working hours, and there was no evidence of discriminatory application of the rule. The employer's solicitation policy did not violate § 1027(1)(A).

21.2	64.3	72.115
35.533	72.1	72.116
35.538	72.111	72.117

V § 1027(1)(A): A requirement that the union notify the employer prior to holding meetings on the employer's premises was designed to avoid room scheduling conflicts and was not discriminatorily applied. Every union request to hold a meeting on the employer's premises was granted. The requirement did not violate § 1027(1)(A).

35.533	72.1	72.113
35.538	72.11	72.23
64.33	72.111	

VI § 1027(1)(A): Questioning by the employer which places an employee in the position of acting as an informer regarding the union activity of fellow employees will be coercive in most if not all instances. Here, the employer's labor relations director asked a unit employee whether a union meeting would be held that day and, if so, who had called the meeting. The employer's questioning did not merely tend to interfere with the free exercise of employee rights but actually placed the employee questioned in fear of losing his job and upset other employees to the point where several of them asked the union business agent to cancel the meeting and to leave as quickly as possible. The questioning of the unit employee violated § 1027(1)(A).

35.535 72.15
64.33 72.151
72.1

VII § 1027(1)(A): Calling an employee into a locus of managerial authority removed from the normal workplace and interviewing the employee about union activity usually constitutes unlawful interference. Although an employee was called into a vice president's office to discuss union activity, no violation occurred because the employee had a long, friendly relationship with the vice president for the purpose of discussing employee problems, the employee did not view the employer's conduct as unusual or alarming, and no other unit employee knew of the meeting.

35.535 72.151
72.1 72.17
72.15

VIII § 1027(1)(A): Threats against employees who are engaged in activities protected by the Act constitute unlawful interference, restraint, or coercion. The test for a violation is: (1) are the employees engaged in protected activity, and (2) whether, in the circumstances, the employees could reasonably conclude that the employer is threatening reprisal for participation in the protected activity. After lawfully picketing outside the building where the employer board of trustees was meeting, the employees marched into the public meeting with picket signs. The Board held that the employees' conduct was offensive or disruptive and was not protected by the Act; therefore, the employer's request that they leave or face a prohibited practice complaint did not violate § 1027(1)(A).

09.674 63.11 72.1
21.5 63.3 72.131
63.1 63.32

IX § 1027(1)(A): The employer first prohibited its police employees from wearing their uniforms while off duty one day after the employees lawfully picketed an employer board of trustees meeting while in uniform. While the employer has the right to decree when its police employees may wear their uniforms, the timing of the order made it plain that the threat of disciplinary action was directed at the lawful picketing; therefore, the employer's action violated § 1027(1)(A). Picketing which does not involve a work stoppage or other activity prohibited by the Act is activity protected by § 1023. The wearing of uniforms by police employee picketers is an integral part of the picketing activity, since picketing in uniform is likely to be more effective. While such wearing of police uniforms apparently was offensive to the employer, there is nothing inherently offensive about such conduct.

09.374 63.3 72.131
21.5 72.1
63.1 72.11

X § 1027(1)(A): The Board adopted the NLRB Weingarten rule under which an employer's denial of an employee's request that a union representative be present at a meeting, which the employee reasonably believes might result in disciplinary action, constitutes unlawful interference, restraint, or coercion. This protection applies only where the employer insists upon the meeting. If the employee requests a meeting, the employer can lawfully refuse to meet with a union representative present and has no obligation to justify said refusal. Since the meeting in question was requested by the employee, the employer did not violate § 1027(1)(A) by refusing to meet with the union representative present.

09.673 47.311
22.37 72.1
47.31 72.18

XI § 1027(1)(A): Surveillance by the employer of employees engaged in union activity is unlawful; however, where the appearance of unlawful surveillance is explained through a legitimate business reason for the employer to be in the area where the union activity is occurring, such presence does not violate the Act.

09.374 72.11
35.540 72.14
72.1

XII § 1029(3): As remedies for the prohibited practices established in the record, the Board ordered:

(1) that the Univeristy of Maine, and is representatives and agents, cease and desist from:

(a) making unilateral changes in the wages, hours, or working conditions of bargaining unit employees without first reaching agreement or impasse with the employees' bargaining agent;

(b) interrogating unit employees as to the identity of persons calling union meetings; and

(c) threatening to discipline police employees for wearing uniforms while off duty, until such time as a work rule prohibiting the same is properly promulgated;

(2) that the employer take the affirmative action, necessary to effectuate the policies of the Act, of offering to negotiate over a bi-weekly payroll plan for the employees affected by the unlawful unilateral institution of such plan. The offer is to remain in effect for 30 days and, if the union does not accept the offer, the employer will be deemed to have satisfied the duty to negotiate over the plan. The unlawfully implemented plan is to remain in effect pending the outcome of the above negotiations; (3) that the employer notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof; and (4) the balance of the prohibited practice complaint be dismissed.

09.651 74.14
71.227 74.16
74.11 74.31

Charles v. City of Waterville, MLRB No. 78-19 (July 21, 1978), appeal dismissed per stipulation, City of Waterville v. Charles, No. CV-78-511 (Me.Super.Ct., Ken.Cty., Nov. 8, 1978)

I § 968(5)(B): The Board recognized an exception to its policy of deferring disputes to the contractual grievance mechanism in situations where the interests of the employees filing the prohibited practice complaint are in conflict with those of the bargaining agent and those of the employer. This exception to the deferral rule is necessary to protect the free exercise of the rights provided to public employees by § 963. When the interests of the employees conflict with those of the bargaining agent, the employees' interests may not be adequately represented in the grievance process. The time lag between completion of the third step of the grievance procedure and initiation of the fourth step, in conjunction with the filing of a decertification petition and actual decertification of the bargaining agent, constitutes prima facie evidence of a conflict between the interests of the employees and those of the former bargaining agent sufficient to trigger the above exception to the deferral rule.

09.25 23.24 47.21 47.5 47.56 71.816
21.12 23.25 47.3 47.53 71.8 71.817
21.13 47.15 47.32 47.54 71.81

II § 965(1)(C): The number of working days allowed as vacation and sick leave and the accrual schedules for both are mandatory subjects of bargaining; therefore, any changes therein must be negotiated by the employer and the bargaining agent. In reaching the conclusion that the employer had made a unilateral change in the employees' vacation and sick leave schedules, the Board looked to the clear and unequivocal language of the collective bargaining agreement, setting forth the current schedules and did not credit parol evidence concerning the parties' intentions behind the contract language.

01.27 09.232 43.15 72.6
09.23 09.25 43.153 72.611
09.231 09.391 43.168 72.641

III § 965(1)(C): The employer contended that its unilateral changes in the vacation and sick leave schedules were not unlawful because such changes had been negotiated with the bargaining agent. The argument was rejected because the record failed to establish that the parties had either negotiated over the changes at issue or that such negotiations had reached an impasse, prior to the employer's unilateral action. Specific negotiations over the changes at issue are required and general negotiations over vacation and sick leave provisions for a successor collective bargaining agreement and discussions concerning the potential impact of a new work schedule were not sufficient to satisfy the statutory duty to bargain.

09.65 72.6 72.663
09.74 72.615
51. 72.63

IV § 965(1)(C): The employer contended that the unilateral changes in contention were not unlawful because the bargaining agent did not specifically request to negotiate over said changes. In argument, the employer conceded that the bargaining agent had requested negotiations over vacation and sick leave at the outset of negotiations. The Board held that such request was sufficient to preserve the right to negotiate on such subjects and that the bargaining agent was not required to reiterate its bargaining demand each time it learns of a possible change in such areas.

09.651 72.6 72.666
09.74 72.614
72.52 72.63

V § 968(5)(C): As remedies for the employer's unlawful unilateral changes established in the record, the Board ordered: (1) that the employer, its representatives and agents, cease and desist from refusing to bargain collectively with the bargaining agent, as required by § 965; and (2) the employer accord to the unit employees the number of days of vacation and sick leave as set forth in the expired collective bargaining agreement, until such time as a successor agreement addressing such topic is agreed to.

41.36 74.31
72.641 74.32
74.14

Teamsters Local Union No. 48 v. Town of Oakland, MLRB No. 78-22 (May 22, 1978)

I § 964(1)(A): Regardless of subjective good faith, statements by the employer's agents which tend to interfere with the free exercise of the rights protected by the Act constitute unlawful interference, restraint, or coercion. The circumstances in which the employer makes statements to economically dependent employees must be considered in evaluating whether such remarks violate § 964(1)(A). The circumstances deemed relevant here were that a meeting of employees involved in organizational activity: (1) was called by the Town Manager less than 24 hours after the employees' first organizational meeting; (2) was an unusual occurrence; and (3) was held in the Town Office, an unfamiliar and possibly intimidating setting for the employees. Taken together, those circumstances created an atmosphere where otherwise innocuous statements took on intimidating or coercive meaning to the employees.

09.374
72.1

II § 964(1)(A): The following statements by the Town Manager, made in the above setting, violated § 964(1)(A): (1) the employees should talk with other town employees "who knew about unions"--a reference to other employees who had recently voted against representation, implying discouragement of participation in organizational activities; (2) the employees and the Town Manager had always been able to work out problems, singling out two union activists whose problems had been amicably resolved--implying such cooperation would not occur, if the employees opted for representation; (3) promising to solicit an across-the-board wage increase from the Town Council.

09.12 21.2 64.2 72.132
09.121 35.537 72.1 72.134
21.12 35.541 72.13

III § 964(1)(A): Immediately after the meeting with the Town Manager, the employees' foreman told several of them that selecting a union would be a big mistake which might result in their salaries being reduced to minimum wage and in the loss of most of their benefits. The Board held that this was a serious violation of § 964(1)(A) because it was a direct threat of economic retaliation for the employees' engaging in organizational activities. The foreman denied making the statement, stating that he had been unaware of the organizational activity at that time. The Board concluded that the foreman's denial was not credible because: (1) although the foreman had never previously discussed unions with the employees, the statement was made less than 24 hours after the employees' first organizational meeting; and (2) the foreman's son-in-law and others with whom the foreman is in daily contact attended the organizational meeting.

09.12 21.12 64.2 72.131
09.121 21.2 72.1 72.134
09.362 35.537 72.13

IV § 968(5)(C): As a remedy for the prohibited practices established in the record, the Board ordered the employer, its representatives and agents to cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by § 963.

74.14
74.31

Maine State Employees Ass'n v. State of Maine and Dept. of Alcoholic Beverages, MLRB No. 78-23 (July 15, 1978), aff'd, State of Maine v. Maine Labor Relations Board, 413 A.2d 510 (Me. 1980)

I Board, as modified by the Law Court:
§ 979-H(2): Since no material issues of relevant fact were identified at the prehearing conference, the parties agreed to submit this dispute to the Board through legal memoranda.

71.228 71.251 71.51
71.25 71.5

II § 979-D(1)(E)(1): During negotiations for a collective bargaining agreement, and without negotiating over the impact of its decision on the wages, hours and working conditions of the employees involved, the employer decided to operate its liquor stores on Washington's Birthday, a day which had always been a holiday for the stores' employees. Holiday work by employees involves the employees' wages, hours, and working conditions; the impact of the employer's decision is a mandatory subject of bargaining. An employer's unilateral change in a mandatory subject bypasses the bargaining agent, is tantamount to a refusal to negotiate on said subject, and violates the duty to negotiate in good faith. It is irrelevant whether the change at issue is beneficial or harmful to the employees involved.

43.11 43.151 43.645 72.612 72.63
43.122 43.44 72.5 72.616
43.15 43.444 72.6 72.617

III § 979-D(1)(E)(1): A unilateral change in a mandatory subject of bargaining during negotiations may be permissible, if consistent with offers made during negotiations, in four very limited instances: (1) where a bona fide impasse has been reached; (2) where important business exigencies require immediate managerial decision; (3) when the union has waived the right to bargain about the unilateral change; or (4) where the unilateral change results from a traditional practice which existed prior to the commencement of negotiations.

11.7 72.662 72.666
72.590 72.663 72.667
72.66 72.664

IV § 979-D(1)(E)(1): The "business exigency" exception to the unilateral change rule permits unilateral changes when a sudden, out-of-the-ordinary event threatens serious harm and requires immediate managerial action. Such a situation does not include a mere convenience to the public or an opportunity to generate revenue, examples of business reasons which are inadequate to justify a unilateral change.

11.7 72.662
72.66 72.667

V § 979-D(1)(E): The union did not waive its right to object to the unilateral change at issue during negotiations, by not submitting a specific request to negotiate over the change after it learned that the change was possible, because it had previously proposed to negotiate over the subject. A contrary rule would require the endless repetition of proposals and would injure the bargaining process.

09.661 72.590 72.66
72.52 72.614 72.666

VI § 979-D(1)(E)(1): The legislative grant of authority to the State Liquor Commission to establish the liquor stores' hours of operation does not remove the subject of holiday work from the mandatory subject category as a matter "prescribed or controlled by public law." Title 28 MRSA § 154 provides a limited grant of authority to establish the stores' hours of operation, within a range of hours of permissible operation, and is not so broad as to include the power to deterine employee holidays. Second, since holidays are such a basic term or condition of employment, the Legislature could not have intended to remove that topic from the mandatory subject of bargaining and, thereby, subvert the public policy behind the Act.

03.3 42.3 42.42 72.589
03.4 42.32 42.47 72.66

VII § 979-D(1)(E)(1): Since the employer's decision unilaterally changed the wages, hours and working conditions for the employees affected and since such change neither fell within one of the exceptions from the unilateral change rule nor was the matter "prescribed or controlled by public law," the employer's action violated the duty to negotiate in good faith.

72.5 72.611
72.6 72.617

VIII § 979-H(3): In remedies for the unlawful unilateral change established in the record, the Board ordered: (1) that the employer, its representatives and agents cease and desist from refusing to bargain collectively with the bargaining agent, as required by § 979-D; and (2) that the employer cease opening its liquor stores on days designated as a State Holiday by the Commissioner of Personnel, without first negotiating with the bargaining agent over the impact of such proposed openings on the mandatory subjects of bargaining for the stores' employees.

74.14
74.31

IX § 979-H(5) & (7): Law Court: In addition to its quasi-judicial function of adjudicating prohibited practice complaints and reviewing representation cases, the Board is given two significant prosecutorial duties under each of the Acts which it administers. These duties are: (1) the Executive Director must screen complaints and may dismiss those which fail to state a claim under the Act; and (2) the Board may initiate actions in the Superior Court to compel compliance with its orders. While the union and the employer press their respective interests, the presence of the Board in judicial review of its decisions insures that the broad public interest, which may be different from those of the parties, will be represented. While an appropriate party in court actions reviewing its quasi-judicial decisions, the Board is not an indispensable party and it should not routinely elect to participate in every review proceeding.

01.2 01.31 81.111 81.19 81.37
01.21 01.32 81.112 81.191 81.374
01.29 81.1 81.18 81.3 81.375

X § 979-D(1)(E)(1): The Court affirmed the Board's conclusion that the employer's decision to open its liquor stores on a traditional holiday had an impact on the store employees' wages, hours and working conditions. The Court adopted the NLRB v. Katz rationale that an employer's unilateral change in a mandatory subject then under negotiation is a clear violation of the duty to bargain in good faith. It was clear to the Court that, despite the language of its order, the Board meant to limit the scope of its bargaining order to the impact of holiday openings on the employees wages, hours and working conditions and, with that clarification, the Court affirmed the Board's order.

43.11 43.151 43.645 72.611 81.5081
43.122 43.44 72.5 72.617 81.521
43.15 43.444 72.6 72.63 81.522

XI § 979: In interpreting the terms of the several state labor relations laws, the Court has found persuasive the construction placed on the National Labor Relations Act by the federal courts. Furthermore, the construction placed on the Act by the Board, as the agency charged with its enforcement, should be accorded considerable deference by a reviewing court.

03.22 81.503
81.493 81.505

XII § 979-D(1)(E)(1): The employer argued that certain questions, such as the days of operation of state agencies, were management prerogatives about which it need not negotiate. This argument was not persuasive because the Legislature had explicitly rejected a proposed "management prerogative" exception to the duty to bargain when it adopted the State Act. Consequently, there is no provision in the State Act analogous to the educational policy exception in the Municipal Act. To read an implied management prerogative exception into the Act would be to disregard pro tanto the express legislative intent to promote collective bargaining for terms and conditions of employment in the public sector.

11.7 72.665
72.589
72.66

XIII § 979-D(1)(E)(1): The Board's finding of fact, that the union had not waived the right to bargain, was supported by the union's request that the stores not be opened on Washington's Birthday and was, therefore, not clearly erroneous.

09.6 72.52 72.614 81.331
09.661 72.590 72.666 81.502

XIV § 979-D(1)(E)(1): The purpose of the "prescribed or controlled by public law" exception to the duty to bargain is merely to prevent a term of a collective bargaining agreement from being a violation of existing law. The authority to decide when liquor stores are open, within the range of hours permitted by statute, must be exercised within the environment of collective bargaining as to wages, hours and working conditions. What is prescribed or controlled is bargaining over store operations during hours other than those in the range permitted by the statute. The mandatory provision for collective bargaining should only be limited in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment.

03.3 42.32 46.2 72.66
03.4 42.44 46.21
42.3 42.47 72.589

Westbrook Police Unit v. City of Westbrook, MLRB No. 78-25 (Sept. 5, 1978)

I § 968(5)(C): The Board strongly recommended that negotiating parties prepare and execute written ground rules for their negotiations, stating that such ground rules would avoid the types of problems involved in this case.

41.31

II § 965(1)(C): Absent a ground rule concerning the binding effect of any agreement reached at the table, there is a strong presumption that tentative agreements are binding on the parties. The parties may reserve to their principal parties the right to ratify any tentative agreement reached at the table; however, in such instances, the negotiators must be clothed with sufficient knowledge, guidelines and authority to reach at least tentative agreement. The preferred bargaining practice is for each party to reveal what steps, if any, will be required after tentative agreement is reached before ratification is complete. If such information is not volunteered, it should be requested. Once a party has reserved the right of its principal party to ratify any tentative agreement, the agreement will not be concluded and binding until it is ratified. A party may authorize its negotiators to reach binding

agreement at the table. Once established, the negotiators' bargaining authority may only be changed after the other parties in the negotiations have received actual or constructive notice of such change. If one party's team does not have authority to reach binding agreement at the table but represents itself as having such authority and the other party acts in reliance on said representation, then the first party is bound by the agreements reached by its negotiators.

07.14	09.1	09.114	09.74	41.22	46.13	46.52	72.539
07.141	09.112	09.123	11.7	41.31	46.5	72.530	72.57
07.142	09.113	09.71	41.2	41.34	46.51	72.536	

III § 965(1)(D): At the outset of negotiations, the employer's negotiator reserved to the city council the right to ratify any tentative agreement reached at the table. Later, said negotiator stated that he was authorized to reach agreement within certain cost guidelines. Since the right of ratification was reserved and since the agreement reached exceeded the cost guidelines, no binding agreement was reached at the table. Second, the employer had always reserved the right to ratify in all prior negotiations between the parties; therefore, it was incumbent on the other party's negotiators to seek clarification of any apparent ambiguity regarding the bargaining authority. In the circumstances, the Board held that the employer's negotiator neither had nor represented himself as having authority to reach binding agreement at the table.

07.14	41.22	46.5	46.52	72.536
41.2	46.13	46.51	72.530	72.57

IV § 965(1)(C): At the outset of negotiations, the City Council authorized its negotiators to reach agreement on minimum service required for retirement, so long as certain cost guidelines were not exceeded. After final tentative agreement was reached, the City Council failed to ratify, in part because of an agreement reducing minimum service required for retirement. Any change of bargaining authority during negotiations must be communicated to the other party to be effective. The "ambiguous" grant of bargaining authority resulted from the employer's failure to provide its negotiators with sufficient guidelines to reach tentative agreement--evidence of negotiating in bad faith. Since the employer's action resulted in considerable misunderstanding and unnecessary delay in the bargaining process, the Board concluded that the employer had violated the duty to negotiate in good faith.

03.35	41.22	72.5	72.536
07.14	43.136	72.53	72.539
41.2	43.137	72.530	72.57

V § 968(5)(C): As remedies for the employer's violation of the duty to negotiate in good faith, the Board ordered: (1) that the employer and its representatives and agents cease and desist from refusing to bargain in good faith, as required by § 965; (2) that the employer reimburse the bargaining agent for all reasonable costs incurred in bringing its complaint, including reasonable attorney's and witnesses' fees; (3) that the parties arrange within 30 days to resume negotiations over a collective bargaining agreement for the unit involved; and (4) that the employer notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

01.29	74.31	74.355
74.14	74.32	
74.16	74.352	

Teamsters Local Union No. 48 v. City of Waterville, MLRB No. 78-28 (July 24, 1978)

I § 964(1)(A): The Board adopted the NLRB's Struksnes Construction Co. (165 N.L.R.B. 1062) test for determining whether employer polling of employees is lawful. Employer polling violates § 964(1)(A) unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority support; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in any prohibited practices or otherwise created a coercive atmosphere. None of these conditions was met here; therefore, the polling violated § 964(1)(A). The purpose of the poll was to ascertain support for an employee committee proposed by the employer and the poll was proposed before the union first asserted majority status. Second, the purpose communicated to the employees was that the poll was to ascertain support for the employer-proposed committee. Third, no assurances against reprisals were given. Fourth, employees were polled individually and were told that

their individual preferences would be reported to their department head and the Mayor. Such individualized questioning created a reasonable fear of reprisal in the minds of the unit employees.

31.24 72.15
31.3 72.151
72.1 72.16

II § 964(1)(A): At a mandatory employee meeting, the department head (Police Chief) expressed his "personal opinion" that the union was a "lousy outfit" and his personal "preference" that the employees not select the union. It is unreasonable to attempt to divorce a public employer's "personal opinion" from his "official" position, especially when the former is expressed during the performance of the official's normal duties. The employer was held responsible for the Chief's remarks while on duty, regardless of the fact that the Chief prefaced his remarks with the statement that they were his "personal opinion." The Board held that the statements injected an element of coercion into the polling.

09.1 09.12
09.11 09.121
09.111 72.1

III § 964(1)(A) and (C): Having held that the employer violated § 964(1)(A), the Board declined to rule on an employer proposal "to meet with a committee representing the staff comprised of the Chief, Captain and [three unit employees] . . . [to] prevent having staff policies, procedures and/or benefits bargained away by non-staff personnel." The Board did express "substantial doubt" as to the lawfulness of the employer's proposal under § 964(1)(A) and (C).

72.1 72.21
72.131 72.24
72.2

IV § 968(5)(C): As remedies for the employer's unlawful interference, through polling unit employees on their views concerning representation, the Board ordered: (1) the employer and its representatives and agents to cease and desist from interfering with, restraining or coercing its employees in the free exercise of the rights guaranteed by the Act; and (2) that a representative of the employer execute a notice provided by the Board and post the same at all work locations, where notices are normally posted for the attention of the unit employees, for a period of 60 consecutive days from a date specified.

74.14 74.36
74.16 74.361
74.31

Greater Portland Transit District v. Division 714, Amalgamated Transit Union, MLRB No. 78-29 Decision and Order Granting Motion for Stay of Proceedings (July 11, 1978)

I § 968(5)(B): The prehearing conference memorandum and order separated consideration of the case into three distinct phases: (1) consideration of a motion to stay proceedings; (2) consideration of a motion to dismiss; and (3) fact hearing on and consideration of the merits. In considering the motion to stay proceedings, the parties waived oral and written argument and agreed that the Board could review all relevant material previously filed and that contained in the Board's file in a separate but related prohibited practice case.

09.373 71.228
09.380 71.25
09.62 71.251

II § 968(5)(B): An action between the parties, involving the same substantive issues as the instant proceeding, was pending in the United States Court of Appeals for the First Circuit. At the prehearing, the parties stipulated that the case is one of serious import and that appeals raising identical issues were pending before several other United States Courts of Appeals. If not dispositive of the issues before the Board, the Court of Appeals' decision should at least assist the Board and the parties in resolving the issues in controversy. Further, staying the proceedings before the Board would result in preserving the Board's and the parties' valuable time and resources.

09.380	71.241	71.513
09.412	71.25	71.515
71.228	71.251	71.83

III § 968(5)(B): The Board ordered: (1) that the proceedings in this case be stayed, pending final judgment by the United States Court of Appeals for the First Circuit in Docket No. 78-1077; and (2) if either party wishes the Board to proceed after such final judgment, such party shall notify the Board of its desire, within 30 days after final judgment by the Court.

71.241	71.520
71.513	71.83
71.515	

Teamsters Local Union No. 48 v. Town of Oakland, MLRB No. 78-30 (Aug. 24, 1978)

I § 964(1)(A) and (B): The public employer must exercise extreme caution in changing long-standing policies and practices which affect the terms and conditions of employment of employees engaging in organizational activities. During organizational campaigns, any changes in long-standing practices immediately raise an inference that the changes are intended to interfere with the exercise of employee rights and to discourage membership in any employee organization participating in the campaign. The test for violation of § 964(1)(A) is: Unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights. The test for violation of § 964(1)(B) is: If it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union animus is needed and the Board can find a prohibited practice even if the employer establishes legitimate business justification for its actions. If the adverse effect of the discriminatory conduct is "comparatively slight," anti-union animus must be proven to sustain the charge, if the employer has come forward with evidence of legitimate business justification for its action.

21.2	35.532	72.13	72.31	72.358
21.3	64.3	72.134	72.311	
35.53	72.1	72.3	72.323	

II § 964(1)(A) & (B): Over a two-year period, the employer paid for employees' breakfasts, if the employees worked throughout the previous night. Shortly after the beginning of an organizational campaign and allegedly because of a lack of funds, the Town Manager discontinued this practice. The Board found that the breakfast payments had become an established practice and held that elimination of the practice may reasonably be said to interfere with employee participation in the organizational drive, since the timing of the elimination may be reasonably interpreted as a form of retaliation for the employees' participation in said activity. Second, the Board held that elimination of the practice amounted to discrimination in regard to the terms and conditions of employment and was inherently destructive of important employee organizational rights. The Board held that discontinuance of the practice violated § 964(1)(B), even though the employer advanced a valid business reason for its action.

21.2	35.532	72.13	72.31	72.323	72.358
21.3	64.3	72.134	72.311	72.33	72.612
35.53	72.1	72.3	72.317	72.342	72.62

III § 964(1)(A) & (B): The complainant charged that the employer had unlawfully changed its coffee break policy. The evidence established that the policy was not followed in one single instance and that there was good reason for said exception. Two employees active in the organizational effort did change their coffee break practices; however, said changes did not result from orders from the employer. The employer did not violate the Act in regard to the coffee break charge.

35.53	72.13	72.366
64.3	72.134	
72.1	72.3	

IV §§ 964(1)(A) & (B) and 968(5)(C): The Board considers the discharge of an employee during an organizational campaign to be a very serious matter. Section 968(5)(C) provides that the

Board may not order reinstatement of an employee who has been discharged for cause. Consequently, although a discharge may interfere with the free exercise of employee rights or it may be inherently destructive of important employee rights, it will not violate § 964(1)(A) or (B) if it was based on just cause. The Board held that the discharge was based solely on the employee's insubordination and was, therefore, based on just cause. The employee and other union witnesses testified that the main reason that the employee refused to perform his assigned work was that he found it demeaning.

01.29	21.3	64.3	72.3	72.361
01.32	35.53	72.1	72.31	74.332
21.2	35.532	72.13	72.334	

V § 968(5)(C): As remedies for the prohibited practices established in the record, the Board ordered: (1) that the employer, its representatives and agents, cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the Act and from discouraging membership in any employee organization by discrimination in regard to any term or condition of employment; and (2) that the employer immediately reinstitute the practice of paying for breakfasts for employees who have worked throughout the previous night, until such time as the practice is governed by a collective bargaining agreement between the employer and the employees' bargaining agent.

35.8	74.31
74.16	74.32

Teamsters Local Union No. 48 v. Biddeford Police Department, MLRB No. 78-31 (Mar. 27, 1979), 1 NPER 20-10007

I § 968(5)(B): A public employee organization, which is seeking to represent a public employee unit but which is not the bargaining agent, has standing to file and prosecute a prohibited practice complaint concerning said unit. Otherwise, the public employer would be able to violate the Act with impunity during an organizational campaign before the employee organization became the bargaining agent, unless an employee was willing to file a complaint.

22.1
71.14

II § 968(5)(B): It is not appropriate to defer to the contractual grievance procedure in instances where the interests of the unit employees are in conflict with those of their bargaining agent. Since the employees had written to the employer, requesting that the dues deduction be terminated, the interests of the employees were clearly in conflict with those of the bargaining agent and the Board declined to defer to the contractual arbitration award.

21.12	22.42	47.3	47.8	71.817
21.13	24.16	47.32	71.8	71.82
21.91	24.161	47.54	71.81	71.825

III § 964(1)(A): An employer who continues to deduct dues after the unit employees validly revoke their dues checkoff authorization violates § 964(1)(A). Employees may revoke their checkoff authorizations at will when there is no collective bargaining agreement in effect. Here, the agreement remained in effect during negotiations for a successor agreement, unless either party gave notice of termination. No notice of termination had been given, the contractual dues authorization provision remained in effect and employee attempts to terminate the dues authorizations were barred by the collective agreement; therefore, the employer's continuation of the dues deduction until the bargaining agent's decertification was proper.

21.12	24.1	24.151	24.4	46.44
21.6	24.131	24.16	24.42	72.1
21.92	24.132	24.161	46.42	72.18

IV § 964(1)(A): The insurgent employee organization/complainant alleged that the dues authorizations were invalid because the employees had executed the same as a result of a "union shop" provision and such provisions were later declared to violate public policy. Churchill v. S.A.D. No. 49 Teachers Ass'n, 380 A.2d 186 (Me. 1977). The Board rejected this rationale because there was no evidence in the record that the employees had executed the dues deductions under the compulsion of the "union shop" article--a matter easily proved by the testimony of the employees. Recognizing that the NLRB has adopted a presumption that the

employees involved must have authorized dues checkoffs because of the union shop provision in their collective bargaining agreement and noting that such precedent is generally deemed persuasive, the Board is reluctant to base a legal or factual finding on a presumption when the fact involved is readily susceptible to proof. Even if certain facts permit the trier-of-fact to draw a certain presumption, such presumption need not necessarily be drawn. The Board declined to adopt the NLRB presumption in connection with dues authorizations and rejected the complainant's premise for lack of proof.

09.23	24.1	24.151	24.223	71.512
09.32	24.131	24.16	43.82	71.517
09.374	24.132	24.161	43.84	

V § 964(1)(A): The collective bargaining agreement (and the dues checkoff provision) provided that its terms would continue after its expiration date and during negotiations for a successor agreement, unless either party gave the other a 10-day notice of termination. In an effort to revoke their dues deduction, the unit employees wrote to the employer, during the negotiations and after the expiration date, stating that the agreement was terminated. The collective bargaining agreement was unclear as to who could give a notice of termination on behalf of the union. In light of this ambiguity, the Board held that it would be "unwise" to permit the unit employees to terminate the agreement over the objection of the bargaining agent's leadership. Such a result could result in chaos in the collective bargaining arena, with dissident groups of employees terminating agreements and causing confusion detrimental to the interests of employees, bargaining agents and employers.

01.27	21.13	24.131	24.16	24.42
09.23	22.41	24.132	24.161	46.42
09.24	24.1	24.151	24.4	46.44

VI § 964(1)(A): Since the bargaining agreement remained in effect after its expiration and until decertification of the bargaining agent and, as a result, the dues deductions also remained in effect, the employer did not violate § 964(1)(A) by continuing to deduct dues during this period. Faced with conflicting demands from the unit employees and the bargaining agent, the employer adopted the most neutral posture possible: continuing the dues deduction and placing the funds collected in escrow pending determination of whether said dues should be returned to the employees or be delivered to the bargaining agent.

24.1	24.131	37.5	72.18
24.13	24.132	72.1	

Sanford School Committee v. Sanford School Custodian Unit, MLRB No. 78-33 (Nov. 14, 1978)

I §§ 964(2)(B) & 965(1)(E): To preserve and enhance the effectiveness of the fact-finding process, parties engaged therein must diligently satisfy their commitments to supply information or to perform any other agreed-upon action to aid the fact finders in their determinations. It is critical that fact finders be provided with as complete a factual record as possible upon which to base their findings and recommendations. The inadvertent failure of a party to supply certain documents to the fact finders as agreed to constitutes a failure to participate in fact finding in good faith, even though there was no intent to frustrate the process.

41.33	47.13	52.16	72.5	73.4
41.7	47.53	53.24	72.75	73.55
46.17	52.15	53.42	72.77	73.56

II §§ 964(2)(B), 965(1)(E) & 968(5)(C): The Board did not award the complainant costs in this case for two reasons: (1) there was no evidence that the union deliberately failed to supply the documents at issue to frustrate the fact-finding process; and (2) since the documents supported the union's own position, its failure to produce them did not harm the employer. Had either of these factors been present, the Board might well have awarded the employer its fact-finding costs.

41.7	47.53	53.24	72.75	73.56
46.17	52.15	53.42	72.77	74.17
47.13	52.16	53.43	73.55	74.355

III § 968(5)(C): As a remedy for the union's failure to participate in fact-finding in good faith, the Board ordered the union, and its representatives and agents, to cease and desist from refusing to bargaining collectively with the employer, as required by § 965.

74.14
74.31

Sanford School Committee v. Sanford Teachers Ass'n, MLRB No. 78-34 (Oct. 19, 1978)

I § 968(5)(B): Since the parties were unable to identify any material issue of relevant fact at the prehearing conference, they agreed to submit their dispute to the Board through legal memoranda and their agreement was incorporated into the prehearing conference memorandum and order.

09.62 71.251 71.51
71.228 71.5 71.522

II § 965(1)(C): By filing a petition to include a warrant for consideration by the Town Meeting of a proposal to fund an amount for the salary account, reflecting the wage increase being sought through collective negotiations, the unit employees did not violate the duty to negotiate in good faith. Although the salary account warrant was placed before the Town Meeting, the bargaining agent did not discontinue negotiations with the public employer, the school committee, nor did the unit employees attempt to bargain with the members of the Town Meeting by placing the warrant before that body; therefore, placing said warrant before the Town Meeting was not an attempt to circumvent the school committee in the bargaining process. If approved, the warrant would merely appropriate the funds for the salary increases being sought through collective bargaining. The fact that the budget contains sufficient money to fund a proposed agreement is no more a requirement for the employer to agree to said proposal than is the fact that the budget contains no money a release from the obligation to bargain.

07.1 07.23 07.27 64.34 73.57
07.2 07.25 07.4 73.4

III § 965(1)(C): Collective negotiations are not an academic search for truth but occur within the context of the political process and the presence of political weapons in reserve, and their actual exercise by the parties on occasion, is part and parcel of the system. The right to petition one's government is one of the most fundamental rights guaranteed by the First Amendment of the United States Constitution. A citizen does not lose this right upon assuming public employee status and an order that the employees cease and desist from engaging in further petitioning activities might well run afoul of the Constitutional guarantee.

01.28 21.11 64.2 64.7 73.57
04.1 22.56 64.34 73.4

Teamsters Local Union No. 48 v. Town of Fairfield, MLRB No. 79-01 (June 21, 1979) 1 NPER 20-10019

Facts: On the day that it received formal notice that a majority of its clerical employees wished to be represented by the union for collective bargaining purposes, the Town Council went into executive session to consider the union's request for voluntary recognition. Upon emerging from executive session, the Council voted to reduce the hours of the social worker, a position in the unit for which voluntary recognition was sought, from 35 to 15 hours per week.

I § 964(1)(A) & (B): An act will volate § 964(1)(A) or (B) if one of the motivating factors behind it was unlawful. While the timing and sequence of the Town Council's vote and the manner in which the vote was taken create a substantial inference that a motivating factor underlying the vote was anti-union animus, such inference was rebutted by evidence showing that the decision to reduce the social worker's hours was motivated solely by legitimate considerations. The following evidence led the Board to its conclusion: (1) since it was first created in 1973, citizens of the town and members of the Town Council had questioned whether a full-time social worker was needed; (2) six months prior to any organizational activity, the Town Council interviewed candidates to fill a vacancy in the position of Town Manager and asked each candidate whether they would be able to handle the town's welfare cases--evidence of an intention to eliminate the social worker position; (3) five months prior to the beginning of protected activity, the employer had reduced by one-half the number of hours per week which the social worker devoted to welfare case work--the social worker was assigned to spend the balance of her work week helping to bring the Town's tax records up to date; (4) due to new welfare eligibility guidelines adopted by the Town at the same time noted in number 3 hereof, the Town's welfare caseload was reduced by over 50%; and (5) by the date of the Council's vote, the Town's tax records were essentially current. In light of these facts, the Board held that these fiscal reasons were the sole motivation for the employer's action; therefore, said action did not violate § 964(1)(A) and the union's complaint was dismissed.

09.32	35.532	71.517	72.18	72.311	72.340	72.353
09.33	71.227	72.1	72.3	72.317	72.35	72.358
09.374	71.512	72.131	72.31	72.323	72.352	

Erskine Academy Teachers Ass'n v. Erskine Academy Board of Trustees, MLRB No. 79-06 (Mar. 27, 1979) (Employee Representative Schoonjans, dissenting), 1 NPER 20-10008

I § 968(5)(B): The respondent employer filed a motion to dismiss the union's complaint, alleging that it was not a public employer; therefore, the Board had no jurisdiction to hear and decide the case. The Board conducted a hearing and received argument on the jurisdictional question and decided that the respondent was not a public employer.

01.1	31.5	71.227
11.12	32.14	

II § 962(7): A public employer, within the meaning of the Act, is any person or body acting on behalf of any municipality or town or any subdivision thereof, or of any school, water, sewer or other district, or of the Maine Turnpike Authority. Agency principles should be applied in determining whether a body is "acting on behalf of" one of the enumerated public entities. Under this analysis, the crucial factor is whether the public entity has the right of control over the work to be performed.

01.1	09.1	11.12
01.28	09.11	11.3
01.32	11.11	11.5

III § 962(7): The Legislature has not established a fixed degree of governmental support as the determining factor for public employer status. Although the respondent derived over 95% of its total income from municipal tuition payments, it is not a public employer under the agency test. The Board based its conclusion on the following: the respondent's board of trustees is under contract with no public body, it is totally independent of local town and school officials, it was founded and still operates as a private school under trustees who need be faithful only to State law, State regulations and the founding trust deed and, significantly, the respondent owns a huge capital investment. Finally, the respondent is not a public employer merely because they have bargained as one for several years. At issue is a question of jurisdiction and jurisdiction cannot be conferred by consent or even by agreement.

01.1	09.1	09.74	11.3	11.8
01.28	09.11	11.11	11.5	
01.32	09.6	11.12	11.6	

IV Dissent:
§ 962(7): The employee representative based his conclusion that the respondent was a public employer on the following: (1) there is an implicit contract between the several towns and the respondent that the latter will provide secondary education to students at a rate approved by the State; (2) the trustees are aware that the respondent's survival depends on the municipal tuition payments; (3) the public character of the respondent is further established by the fact that it received a capital grant from the State, the towns are offsetting depreciation through an annual per student assessment and its teachers participate in the Maine State Retirement System; (4) the trustees considered themselves to be a public employer for several years; and (5) there is a strong public policy of encouraging collective bargaining and against work stoppages in educational institutions.

01.1	09.74	11.3	11.8
01.28	11.11	11.5	
01.32	11.12	11.6	

Teamsters Local Union No. 48 v. University of Maine, MLRB No. 79-08 (June 29, 1979), 1 NPER 20-10022, appeal dismissed for lack of prosecution University of Maine v. Teamsters Local Union No. 48, No. CV-79-406 (Me.Super.Ct., Ken.Cty., Dec. 30, 1981)

I § 1027(1)(E): It is a per se violation of the duty to bargain in good faith for an employer to make a unilateral change in a mandatory subject of bargaining during the life of a collective bargaining relationship. A unilateral change is in effect a refusal to bargain in fact and thus the issue of good faith is not reached. A merit increase plan is a mandatory subject of bargaining and, without negotiating thereon with the bargaining agent, the employer discontinued paying merit increases to unit employees; therefore, the employer's action was unilateral. The employer did not allege that an impasse had been reached and, even if impasse had been established, the employer's action would not have been permitted since it did not represent the employer's last best offer. Finally at issue is the nature of the status quo which must be maintained. During the period prior to the initial collective bargaining agreement, the dynamic status quo must be maintained; a static view of the status quo must be maintained during the period between collective bargaining agreements. The following policy reasons support this distinction: (1) prior to the initial agreement, the employees have not had the opportunity to negotiate on the mandatory subjects; (2) there could, therefore, be no understanding or agreement on a termination date for wage escalators; (3) it would be harsh and unfair to employees if clear, automatic wage escalators were terminated upon certification of a bargaining agent. The Board concluded that the employer's action was a change of the static or the dynamic status quo and was, therefore, unlawful.

32.95	43.113	72.51	72.612	72.64
43.1	43.115	72.6	72.618	72.663
43.11	72.5	72.611	72.63	

II § 1027(1)(E): Because they varied from year to year, an annual cost-of-living adjustment was deemed by the Board as not constituting a working condition; therefore, discontinuance thereof was not a change in a mandatory subject.

43.1	43.113
43.11	

III § 1029(4): Charges in a complaint which are not argued by the complainant in its post-hearing memorandum are deemed to have been withdrawn.

01.312	71.229
71.17	

IV § 1027(B) & (D): The union alleged that the employer unlawfully discriminated against a union activist by failing to grant his reclassification request and refusing to hire him to fill a vacancy. The person hired to fill the vacancy was also a union activist; therefore, the latter charge was dismissed. The employer established sufficient economic justification for its decision to deny the reclassification request and there was no evidence that the employer's action was discriminatory; therefore, that allegation in connection with the reclassification request was dismissed.

72.3 72.323 72.35
72.31 72.338 72.358
72.318 72.339 72.366

V § 1029(2) & Rule 4.03(A)(4): If a complaint is clear and concise enough to apprise the respondent of the issues of the case, it will survive a motion to dismiss for lack of particularity.

06.3 71.12
71.11 71.222

VI § 1029(3): As remedies for the employer's unlawful unilateral change established in the record, the Board ordered that the University of Maine and the Board of Trustees, its members, agents, successors or assigns shall: (1) cease and desist from making unilateral changes in the mandatory subjects of bargaining, without first negotiating such changes with the employees' bargaining agent, particularly with respect to merit increase plans; and (2) reinstate the merit increase plan unlawfully terminated and make the unit employees whole for any monetary loss suffered as a result of the unlawful action, plus legal interest thereon, and maintain said merit increase plan in effect until execution of a collective bargaining agreement, decertification of the bargaining agent, or to the point of bona fide impasse in the parties' negotiations, at which point the employer may institute its last best offer in connection therewith.

72.663 74.32 74.345
74.14 74.34 74.355
74.31 74.341

Teamsters Local Union No. 48 v. Town of Falmouth, MLRB Nos. 79-10 & -18 (June 6, 1979) 1 NPER 20-10017

I § 968(5)(B): At the prehearing conference, cross-complaints between the parties were ordered to be consolidated for purposes of hearing and consideration.

71.5
71.514

II § 965(1)(E): The statute provides that, whenever the bargaining agent seeks to negotiate over matters requiring the appropriation of money, it must serve written notice of its intent on the public employer at least 120 days prior to the conclusion of the current fiscal operating budget. The purpose of the 120-day notice requirement is to permit the employer to plan appropriate contingencies in its budget process to fund any items in collective bargaining agreements requiring appropriations. The clear language of the statute provides that the 120-day notice requirement applies to both initial and successor negotiations. Second, the statute requires that the notice must be given by the bargaining agent; therefore, such notice given by an employee organization prior to certification does not satisfy the statutory requirement. If an incumbent bargaining agent, which has given a timely 120-day notice, is decertified and replaced by a different employee organization, the notice continues to be valid.

07.24 09.651 22.41 37.9 42.43 72.581 72.590
07.25 22.1 22.43 41.32 42.47 72.583 72.591
09.65 22.3 37.8 41.9 72.52 72.589 73.41

III § 965(1)(E) & (C): The bargaining agent's failure to serve a timely 120-day notice transforms the topics of "wages, rates of pay [and] any other matter requiring the appropriation of money" for the fiscal year in question into permissive subjects over which the employer may, but need not, negotiate. Since the bargaining agent failed to give a timely 120-day notice, the employer did not violate the duty to bargain by refusing to negotiate over economic items for the approaching fiscal year.

07.24 09.651 42.22 72.589 73.41
07.25 41.32 72.52 72.590
09.65 42.2 72.581 72.591

IV § 965(1)(E) & (C): The public employer is obligated to negotiate over non-economic terms for the fiscal year regardless of whether the bargaining agent served a timely 120-day notice.

Despite the union's insistence on negotiating over economic items, without having first given a timely 120-day notice, the employer committed a "technical" violation of the duty to bargain by failing to negotiate over non-economic items while properly refusing to bargain over economic items.

07.24 41.32
07.25 72.52

V § 965(1)(C): A party commits a per se violation of the duty to bargain by insisting that a non-mandatory subject be negotiated. The rationale behind this principle of labor law is that insistence upon bargaining over non-mandatory subjects is, in substance, a refusal to bargain about mandatory subjects. Despite the fact that the question involved a matter of first impression for the Board, the union's insistence on negotiating over monetary issues when such issues were non-mandatory subjects was the major cause for the breakdown in negotiations, resulting in a five-month hiatus in bargaining; therefore, the union's conduct violated the duty to bargain in good faith. One of the risks which a party assumes when it decides to insist upon bargaining over a particular topic is that its insistence may be held to be violative of the Act.

01.26 72.589 73.45
72.541 73.41

VI § 968(5)(C): As remedies for the prohibited practices established in the record, the Board ordered: (1) that the employer, and its representatives and agents, cease and desist from refusing to bargain over non-economic items for the 1978-79 fiscal year; (2) that the bargaining agent, and its representatives and agents, cease and desist from insisting on bargaining on economic items for the 1978-79 fiscal year; (3) that the parties take the affirmative action of resuming negotiations over non-economic items for the 1978-79 fiscal year; and (4) that the parties notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.14 74.31
74.16

Waterville Teachers Ass'n v. Waterville Board of Education, MLRB No. 79-12 Interim Order (Feb. 6, 1979) 1 NPER 20-10002

Facts: No representative of the employer appeared at the prehearing conference, although the employer received notice of the conference by certified mail. After waiting approximately one hour without hearing from the employer, the prehearing officer granted the complainant's motion for default and ordered that the relief prayed for in the complaint be granted. Both parties requested the Board to set aside the default order and to reconvene a prehearing conference, on the grounds that the failure to appear was not intentional but was the result of mistake, inadvertence or neglect on the part of the employer.

I § 968(5)(B) & Rule 4.07: The failure to participate at the prehearing conference warrants imposition of a default judgment by the prehearing officer. If a party can refuse to participate in Board procedures with impunity, the procedures of the Board would be emasculated, its effectiveness undermined, and it would not be able to adequately discharge its statutory responsibilities. The prehearing officer's authority to impose appropriate sanctions is codified in Rule 4.07 of the Board's Rules.

01.21 09.62 71.25
01.32 09.74 71.251
06.3 71.240 71.252

II § 968(5)(B): Since both parties moved to vacate the default judgment and since the offending party's counsel has sworn that the employer's failure to appear was not a deliberate act, the Board decided to vacate the default judgment and ordered that a new prehearing conference be scheduled forthwith by the Executive Director.

71.240 71.251 71.520
71.25 71.252

Waterville Teachers Ass'n v. Waterville Board of Education, MLRB No. 79-12 (May 29, 1979) 1 NPER 20-10016

I §§ 965(1)(C) & 968(5)(B) & (C): Parties entered into a consent decree at prehearing conference, whereby the employer admitted having made a unilateral change in its sick leave policy, a mandatory subject of bargaining, during the interval between expiration of the former collective bargaining agreement and ratification of the successor agreement.

09.380	43.168	71.25	72.6	72.641
09.62	46.17	71.251	72.63	
43.133	71.228	72.5	72.64	

II § 968(5)(C): As a result of the parties' stipulation, the Board ordered that the employer:

(1) Cease and desist from refusing to negotiate with the bargaining agent as required by § 965;
(2) Cease and desist from making unilateral changes in mandatory subjects of bargaining during the period between the end of one contract and the beginning of another;
(3) Pay to the affected employees the amount of sick pay each would have received but for the unlawful unilateral change in the sick leave policy, plus interest thereon;
(4) Post a copy of the Board's order for 60 days; and
(5) Notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16	74.32	74.341	74.36
74.31	74.34	74.345	74.361

Easton Teachers Ass'n v. Easton School Committee, MLRB No. 79-14 (Mar. 13, 1979), 1 NPER 20-10004

I § 968(5)(B): Shortly after the prehearing conference, the parties entered into a stipulation of the relevant facts and submitted their dispute to the Board on the basis of written memoranda of law. One party included germane facts in its brief which had not been part of the stipulation. This practice was improper and the Board disregarded said facts but cautioned that such facts could be viewed as an admission by the party advancing them.

09.380	09.39
09.383	71.228

II § 965(1)(C): The employer may not make any unilateral changes in the mandatory subjects of bargaining at any time during the collective bargaining relationship. The rationale behind this rule is that a unilateral change in a mandatory subject undermines negotiations just as effectively as if the employer completely refused to bargain over the subject.

21.4	72.5	72.63
46.64	72.51	
46.65	72.6	

III § 965(1)(C): After expiration of a collective bargaining agreement, the employer must negotiate with the bargaining agent before it may permissibly make a unilateral change in those terms of the agreement which comprise mandatory subjects of bargaining. This result is not dictated by the contract itself but rather by the statutory duty to negotiate which provides that, once established, the existing terms and conditions of employment cannot be unilaterally changed during the collective bargaining relationship, unless such change is either agreed to by the bargaining agent or falls within one of the recognized exceptions to the unilateral change rule. The exceptions to the unilateral change rules are: if a bona fide impasse is reached, business exigency, waiver, and traditional practice.

09.6	09.66	46.4	51.	72.612	72.641	72.663
09.64	21.4	46.42	72.6	72.63	72.642	72.666
09.65	21.91	46.44	72.611	72.64	72.662	72.667

IV §§ 965(1)(C), 964(1)(E) and (A): In addition to committing a per se violation of the duty to negotiate in good faith by making unlawful unilateral changes in several mandatory subjects of bargaining, the employer evidenced a specific lack of good faith by making said changes, while tentatively agreeing to many of them or proposing to retain or to actually increase others at the table. Such conduct can only poison the atmosphere of fruitful collective bargaining and result in a coercive effect on the employees who must endure the elimination of the benefits for which they should have the right to bargain, in violation of § 964(1)(A).

72.1 72.5 72.534
72.18 72.53 72.591

V § 965(1)(A): The following are mandatory subjects of bargaining and the employer's unlawful unilateral termination thereof violated § 964(1)(E) and (A):

Grievance procedure
Medical insurance premiums
Professional dues deduction
Emergency leave days
Personal leave days
Professional leave days
Availability of music accompanist
Sick leave accumulation

43.131 43.162 43.321 47.16
43.152 53.166 43.322 47.514
43.16 43.168 43.73 47.77

VI § 965(1)(C): Teacher evaluation is a matter of educational policy; however, the employer violated the duty to negotiate by unilaterally changing said policy, while proposing to retain the old policy at the table.

42.2 43.45 43.624
43.232 43.61

VII § 965(1)(C): While salary step increase and experience factor increases for extracurricular activities affect wages and are mandatory subjects, the Board held that the employer did not unilaterally change the status quo in connection therewith. The employer did not terminate the wage; it merely froze the existing wages without giving effect to the built-in wage escalator. In so holding, the Board opted for a static view of the status quo as opposed to a dynamic view thereof, for the period between expiration of a collective bargaining agreement and finalization of its successor.

43.11 43.114 72.618
43.113 72.6

VIII § 968(5)(B): The employer moved to dismiss the complaint because it was signed and filed by a union business agent, a person who is neither a member of the union nor an attorney. The Board held that § 968(5)(B) incorporating the § 962(2) definition of bargaining agent explicitly permits non-attorneys to practice before the Board. The definition of bargaining agent includes "individual representative[s]" of employee organizations. Second, non-attorneys routinely represent parties before labor boards nationwide. Third, Rules 4.08, 4.14, 4.01 and 4.03(A)(1) all permit parties to be represented before the Board by counsel or other representative.

06.3 22.1 22.72 71.18
21.7 22.7 71.14 71.511

IX § 968(5)(C): As remedies for the "flagrant" violations of the Act established in the record, the Board ordered that the employer, its members, agents, successors, and assigns shall: (1) cease and desist from: (a) refusing to bargain in good faith with the bargaining agent, (b) making unilateral changes in the mandatory subjects of bargaining, and (c) in any other manner interfering with, restraining, or coercing its employees in their exercise of the rights guaranteed by the Act; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of: (a) reinstating the status quo ante with respect to each mandatory subject unlawfully unilaterally changed by the employer, until such time as different terms and conditions are negotiated with the bargaining agent or the bargaining agent is decertified or bona fide impasse is reached in which case the employer may continue the status quo or implement its last best offer in connection with each such topic; (b) making the employees whole for any economic loss incurred as a result of the unlawful unilateral changes, plus legal interest thereon; (c) sign, date and post copies of a notice provided by the Board, at such places where notices are usually posted for the unit employees, for a period of 60 consecutive days, commencing 5 days from receipt of the Board's order; and (d) notify the Executive Director, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof and again after 45 days but not more than 60 days from the date of said order.

74.14 74.31 74.341 74.36
74.16 74.32 74.345 74.361
74.17 74.34 74.355

Rumford School Department v. Rumford Teachers Ass'n, MLRB No. 79-15 (July 30, 1979) (Alternate Employee Representative Haney, dissenting), 1 NPER 20-10023, appeal dismissed by appellant, Rumford Teachers Ass'n. v. Rumford School Department, No. CV-79-478 (Me.Super.Ct., Ken.Cty., Dec. 18, 1979)

I § 968(5)(B): Because the complaint concerned an alleged strike or work stoppage which was on-going, the Board convened an evidentiary hearing on the day after the complaint was filed. Since the job action was abandoned on the first day of the Board hearing, the Board ordered that the case be processed through the normal prohibited practice procedures.

01.23 73.58
01.311

II § 964(2)(C)(3): The record established that 87 of the 110 teachers and support staff represented by the bargaining agent failed to report to work as scheduled and without having been excused from having to do so by the employer. The bargaining agent released a statement to the employer and the media stating that the teachers did not work on the day in question because they were discussing the status of their collective negotiations, having commenced the third straight school year without a contract. While the employees' frustration was understandable, the fact that a new contract had not yet been agreed to provided no justification for the employees' failure to work. If the employees believed that the employer was negotiating in bad faith, their only recourse was to pursue a complaint before the Board and not to engage in impermissible self-help measures. In the circumstances, the Board held that the bargaining agent had engaged in a strike in violation of § 964(2)(C)(3) on the day in question.

01.23 61.5 62.2 62.31
21.8 61.51 62.23 73.58
61.2 62.1 62.231

III §§ 964(2)(C)(3) & 968(5)(B): The bargaining agent argued that since the expired bargaining agreement contained a "no-strike" provision and since the agreement's grievance procedure continued in effect after expiration of the agreement, the Board should defer to the contractual grievance procedure. While recognizing that the grievance procedure does continue in effect after expiration of the agreement pending negotiation of a successor agreement, the Board declined to exercise its "discretionary deferral policy." First, the grievance procedure does not provide for the employer to file a grievance. Second, the crux of the complaint is a violation of the Act and not of the contract. Deferral here would constitute a dereliction of the Board's duty.

43.73 47.32 47.77 71.811 73.58
46.42 47.514 62.232 71.813
47.16 47.54 71.8 71.817

IV § 968(5)(C): A party which has incurred expenses as a result of another party's flagrant unfair labor practice must be reimbursed for the reasonable expenses incurred as a result of said violation, including counsel fees. The party seeking such reimbursement must establish through competent evidence that such expenses were reasonable and necessary and resulted from the other party's flagrant violation of the Act. Here, the violation of the statutory strike prohibition was flagrant since such prohibition is well known and since, prior to its occurrence, the president of the union told the superintendent that he knew the strike would be illegal. The employer attempted to introduce evidence concerning a particular expenditure with its post-hearing brief. Since there was no competent evidence concerning the nature of the bill, it was disregarded.

09.383 62.2 62.52 62.77
21.8 62.23 62.525 71.512
61.4 62.231 62.7 73.58

V § 968(5)(C): In settling the successor collective bargaining agreement, the parties agreed that the employer would "take no reprisals" against the union or its members on account of the strike; however, the employer explicitly preserved its right to pursue the instant complaint before the Board. The employer did not therefore waive its right to seek relief from the Board.

09.62 62.9
09.74

VI § 968(5)(C): As remedies for the prohibited practice established in the record, the Board ordered that the bargaining agent: (1) cease and desist from engaging in strikes; (2) reimburse the employer for the reasonable expenses incurred as a result of the strike, plus legal interest thereon from the date of the Board's order until the entire sum is reimbursed; (3) sign, date and post copies of a notice provided by the Board on all bulletin boards to which it has access at the place of employment and keep said notices posted for 60 consecutive days; and (4) notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof.

74.16 74.34 74.352 74.45
74.31 74.345 74.355

Dissenting Opinion:

VII § 964(2)(C)(3): The teachers merely delayed the opening of the school year by one day, after having given notice of an intention to do so. Had they continued this action until a successor agreement was reached, that would have constituted a strike. The fact that this was the third year of the employees' beginning school without a contract shows that the employer was not negotiating in good faith, possibly justifying the employees' action.

61.3 62.31 62.792
62.1 62.791

Board of Directors of M.S.A.D. No. 24 v. Van Buren Custodian/Bus Driver/Maintenance Personnel Ass'n, MLRB No. 79-16, 1 NPER 20-10009 (Mar. 27, 1979),

I § 965(1)(C): The parties were clearly at impasse over the issue of whether their bargaining sessions should be tape recorded, with the union unwilling to negotiate unless it is allowed to tape the sessions and the employer willing to negotiate unless the sessions are recorded.

51.0
51.01

II § 965(1)(C): The Act requires the employer and the bargaining agent to negotiate over wages, hours, working conditions and contract grievance arbitration. The parties may, but are not required to, negotiate over topics which do not fall within one of the four mandatory subjects of bargaining. The use of a tape recorder during bargaining sessions does not fall within any of the mandatory subjects and is, therefore, a permissive subject. The insistence to the point of impasse on negotiating over a non-mandatory subject is a per se violation of the duty to negotiate in good faith. The use of recording devices, like the presence of the media or the public, has a tendency to inhibit the free and open discussion necessary for successful collective bargaining.

07.5 41.3 42.21 72.533 73.4 73.477
07.51 41.31 42.22 72.541 73.434
07.512 42.2 72.5 72.589 73.45

III § 968(5)(C): As remedies for the union's violation of the duty to negotiate in good faith, the Board ordered the bargaining agent, its representatives and agents to: (1) cease and desist from insisting on bargaining over non-mandatory subjects and from insisting on using a tape recorder to record collective bargaining sessions; and (2) bargain collectively with the public employer.

74.14
74.31

Teamsters Local Union No. 48 v. Town of Jay, MLRB Nos. 79-19 & -11, 1 NPER 20-10006, (Feb. 27, 1979) appeal dismissed by appellant, Town of Jay v. Teamsters Local Union No. 48, No. CV-79-27 (Me.Super. Ct., Franklin Cty., Mar. 22, 1979)

I § 964(1)(A) or (B): A discharge is unlawful if one of the motivating factors was unlawful. The Board concluded that the chief union activist and shop steward, who was discharged for unauthorized use of the employer's property, suffered that fate because of his participation in protected activity. The Board based its conclusion of improper motive on the following circumstantial evidence: the failure to investigate the underlying incident at all--creating

a strong inference of improper motive; the failure to "thoroughly" investigate, as required by the collective bargaining agreement; the failure to give the employee an opportunity to explain himself; although the only employees ever discharged had been subject to progressive discipline--none was followed here; the determination that discharge was "the only way to maintain discipline," despite the lack of progressive discipline; and the sheer unlikelihood that an employee with 15 years' experience, with a clean record and no prior discipline at all, would be discharged under the circumstances had he not been the foremost union activist in the unit and was well known as such by the employer. Concluding that the employee had not been discharged for cause, the Board ordered his reinstatement.

09.374	21.5	72.18	72.312	72.318	72.323
21.12	72.1	72.3	72.314	72.319	72.324
21.3	72.13	72.31	72.315	72.32	72.334

II § 968(5)(C): As remedies for the employer's unlawful discharge of a unit employee, the Board ordered that the employer, its representatives and agents: (1) cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act and cease and desist from discouraging membership in the bargaining agent by discriminating with regard to hire or tenure of employment and particularly by discharging employees because of their exercise of rights protected by the Act; and (2) offer the discharged employee reinstatement without back pay to his former position or, if that position no longer exists, to an equivalent one, without loss of seniority or other rights or privileges, including vacation accumulation which shall accrue as if service had been continuous.

74.14	74.33	74.336
74.31	74.335	

M.S.A.D. #68 Teachers Ass'n v. M.S.A.D. #68 Board of Directors, MLRB No. 79-22, 1 NPER 20-10001 (Jan. 24, 1979)

I § 965(1)(E) & (2)(B): The duty to bargain collectively includes the duty to participate in good faith in mediation, fact-finding and arbitration. Either party may invoke and thereby require the other party's participation in mediation at any time prior to arbitration. The parties' obligation in connection with the impasse resolution procedures has two elements--participation and good faith. The first part of the duty is plainly susceptible to violation without regard to motive or intent: it requires that parties must attend scheduled proceedings and keep whatever commitments they make thereat. The parties filed a joint request for mediation and agreed on a date for mediation. Subsequent to said agreement, the employer failed to appear at the mediation session. A joint request for mediation may not be withdrawn unilaterally and there was no agreement between the parties to cancel the mediation. Scheduling of mediation sessions is between the mediator and the parties; therefore, the Board rejected the employer's assertion that the mediation session had been cancelled by a member of the Board's staff. The Board pointed out that its staff members were available to testify in connection with the employer's claim but were not called as witnesses. The employer's failure to attend the agreed-to mediation session violated § 965(1)(E).

01.21	09.382	52.12	52.21	72.5
07.16	41.33	52.15	52.3	72.75
09.34	46.17	52.16	52.34	

II § 965(1)(E) & (2)(B): The violation of the duty to participate in good faith in the impasse resolution procedures here was not the result of mere benign neglect. Prior to the failure to appear, the employer was informed by its experienced labor relations consultant that such failure would constitute a prohibited practice. Without seeking a second opinion, the employer decided not to attend the scheduled mediation session. The employer, therefore, also violated the good faith requirement of § 965(1)(E).

07.16	72.5
52.16	72.75

III § 968(5)(C): The bargaining agent claimed that its fact-finding costs were incurred as a result of the employer's action. Although there was substantial injury here, an award of fact-finding costs would be based on the speculation or surmise that the successor agreement would have been reached at mediation, thereby obviating the necessity of convening the fact-

finding hearing. The Board declined to base a remedial order on such speculation or surmise. On the other hand, in light of the employer's intentional violation of the duty to participate in the statutory impasse procedures in good faith and the fact that the employer had previously been adjudicated as having violated the duty to bargain in good faith, the Board awarded the complainant its reasonable counsel fees incurred in the preparation and prosecution of its prohibited practice complaint. The Board also ordered that the employer, and its representatives and agents: (1) cease and desist from refusing to participate in good faith in mediation, as required by § 965(1)(E); and (2) sign, date and post a notice provided by the Board at all work locations of employees of the unit involved for a period of 60 consecutive days, beginning on or before a date stated in the Board's order.

01.29 74.16 74.355 74.40
53.43 74.31 74.36
74.14 74.352 74.361

East Millinocket Teachers Ass'n v. East Millinocket School Committee, MLRB No. 79-24, 1 NPER 20-10010 (Apr. 9, 1979)

I § 968(5)(B): Where no contract violation has been alleged and both parties agree that, to the extent applicable, the contract has been followed, contract grievance procedures are not available, a circumstance necessary to trigger the Board's deferral policy. Second, in instances where deferral is not raised until after the prehearing conference, the purpose of deferral is partially defeated and the Board might opt not to defer. Third, deferral does not remove a matter from the Board's jurisdiction. Deferral is used when Board jurisdiction is present and exists concurrently with the possibility of resolving the dispute through the contractual grievance procedure.

01.1 71.8 71.813
47.54 71.81 71.817

II § 965(1)(B) & (C): The parties' collective bargaining agreement permitted the employer to establish new positions and to set the compensation therefor mid-term, with the amount of said compensation being negotiated in future contracts. There was no contractual provision concerning the posting of vacancies of curricular or extra-curricular jobs and no consistent past practice had developed in connection therewith. The parties' agreement did not contain a zipper clause and is silent in regard to new issues arising mid-term. Section 965(1)(B) requires a party to meet, within 10 days after receipt of a notice requesting a meeting for collective bargaining purposes, unless the parties have otherwise agreed in a prior contract. The procedure for filling vacant positions is a benefit of employment and a working condition. The impact on the mandatory subjects of bargaining of an employer action permitted by the parties' agreement is a mandatory subject of bargaining. Since there was no bargaining history on the two areas, the parties' agreement was silent thereon, and said agreement contained no zipper clause, the general rule, that the obligation to bargain over the mandatory subjects continues with respect to new issues arising during the term of a collective bargaining agreement, applies.

01.27 09.661 41.32 43.311 46.64 72.5 72.52 73.4
09.641 09.662 43.21 43.421 46.642 72.51 72.590 73.41
09.642 41.3 43.211 43.645 46.643 72.511 72.63 73.478

III § 965(1)(C): The fact that a contract is silent with regard to particular topics is evidence that there has been no waiver of the right to negotiate thereon. To be effective, a waiver must be clear and unambiguous.

01.27 09.6 09.641 73.478
09.23 09.61 21.91
09.231 09.612 72.590

IV § 965(1)(B): The employer violated the duty to bargain by failing, within 10 days of receipt of a notice requesting a meeting for collective bargaining purposes, to meet with the bargaining agent to negotiate over two mandatory subjects. Said subjects had not been negotiated away in the pre-agreement bargaining, the parties' collective agreement was silent thereon, and said agreement did not contain a zipper clause.

41.3 46.642 72.51 72.590 73.41
41.32 46.643 72.511 72.63
46.64 72.5 72.52 73.4

V § 965(1)(B): When in doubt as to the propriety of a "10-day notice," the safer and wiser response is to meet as requested. A misunderstanding concerning the law or the facts in connection with the particular request will not excuse a party's failure to honor a "10-day notice."

41.3 72.5 73.41
41.32 72.51
46.64 72.52

VI § 968(5)(C): As remedies for the violation of the duty to bargain established in the record, the Board ordered the employer, its members, agents, successors and assigns to: (1) cease and desist from failing to meet within 10 days after receipt of a written notice requesting a meeting for collective bargaining purposes where they have not otherwise agreed in writing; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of meeting with the bargaining agent for the purpose indicated in the 10-day notice involved in the case, within 10 days of receipt of the Board's order, unless otherwise agreed by the parties.

74.14 74.31
74.16

Teamsters Local Union No. 48 v. City of Bangor, MLRB No. 79-29, 1 NPER 20-10005, Interim Order (Mar. 2, 1979)

I §§ 965(1) & 968(5)(B): A prohibited practice complaint alleging a violation of the duty to bargain in good faith is not automatically rendered moot by the subsequent execution of a collective bargaining agreement. On the other hand, the right to object to a violation may be waived. The rationale behind non-waiver is that the Board does not oversee the private settlement of disputes but, rather, is charged with protecting public rights under the Act. These rights are not protected and the effects of prohibited practices are not expunged merely because of a private settlement of the dispute, which may or may not serve to remedy the adverse effect on the employees' statutory rights. In one of its earliest cases, Bangor Education Ass'n v. Bangor School Comm., PELRB No. 73-12, the Board outlined a broad rule that the subsequent execution of a collective bargaining agreement rendered moot a prior refusal to bargain charge. The Board is no longer willing to apply said broad rule.

09.6 21.9 71.522 72.591 79.479
09.62 71.13 72.58 73.47
09.74 71.230 72.590 73.478

Teamsters Local Union No. 48 v. City of Bangor, MLRB No. 79-29, 1 NPER 20-10026 (Aug. 24, 1979)

I § 965(1)(C): The unilateral withdrawal of a tentative agreement is strong evidence of a failure to negotiate in good faith. Here, the employer conditioned its tentative agreement upon ratification of the final tentative agreement at a particular time by the unit employees. Since the unit employees voted against ratification at the time provided, the employer's withdrawal of the tentative agreement was proper in the circumstances.

41.3 46.51 72.539 73.4 73.47
46.13 72.5 72.58 73.43 73.479
46.5 72.53 72.591 73.441

II § 968(5)(B): Because of confusion and conflict surrounding bargaining, where positions change frequently and rapidly, it is unlikely that a tentative agreement can be established unless it is written and signed or initialed by the parties' negotiators.

09.3 09.372
09.33 46.13

M.S.A.D. No. 43 Board of Directors v. M.S.A.D. No. 43 Teachers Ass'n, MLRB No. 79-31, 1 NPER 20-10011, Interim Order (April 10, 1979), case on the merits dismissed by stipulation (May 18, 1983)

I § 968(5)(B) & Rule 4.05: Although the respondent filed a timely answer with the Board, it failed to provide the Board with proof of service, establishing that said answer was served

on the complainant. Since the complainant's motion for default does not allege lack of actual service or any prejudice, the Board exercised its discretion under the Rule and declined to grant the motion for default.

01.28 71.12 71.21
06.3 71.16 71.224

II § 968(5)(B) & Rules 4.03 & 4.02: The complaint must contain a clear and concise statement of the facts which constitute the complaint and must contain a declaration that the complaint's allegations are true. The former requirement was met and while the letter of the latter requirement may not have been met, the spirit of the rule was complied with.

01.28 71.11 71.222
06.3 71.21

III § 968(5)(B): Since an action was pending before the Superior Court, involving the same parties and issues as the instant complaint, collateral estoppel would preclude relitigation before the Board. Since the Court's determination of the legal and factual issues might override the Board's determinations thereon, the Board ordered that the action before the Board be stayed, pending disposition of the identical case by the Superior Court.

09.7 09.73 71.241 71.516
09.72 09.74 71.513 71.83

S.A.D. #22 Non-Teachers Ass'n v. S.A.D. #22 Board of Directors, MLRB No. 79-32, 1 NPER 20-10024 (July 30, 1979)

I § 965(1)(C): A party commits a per se violation of the Act by insisting to impasse on a non-mandatory subject of bargaining. Insistence upon negotiating over a permissive subject need not be the sole cause of impasse in order to establish violation of the duty to bargain.

42.2 72.5 73.4
51.0 72.535 73.436
53.11 72.541 73.45

II § 965(1)(C): A mandatory subject is one which falls within the ambit of wages, hours, working conditions, or contract grievance arbitration and which settles an aspect of the relationship between the employer and its employees. The employer insisted, through fact-finding, on negotiating over retaining a contract article which provided, in part, that the implementation of the agreement and the benefits contained therein was contingent upon the appropriation of the necessary funds by the voters of the school district. This proposal did not settle any aspect of the mandatory subjects but provided for nullification of the agreement by a third party. The Board, exercising its expertise in the field of labor relations, held that this proposal was a permissive subject of bargaining. Second, this contingent implementation clause weakens the collective bargaining process by allowing the public employer to avoid its duty to bargain by shunting the ratification decision to the voters. The power to make agreements lies with the public employer and any effort by that body to require ratification of the final tentative agreement by a body other than itself is a non-mandatory subject. This holding does not result in undue hardship for the employer because, should the electorate fail to appropriate sufficient monies to fully fund the agreement, the employer may reduce personnel, cut programs, or seek appropriate contract modifications through the reopening of negotiations.

01.26 07.28 42.2 46.52 72.535 72.585 73.477
07.152 07.4 42.21 72.5 72.541 72.589
07.27 41.34 46.5 72.53 72.581 73.45

III § 965(1)(C): The employer insisted, through fact-finding, on negotiating over retaining a contract article which provided, in part, that in the event of insufficient funding by the school district electorate, total control over all mandatory subjects was vested in the employer. Although the United States Supreme Court has held that a management rights article, vesting total control over a few mandatory subjects in the employer for the term of the agreement, was not a per se violation of the Act, 343 U.S. 395, at 409; this article vests all such control in the employer and is so inherently destructive of the principles of collective bargaining as to constitute not mere evidence of bad faith but to amount to a per se violation of the Act.

01.26	21.4	42.3	42.47	46.2	72.535
07.27	21.9	42.31	43.79	72.5	72.541
07.28	21.91	42.44	43.9	72.53	

IV § 965(1)(C): By once bargaining and agreeing on a permissive subject, a party does not waive its right to refuse to negotiate thereon at a future time. To sustain a claim of waiver would penalize a party for endeavoring to reach agreement by consenting to bargaining upon issues over which the Act does not require negotiations. A permissive subject never changes into a mandatory subject, no matter how lengthy the bargaining or how often said topic was included in prior agreements.

09.6	09.65
09.62	42.46

V § 965(1)(C) & (3): The onset of fact-finding is the most desirable point for a party to differentiate between mandatory and permissive subjects. Fact-finding is the usual starting point of impasse resolution, since the parties' inability to reach agreement is the threshhold requirement for invoking the process. The employer's insistence on negotiating over the two proposals at issue--non-mandatory subjects--constituted bargaining to impasse over non-mandatory subjects and, hence, violated the duty to bargain in good faith.

51.	53.1	72.541
51.01	53.11	73.45
53.	53.21	73.477

VI § 968(5)(B): By reaching agreement on the two proposals at issue and making said agreement explicitly contingent upon this Board's determination of whether said proposals were mandatory subjects, the bargaining agent did not waive its right to object to the negotiability of said proposals.

01.27	09.62	71.516
09.6	09.64	

VII § 965(3): Determinations by a fact-finding panel that topics are mandatory subjects do not bind the Board.

53.32	53.75
53.7	

VIII § 965(1)(C): The Board declined to rule on whether an article concerning a permissive subject is automatically terminated with expiration of the agreement.

41.36	72.641
42.2	

IX § 968(5)(C): As a remedy for the employer's violation of the duty to negotiate in good faith, the Board ordered the employer, its members, agents, successors, and assigns to cease and desist from submitting non-mandatory subjects to fact-finding, when objected to by the bargaining agent. The Board disagreed with the employer's characterization of an award of consequential costs of fact-finding as being a penalty; nevertheless, the Board opted not to award the union its fact-finding costs here because the violation was an isolated transgression, the issues presented were novel and complex, and the parties' collective agreement deleted the non-mandatory topic article, through the caveat making retention of said article contingent upon the Board's holding.

53.43	74.21	74.355
74.14	74.31	
74.17	74.351	

Sabattus Teachers Ass'n v. Sabattus School Committee, MLRB No. 79-35, 1 NPER 20-10020 (June 21, 1979)

I §§ 968(5)(B) & 964(1)(A): Since, in some circumstances, conduct by a chief negotiator which insults, demeans, and harasses the counterpart negotiator could constitute unlawful interference, restraint, or coercion, the Board declined to grant a motion to dismiss a complaint charging a violation based thereon.

09.12 41.2 71.222 72.1
09.121 71.11 71.227 72.18

II § 964(1)(A): Where proof of a motive to discourage protective activity through certain conduct has not been established, the test for whether the conduct is unlawful is whether, it may reasonably be said, the conduct tends to interfere with the free exercise of employee rights. While it was plain that the employees involved felt insulted and harassed, the employer's conduct could not reasonably be said to interfere with the employees' rights. The employees involved were too sensitive to criticism. Negotiations are tension-filled situations by nature and the perception of the bargaining adversary as unreasonable is common. Criticism of the adversary's bargaining style, while perhaps inartful, is also common. Thus, an even temper and a thick skin are practical prerequisites to sucessful negotiating. Viewed objectively, the employer's position was not unreasonable. While the employer's ad hominem comments were less than ideal, no violation occurred in light of the fact that agreement was reached on the substantive issue under discussion and that the union negotiator in the next round of negotiations is not having any problems with the employer.

41.2 72.18
72.1

III § 964(1)(C): A violation of the statutory prohibition against employer domination of an employee organization requires a direct attempt to interfere with the organization's formation, its existence, or its administration. The evidence in the record did not establish an attempt to influence any of the union's functions or administration.

72.2 72.23
72.21

M.S.A.D. No. 43 Board of Directors v. M.S.A.D. No. 43 Teachers Ass'n, MLRB Nos. 79-36, -39, -45, & -47, 1 NPER 20-10027 (Aug. 24, 1979), modified, M.S.A.D. No. 43 Teachers Ass'n v. M.S.A.D. No. 43 Board of Directors, No. CV-79-541 (Me.Super.Ct., Ken.Cty., July 8, 1980), aff'd, 432 A.2d 395 (Me. 1981)

I § 965(1)(C): The duty to negotiate in good faith requires the parties to bargain over wages, hours, working conditions and contract grievance arbitration. On the other hand, the employers of teachers must meet and consult but not negotiate over educational policy matters. In determining whether a topic is one of educational policy,.matters relating to teacher working conditions are prima facie eligible for mandatory bargaining; however, such eligibility can be overridden if the quantitative number and/or qualitative importance of functions "generally cognizable as 'managerial' and 'policy making' . . . are found significantly substantial."

03.31 42.1 42.21 42.42
03.4 42.12 42.22 42.47
41.6 42.2 42.4 43.61

II § 965(1)(C): A bargaining agent seeking to meet and consult with the employer over an educational policy matter should make its request clear. Otherwise, the request may be viewed as a demand to negotiate.

41.6
41.64

III § 965(1)(C): It is lawful to insist to impasse (fact-finding) upon negotiating over mandatory subjects and unlawful to so insist in relation to non-mandatory subjects, regardless of the subjective good or bad faith of the insisting party. The rationale behind this principle is that insistence upon bargaining over non-mandatory subjects is, in substance, a refusal to bargain over mandatory topics. The insistence on bargaining over non-mandatory topics to the point of impasse is a violation of the duty to negotiate in good faith.

53.0 72.5 72.541 73.436
53.11 72.535 73.4 73.45

IV § 965(1)(C): Determination of whether a topic is a mandatory subject should be done on a "topic" basis. The Board held that the inclusion of mandatory and non-mandatory topics in a

single proposal is an attempt to require the other party to negotiate over the non-mandatory proposal and, in such cases, the other party is justified in refusing to negotiate over the entire proposal. The SUPERIOR COURT reversed the Board on this one point, finding the Board's reasoning arbitrary, especially since, in every instance of such "mixed" proposals, the Board successfully separated the mandatory from the non-mandatory components. The Court directed the parties to negotiate over all mandatory subjects, while refusing to negotiate over the non-mandatory topics if such was their wish.

01.26 72.589 81.331
03.22 81.3 81.503
42.4 81.33 81.522

V § 968(5)(B): Reaching agreement on a successor agreement does not render moot violations of the duty to bargain which occur during the pre-agreement negotiations. A private settlement may not fully protect the statutory rights involved and the public and the charging party are entitled to the protection of future rights by the requirements of continued compliance which a cease and desist order provides.

71.230 72.58 73.47
72.5 72.591 73.479

VI § 965(1)(C): A proposal that the discipline, reduction in rank or compensation, or termination of tenured teachers be contingent upon just cause is a mandatory subject. Such standard can be the determinative factor governing rank, level of salary, and working conditions. By enacting a statute providing that just cause "may" be negotiated, the Legislature was reversing a prior court decision, holding that superintendents were without authority to negotiate just cause, and did not, by using the words "may be negotiated," make just cause a permissive subject.

43.111 43.233 43.32 43.5
43.23 43.3 43.322

VII § 965(1)(C): The topic of school calendars, including commencement and termination of the school year and the scheduling and length of intermediate vacations are, to the extent that both teachers and students are involved, matters of educational policy. On the other hand, the commencement of the teacher work year, prior to the student year, and scheduling and number of teacher workshops, to the extent that they don't involve students and have no impact on the academic year, are mandatory subjects. Third, the number of minimum pupil days per year is governed by statute and is therefore an illegal subject.

42.2 42.32 43.61 43.622
42.21 43.43 43.616
42.3 43.44 43.619

VIII § 965(1)(C): Since it is likely to have an impact on the overall length of the school day, the matter of daily preparation periods for teachers is a matter of educational policy. Whether the teachers are to have a duty-free lunch is fundamentally related to working conditions and is a mandatory subject; when that duty-free lunch occurs must be based on educational needs and is an educational policy matter. The ability to eat a meal and rest during the work day has an important bearing on the health and welfare of the teacher. Unlike proposals for preparation periods, those for duty-free lunch involve greater employee concerns than student interests and bargaining over one such period per day of a specified length would not significantly encroach on managerial and policy-making functions. The use of aides to supervise lunchrooms and playgrounds is a mandatory subject.

43.442 43.618 43.621
43.61 43.619

IX § 965(1)(C): The criteria and standards by which teachers are to be evaluated are permissive subjects of bargaining as are the form and frequency of the evaluations. A proposal that the teachers be provided with a copy of the evaluation form and criteria at the beginning of the school year does not impinge on managerial control and is a mandatory subject.

43.45 43.452 43.624
43.451 43.61

X § 964(1)(E) & (A): During the period between expiration of one agreement and execution of its successor, the static status quo must be maintained as if the existing conditions were frozen and without giving effect to built-in wage escalators. Here the employer properly paid the returning teachers the same amount as each had earned the previous year without giving each the step increase; however, by awarding said step increase to newly-hired teachers, the employer engaged in unlawful interference, restraint, or coercion. The test for the latter violation is whether the employer engages in conduct which, it may reasonably be said, tends to interfere with the free exercise of rights protected by the Act. By giving the step increase to newly-hired teachers, the employees could reasonably view the action as a "message" of displeasure over their exercising their bargaining rights.

21.4	46.4	72.1	72.18	72.64
43.114	46.42	72.13	72.6	72.641
43.120	46.44	72.133	72.618	

XI § 964(1)(A) & (B): The union failed to establish that the employer had engaged in a selective denial of personal leave requests.

71.211	71.512	72.3
71.227	72.1	72.342

XII § 965(1)(C): Since the expired agreement provided that each teacher was to be credited with 12 days of sick leave at the beginning of the school year, the employer's failure to credit each employee's "account" violated the duty to bargain in good faith. The status quo in connection with sick leave accumulation had to be maintained, until a successor agreement or impasse were reached, at which point, if a larger or smaller number of sick leave days was established, the employees' "accounts" could be adjusted accordingly.

43.168	46.44	72.641
46.4	72.6	72.66
46.42	72.64	72.663

XIII § 965(1)(C): On a particular day, approximately 50% of the teachers called in sick. As a response, the employer required for the first time that medical reports confirming illness be submitted. "Important business exigencies" justify an exception to the unilateral change rule. While mere business reasons are insufficient to trigger this exception, the sudden, out-of-the-ordinary absence of 50% of the work force is plainly the type of emergency situation which legitimizes unilateral action.

61.4	62.525	72.66
61.53	72.6	72.667

XIV § 964(2)(A): A state-wide union bylaw, excluding from membership persons who serve on management bargaining teams negotiating with that Union, is designed to avoid disclosure of union bargaining strategies and tactics outside of the normal bargaining process and, so long as it is not discriminatorily applied, does not interfere with the employer's choice of its own negotiators.

22.2	22.22	41.21
22.21	41.2	73.57

XV § 968(5)(C): As remedies for the prohibited practices established in the record, the Board ordered: (1) the union, and its agents and members, to cease and desist from insisting to the point of impasse upon negotiating over permissive subjects and (2) that the employer, and its representatives and agents, cease and desist from: (a) refusing to bargain collectively as required in § 965; (b) paying teachers who have the same experience and level of education at different salary rates; and (c) unilaterally changing the sick leave accumulation policy. Although one of the violations involved payment of newly-hired teachers at a higher rate than returning teachers, the Board opted for only a cease and desist remedy because the newly-hired teachers were merely innocent beneficiaries of the unlawful act; therefore, forcing them to remit the excess sum would be unfair. On the other hand, payment of the extra step to the returning teachers was not ordered because the issue of what to pay to newly-hired teachers, under the static status quo, was a novel one. The prospective remedy was the best to effectuate the policies of the Act.

74.14	74.32
74.31	

LAW COURT: The Law Court appeal was limited to the propriety of the Board's cease and desist order in connection with the salary differential issue.

XVI § 965(1)(C): The Court affirmed the Board's view of the static status quo not allowing the payment of step increases, during the period between contracts.

46.4 72.5 72.618
46.42 72.6 72.64
46.44 72.611 72.641

XVII § 968(5)(C): The Board should and did exercise its "informed discretion" in fashioning a remedy for the violation established in the record. The Court will not interfere with the choice of remedy where the Board articulates the reasons for its choice and said reasons are within the Board's statutory power. Since the relation of remedy to policy is peculiarly a matter of administrative competence, courts must not enter the allowable area of discretion and must guard against unconsciously sliding into the domain of policy. The reasons given by the Board for its order did not constitute an abuse of discretion.

01.29 74.17 81.5083
74.12 81.493 81.5091

XVIII § 968(5)(C): Given the overlapping statutory language between the National Labor Relations Act and the vaious Maine labor relations laws, the Legislature must have understood and intended to give the Board the same remedial powers as those given by Congress under the NLRA.

01.29 03.22 74.13 81.5091
03.2 74.12 81.508

M.S.A.D. No. 43 Board of Directors v. M.S.A.D. No. 43 Teachers Ass'n, MLRB No. 79-36, 3 NPER 20-12015, Decision and Order on Remand (Mar. 18, 1981)

I § 965(1)(C): Since each of the following proposals involves teacher attendance at school during times when students are not present and each involves a working condition, the following were held to be mandatory subjects of bargaining: (1) commencement of the employment year (the number of days prior to the first day of student instruction that teachers are to report for work), (2) the minimum number of workshop days, and (3) the dates on which the workshops are to be held. This latter topic could become a matter of educational policy, if it had the effect of shortening or lengthening the academic year. A proposal to build in three storm days into the school calendar is a matter of educational policy because it could have the effect of determining the commencement and termination of the school year--clearly a question of educational policy.

03.31 43.44 43.616 43.622
43.43 43.61 43.619

II § 965(1)(C): The form and frequency of teacher evaluations are matters of educational policy; therefore, the following proposals were not mandatory subjects: (1) that evaluations be written, and (2) that a method of improving deficiencies found be included in the evaluation. On the other hand, a proposal that teachers be provided a copy of the evaluation criteria and form at the beginning of the school year does not interfere with the employer's discretion in the evaluation procedure but does involve working conditions since it facilitates the employees' efforts to meet the employer's performance expectations.

03.31 43.3122 43.451 43.624
43.232 43.322 43.452
43.312 43.45 43.61

III § 965(1)(C): The union violated the duty to bargain in good faith by insisting to the point of impasse on negotiating over all of the above proposals, including those found to be non-mandatory subjects. The employer violated the duty to negotiate by failing to bargain over all of the above proposals, including those held to be mandatory subjects.

72.5 73.4
72.541 73.45

IV § 968(5)(C): As remedies for the violations established in the record, the Board ordered: (1) that the employer, and its representatives and agents, cease and desist from refusing to negotiate with the bargaining agent over those proposals held to be mandatory subjects; and (2) that the bargaining agent, and its agents, members, and bargaining agents, cease and desist from insisting to the point of impasse on negotiating over those proposals held to constitute matters of educational policy.

74.14
74.31

V § 968(5)(C): A cease and desist order effectuates the policies of the Act because they are enforceable in Superior Court, without further resort to the Board, if the violations continue or are renewed. The existence of a cease and desist order makes it easier for the complaining party to prevent recurrences of a violation.

01.29	09.411	74.31
09.4	74.11	81.19
09.41	74.17	81.5083

Teamsters Local Union No. 48 v. University of Maine, MLRB No. 79-37, 1 NPER 20-10030 (Oct. 17, 1979)

I § 1029(3): Prior to the convening of the evidentiary hearing, the parties filed a full stipulation of the relevant facts and agreed to argue the merits of the case through memoranda of law.

09.380 71.5
71.228

II § 1027(1)(E): Within days of the union's certification as the bargaining agent for the university's police officers, the employer issued a directive prohibiting its officers from assisting other police departments in off-campus matters. The employer asserted that it was not obligated to negotiate over its directive because the jurisdiction of its police officers was governed by statute; therefore, the topic was an illegal subject. The Board rejected this contention because, although authorizing university police to act as policemen on the property owned by or under the control of the university, the statute did not prohibit university police assisting local departments off-campus, acting under and subject to the authority of the local department being assisted.

03.3	03.4	42.32
03.36	42.3	42.44

III § 1027(1)(E): The employer's action did not violate the duty to negotiate in good faith because it had no tangible effect on the employees' wages, hours or working conditions. By limiting the geographic area in which the university provided police services, the officers' duties remained the same, as did their wages, fringe benefits, and hours of work, and the decision had no effect on the number of employees employed. If the decision had any effect on wages, hours, or working conditions, the employer would, of course, be required to bargain over those effects.

42.1	42.48	43.95	72.584	72.66
42.12	43.64	72.5	72.589	72.661
42.4	43.645	72.58	72.617	72.667

IV § 1029(3): The Board's usual practice is to treat allegations of violations as withdrawn if they are not argued by the parties.

01.312 71.5
71.229

V § 1029(3): The Board will not admit into evidence unsupported and untested documents attached to a party's brief, especially when objection thereto is raised.

09.383 71.517
71.5

VI § 1027(1)(A): Unlawful employer interference, restraint, or coercion does not turn on the employer's motive or on whether the interference succeeded or failed but rather on whether it may reasonably be said that the employer's conduct tends to interfere with the free exercise of employee rights guaranteed by the Act. Although the employer's action came shortly after the union's certification, there was no evidence in the record as to how the employees viewed the prohibition against off-campus assistance. The Board was unwilling to speculate on the impact, if any, of the employer's action on the employees and stated that the mere timing of said action, without more, is insufficient to establish that the action was a "message" of displeasure with the employees' organizing activities.

09.33 72.13 72.18
72.1 72.131

VII § 1027(1)(B): In the absence of proof of anti-union animus, the employer's conduct will constitute unlawful discrimination, if it is inherently destructive of important employee rights. Since the action did not involve any employee working condition and there was no proof of anti-union animus, the Board could not reasonably conclude that the employer's action was inherently destructive of any important employee rights.

72.3 72.323 72.342
72.317 72.324 72.35
72.321 72.33 72.366

Teamsters Local Union No. 48 v. Town of Millinocket, MLRB No. 79-40, 1 NPER 20-10013, Interim Order (Apr. 26, 1979)

I § 968(5)(B): At the prehearing conference, the parties agreed that the case should be bifurcated, with the Board first considering the merits of several motions to dismiss based on procedural objections. The parties argued the merits of said motions through written memoranda.

71.25 71.75
71.5

II § 968(5)(B) & Rule 4.02: The requirement, that the prohibited practice complaint shall be signed and duly acknowledged as being true, does not require a particular form of statement. What is required is that the signer evince an awareness that the signer is responsible for the truth of the statements contained in the complaint. It is not the form of the statement of oath but the substance of the statement which is significant.

06.3 71.222
71.11

III §§ 968(5)(B) & 964(1)(A): The test for the sufficiency of allegation in a complaint is whether, if all of the averments are true, the complainant would be entitled to the relief sought. The allegation, that the employer had interfered with the conduct of a fair election by continuing to deal with an individual who had become president of the rival union and who had been removed as shop steward by the incumbent union, was sufficient to state a claim of unlawful interference, restraint or coercion.

71.11 72.1 72.21
71.222 72.18 72.22

IV § 968(4) & (5)(B) & Rules 3.08 & 3.07(B): The 5-day appeal period contained in § 968(4) applies when a party is challenging the conduct of another party or the Board during the election. The normal 6-month statute of limitations applies to claims concerning the pre-election conduct of a party. Rule 3.08 with its 5-day filing period applies only to challenges to open, observable conduct by a party to the election.

01.28 35.42 35.515 71.711
06.3 35.5 35.52
35.4 35.51 71.13

V § 968(5)(B): Since the recently-decertified bargaining agent could, as a result of the relief requested in its complaint, once again become the bargaining agent for the unit involved, it has proper standing to prosecute the complaint.

35.41
71.14

Teamsters Local Union No. 48 v. Town of Millinocket, MLRB No. 79-40, 1 NPER 20-10029 (Oct. 11, 1979)

I § 964(1)(A), (C) & (E): The union's chief steward began circulating a petition to decertify the union and to replace it as the bargaining agent with a different employee organization. Upon hearing of the steward's activity, the union replaced the steward and notified the employer of the identity of the new steward. The union alleged that the employer violated § 964(1)(A), (C) and (E) by continuing to deal with the deposed steward (who was also president of the insurgent organization) and by refusing to deal with the duly-authorized replacement steward. The union was subsequently decertified and replaced as bargaining agent by the insurgent organization. Had the union's allegations been supported by the record, the Board would have ordered the results of the election be set aside. So long as a union remains as the certified bargaining agent, the employer is required under the Act to deal only with the persons designated as job stewards by the bargaining agent. The evidence did not establish that the employer had continued to deal with the former steward after he was replaced or that the employer had refused to deal with the newly-appointed steward.

09.112 32.95 72.1 72.21 72.55
22.41 35.534 72.18 72.22
22.73 35.81 72.2 72.5

II § 964(2)(A): A union may properly remove one of its elected stewards who acts in direct conflict with the union's interests, such as through circulating a petition for the decertification of the union as the bargaining agent.

22.21 23.4 73.32
22.57 73.31

III § 964(1)(A): During the hearing before the Board, it was established that the Town Manager approached a unit employee, shortly before the commencement of the election. Upon hearing the employee say that he was undecided as how to vote, the Town Manager stated that, if the union was voted out, he would see that things went easy for the employee. The union's complaint did not charge that said comment violated the Act and the complaint was not amended at the hearing. Since the issue of the legality of the comment was not litigated, the issue was not properly before the Board and the Board declined to rule thereon.

01.312 35.541 71.15 71.223
35.5231 71.11 71.222

IV § 964(2)(A): Once he left the incumbent union, the president of the insurgent union did not represent himself to be a representative of the incumbent and no other attempt to interfere with the authority of the incumbent union was established; therefore, the record did not establish that the insurgent union engaged in unlawful interference, restraint, or coercion with the employee rights protected by the Act.

35.55 73.1 73.32
35.552 73.31

Teamsters Local Union No. 48 v. City of Auburn, MLRB No. 79-41, Interim Order (Apr. 12, 1979)

I § 968(5)(B): The employer moved that the Board defer to the municipal Civil Service Commission's determination that an employee was discharged for failure to work required overtime and because of his union activity. Since the parties agreed that the Civil Service Commission proceeding was fair and regular, the Board deferred to its conclusion as to the reasons for the employee's discharge.

09.41 71.8 71.824
09.413 71.812 71.83

II § 968(5)(B): The Board determined that it should not defer to the Civil Service Commission's remedy (reinstatement without back pay) because (1) the Commission did not fully consider whether the employer had effected an unlawful unilateral change in its overtime policy,

thereby changing the employee's working conditions, and discharging him for his failure to comply with the changed conditions; and (2) if such an unlawful unilateral change occurred, the Board may well order the payment of full back pay, as a remedy necessary to effectuate the policies of the Act.

43.445 71.821 71.83
71.8 71.823

Teamsters Local Union No. 48 v. City of Auburn, MLRB No. 79-41, 1 NPER 20-10028 (Oct. 4, 1979)

I § 968(5)(B): Allegations contained in a complaint which are not supported by the record and are not argued orally or in a post-hearing memorandum are deemed as having been withdrawn.

01.312 71.17 71.229
71.11 71.222 71.512

II § 964(1)(A) & (B): An act will violate these sections if one of the motivating factors for the conduct was unlawful. In evaluating motivation, the Board examines the entire record and draws reasonable inferences therefrom. An inference of unlawful motive does not constitute a per se violation and may be rebutted by evidence establishing that the conduct at issue was motivated solely by legitimate considerations.

09.3 71.517 72.3 72.35
09.33 72.1 72.31
09.374 72.18 72.311

III § 964(1)(A) & (B): The Board based its conclusion that the employer's conduct violated the Act on the following: (1) the employee involved was a leader in the union organizational campaign, was a shop steward, and was a member of the union bargaining team; (2) prior to the onset of any organizational activity, the employee's need to work a reduced overtime schedule was accommodated and he was not threatened with any sort of discipline for his failing to work overtime; (3) once the union became certified, the employee was notified in writing that he must work overtime or be dismissed; (4) when he was hired, the employee was not told of any requirement that he work overtime; (5) the city's Civil Service Commission determined that one of the reasons for the employee's termination was his involvement in union activities; (6) during negotiations, the employer's team learned of the long-standing practice of allowing unit employees to use the employer's small tools when working on their own cars and, temporarily, halted the practice; and (7) in discussing reasons for the employee's termination for failing to work overtime, the City Manager stated that the employee had "pushed the union down peoples' throats" and had upset foremen by talking about "unfair labor practices."

09.374 64.3 72.134 72.311 72.315 72.324 72.340
09.413 72.1 72.18 72.312 72.317 72.331
64.2 72.13 72.3 72.314 72.319 72.334

IV § 968(5)(C): As remedies for the prohibited practices established in the record, the Board ordered the employer, and its representatives and agents: (1) cease and desist: (a) from applying a different overtime policy for the employee involved from that which was in effect prior to the union's certification; and (b) from unilaterally discontinuing the practice of allowing unit employees to use small tools in the Highway Department garage for repair of their personal vehicles, until a different practice is negotiated with the employees' bargaining agent (the Employer admitted that its temporary change of this long-standing practice had been in violation of the Act and consented to this part of the Board's order); and (2) pay to the discharged employee full back pay, less any compensation which the employee actually earned, for the period between the employee's discharge and his reinstatement, under the order of the Municipal Civil Service Commission.

74.14 74.32 74.343
74.31 74.341 74.42

M.S.A.D. No. 43 Teachers Ass'n v. M.S.A.D. No. 43 Board of Directors, MLRB No. 79-42, 1 NPER 20-10014 (May 1, 1979)

I § 968(5)(B): At the prehearing conference, the parties agreed that the case presented no material issues of relevant fact; therefore, the parties argued the merits of the dispute through legal memoranda.

71.228 71.251
71.25 71.5

II § 965(1)(B) & (C): Section 965(1)(B) provides that the parties are mutually obligated to meet within 10 days after receipt of a written notice from the other party requesting a meeting for "collective bargaining purposes." Under § 965(1)(C), "collective bargaining" includes the obligation to negotiate in good faith over wages, hours, working conditions and contract grievance arbitration as well as the mutual obligation to meet and consult with respect to matters of educational policy. The ten-day notice provision, therefore, applies equally to meet and consult and negotiation requests.

03.31 41.6 72.5
41.3 41.63 72.52
41.32 41.64 72.537

III § 965(1)(B) & (C): The duty to bargain and the duty to meet and consult have two elements: participation and good faith. The first part of each duty is susceptible to violation without regard to motive or intent. A failure to meet within 10 days of receipt of written notice requesting a meeting for collective bargaining purposes is a per se violation of § 965(1)(B), regardless of any subjective good faith. A meeting after the 10-day period does not render moot a violation of § 965(1)(B). The Board's duty is to protect public interests and rights. These rights are not protected and the effects of violations expunged merely by a future meeting. Second, the public and the charging party are entitled to the protection of future rights by the requirement of continued compliance with a cease and desist order.

03.31 41.6 71.230 72.537
41.3 41.63 72.5 74.31
41.32 41.64 72.52

IV § 965(1)(C): The duty to meet and consult arises prior to the implementation of eduational policy decisions.

03.31 41.6 41.64 72.52
41.3 41.63 72.5 72.537

V § 968(5)(C): The evidentiary standard upon which the Board must base its decisions is a preponderance of the evidence in the record. The employer claimed that its failure to meet and consult was due to mitigating circumstances. Since the record was devoid of any evidence of such circumstances, the Board would commit legal error by relying upon extra-record "facts" in excusing the employer's conduct.

09.3 71.5 71.512
09.32 71.51 71.517

VI § 968(5)(C): As a remedy for the employer's violation of § 965(1)(B), the Board ordered the employer, and its representatives and agents, to cease and desist from failing to meet with the bargaining agent within 10 days after receipt of a written notice requesting a meeting for collective bargaining purposes, provided the parties have not otherwise agreed in a prior written contract.

74.14
74.31

Maine State Employees Ass'n v. State and Bureau of Mental Retardation, MLRB No. 79-43, 2 NPER 20-11002 (Dec. 6, 1979)

I § 979-H: The established practice for the teachers at the Pineland Center had been to work 35 hours per week on-grounds and to be paid for an additional 5 hours per week for off-grounds preparation time. The employer unilaterally changed this practice by requiring that the entire 40-hour work week be performed on-grounds, without a change in duties. The teacher employees filed a "class action" grievance, challenging the employer's action before the State Employees Appeals Board and the bargaining agent filed the instant prohibited practices complaint with the Board. The employer defended the grievance before the S.E.A.B. on the grounds that the matter was within the exclusive jurisdiction of the Board. The S.E.A.B. concluded it had jurisdiction, that the requirement was "arbitrary and capricious" regarding

the teachers, but "not unreasonable" regarding the teacher aides. The employer appealed to Superior Court on jurisdictional grounds. Since the employer action was alleged to be an unlawful unilateral change in working conditions, since the employer challenged the jurisdiction of the S.E.A.B., and since both parties agreed the Board had jurisdiction over the dispute, the Board exercised its jurisdiction and heard and decided the matter.

01.1 03.32 71.816
01.26 71.81 71.817

II § 979-C(1)(E): The public employer may not, consistent with the duty to negotiate in good faith, unilaterally change a mandatory subject of bargaining, absent one of four "very limited" exceptions. The employer did not contest that it changed the unit employees' work schedules--a mandatory subject--but interposes several defenses to the unilateral change charge.

43.431 72.5
43.432 72.6

III § 979-C(1)(E): The decision to change the work schedules of custodial workers is not a public policy decision. Even if it was, unlike the educational policy exception in the Municipal Act, the State Employees Act does not contain a governmental policy or managerial prerogative exception to the duty to bargain.

42.47 72.66 72.667
43.9 72.665

IV § 979-C(1)(E): The employer argued that its decision to change the custodial employees' work schedules was the result of a business exigency--one of the four recognized exceptions to the unilateral change rule. A mere business reason is not sufficient to justify a unilateral change. An "exigency" is a sudden, out-of-the-ordinary event threatening serious harm and requiring immediate managerial action. Here there was no business exigency because the change was made two months after the precipitating event and was made after 15 days' notice to the employees. There was ample time to negotiate the change or one of several alternatives before the change was made.

72.6 72.667
72.66

V § 979-C(1)(E): The employer argued that its change was required by a Federal Court Consent Order. The Court Order did not require the change actually made and several alternatives were available; therefore, the change was not required by law. While some of the options available might be costlier than the change implemented, collective bargaining would be a sham if the employer could refuse to negotiate over any change in working conditions on the grounds that it had no money.

42.3 42.44 72.66 72.667
42.43 72.6 72.662

VI § 979-C(1)(E): The employer alleged that the bargaining agent had waived its right to object to the change--a second exception to the unilateral change rule. Since the shift schedule issue was on the table for the ongoing negotiations between the parties, at the time that the change was made, the union did not have to renew its demand to negotiate over the subject in order not to waive its right to object thereto. Second, the memorandum implementing the change was essentially a fait accompli, precluding the availability of negotiations and militating against a claim of waiver.

09.62 09.651 72.614 72.66
09.65 72.6 72.63 72.666

VII § 979-C(1)(E): The employer argued that the parties were at an impasse in their negotiations and that, under the recognized impasse exception to the unilateral change rule, the employer could change the employees' work schedule. In order for this exception to permit a unilateral change in a mandatory subject, the following factors must be present: (1) the parties must be at impasse over the particular change at issue and (2) the change implemented must be consistent with the employer's impasse position. Impasse is a state of facts in which the parties, despite the best of faith, are simply deadlocked. In determining whether an impasse existed, the Board considers the following factors: the bargaining history, the good faith

of the parties in the negotiations, the length of the negotiations, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations. The party claiming the impasse exception has the burden of establishing its contention through the record. A general impasse does not suspend the obligation to negotiate a new proposal or a change in circumstances. The employer failed to carry its burden of proof on the impasse issue.

09.32 51.1 72.6
51.0 51.12 72.66
51.01 71.512 72.663

VIII § 979-H(2): A threatened unlawful unilateral change is not necessarily a violation until it takes place. The actual change constituted the basis for the charge and the instant complaint was timely filed, since it was filed within 6 months of the date of the actual change at issue.

72.5 72.611 72.667
72.6 72.66

IX § 979-H(3): As remedies for the unlawful unilateral changes established in the record, the Board ordered the employer, its agents and representatives: (1) to cease and desist from making changes in the mandatory subjects without collective bargaining; and (2) to meet with the bargaining agent, if requested, and negotiate over the changes at issue.

74.14
74.31

Caribou Teachers Ass'n v. Caribou School Committee, MLRB No. 79-44, 1 NPER 20-10003 (Feb. 7, 1979)

I § 968(5)(B): The parties filed a stipulation of all relevant facts, framed the issue presented for resolution by the Board and waived oral and written argument. The Board decided the matter without convening either a prehearing conference or an oral argument.

01.26 09.380 71.25
01.31 71.228 71.5

II § 965(1)(C): Questions about whether school employees may smoke on school property in areas restricted to student access or that are ordinarily outside those areas normally visited by or visible to students involves working conditions and is a mandatory subject. Smoking in all other areas of school property involves educational policy about which school committees are obligated to meet and consult but not negotiate. This reaffirms the Board's Oxford Hills, PELRB No. 73-06, decision and is consistent with the later decision of the Law Court in City of Biddeford, 304 A.2d 387 (Me. 1973).

03.31 42.42 43.61
41.6 43. 72.5
41.63 43.476 72.6

III § 965(1)(C): While willing to meet and consult thereon, the employer refused to honor the bargaining agent's demand to negotiate over implementation of a smoking ban on all school premises. The employer's refusal to negotiate violated the duty to bargain in good faith.

43.61 72.52
72.5 72.614

IV § 968(5)(C): As a remedy for the employer's violation of the duty to negotiate in good faith, the Board ordered: (1) the employer, its representatives and agents to cease and desist from refusing to bargain collectively with the bargaining agent as required by § 965(1); (2) that the smoking ban in regard to school property areas restricted to student access be rescinded until the issue is negotiated with the bargaining agent; and (3) that any and all disciplinary action imposed on any unit employee for violation of the smoking ban in areas restricted to student access be rescinded and the files of such employees be expunged of any reference to such violations.

74.14 74.32
74.31 74.338

Maranacook Community School Staff Ass'n v. Harrison, MLRB No. 79-49, 1 NPER 20-10034 (Nov. 8, 1979)

FACTS: During the period when the employer and the bargaining agent were negotiating a successor collective bargaining agreement, the employer, in essence, reclassified an employee by creating a new position and assigning her to it. Through individual bargaining with the employee, a salary was established for the new classification, reflecting the employee's increased duties and responsibilities and amounting to a 15% wage increase for the employee. Although aware of the creation of the new position, the employer and the bargaining agent did not negotiate over the unit status of the classification in their negotiations and the resulting successor agreement was silent with respect to that position. The successor agreement, reached some months after the creation of the position but with retroactive effect to beginning of the school year, provided for an across-the-board wage increase for the unit employees. When the employer failed to pay the across-the-board wage increase to the employee in the new position, the bargaining agent filed the instant complaint. The parties then agreed that a Board hearing examiner would determine the unit status of the new classification and the unit clarification decision assigned the position to the unit. Consistent with the established practice of keeping the initial salary for a new position unchanged for a year, the employer continued to refuse to pay the across-the-board increase to the employee for the first academic year of the agreement but agreed to pay the negotiated general wage increase for the second year of the agreement to the employee, when that increase took effect.

I § 965(1)(C): Once a bargaining agent is certified, the employer may not make unilateral changes in the mandatory subjects of bargaining without negotiating the changes with the bargaining agent. Any unilateral change in the mandatory subjects constitutes a per se violation of the duty to bargain. The rationale for this prohibition is that a change in a subject upon which the employer is obligated to bargain frustrates the duty to bargain as effectively as does a flat refusal to negotiate.

32.95 42.12 72.6
42.1 72.5 72.62

II § 964(1)(E): Although the employer is statutorily required to negotiate exclusively with the bargaining agent, it may lawfully negotiate directly with a unit employee, over that employee's working conditions, in instances where the bargaining agent is aware of and has acquiesced in said individual bargaining.

21.91 72.5
22.41 72.55

III § 965(1)(C): The employer has unilaterally changed the wage agreement in connection with the new position by not paying the negotiated across-the-board increase for the first year of the agreement, unless it can be shown that the parties have agreed that said increase did not apply to said classification for the first year of its existence. In the absence of clear and convincing evidence of a contrary agreement, the salary increase provided in the parties' agreement must be paid. No such clear and convincing evidence was presented. A clear past practice does not override the plain language of the agreement and employer's intent to keep the salary of the position at issue unchanged for one year was never communicated either to the employee or to the bargaining agent. No evidence was presented that the bargaining agent knew that the past practice would apply to the position at issue.

01.27 09.233 09.612 09.65 43.113 72.590 72.63 72.667
09.23 09.33 09.613 36.3 46.4 72.6 72.66
09.231 09.6 09.642 36.33 72.5 72.612 72.666

IV § 968(5)(C): As a remedy for the unlawful unilateral change established in the record, the Board ordered that the employer: (1) cease and desist from unilaterally changing the wage provision contained in the parties' current collective bargaining agreement; and (2) pay to the employee in the position at issue the across-the-board wage increase negotiated for the first year of the parties' agreement.

74.31 74.34
74.32 74.355

Sanford Highway Unit v. Town of Sanford, MLRB No. 79-50, 1 NPER 20-10012 (Apr. 5, 1979), aff'd, Nos. CV-79-171, -172, -278 & -186 (Consolidated) (Me. Super. Ct., York Cty., Aug. 30, 1979), aff'd 411 A.2d 1010 (Me. 1980), enf'd, No. CV-80-243 (Me. Super. Ct., York Cty., Apr. 14, 1980)

I § 968(5)(B) & (C): Although it is improper to consider a party's prior prohibited practices in determining whether particular charged conduct violates the Act, a party's prior unfair labor practices in the recent past are a relevant consideration in fashioning a remedy for a subsequent violation of the Act.

74.17

II § 968(5)(B): A witness' assertions of the privilege against self-incrimination were based on real cause; therefore, said assertions cannot serve as the basis for striking the witness' testimony or as admissions to the questions posed.

09.393 71.517
71.5

III § 968(5)(B): Prior to the Board's hearings herein, the Maine Board of Arbitration and Conciliation had investigated the causes of the labor dispute and, pursuant to statute, reported its findings to the executive director of the Board. Since the Board is charged by statute with the responsibility of conducting hearings, when necessary, and to make its own findings of fact and conclusions of law with respect to alleged violations of the Act, the report by another board or commission is irrelevant to the issues before the Board and said report was excluded from the record.

09.394 09.41
09.4 09.413

IV § 965(1)(C): On the basis of the totality of the employer's conduct, the Board concluded that the employer had engaged in bad faith bargaining with no serious intent to reach agreement with the bargaining agent.

72.5 73.4 73.440
72.538 73.43

V § 965(1)(C): The employer's initial wage proposal was so ambiguous, including in it money that the employer was already obligated to pay to the employees, as to constitute trickery or misrepresentation and, thereby, induce the bargaining agent to reveal its bargainng position. Such a proposal is evidence of bad faith.

72.5 72.535 73.43
72.53 73.4 73.436

VI § 965(1)(C): Maintaining an adamant position on a particular subject of bargaining is permissible, where there exists legitimate justification for the refusal to move and the justification is forthrightly conveyed to the other party. While the duty to bargain in good faith does not require a party to make a concession on any given issue or to adopt any particular position, the parties must evidence a willingness to compromise and must make some reasonable effort in some direction toward such compromise. Here the employer: rejected all union proposals on the ground that they cost money, made no counterproposals or compromise proposals, and rigidly adhered, without justification, to its initial wage offer. Not a single tentative agreement was reached throughout five months of bargaining. Further, the employer knew as early as the first session that its opening wage offer would not settle the contract and, despite said knowledge, the employer's negotiator repeatedly indicated that the proposal would not change through mediation, fact-finding, arbitration, or if the employees "hit the bricks." In sum, the employer engaged in classic bad faith surface bargaining, going through the motions of bargaining and accomplishing the same as if they had refused to bargain altogether.

09.123 72.53 72.536 73.433
41.2 72.532 72.538 73.436
72.5 72.535 73.4 73.437

VII § 965(1)(C): An attempt to bypass a party's bargaining representative is evidence of bad faith bargaining. Here each party met with the other's principal party with nothing of significance being discussed. The situation exhibited a lack of sophistication but did not rise to the level of violating the Act.

41.2 72.53 73.4
72.5 72.55

VIII § 965(1)(C): The public employer is obligated to negotiate over the subcontracting of unit work; here the subcontracting was in response to an emergency and the employees acquiesced in it.

43.54

IX § 965(1)(C): Threats of engaging in self-help (i.e. job actions or subcontracting unit work) could constitute unlawful pressure on the bargaining process; however, bargaining does not occur in a vacuum free of pressures from the outside world.

72.5 73.4
72.53 73.43

X § 965(1)(C): Absent an express agreement in the ground rules, one need not be a member of the unit or even be a public employee to be on a union team. A refusal to bargain until certain team members are excluded violates the duty to negotiate in good faith.

41.2 72.5 73.4
41.21 72.53 73.434
41.31 72.533 73.57

XI § 964(2)(C)(3): There can be no justification for a strike by public employees and a failure by the employer to negotiate in good faith, even as egregious as the failure here, does not transform an illegal strike into a legal one. The employees' refusal to work for a 3-day period constituted an illegal strike.

61.1 61.3 62.2 62.231
61.2 62.0 62.23 73.58

XII § 968(5)(C): Upon concluding that a party has violated the Act, the Board must issue a cease and desist order and may order such affirmative action, including the reinstatement of employees with or without back pay, as is necessary to effectuate the policies of the Act; however, the Board may not order reinstatement of employees discharged for cause. It is for the Board to determine, on a case-by-case basis, whether the termination was "for cause." Here the employer's violation of the duty to bargain precipitated the strike. While the public employer misconduct which causes an illegal job action cannot serve to justify the illegal act, public employer provocation is a factor to be considered in determining the remedies for the unlawful job action. When the public employer misconduct causes an illegal job action, participation in that job action does not constitute sufficient cause for discharge. Because the job action was, nevertheless, illegal, reinstatement without back pay was ordered.

01.29 61.3 62.23 62.521 62.79 73.58 74.32 74.332
03.22 61.4 62.231 62.523 62.791 74.17 74.33 74.337
61.2 62.2 62.5 62.77 62.8 74.31 74.331

XIII § 968(5)(C): As remedies for the violations established in the record, the Board ordered: (1) the employer, and its representatives and agents, cease and desist from refusing to bargain in good faith as required by § 965; (2) the bargaining agent, its agents, members, and bargaining agents, cease and desist from engaging in strikes prohibited by § 964(2)(C)(3); (3) that the employees be reinstated under the same terms and conditions as were in effect at the time of the strike, but without back pay, within 24 hours of the receipt of the Board's order, and any employee not so reinstated shall nevertheless be entitled to receive his weekly salary as if he had been reinstated; and (4) within 48 hours of receipt of the Board's order the parties are to begin collective negotiations for a successor agreement. Both parties are to notify the Board, in writing, of the progress of negotiations every 15 days and, if no final agreement is reached during the first 15-day period, the parties are to spend at least 20 hours per week negotiating with each other thereafter.

74.14 74.32 74.337
74.31 74.33

XIV LAW COURT:
§ 968(5)(F): Despite the language of the Maine Administrative Procedures Act, judicial review of the Board's prohibited practice orders is governed by the provisions of the various labor Acts. The Board's determinations in representation cases are not subject to judicial

review under the APA because the Board's findings of fact are conclusive in the absence of fraud.

81.331 81.494
81.333

XV § 968(5)(F): The evidentiary standard for judicial review of the Board's factual findings in prohibited practice cases is the clearly erroneous/substantial evidence standard. In essence, the Board's findings are to be upheld if there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

81.502

XVI § 968(5)(F): "Cause" is an equitable concept which must be determined by the Board in light of the conduct of the parties and the purposes of the Act. Here, the Board correctly found that employer's misconduct precipitated the strike; therefore, participation in the strike was not cause for discharge. In evaluating the remedial powers of the Board, to the full extent which is reasonable, the Maine Board shall have the powers under Maine law that federal law gives to the NLRB.

01.29 74.12 74.331
03.22 74.33 74.332

XVII § 968(5)(F): The Board's order was upheld as effectuating the policies of the Act by (1) seeking a restoration of the status quo to that which would have obtained, but for the unfair labor practices, and (2) discouraging self-help by both parties.

01.29 74.33 81.5087
74.12 81.1 81.5088
74.32 81.12 81.521

XVIII SUPERIOR COURT ENFORCEMENT ORDER: The Court held the employer in contempt and ordered: (1) the employees be paid the sum of $3,908 plus interest and Court costs; (2) the Sanford Board of Selectmen be fined $11,000 for its failure to comply with the Court's order; (3) beginning one day after the Court's order, the Board of Selectmen shall pay a fine of $1,000 per day for each day that they fail to comply with the Court's order; (4) the employees are entitled to their reasonable attorneys' fees, to be determined by the Court; and (5) the eligibility status of one employee for reimbursement was remanded to the Board [this matter was settled by the parties].

74.34 74.35 74.352 81.191
74.345 74.351 81.19 82.

Teamsters Local Union No. 48 v. Town of Machias, MLRB No. 79-51, 1 NPER 20-10033 (Nov. 13, 1979)

I § 964(1)(A) & (B): The main union employee organizer was discharged five days after the union was certified as the bargaining agent, through an election in which the employee organizer was the sole person who appeared to vote. An action will violate § 964(1)(A) or (B) if one of the motivating factors for the action is unlawful. If one of the reasons for a discharge is the employee's union activities, then the discharge violates § 964(1)(A) and (B) and the employee is entitled to reinstatement and full back pay. The Board determines whether the discharge was motivated in part by an unlawful reason by examining the entire record and drawing reasonable inferences therefrom. An inference of unlawful motive does not constitute a per se violation of § 964(1)(A) or (B) and may be rebutted by evidence showing that the discharge was motivated solely by legitimate reasons.

09.374 72.13 72.3 72.32
72.1 72.18 72.31 72.35

II § 964(1)(A) & (B): The timing of the discharge, five days after the employee's vote resulted in certification of the union, permits an inference of unlawful motive. Second, the employee discharged was the employee most active in the union organizational campaign. The Board held that any inference of unlawful motive was rebutted by facts showing "substantial cause" for the discharge. The Board's conclusion was based on: the employee's long history of disobeying orders, unsatisfactory job performance, and bad attitude; prior suspensions; failure

to improve job performance; refusing to obey direct orders; and his inability to get along with his department head. Since some of the employee's poor "work history" occurred after the onset of organizational activity, The Board closely scrutinized those incidents, determined that the employee was not provoked into engaging in misconduct, and that the prior discipline was deserved. Since the discharge was "for cause," the Board did not order reinstatement and dismissed the complaint.

71.227	72.13	72.31	72.314	72.324	72.361
71.517	72.18	72.312	72.315	72.334	72.365
72.1	72.3	72.313	72.317	72.35	72.366

Associated Faculties of the University of Maine v. University of Maine, MLRB No. 79-55, 1 NPER 20-10018, Decision and Order on Motion to Revoke Subpoenas (June 14, 1979), appeal dismissed under M.R.C.P. 41-B, University of Maine v. Associated Faculties of the University of Maine, No. CV-79-343 (Me.Super.Ct., Ken.Cty, July 14, 1982), prohibited practice complaint withdrawn (July 30, 1980)

I § 1030(2): The employer's motion to quash subpoena was denied for the following reasons:

(1) Unlike the procedure under the court rules, there is no requirement that the Board have or use a seal for its subpoenas;
(2) An agent of a party may serve Board subpoenas;
(3) Subpoenas duces tecum may be quashed if they cannot be reasonably complied with prior to the hearing (there was no evidence that the number of documents requested was so large as to preclude compliance;
(4) Public records may be subpoenaed;
(5) A party requesting production of documents will be required to pay the cost of producing the documents at the hearing and not at the time of service of the subpoena;
(6) A party objecting to production of documents on the grounds of privilege must produce the documents for the Board's in camera inspection and determination of privilege. The Board adopted a policy that documents or portions thereof revealing collective bargaining positions, strategies, or tactics would be deemed privileged. The Board bases its decisions on a preponderance of the evidence in the record and documents ruled to be privileged in an in camera inspection will not be considered in the decision-making process.
(7) Mileage fees, under a subpoena duces tecum, are to be paid from the location where the records are kept to the place of the hearing and return.

01.32	09.379	71.212	71.51
09.3	09.39	71.34	71.517
09.36	09.393	71.4	71.523

II § 1029(7) & Rule 4.09: During the pendency of the Superior Court appeal, the complainant withdrew its complaint, with agreement of the respondent.

71.227	71.229
71.228	

Saco Valley Teachers Ass'n v. MSAD #6 Board of Directors, MLRB No. 79-56, 1 NPER 20-10025 (Aug. 9, 1979)

I § 965(1)(C): The Legislature has amended the education laws to provide that the performance criteria and standards are no longer matters of educational policy and are now permissive subjects of bargaining. This change effectively reverses the Board's holding in Caribou School Department, Case No. 76-15, which held that teacher evaluation programs were matters of educational policy.

03.31	43.232	43.452
42.2	43.322	43.61
42.22	43.45	43.624

II § 965(1)(C): Although teacher evaluation programs are now permissive subjects, they cannot be used to circumvent the just cause provisions in the agreement (mandatory subject) because, if the former are not negotiated, the union has not conceded the validity of the criteria and can challenge the same in a just cause grievance.

03.31 09.672 43.232 43.452 47.01
09.613 21.9 43.322 43.624 47.521
09.67 21.91 43.45 46.63 47.82

III § 965(1)(C): Work rules and requirements are generally recognized to be mandatory subjects. Since evaluation criteria effectively create work rules by setting up expectations which should be met, the establishment of such criteria has a significant impact on working conditions. Here, in order for teachers to receive positive marks on their evaluations, they may have to expend money and time attending educational courses, spend additional hours creating and revising planning documents, as well as other additional work.

43.232 43.452 43.472 72.617
43.322 43.453 43.624
43.45 43.47 43.630

IV § 965(1)(B) & (C): Section 965(1)(B) requires the parties to meet within 10 days after receipt of a written notice from the other party requesting a meeting for collective bargaining purposes, provided the parties have not otherwise agreed in a prior written contract. Since the impact of the new teacher evaluation proposal was mandatorily negotiable, the employer violated § 965(1)(B), by failing to meet within 10 days after receipt of the union's 10-day notice, and § 965(1)(C), by continuing to refuse to negotiate over said impact.

72.5 72.52 72.617
72.51 72.537

V § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the employer, its members, agents, successors and assigns: (1) cease and desist from refusing to meet within 10 days after receipt of a written request to negotiate the impact on working conditions of any change in policy or program; (2) cease and desist from refusing to negotiate in good faith the impact of any policy or program change on working conditions; and (3) take the affirmative action of meeting with the bargaining agent within 10 days of receipt of a written notice requesting negotiations over the impact on working conditions of the new evaluation form.

74.14
74.31

Teamsters Local Union No. 48 v. Baker Bus Service, MLRB No. 79-57, Consent Decree (Mar. 4, 1980)

I § 968(5)(B) & (C): At the hearing before the Board, the respondent may, without waiving its right to challenge the Board's jurisdiction in a companion case and without admitting to having violated the Act, enter into a consent decree, ordering the respondent to cease and desist from engaging in certain enumerated conduct and for posting of the decree.

01.1 46.17 74.12 74.42
01.28 71.228 74.31
09.6 71.5 74.361

Sanford Fire Fighters Ass'n v. Sanford Fire Commission, MLRB No. 79-62 (Dec. 5, 1979)

I § 965(1)(C): A party is not required to abide by the terms of an agreement provision which was held to be unlawful. Here, the Law Court held that a similar contract article, establishing payment of full union dues as a condition of continued employment, is unlawful. The employer did not violate the Act by refusing to continue the deductions, especially since it offered to reinstate the deductions if the unlawful portion of the clause, the condition of continued employment language, was deleted.

09.2 42.3 43.82
09.21 42.31 43.84
09.25 43.8 46.24

II § 965(1)(C): Negotiating ground rules are probably not mandatory subjects, even though they are very useful in reducing the potential for confusion, misunderstanding, uncertainty, and

untimely delay in bargaining. The fact that the parties had successfully used ground rules for over ten years and that their use in the current round of negotiations was summarily rejected by the employer at the first bargaining session is evidence of a failure to negotiate in good faith.

41.31 72.531
72.53 72.54

III § 965(1)(C): While a party's initial proposal may be so regressive as to constitute evidence of bad faith, the employer's proposal was not, by itself, evidence of bad faith here.

72.53
72.535

IV § 965(1)(C): Rigidly adhering to an initial proposal, which is extremely regressive, and labeling said proposal as "final," when it is clear that said proposal is unacceptable is strong evidence of a pre-determination not to reach agreement, to frustrate bargaining, and to force the other party to resort to the impasse resolution procedures. This is strong evidence of a failure to negotiate in good faith.

72.53 72.535
72.532

V § 965(1)(C): The failure of a public employer to seek a budget increase, to fund an agreement which is being negotiated and prior to final agreement, is not unlawful since the budget process is not beset with rigor mortis and the employer is bound to honor its agreement.

07.143 07.23 07.27
07.2 07.24 07.28

VI § 965(1)(C): An impasse is a state in which the parties, despite the best of faith, are simply deadlocked. The bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues which remain outstanding, and the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered by the Board in determining whether a bona fide impasse in bargaining existed. No impasse existed: substantial progress had been made, the parties expected to meet again, and impasse was unilaterally declared by the employer's negotiator, without consulting with the union team. The timing of the declaration of impasse, two days before the agreement was due to expire, and the subsequent attempt to justify some unilateral changes on the existence of the "impasse" established that declaration of impasse was not bona fide and was a tactic to put economic pressure on the bargaining agent. The declaration of impasse in the circumstances constituted evidence of a failure to negotiate in good faith.

51.01 51.12 72.586
51.1 72.53

VII § 965(1)(C): The employer's unilateral declaration of impasse, in the absence of a ground rule establishing the effect of oral tentative agreements, forced the union to submit all of the issues to the fact finders, thereby frustating over five months of collective bargaining.

53.1 72.586
72.53

VIII § 965(1)(E): Since, regardless of the way fact finding is invoked, the costs of fact finding are shared equally by the parties, the employer did not violate the Act by failing to join in the request for fact finding.

53.21
53.43

IX § 965(1)(C): The duty to negotiate in good faith precludes the employer's making unilateral changes in the mandatory subjects of bargaining without negotiating the changes with the bargaining agent. By changing the mandatory subjects from those described in the expired collective bargaining agreement without negotiating with the bargaining agent, the employer

frustrates the statutory objective of establishing working conditions through bargaining and commits a per se violation of the duty to negotiate in good faith. The employer violated the duty to bargain by unilaterally terminating the provisions of articles concerning the following mandatory subjects: the manner of filling temporary and long-term vacancies; work rules; pay for time spent by union officers for union business, including negotiations; continuation of past practices not abrogated by the collective agreement; and the grievance and arbitration procedure.

01.27	43.211	43.73	46.44	72.5	72.612	72.641
09.24	43.47	43.86	47.514	72.53	72.63	
22.51	43.72	46.42	47.77	72.6	72.64	

X § 965(1)(C): The employer's change in several mandatory subjects did not fall within the impasse exception to the unilateral change rule because: (1) there was no impasse, (2) some of the changes were inconsistent with the employer's bargaining position expressed at the table, and (3) the impasse was not bona fide.

51.	72.5	72.6	72.663
51.01	72.53	72.63	

XI §§ 964(1)(A) & 965(1)(C): The employer's action in terminating several articles concerning mandatory subjects, upon the expiration of the agreement and in a manner inconsistent with its bargaining position, not only violated the duty to negotiate in good faith but also constituted a bad faith self-help attempt to economically coerce the employees into capitulation. Therefore the employer's conduct also constituted unlawful interference, restraint, or coercion with the employees' bargaining rights.

21.4	72.1	72.5	72.64
46.42	72.134	72.6	
46.44	72.18	72.63	

XII § 965(1)(C): Denying the bargaining agent's request, made at the outset of negotiations, to extend the agreement in the event that a new contract was not reached, when combined with the eleventh-hour break-off of negotiations and mediation, and the unilateral change in working conditions, all indicate that the employer's negotiator did not intend to reach agreement, until at least after the expiration of the old agreement, a violation of the duty to negotiate in good faith.

41.36	52.35	72.53	72.63
52.15	72.5	72.6	72.64

XIII § 965(1)(C): Each party must clothe its negotiator(s) with sufficient knowledge, guidelines, and authority to reach an agreement. Although the quantum of the employer negotiator's authority here was somewhat confusing, this did not rise to the level of being evidence of bad faith.

41.22	
72.530	

XIV § 968(5)(C): A properly designed remedial order seeks a restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice. Since the prohibited practices began at the first bargaining session, restoration of the status quo ante requires the employer to reimburse the union for its bargaining expenses incurred since that time, including attorney's fees, mediation, fact finding, and interest arbitration costs. The unlawfully terminated working conditions were ordered reinstated and the employees made whole. Since a number of counts of the prohibited practice complaint were without merit, no attorney's fees were awarded for its prosecution. Finally, the employer's labor consultant has often been ordered to cease and desist from violating the duty to bargain in good faith. The Board may, in the future, order that he cease and desist from representing any public employer, should he again be found to have violated the duty to bargain.

01.29	74.15	74.34
74.11	74.31	74.352
74.14	74.32	74.355

Galaska v. M.S.A.D. No. 47, MLRB No. 79-63, 2 NPER 20-11004 (Dec. 18, 1979) (Employee Representative Legge, dissenting)

I § 964(1)(A) or (B): An action will violate § 964(1)(A) or (B) if one of the motivating factors for the action was unlawful. If one of the reasons for an employee discharge is the employee's union activities, then the discharge violates § 964(1)(A) and (B) and the employee is entitled to reinstatement and full back pay. Whether the discharge is due to unlawful motivation is determined by examining the entire record and drawing inferences therefrom. An inference of unlawful motive does not constitute a per se violation of § 964(1)(A) or (B) and may be rebutted by evidence showing that the discharge was motivated solely by legitimate reasons.

21.3 72.13 72.3 72.35
72.1 72.18 72.311 72.365

II § 968(5)(B): Anti-union statements made more than 6 months prior to the filing of a complaint are time barred by the Act's statute of limitations; however, such statements are admissible for the purpose of establishing anti-union animus in a § 964(1)(A) or (B) charge.

01.28 09.39 72.1
01.32 71.13

III § 964(1)(A) or (B): The only evidence which could suggest anti-union animus was a statement by the supervisor, two months before the discharge, that the employees would not do better with a union and the change of the employees' workload, during the course of the organizing campaign. Changes in working conditions during organizing campaigns will violate the Act if it may reasonably be said that such changes tend to interfere with the free exercise of employee rights. In determining the existence of such unlawful interference, the Board examines whether the employer had sufficient legitimate reasons to make the change and whether the employees could reasonably view the change as a threatening message that the employer is displeased with their union activities. Here, the additional work resulted from the hiring of a new employee, who could not perform all of the work normally assigned to his shift; therefore, the employer had sufficient reason to make the change and, aware of this reason, the employees could not reasonably view the change as a threatening message. Anti-union animus could also have been found, if the discharge was excessive discipline in light of the circumstances. While the employee was the leading union advocate, the employer was aware of the employee's union activity, and a lesser form of discipline might have been preferable; the discharge was warranted because the employee was not performing his assigned duties, he had a poor attitude toward his work, and, when approached about not performing his duties, he became disrespectful and hostile. Since anti-union animus played no part in the discharge and it was for cause, the prohibited practice complaint was dismissed.

35.51 71.227 72.18 72.311 72.361
35.53 72.1 72.3 72.334 72.363
35.537 72.13 72.31 72.35 72.365

IV § 968(5)(B): When faced with conflicting testimony concerning events, the Board must make credibility determinations, as part of its responsibility in administering the labor relations statutes. Having carefully observed the demeanor of the witnesses, the Board credited the testimony of four supervisory employees over that of the complainant.

01.32 09.34 09.362 71.523
09.3 09.36 71.5
09.33 09.361 71.517

V Dissenting Opinion:
§ 964(1)(A) & (B): The supervisor's anti-union statement, at the outset of the organizing campaign, established his unlawful animus. Second, the change of duties could reasonably be viewed as a threatening message particularly because the complainant had formerly worked the third shift and, as a new employee, had been expected to perform the work which the newly-hired custodian allegedly "couldn't" perform. Third, the reasons given for the discharge do not hold up under careful scrutiny. The "insubordination" charged occurred in response to the supervisor's use of "fighting words." Other custodians had also failed to clean bathrooms in the past without being discharged. The employee had a satisfactory work record, receiving two raises during his one year of employment. The employee was never warned that he was facing discharge for failing to do assigned work and he had a good reason for his failure to do so since another employee was out sick and the employee was "covering" for that employee.

Finally, the employer did not thoroughly investigate the reasons for the dismissal, prior to upholding it. The employee was never given the opportunity to explain his side of the incident. Since some discipline was warranted, the dissenting member would have ordered reinstatement, without back pay.

35.51	72.13	72.31	72.314	72.319	74.17
35.53	72.18	72.311	72.315	72.324	74.33
72.1	72.3	72.312	72.318	72.334	74.341

International Brotherhood of Police Officers, Local 545 v. City of Lewiston, MLRB No. 79-64, 2 NPER 20-11003 (Dec. 18, 1979)

I § 968(5)(B): While normally following the doctrine of Collyer Insulated Wire, in pre-arbitral deferral cases, the NLRB has recently restricted pre-arbitral deferral to violations of the duty to bargain. The Board held this to be an appropriate restriction on pre-arbitral deferral and, since this matter involves allegations of violation of basic § 963 rights, the Board declined to defer to arbitration.

71.8	71.811
71.81	71.817

II § 964(1)(B): The test for violation of this section is whether there was discrimination which had as its purpose the encouragement or discouragement of union activities. No purpose need be proved where the natural consequence of the discrimination is the discouragement or encouragement of union activity or where the conduct was inherently destructive of important employee rights. Where the adverse effect is comparatively slight, an anti-union motive must be proved if the employer has come forward with evidence of legitimate and substantial justification for its conduct. Here, all the patrolmen grew beards, as a form of protest for the employer's bargaining tactics and in violation of a departmental regulation. On the grounds that the 3 school liaison officers were supposed to encourage abiding by the law and their growing beards would convey the opposite message, the Chief reassigned the three liaison officers to patrol duties. There was no proof of anti-union animus, the adverse effect on the three employees was relatively slight (involving only the "right" to grow a beard), and the transfer was warranted for the purpose of preserving the integrity of the school liaison program; therefore, there was no violation of § 964(1)(B).

61.2	72.3	72.319	72.35
61.4	72.31	72.324	72.365
61.57	72.311	72.331	72.366

III § 964(1)(A): An action violates § 964(1)(A) if, it may reasonably be said, the action tends to interfere with the free exercise of § 963 rights. When employee activity involves a breach of work rules or of the collective agreement, the NLRB balances the character and importance of the protected activity against the legitimacy of the employer's right to direct and control operations. Here, the three employees violated an established work rule as did all of the other unit employees and, rather than punishing all of the employees, the employer limited its response to the most significant violations; therefore, there was no violation of § 964(1)(A).

61.2	61.57	72.13	72.18
61.4	72.1	72.134	

IV § 965(1)(C): A party's negotiator must be vested with sufficient authority to at least reach tentative agreements; otherwise, the negotiator is a mere conduit in violation of the duty to negotiate in good faith. Since the parties had successfully negotiated several agreements, over a period of several years, with the negotiator having the same quantum of authority throughout and in the absence of ground rules, it could not be established that the employer's negotiator had insufficient authority.

41.2	41.31	72.530	73.431
41.22	72.5	73.4	

V § 965(1)(C): Separate from the quantum of authority conferred on its negotiator is the principal party's willingness to make concessions or agreements. Where the authority of the negotiator is adequate, but the employer is not willing to move very far, there is no problem concerning the negotiator's authority although it might appear that way when viewed from

across the table. Here the employer was willing to make few changes in the agreement which had been developed over several rounds of bargaining. Although an unwillingness to compromise is evidence of a failure to negotiate in good faith, the employer's conduct, in the circumstances, did not rise to the level of bad faith.

41.2	72.5	72.535	72.591	73.433	73.47
41.22	72.530	72.536	73.4	73.436	73.479
46.15	72.532	72.58	73.431	73.437	

VI § 965(1)(C): It is a per se violation of the duty to negotiate in good faith to refuse to execute a written agreement reflecting the terms agreed to and it is evidence of a violation of said duty when tentative agreements are unilaterally withdrawn without cause. Here no agreement was reached; therefore, there was no duty to execute the same. Second, although the employer did attempt to persuade the bargaining agent to waive a tentative agreement, it did not withdraw unilaterally therefrom.

46.13	72.5	72.572	73.461
46.52	72.539	73.4	73.462
46.55	72.571	73.441	

VII § 965(1)(C): The Act requires the parties to participate in non-binding fact finding and in arbitration (that is binding on all issues but wages, pensions, and insurance) in good faith. A party's willingness to participate in binding arbitration on all issues is not required by the Act and is not evidence of a failure to negotiate in good faith.

51.31	53.7	55.3	55.84	72.72
53.21	53.75	55.34	55.911	73.52
53.24	55.21	55.62	55.94	

VIII § 965(1)(C): The harsh reality of the Act is that, at the end of the dispute resolution process, there is simply no method to resolve differences over salaries, pensions, and insurance. Even in the exercise of its broad remedial authority, the Board cannot order parties to make concessions and to conclude agreements.

01.28	53.75	55.84	74.12	74.44
01.29	55.21	55.911	74.21	
03.2	55.62	55.94	74.40	

IX §§ 962(6) & 965(1)(C): Most of the negotiating difficulties in this case were the result of the employer's tri-partite organizational structure. Two employer models exist--the single employer model and the joint employer model. An attempt by an employer to mix models, by utilizing a single employer approach at the bargaining table when it is actually employing a joint employer structure in its decision-making, would probably constitute a failure to negotiate in good faith.

11.11	11.23	46.52	72.57
11.12	41.11	72.5	
11.13	41.12	72.530	

X §§ 962(6) & 965(1)(C): In instances where only one entity exercises final authority over any bargainable issue, the single employer model applies. In such instances the single employer must negotiate and reach agreement with the bargaining agent and it is a violation of the duty to negotiate in good faith for such an employer to insist on the ratification of the final tentative agreement by the municipal finance body or town meeting. If insufficient funds are then appropriated to fund the negotiated agreement in the single employer model, the bargaining agent can agree to renegotiate or the employer must live with its agreement, even though it may be required to reduce services in order to do so. On the other hand, where various bodies in fact exercise final authority over any bargainable issue, the joint employer applies. Under this model, the duty to negotiate in good faith requires each body to participate in the bargaining and, together, to present a common front. In the joint employer model, the representative participation of each employer body in bargaining would eliminate the possibility of a lawful failure of ratification by each body, except in rare circumstances. Such a joint employer model does not require redistribution of power but does envisage cooperation among the bodies and, if such cooperation is inherently impossible under the municipal charter, the municipal structure may have to yield to the supervening state law concerning the duty to bargain.

03.34	07.2	11.11	11.23	41.12	72.5	72.571
03.41	07.28	11.12	11.7	41.22	72.530	72.572
07.143	09.22	11.13	41.11	46.52	72.57	

XI §§ 962(6) & 965(1)(C): The parties should establish, through ground rules, the nature of the employer's organizational structure in connection with negotiation, execution, and ratification of collective bargaining agreements. Once established, the employer model will assist the parties in avoiding ratification problems at the end of the bargaining process.

09.22	11.13	41.12	72.5
11.11	11.23	41.31	72.530
11.12	41.11	46.52	72.57

Teamsters Local Union No. 48 v. Lewiston-Auburn Water Pollution Control Authority, MLRB Nos. 79-65 & 80-07, 2 NPER 20-11036 (July 29, 1980)

I § 968(5)(B): At the prehearing conference, cross-complaints between the parties were ordered consolidated for hearing and decision.

71.25	71.514
71.251	

II § 968(5)(B): The chairman who presided at the hearing withdrew from consideration of the case prior to deliberations. Upon notice to the parties, another chairman participated in the decision of the case on the basis of the transcript and documentary evidence.

09.373	71.31
71.3	

III § 964(1)(A) & (B): The employer had been planning a wage equalization adjustment well before the advent of union activity, the employees were aware of the employer's plan, and the plan was implemented after the advent of union organizing activity, but was not changed as a result thereof. In the circumstances, the wage adjustment, during the union organizational campaign, did not violate the Act.

43.113	72.133	72.35
72.1	72.3	72.366

IV § 964(1)(A) & (B): A CETA employee was not hired for two permanent openings, although he was plainly more qualified to fill the vacancies than the persons chosen. The employer stated that the persons chosen were selected as a result of its unwritten policy favoring the promotion of regular employees. The stated policy had not been evenly applied in the past. Since the non-selected employee had merely signed a union authorization card, attended union meetings, and was not a known union leader, the employer's denial of knowledge of his feelings toward the union was credible and refuted any inference of unlawful interference or discrimination.

72.1	72.3	72.338	72.362
72.13	72.312	72.339	
72.18	72.324	72.35	

V § 964(1)(A) & (B): The employer: eliminated a policy of paying for an employee's attendance at job-related educational meetings, started opening an employee's mail, terminated the employee's flex time and assigned him to a fixed shift, shortly after the employee testified at a unit determination proceeding and his position was assigned to a bargaining unit by a Board hearing examiner. The employer attempted to justify its actions on the basis that the employee in question had "opted" to become a member of the "rank-and-file," was no longer considered to be "management," and had to be treated like the other "rank-and'file" employees. Further, on the grounds that it was saving money, the employer terminated the employee's overtime. A public employer should refrain from changing working conditions, to the benefit or detriment of unit employees, during the organizational campaign and prior to a bargaining agent election, unless it can demonstrate that the change is consistent with a regular cycle or was decided upon prior to the advent of awareness of union activity. If established such conduct may be grounds for setting aside the results of an election. Conduct violates § 964(1)(A) and (B) if it is motivated in part by anti-union animus. Anti-

union animus was plain from the timing of the changes, the employer's view of the employee's giving testimony as disloyalty, and the plainly pretextual nature of the expressed justification for the changes. Unit assignments are made by the Board and not by employees "opting" for inclusion or exclusion; the term "rank-and-file" has no meaning under the Act, since both supervisors and professional employees are accorded bargaining rights thereunder; and there is no necessity to treat all unit employees alike in all aspects of working conditions. They certainly are not treated alike for pay purposes and different job classifications involve different hours, training opportunities, and work rules, among others. The changes clearly constituted a message of displeasure with the employee's engaging in organizational activities and, by affecting several important working conditions--compensated educational opportunities, flex time, and overtime (the allegation concerning opening the employee's mail was dismissed as trivial)--the changes were inherently destructive of important employee rights and, therefore, violated § 964(1)(A) & (B).

21.2	35.532	43.431	43.444	72.13	72.3	72.317	72.342
21.3	35.81	43.432	43.445	72.134	72.311	72.324	72.35
35.53	43.162	43.443	72.1	72.18	72.312	72.340	72.366

VI § 964(1)(D): The employer considered the employee's giving testimony in a unit determination proceeding as a sign of disloyalty and retaliated against him in part for that reason. The employer's changes in the employee's working conditions, discussed in the preceding paragraph, violated § 964(1)(D).

72.4

VII § 964(1)(A) & (B): The termination of the employee's assistant did not violate the Act because said termination had no effect on the employee and only occurred at the end of the assistant's CETA contract.

72.1	72.18	72.317	72.366
72.134	72.3	72.35	

VIII § 964(1)(A): The employer removed a notice of a union meeting, which had been posted without first seeking permission to do so. The employer required that only approved notices could be posted; however, permission to post notice of a union meeting has never been refused. The employer's requirement of prior approval is not unfair and, in the circumstances, the employer did not violate the Act.

35.533	72.1	72.115
35.538	72.11	72.120

IX § 964(1)(A) & (B): Prior to the advent of organizational activity, the employees allegedly enjoyed a 15-minute morning coffee break and a 30-minute lunch. Claiming that its policies always provided therefor, the employer enforced 10-minute coffee breaks and 20-minute lunch breaks, after the outset of the organizational campaign. Had the union carried its burden of establishing either a change in the policies or a change in the enforcement of the policies, a prohibited practice would have been established; however, the union did not establish that a change had occurred.

09.32	72.1	72.311	72.366
43.441	72.134	72.340	
43.442	72.3	72.35	

X § 968(5)(C): In fashioning a remedy for the loss of overtime opportunities, the Board must consider that the employee has lost substantial money through loss of overtime and that some monetary relief must be provided therefor. On the other hand, the amount of overtime available is a matter that is generally an exclusive employer decision that is based on several factors not necessarily relating to working conditions. An employer cannot be required to provide overtime indefinitely simply because it has provided some in the past. To balance these interests, the Board ordered the employer to pay the employee 150% of his regular hourly pay times the difference in the average amount of overtime worked before and after the change in the intervening 5 months, plus interest thereon.

43.116	74.17	74.346
43.445	74.345	74.355

XI § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer, its officers, agents, and successors shall: (1) cease and desist from: (a) discouraging membership in the bargaining agent by deleting benefits, changing work schedules, limiting overtime opportunities, or otherwise discriminating against its employees in respect to their tenure of employment or other term or condition of employment; (b) discriminating against an employee because he has given information or testimony in any Board proceeding; and (c) interfering with, restraining, or coercing employees in their exercise of the rights guaranteed by the Act; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of: (a) restoring the practice of allowing the Lab Technician to attend educational conventions and seminars on paid time and make him whole for any harm suffered through the discontinuance of the practice; (b) upon request, restore the Lab Technician to a flex time schedule; (c) keep the policies mentioned in effect until superceded by an agreement between the parties; (d) pay the employee harmed by the loss of overtime opportunities the amount discussed in the body of the opinion; and (e) notify the executive director, in writing, of the steps taken in compliance with the Board's order, within 20 days of the date thereof.

74.14 74.32 74.345
74.16 74.34 74.346
74.31 74.341 74.355

Teamsters Local Union No. 48 v. Town of Oakland, MLRB No. 79-67, 2 NPER 20-11005 (Dec. 20, 1979)

FACTS:
During negotiations, the parties believed that they had reached final tentative agreement. The employer fowarded a draft copy to the union business agent, who discovered that the employer had deleted employee dependent health coverage therefrom among other "mistakes," noted the problems on the draft, and returned the draft to the employer. The employer corrected several errors in the draft but, believing that the parties had adopted the employer's view thereon, omitted employee dependent health coverage from the second draft. The union business agent was on vacation and, without reading the contract and having been repeatedly told by the business agent "Don't do anything," the union steward signed the agreement on behalf of the union. The employer, relying on the ratified and executed agreement, paid the employees' retroactive pay based on the agreement. Still without reading the agreement, the business agent pursued a grievance under the dues deduction article of the agreement and was successful thereon in arbitration. The union challenged the employer's omission of the employee dependent health coverage from the agreement before the Board.

I § 965(1)(D): There is no violation of the duty to reduce agreements to writing and to execute the same unless there was an agreement actually reached. The evidence shows that there was no meeting of the minds on the dependent coverage issue; therefore, there was no duty to reduce anything to writing.

09.22 46.55 72.572 73.462
09.62 72.571 73.461

II §§ 968(5)(B) & 964(1)(A) & (E): The bargaining agent alleged that the employer's violation of § 964(1)(E) also resulted in a violation of § 964(1)(A). Since the allegation of a distinct violation of § 964(1)(A) was not pressed, it is deemed withdrawn. A derivative violation of § 964(1)(A), based on a violation of § 964(1)(E), fails if the latter violation is not proven.

01.312 71.229 72.18
71.17 72.1

III § 965(1)(C): The bargaining agent failed to repudiate the agreement for over two months after learning of the dependent coverage problem, relied on the contract in processing a grievance through arbitration, the employer could have defended against the grievance on the grounds of no agreement had the union attempted to repudiate the same earlier, and the employer paid the employees' retroactive pay in reliance on the agreement. In the circumstances, the doctrine of equitable estoppel barred the bargaining agent from repudiating the bargaining agreement and its complaint was, therefore, dismissed.

09.113 09.51 09.72 72.5 73.478
09.22 09.7 09.74 72.590 73.479
09.5 09.71 71.227 72.591

Cape Elizabeth School Board v. Cape Elizabeth Teachers Ass'n, MLRB No. 79-68, 2 NPER 20-11010 (Feb. 14, 1980) (Employer Representative Ziegenbein, concurring), appeal taken and dismissed by appellant, Nos. CV-81-71 & 82-205 (Me.Super.Ct., Cum.Cty., Oct. 28, 1983)

I § 968(5)(B): Although the parties filed a stipulation of the material relevant facts and argued the merits through written memoranda, the Board granted the employer's request for oral argument.

09.380 71.228
09.62 71.5

II § 965(1)(C): A party may lawfully insist to the point of impasse on subjects which fall within the scope of wages, hours, working conditions, or contract grievance arbitration--the mandatory subjects of bargaining. Subjects not falling within the scope of the mandatory topics are permissive subjects, about which the parties may, but are not required to, negotiate. A party may not insist to the point of impasse on a permissive subject, over the objection of the other party. Matters of educational policy, although within the scope of working conditions, are, by statute, deemed to be permissive subjects.

03.31 42.2 53.11 72.589 73.477
42.1 42.22 72.5 73.4
42.12 43.61 72.541 73.45

III § 965(1)(C): The entire legislative history of the amendment to 20 M.R.S.A. § 161(5), which now provides that "[j]ust cause for dismissal or non-renewal may be negotiable . . . for teachers who have served beyond the probationary period," and the reference therein to the labor relations Act persuade the Board to conclude that a just cause proposal regarding the dismissal or non-renewal of continuing contract teachers is a mandatory subject of bargaining.

01.26 43.233 43.452 43.624
03.31 43.322 43.61

Teamsters Local Union No. 48 v. Baker Bus Service, Inc., MLRB No. 79-70, 2 NPER 20-11012 (Mar. 3, 1980), aff'd sub nom Baker Bus Service v. MLRB, No. CV-80-157 (Me.Super.Ct., Ken.Cty., Sept. 4, 1980), aff'd sub nom Baker Bus Service v. Keith, 428 A.2d 55 (Me. 1981)

I § 964(1)(A) & (B): An action will violate § 964(1)(A) or (B) if one of the motivating factors for the action was unlawful. The Board determines whether there was unlawful motivation for an action by examining the entire record and drawing inferences therefrom. An inference of unlawful motivation may be rebutted by evidence establishing that the action was solely motivated by legitimate reasons. The Board based its conclusion that an employee's discharge was based on unlawful motivation on the following: (1) immediately after the discharge, the employer called the main union employee organizer into his office, told her of the discharge, and said that she was the cause of all his trouble (there was no business justification for this meeting and the comment drew a link between the discharge and the union activity, indirectly suggesting there would have been no discharge, but for the organizing activity). This comment was an attempt at unlawful interference not only with the rights of the discharged employee but also of all of the union activity; (2) the sheer unlikelihood of the discharge on the basis of the grounds alleged which were minor or were uninvestigated and since, in the past, the employee had not been disciplined, had never been warned that his job was in jeopardy, there was no progressive discipline, and the only prior cases of employee discharge were the result of serious problems; (3) the employer changed the reasons for the discharge; and (4) the general state of anti-union atmosphere, with the employees fearful of even mentioning the union and the employer being an outspoken opponent of the union.

09.374 72.1 72.3 72.314 72.319
21.3 72.131 72.31 72.315 72.324
35.532 72.18 72.311 72.318 72.334

II § 968(5)(C): As remedies for the unlawful discharge established in the record, the Board ordered the employer, its officers and successors, representatives and agents, to: (1) cease and desist from: (a) interfering with, restraining or coercing its employees in the free exercise of the rights guaranteed by the Act; and (b) discouraging membership in the bargaining agent by discrimination in regard to tenure of employment because of union activities; (2) make the employee an unconditional offer of reinstatement to the same or substan-

tially equivalent position, without loss of seniority, rights, or privileges; and (4) make the employee whole for any lost earnings suffered as a result of the discharge by paying him the net back pay due. The Board retained jurisdiction over the matter to determine the amount of net back pay due, in the event of the parties' inability to agree thereon. Among the factors to be considered in calculating the net back pay due are: weekly gross back pay claimed, actual earnings from other employment, expenses incurred in seeking and holding interim employment, interest claimed, and documents or affidavits supporting each item.

74.14	74.33	74.336	74.343	74.355
74.31	74.3331	74.34	74.344	
74.32	74.335	74.341	74.345	

III SUPERIOR COURT:
§ 968(5)(F): The Board's findings of fact challenged by the appellant were each based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; therefore, such findings were not clearly erroneous and were affirmed.

09.32	71.512	81.12	81.502
09.33	71.517	81.331	

IV § 968(5)(F): The appellant challenged the Board's use of the "in-part" test for unlawful conduct under § 964(1)(A) or (B). Despite the Board's use of the in-part test, the dominant motive for the discharge was anti-union animus; therefore, the Board's decision stands, even under the more restrictive "dominant motive" test.

72.1	72.31	81.503
72.3	72.324	

V LAW COURT:
§ 968(5)(F): In interpreting the Municipal Act, it has been the Law Court's policy to look for guidance to parallel federal law, found in the National Labor Relations Act and decisions thereunder. The circuit courts of appeal are divided on the degree of unlawful motivation required to establish violations of the federal act parallel to § 964(1)(A) and (B); however, since unlawful anti-union animus was the dominant reason for the discharge here, the Court had "no occasion" to rule on the Board's use of the "in-part" test and affirmed the Board's conclusion under either test.

03.22	72.31	81.503
72.1	72.324	81.505

VI § 968(5)(F): Since the discharge was the result of unlawful motivation, it was not "for cause," within the meaning of the § 968(5)(C) limitation on the Board's remedial authority to order reinstatement.

01.29	74.33	74.332
03.22	74.331	81.507

Teamsters Local Union No. 48 v. Baker Bus Service, Inc., MLRB No. 79-70, 4 NPER 20-13009, Compliance Order (Jan. 25, 1982), appeal dismissed on Court's motion for want of prosecution, Baker Bus Service, Inc. v. Noddin, No. CV-82-88 (Me.Super.Ct., Ken.Cty., Aug. 2, 1984)

I § 968(5)(C): In its original order, the Board retained jurisdiction to determine the amount of back pay due the discharged employee, in the event the parties were unable to agree thereon. The Board ordered that "[t]wenty days after the expiration of the appeal period of this order or after a judgment of the Superior Court enforcing" the order, the complainant had to make his detailed claim for back pay and interest. Within eight days of the Law Court's decision affirming the Board's decision and order, the bargaining agent forwarded a detailed list of the back pay and expenses claimed. Since appeal to the Law Court stayed the execution of the Superior Court order, Rule 62 M.R.C.P., said order was not enforceable until affirmed by the Law Court; therefore, the submission of the detailed back pay claim within 20 days of the Law Court's order was in substantial compliance with the Board's order and there was no waiver of the Board's remedy.

74.12	81.62
74.16	

II § 968(5)(C): The guiding principle in fashioning remedial orders is to seek "a restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice." Since the employee receiving the back pay must repay the unemployment compensation he received during the summer months and he would not have had to repay said sum but for the unlawful discharge, the employer had to pay to the employee the sum to be repaid to the Employment Security Commission. Since the employee had use of the unemployment compensation funds throughout the dispute, no interest is due thereon so long as the payment is made immediately. If it is not paid immediately, interest will accrue thereon in the usual fashion.

09.62 74.34 74.355
74.32 74.344

III § 968(5)(C): Interest awarded by the Board is to be calculated as follows: loss of pay and other compensable costs are totalled for each separate calendar quarter or portion thereof, during the period from the unlawful discharge until the date of the reinstatement offer; interest is computed as of the last day of each calendar quarter on the total amount then due and owing at the adjusted prime interest rate, as determined by the United States Secretary of the Treasury. That rate was 6% per annum, from 2/1/78 to 1/30/80; 12%, from 2/1/80 to 1/31/82; and 20%, as of 2/1/82.

74.345

Union #37 Teachers Ass'n v. Richards, MLRB No. 79-71 (Oct. 15, 1979)

I § 968(5)(B): At the prehearing conference, the respondent may, without admitting to having violated the Act, enter into a consent decree, ordering the respondent to cease and desist from engaging in enumerated violative conduct.

09.62 71.25 74.42
71.228 71.251

II § 968(5)(B): When a particular management official is named as a respondent in a complaint and the individual terminates his employment with the employer, the complaint becomes moot as to that individual.

01.28 09.111 71.230 74.15
01.29 71.14 74.14

Teamsters Local Union No. 48 v. Town of Jay, MLRB No. 80-02, 2 NPER 20-11006 (Dec. 26, 1979)

I § 964(1)(E): An employer's unilateral changes in wages, hours, and working conditions, during the time that the employees involved are represented by a bargaining agent, violates the duty to negotiate in good faith. The essence of this prohibition is that, once a bargaining agent has begun to represent a unit of employees, the employer may not make unilateral changes in the mandatory subjects without negotiating the changes with the bargaining agent. An unlawful unilateral change occurs if: (1) the employer made a change, (2) the change was made unilaterally, (3) the change involved wages, hours, or working conditions, and (4) none of the limited exceptions to the unilateral change rule--impasse, waiver, business exigency, or traditional practice--applied.

72.5 72.611 72.663
72.51 72.612 72.666
72.6 72.662 72.667

II §§ 964(1)(E) & 968(4): The changes at issue were made after the election resulting in certification of the bargaining agent but before the objections to said election were resolved. An employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. Where the final determination on the objections results in certification of a bargaining agent, the employer violates the Act for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as bargaining agent. To hold otherwise would allow the employer to box the union in on future bargaining positions by implementing changes during the period when objections or determinative challenges to the election are pending.

32.95 35.5 72.6
32.96 72.5 72.62

III § 964(1)(E): Although the Selectmen did not know of certain practices, the employer is held responsible for the knowledge of its agents--the Town Manager, Town Clerk, or Chief of Police. In cases where actual, long-standing practice varies from the employer's "official policy," it is the actual practice in connection with the mandatory subjects which cannot be changed unilaterally.

09.1 09.113 09.121
09.112 09.12

IV § 965(1)(C): The official policies of the employer were: (1) employees are to be paid on Thursday, and (2) police cruisers are not to be used for personal conveyance. Despite these official positions, the Town Clerk had, for over a year, been paying the employees on Wednesdays. The strict enforcement of the official policy, after the bargaining agent election, constituted a change from the established practice, the change was not negotiated with the union, and none of the exceptions to the unilateral change rule applied. The time when the employees are to receive their pay is so closely related to the amount that they are paid that it reasonably falls within the term "wages." Second, despite the official cruiser use policy, the Town Manager and the Chief of Police were aware that, for at least 1½ years, the patrolmen had picked up the officer coming on duty at his home with the cruiser. The use of the employer's vehicles for transportation to and from work involves working conditions and is a mandatory subject of bargaining. The strict enforcement of the official cruiser policy, after the bargaining agent election, was not negotiated with the union, constituted a change in established practice, and none of the exceptions to the unilateral change rule applied. Both changes constituted violations of the duty to negotiate in good faith.

43.11 72.5 72.612
43.141 72.6

V § 965(1)(C): In the past, each employee worked a 40-hour work week and openings for regular and overtime vacancies were assigned on a "posting and bidding" basis. After certification of the bargaining agent, citing "management prerogative," the employer unilaterally assigned each employee a 56-hour work week, involving 14 consecutive work days for each employee and, in effect, eliminating the "posting and bidding" procedure. There is no "managerial prerogative" exception under the Act; shift schedules are mandatory subjects; the change was made unilaterally; and none of the exceptions to the unilateral change rule applies. The change violated § 964(1)(E).

03.34	43.431	43.445	72.665
03.36	43.432	72.5	
11.7	43.444	72.6	

VI § 964(1)(A): Unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded, but on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of the rights guaranteed by the Act. The employer's unlawful unilateral changes in the pay and cruiser practices, within a month of the bargaining agent election, could reasonably be viewed as retaliation for the employees' exercise of their right to select a bargaining agent. The same is true for the change in the shift schedule, with a threat of discharge for anyone refusing to work the new schedule. The "message," which the town created through the unilateral changes, reasonably tended to interfere with the employees' exercise of their organizational and bargaining rights and violated § 964(1)(A).

21.2	21.7	72.1	72.18
21.4	64.2	72.134	

VII § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer, and its representatives and agents: (1) to cease and desist from making any change in the mandatory subjects without first negotiating said changes with the bargaining agent; and (2) immediately reinstate the practices of: (a) allowing the employees to pick up their paychecks on Wednesday, (b) allowing patrolmen to pick up the officer coming on duty with the police cruisers, and (c) scheduling the employees for 40-hour work weeks, with all unassigned shifts being posted for bids by the employees and part-time officers.

74.14	74.32
74.31	74.39

Council 74, AFSCME, AFL-CIO v. M.S.A.D. No. 1, MLRB No. 80-04, 2 NPER 20-11011 (Feb. 29, 1980)

I § 964(1)(A): The conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union, interferes with the protected right to organize. The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of the benefits is the source of later benefits, which might dry up if the source is not obliged. Although granting employee benefits during the period immediately preceding an election is not a per se violation, the Board deems that such increases are calculated to influence the employee choice in the election, unless the employer establishes that the timing of the action was governed by factors other than the pendency of the election. Here, the employer increased sick leave accrual and total permissible accumulation and provided an additional paid holiday prior to the election. The employer's action was held to violate § 964(1)(A) because the employer did not attempt to prove any legitimate justification for its action, the increases were not announced at the same time as other scheduled increases, there was no evidence that the changes had been planned prior to the organizational activity, and some of the changes were announced one week, and others one day, prior to the election. These facts suggested that the increases would not have been granted but for the pending election and in order to induce the employees to vote against certification of a bargaining agent.

09.32	35.511	35.541	72.13
35.51	35.53	72.1	72.133

II § 964(1)(A): An employer's pre-election statements that reasonably tend to threaten employees with loss of existing benefits, if they select the union, violate § 964(1)(A). One day prior to the election, the employer delivered a letter which stated, in part: "[r]emember, the Union can promise you everything, but it cannot guarantee you anything. In a collective bargaining situation everything, including benefits you now have are negotiable." The employer's statement could reasonably mean that existing benefits might be unilaterallly withdrawn or that the employer would take a regressive bargaining posture in negotiations to penalize employees for selecting the union; either interpretation constitutes unlawful interference with the employees' exercise of the rights protected by the Act.

35.51	35.5212	35.537	72.13
35.521	35.5218	72.1	72.131

III § 964(1)(A): Having held that one statement in the employer's letter violated § 964(1)(A), the Board discussed other statements in the letter in dicta. The Board stated that, in many circumstances especially where the other party does not have adequate time prior to the election to respond thereto and to correct the same, false or misleading statements constitute unlawful employer interference with the free exercise of employee organizational rights. Among the statements cited as misleading here were: only one steward would represent all three groups of employee classifications in the unit; the employer and the employees could no longer have a personal relationship, if the union is selected; and union representation can result in costly dues, fines, or special assessments.

21.2 35.521 35.5216 72.1
35.51 35.5212 35.537 72.18
35.511 35.5214 64.2

IV § 968(5)(C): Conduct violative of § 964(1)(A) is a fortiori conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test for conduct which may interfere with the "laboratory conditions" required for an election is considerably more restrictive than the test for unlawful interference, restraint, or coercion. When the employer's misconduct has destroyed the pre-election laboratory conditions, the Board may order that the employer recognize and bargain with the union without an election. This remedial power exists even if the union has lost the representation election. Bargaining orders are appropriate only when the union at some point has obtained the support of a majority of the unit employees or when the employer's misconduct is outrageous and pervasive. Here, the union obtained signed authorization cards from only 37% of the unit employees and lost the election; therefore it did not have evidence of majority support. While serious, the employer's misconduct was not outrageous and pervasive. In the circumstances, no bargaining order will issue; however, the results of the bargaining agent election will be set aside and a new election conducted.

01.29 32.99 35.81 74.38
32.91 35.51 35.82 74.39
32.92 35.8 64.2

V § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer to: (1) cease and desist from: (a) changing the terms and conditions of employment of the unit employees in order to induce them into voting against the union; however, the benefits established prior to the unilateral change were to be continued; (b) threatening employees with loss of existing benefits for engaging in union activity or supporting the union; and (c) interfering with, restraining, or coercing its employees in their free exercise of the rights guaranteed by the Act; and (2) take the affirmative action of signing, dating, and posting the notice provided by the Board and maintaining said posting for 60 consecutive days. The first bargaining agent election results were set aside and a new election was ordered to be conducted, within 45 days of the date of the Board's order.

35.8 74.31 74.361
35.81 74.36 74.38

Winthrop Educators Ass'n v. Winthrop School Committee, MLRB No. 80-05, 2 NPER 20-11007 (Feb. 8, 1980)

I § 968(5)(B): Service of a prohibited practice complaint on a school principal, who together with the superintendent comprised the employer's bargaining team, was effective against the superintendent and the school committee. The principal was an agent of the other two and no lack of notice or prejudice resulted from serving only the principal.

09.111 71.16
71.12

II § 968(5)(B) & Rule 4.02: The caption of the complaint was inartfully drafted and, although both the union president and the union business agent signed the complaint, only the business agent's signature was duly acknowledged before a notary and only the business agent made oath as to the truth and accuracy of the contents of the complaint. To dismiss the complaint for such technical and harmless problems would violate notions of justice and fair play. In any event, the Board ordered, and the complainant complied, that an amended complaint be filed to correct the minor technical problems.

71.11 71.222
71.15 71.223

III § 968(5)(B): The subsequent execution of a collective bargaining agreement does not render moot a prohibited practice complaint charging unlawful interference, restraint, or coercion, violation of the duty to bargain, and unlawful domination of a labor organization. This is particularly true when the issue giving rise to the complaint--use of the school employee mailboxes by the union--is not covered by the collective bargaining agreement.

71.230

IV § 968(5)(B): The Board is not prone to grant motions to dismiss for failure to state a claim upon which relief may be granted unless the entire complaint is: (1) completely deficient in identifying the general events complained of or (2) obviously deficient as a matter of law.

71.11 71.227
71.222

V § 964(1)(A): This section of the Act prohibits employer conduct which is intended to interfere with the free exercise of protected activity or which, it may reasonably be said, tends to interfere with the free exercise of protected activity. Upset over the content of a memorandum from the union bargaining team to the membership which was distributed through the school mailboxes, the school principal prohibited the bargaining agent from using the school mailboxes in his school. Communications between the negotiations team and the union membership is by nature the most fundamental form of protected activity. There is no question that the employer interfered with this activity; however, it sought to justify its actions by alleging that: (1) the union had bargained away its right to communicate in this fashion, by its agreement to a bulletin board article in the parties' collective agreement; and (2) that the activity lost its protective nature in the balance against the employer's right to control its operations and to maintain discipline. The contract article was silent on the use of mailboxes and the question had never been discussed by the parties; therefore, the contract article did not waive the union's right to use the mailboxes. Second, while the employee interest at stake was significant, there was no legitimate employer concern. Third, while the employer may, through a broad no-soliciation rule, limit union solicitation of membership in work areas, here the prohibition was directed at the content of the literature, not the fact of distribution, and the bargaining agent was already certified and was not soliciting membership.

09.121 09.64 21.91 72.116 72.134
09.23 09.641 72.1 72.119
09.6 21.4 72.115 72.120

VI § 964(1)(C): This section is designed to protect the integrity of the labor organization as an entity. The statutory history of the federal statute on which § 964(1)(C) is based makes it clear that the type of interference contemplated is interference in the nature of support or control of the union by the employer. In essence, the evil which this section seeks to avoid is the employer, because of his assistance or support, obtaining such a degree of control or influence over the labor organization that he could be said to "sit on both sides of the bargaining table." While the employer interfered with the exercise of employee rights, it did not violate § 964(1)(C). The latter involves more subtle cases of support, involvement, and control of the organization by the employer.

72.2 72.25
72.23 72.26

VII § 965(1)(C): When the employer's defense is based on the contract, alleging that its action was permitted thereby, the Board must construe the contract to the extent necessary to determine whether the bargaining agent has waived its right to object to the change in contention. The Board prefers that the parties resolve such contract-based disputes through their contractual grievance arbitration procedure. Since the contract did not apply here, there was nothing to defer. The use of school mailboxes by the bargaining agent to communicate with the unit employees is a mandatory subject of bargaining, the established practice had been for the bargaining agent to so use the mailboxes, the employer unilaterally discontinued the practice, and the bargaining agent did not waive its right to object to the change; therefore, the employer's action constituted an unlawful unilateral change in violation of the duty to negotiate in good faith.

01.27 09.64 21.91 71.8 71.813 72.6 72.65
09.23 09.641 43.86 71.81 72.5 72.611 72.651
09.6 21.4 47.54 71.811 72.511 72.612 72.666

VIII § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the School Committee, the Superintendent of Schools, and the Principal, and their representatives and agents, shall cease and desist: (1) from interfering with, restraining, or coercing the unit employees in their use of the school mailboxes for the purpose of communicating with each other; and (2) from making unilateral changes in the unit employees' working conditions concerning their use of the school mailboxes for the purpose of communicating with each other.

74.14 74.31
74.15 74.32

Teamsters Local Union No. 48 v. University of Maine, MLRB No. 80-06 (Nov. 8, 1979)

I § 1029(2): The statute requires that the prohibited practice complaint be served on the respondent, prior to being filed with the Board. Since the complainant failed to follow the statutory procedure, the Board dismissed the complaint without prejudice. The complaint could be re-filed, if served properly, any time within the 6-month limitations period.

01.28 71.1 71.15 71.227
01.32 71.12 71.16

Teamsters Local Union No. 48 v. Town of Jay, MLRB No. 80-08, 2 NPER 20-11008 (Jan. 9, 1980)

I § 965(1)(C): An employer's changes in the mandatory subjects of bargaining for employees represented by a bargaining agent constitutes a per se violation of the statutory duty to bargain collectively, when the employer does not first negotiate the changes with the bargaining agent. One of the four patrolmen in the bargaining unit resigned and the employer unilaterally changed the work schedule of the remaining patrolmen, from a 5-day/40-hour week to a 7-day/56-hour week, without first even notifying the bargaining agent. In the past, including a time when the department included only 3 full-time patrolmen, open shifts were filled through a "posting and bidding" procedure, first by the full-time officers, then by the part-timers. The employer's change in the work schedule had an effect on the unit employees' hours and working conditions; therefore, said change was a change in a mandatory subject. The change was made without even advance notice to the union; therefore, it was "unilateral."

43.43 43.44 72.5 72.611 72.63
43.431 43.444 72.51 72.612
43.432 43.445 72.6 72.613

II § 965(1)(C): The employer argued that the unilateral change in working conditions was required by the resignation--a business exigency, one of the recognized exceptions from the unilateral change rule. Mere business reasons for a unilateral change are insufficient to suspend the duty to bargain. An "exigency" is a sudden, out-of-the-ordinary event threatening serious harm and requiring immediate managerial action. The resignation of the patrolman did not constitute a "business exigency" for two reasons: (1) the employer used the 40-hour schedule and the "posting and bidding" procedure when the department had only 3 full-time patrolmen; and (2) whatever exigency resulted from the resignation on short notice did not continue in effect, once the employer had reasonable time to fill the vacant shifts through the "posting and bidding" procedure. Had the employer tried the established procedure and had it proved inadequate to meet the employer's needs, then the Board might have found a business exigency.

72.66
72.662

III § 964(1)(A): The employer's unilateral change reasonably tended to interfere with and coerce the unit employees' exercise of their organizational and bargaining rights in violation of § 964(1)(A), particularly since there was no reason for the employer not to use the "posting and bidding" procedure within a week or so of the resignation.

21.2 64.2 72.13 72.18
21.4 72.1 72.134

IV § 968(5)(C): Had the Board's decision and order in Case No. 80-02, a matter involving three unlawful unilateral changes including a scheduling change identical to that at issue here,

been released at the time of the unilateral change which is the subject of this action, the Board would have exercised its full remedial authority to remedy the violations found in this case. As it is, the employer is on notice that it may not effect unlawful unilateral changes in the unit employees' working conditions and that any further unlawful unilateral changes will be treated as a most serious matter.

01.29
74.17

V § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the employer, and its representatives and agents: (1) cease and desist from changing the unit employees' wages, hours, and working conditions, without first negotiating the change with the employees' bargaining agent; (2) immediately reinstitute the 40-hour work week for the unit employees and the "posting and bidding" procedure to fill unassigned shifts; and (3) sign, date, and keep a notice provided by the Board posted for a period of 60 consecutive days.

74.14 74.32 74.361
74.31 74.36

Maine State Employees Ass'n v. State of Maine, MLRB No. 80-09, 2 NPER 20-11001 (Dec. 5, 1979), appeal docketed but dismissed by appellant, No. CV-79-758 (Me.Super.Ct., Ken.Cty., June 7, 1982)

FACTS:
The employer insisted to the point of impasse over having a non-verbatim note-taker present during negotiations and the union insisted to the point of impasse that it would not negotiate over substantive matters until the employer's note-taker was withdrawn from the table. The employer had taken similar non-verbatim notes during an earlier round of negotiations with the union and had never submitted the same to any tribunal or represented the same as being a verbatim record of the negotiations. The employer failed to honor a "10-day notice," after impasse had been reached.

I § 979-H(2) & Rule 4.13: Because of the nature of the issue presented and its impact on the ongoing collective negotiations for five state employee units, the Board decided to expedite the hearing herein. The prehearing conference was held two days after the response was filed, the hearing on the merits was held five days after issuance of the prehearing conference memorandum and order, and the Board's decision was issued within one month of the date of the hearing.

01.311 71.5
71.25 71.51

II § 979-H(2): In its counterclaim, the employer alleged that the union's action violated § 979-C(2)(A), by attempting to dictate the composition of the employer's bargaining team. This allegation was not pursued in the employer's brief and was deemed as having been withdrawn by the Board. Also, this allegation was not supported by the evidence.

01.312 71.17 73.57
41.21 71.229

III § 979-D(1)(E)(1): A party commits a per se violation of the duty to bargain by insisting to impasse that a non-mandatory subject be bargained. The rationale for this principle is that insistence upon bargaining over non-mandatory subjects is, in substance, a refusal to bargain about the mandatory subjects.

72.5 72.541 73.436
72.535 73.4 73.45

IV § 979-D(1)(E)(1): The parties were at impasse over the note-taking issue. Despite good faith proposals on both sides, the parties had two meetings, each remained adamant on its position, and each insisted that it would not retreat from its position.

51. 51.3
51.1

V § 979-D(1)(E)(1): The mandatory/non-mandatory test has been applied by the National Labor Relations Board and the Board to preliminary issues arising prior to the commencement of substantive negotiations. Such application is warranted because labor boards have the statutory responsibility of fostering and encouraging meaningful collective bargaining and such bargaining should not be stifled in conduct regarding threshold issues. The mandatory subjects are those involving wages, hours, working conditions, or contract grievance arbitration. The use of a stenographer during negotiations clearly does not involve any of the mandatory subjects.

01.26	41.31	42.2
01.29	42.1	42.21
41.3	42.11	72.5

VI §§ 979-D(1)(E)(1) & 979-C(1)(A): Since both parties insisted to impasse on the issue, the Board must determine which insistence was unlawful. This Board and others have held that making a verbatim record of negotiations tends to inhibit free and open collective bargaining by causing parties to speak for the record rather than engaging in serious bargaining, and constitutes a per se violation of the duty to negotiate in good faith. There was no attempt to make a verbatim record here, the stenographers did not have the ability to do so and one of them was specifically directed not to attempt to do so. Second, the employer assured the union that it would not be making a verbatim record. While no verbatim record was being made, the note-taking would constitute unlawful interference, restraint, or coercion if it could reasonably be said to inhibit, slow down, or hinder the bargaining process. In evaluating any such negative effect, the Board relies on its knowledge, experience, and judgment in the field of collective bargaining. Relying on its expertise, the Board concluded that the note-taking did not inhibit the bargaining process. Keeping accurate minutes of the main points raised during negotiations is important in keeping a running record of issues raised, those settled, and those abandoned. Such notes are critical in drafting the final language and in resolving disagreements as to what was agreed to at the table. Where the note-takers disrupted or slowed the negotiations, by repeatedly asking that spokespersons slow down or that statements be repeated, the result might be different. A negotiator's subjective feeling of inhibition does not control, if such feeling is unreasonable. While collective bargaining is a fragile process, it does not occur in a vacuum, free from all pressures and interruptions. So long as an action does not unduly inhibit or hinder negotiations, it must be accepted as part of the bargaining experience.

07.51	41.3	72.18
07.511	41.31	72.5
07.512	72.1	72.535

VII §§ 979-H(3) & 979-D(1)(E)(1): Both parties submitted reasonable solutions to resolve the impasse; however, it remained unresolved. Both parties were, therefore, responsible for the impasse. Since the note-taking was proper, the union's insistence that it cease constituted a per se violation of the duty to negotiate in good faith. Since some of the confusion on the issue may have resulted from reading of the Board's own decisions (on the issue of verbatim records), the Board will issue only a cease and desist order.

51.	72.535	73.4	73.45
72.5	72.541	73.436	74.17

VIII § 979-D(1)(B): After impasse, the employer failed to meet with the union within 10 days after its receipt of a written request for a meeting for collective bargaining purposes. The Board construes the 10-day notice provisions strictly and has held that the invoking of impasse resolution procedures does not suspend the 10-day notice obligation. While the Board's holdings thereon may not be consistent with the position of the N.L.R.B., the parallel sections of federal law do not contain a 10-day notice requirement. The Board held that parties at impasse must, upon receipt of a 10-day notice, meet at least one more time in an effort to resolve their disputes through negotiations. The employer's failure to do so violated § 979-D(1)(B).

51.4	72.51	72.537	73.41	73.474
52.13	72.52	72.586	73.411	
72.5	72.521	73.4	73.439	

IX § 979-H(3): As remedies for the violations established in the record, the Board ordered: (1) that the bargaining agent, and its agents and members, cease and desist from insisting that the employer stop using a note-taker during bargaining sessions; (2) that the employer, and its representatives and agents, cease and desist from failing to meet for collective

bargaining purposes with the bargaining agent, within 10 days after receipt of a written request to so meet; and (3) that the parties take the affirmative action of commencing negotiations as soon as practicable for successor collective bargaining agreements for the five units represented by the bargaining agent.

74.14
74.31

Medway Teachers Ass'n v. Medway School Committee, MLRB No. 80-10, 2 NPER 20-11009 (Jan. 10, 1980)

FACTS:
The parties reached a final tentative agreement for a successor collective bargaining agreement and said agreement was, by explicit agreement and understanding, contingent only upon ratification by the employees. The final tentative agreement, including full family health insurance coverage paid by the employer, was promptly ratified by the employees, who informed the employer of their action. The Town Meeting voted to reduce the line budget item for employee health coverage, from full family to employee only coverage. Rather than follow the negotiated article providing that "[i]n the event sufficient funds are not appropriated to implement this contract, its terms shall be subject to renegotiation," the school committee did not request renegotiation and presented the bargaining agent with a draft agreement containing only employee health coverage.

I § 965(1)(D): The tentative agreement was conditioned on only one contingency, ratification by the employees. As soon as the employer was notified of the satisfaction of said contingency, a binding agreement existed and § 965(1)(D) makes it an absolute obligation to execute this agreement in writing. The bargaining agent requested and the employer refused to do so; such refusal violated the duty to negotiate in good faith.

09.22 46.11 46.41 72.571 73.461
41.3 46.13 46.55 72.572 73.462
41.32 46.4 72.5 73.4

II § 965(1)(C) & (B): In the event of insufficient funding, the employer was contractually bound to request renegotiation, after having satisfied the statutory obligation of signing the negotiated agreement. The union did not wish to change the agreement--the employer did; therefore, the burden is on the employer to request renegotiation. Employer-paid health insurance coverage, including dependent coverage, is a mandatory subject of bargaining. The employer's unilateral change in the level of said coverage constituted a violation of the duty to negotiate in good faith.

07.143 07.28 09.25 43.131 72.581 72.613 72.662
07.2 07.4 41.34 72.5 72.6 72.65
07.27 09.24 41.35 72.52 72.611 72.652

III § 968(5)(B): Since the superintendent of schools was acting exclusively at the direction of the school committee, the complaint was dismissed as against him as an individual.

09.121 71.14 74.14
11.15 71.227 74.15

IV § 968(5)(C): The unit employees are entitled to the benefits of the negotiated agreement, until the same are changed through negotiations. The Board will, therefore, order the employer to reimburse each employee the amount said employee has paid to secure full family health coverage or the amount the employer would have paid to secure the same, whichever is greater, for the period from termination of the benefit through its reinstatement or until the agreement is modified. The acceptance of such payment by the employees will not necessarily constitute a waiver of any claim for other expenses incurred during the term of noncoverage that may be raised in another forum.

01.29 21.9 74.11 74.21
21.13 21.92 74.17
21.14 46.31 74.20

V § 968(5)(C): As remedies for the violations established in the record, the Board ordered the school committee, its members, successors, agents, and representatives, shall: (1) cease and

desist from failing to execute in writing any agreements arrived at and from making unilateral changes in working conditions; and (2) take the affirmative action of (a) immediately reinstating full family health insurance coverage; and (b) make an unconditional offer to reimburse each unit employee for what each actually paid for family health insurance coverage or what the employer would have paid therefore, whichever is greater, for the period from termination of the benefit until its reinstatement or the agreement is modified. If the parties cannot agree on the amount due within 30 days of the date of the Board's order, the bargaining agent may apply for a supplemental order, by submitting affidavits and written argument postmarked no later than 40 days after the date of the Board's order. The employer may respond in similar fashion within 50 days of the date of the Board's order.

09.371 74.14 74.31 74.34
71.520 74.16 74.32 74.355

Council 74, AFSCME, AFL-CIO v. Town of Millinocket, MLRB No. 80-13, 2 NPER 20-11014 (Mar. 13, 1980)

I § 964(1)(A): In evaluating the legality of an employer's questioning of prospective unit employees concerning their feelings toward the prospective bargaining agent, the Board must first determine if such questioning constitutes an employee poll or is isolated questioning concerning union preference. If the questioning is a poll, it is evaluated under the Struknes Construction Co. criteria; if it is isolated conduct, its propriety is evaluated under the general reasonable interference or coercion test. The Board held that the questioning here constituted a poll because (1) the views of three of the five employees likely to be included in the proposed unit were discovered and (2) because of small number of employees and the fact that they work together closely, it is likely that the employer questioning resulted in discovering the preferences of most if not all of the employees involved.

21.2 35.535 64.3 72.15
21.3 35.536 64.35 72.151
35.51 64.2 72.1 72.16

II § 964(1)(A): In Struknes, the N.L.R.B. noted that any attempt by an employer to ascertain employee views regarding unionism generally tends to cause fear of reprisal in the employees' minds, in violation of § 964(1)(A). When faced with a claim of a union's majority status, the employer may lawfully poll its employees if the following safeguards are observed: (1) the purpose of the poll is to determine the truth of the claim of majority status, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. None of these safeguards were met. The employer never claimed a purpose for its inquiries; no purpose was communicated to the employees questioned; despite obtuse disclaimers, the employees felt fearful; no secret ballot occurred; and the employer committed a subsequent prohibited practice. The employer's conduct, therefore, violated § 964(1)(A).

21.2 35.535 64.3 72.151
21.3 35.536 72.1 72.16
35.51 64.2 72.15

III § 964(1)(A): The general test for unlawful interference, restraint, or coercion is whether the conduct at issue may reasonably be said to interfere with the free exercise of employee rights guaranteed by the Act. We have held that isolated questioning concerning union sympathies did not violate the Act in an instance where the employee had a long, friendly relationship with the employer, they had frequent contact, and the questioning had been initiated by the employee. The employer's conduct would constitute unlawful interference, under the reasonable interference test because: (1) the questioning occurred immediately after the employer first learned about the organizational activity; (2) the employees reacted in a fearful way; (3) no reason was given for the inquiries which were initiated by the employer; and (4) the questioning was clearly planned as an effort to learn the unit employees' union sympathies in order to maneuver the employees in such a way as to defeat the organizing effort. The subsequent transfer of a prospective unit employee was considered critical in the Board's conclusion, since the unlawful transfer was the result of the information learned through the questioning.

64.2 72.1 72.151
64.3 72.15 72.16

IV §§ 964(1)(B) & (A) & 968(5)(B): The ultimate public employee status of one who is the victim of unlawful discrimination and unlawful interference, during the organizational campaign and prior to the unit determination decision, is irrelevant to a finding of violation. The injuries flowing from violative conduct occurring during the delicate period of the union organizing campaign flow not only to the individual employee but indirectly to all other employees involved in the union organizing activity.

01.1 01.29 72.3
01.28 72.1

V § 964(1)(B) & (A): Conduct violates these sections of the Act, if one of the motivating factors for such conduct is the employee's union activities. Shortly after learning of the union organizational campaign and that the employee had signed a union authorization card, the employer transferred an employee to a lower status position, without any advanced notice or consultation, and made said transfer effective at the moment that it was announced. The Board concluded that the employee's union sympathy was the primary, if not the sole, reason for the transfer. In light of the timing of the decision and the employer's knowledge of the employee's position regarding the union, an inference of unlawful motive was created. That there was no legitimate justification for the transfer was established by: (1) although a vacancy existed no need was shown why this employee had to be permanently transferred to fill it; (2) the employee, who had previously held the position to which she was transferred, had trained her replacement while occupying her higher position; (3) no reason was given for the precipitous nature of the transfer, without prior consultation; (4) the employee had a perfect record in her higher position; (5) although all other vacancies had been filled through posting and bidding procedures, the same were not followed here; and (6) the employer was seeking to have the employee's original position excluded from the prospective bargaining unit on the grounds of confidentiality. Such grounds turn on the nature of the position and such factual determination usually requires the testimony of the incumbent employee. The employer knew of the employee's union sympathies and could have viewed this as a liability in his efforts to have the position excluded from the proposed unit.

72.1 72.31 72.315 72.319 72.342
72.13 72.311 72.317 72.324
72.3 72.312 72.318 72.333

VI § 964(1)(B) & (A): The timing of the transfer of another of the employees involved, in fact the chief union employee organizer, could support an inference of unlawful motivation; however, in the circumstances, the Board held that the transfer was motivated solely by legitimate business purposes. The Board based its conclusion on the following: (1) the employee had an unsatisfactory work record, including two oral and one written reprimands, in her former position; (2) her personnel and job morale problems started and were documented well before the onset of any organizational activity; and (3) the transfer decision would have been made in the absence of any protected activity.

72.1 72.31 72.315 72.35
72.13 72.311 72.317 72.365
72.3 72.312 72.324

VII § 968(5)(C): The employee organization/complainant sought issuance of a bargaining order in this case. The Law Court has, in Sanford Highway Unit, 411 A.2d 1010, recognized the Board's authority to issue such an order. Although an employer's outrageous and pervasive unlawful conduct will justify issuance of such an order when the union never obtained majority status, the more common case for such issuance is where the employer, after refusing to recognize a union on the basis of a card majority, commits unfair labor practices which make a fair election unlikely. Although recognizing the serious impact of the employer's actions on this small unit, the Board held that such actions were not outrageous or pervasive and a fair election could be held after issuance of the instant order.

01.29 32.91 35.51 74.17
01.32 32.92 35.82 74.39
32.23 32.99 74.12

VIII § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer, its officers, successors, representatives, and agents, and the Town Manager, shall: (1) cease and desist from interfering with, restraining, or coercing its employees in their exercise of the rights guaranteed in § 963, particularly by polling or questioning employees regarding their union activities or by transferring employees because of such activities; (2) cease and desist from discouraging membership in the complainant employee organization, by

discriminating in regard to any term or condition of employment, particularly by transferring employees because of their union activities; (3) make an unconditional offer to the employee unlawfully transferred of full reinstatement to her former position without prejudice to seniority or other rights or privileges; and (4) the Town Manager is to sign, date, and keep posted, for a period of 60 consecutive days, a notice supplied by the Board, at all places where notices are customarily posted for the attention of the employees involved.

74.14 74.31 74.334 74.36
74.15 74.32 74.335 74.361
74.16 74.33 74.336

Teamsters Local Union No. 48 v. City of Waterville, MLRB No. 80-14, 2 NPER 20-11017 (Apr. 23, 1980)

I § 968(5)(B): At the prehearing conference, the parties agreed that there were no issues of material relevant facts presented in the case, that no evidentiary hearing was required, and the parties submitted their legal arguments to the Board through memoranda of law.

09.380 71.228 71.251
09.62 71.25 71.5

II § 968(5)(B): Both the Act and the National Labor Relations Act, in 29 U.S.C. § 160(b), contain provisions which, in effect, state that "no hearing shall be held based upon any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint." The degree to which conduct occurring outside the limitations period can be considered by the NLRB was decided in Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960). Where events within the six-month period in and of themselves may constitute an unfair labor practice, earlier events may be utilized to shed light on the character of matters occurring within the limitations period. If, on the other hand, conduct occurring within the six-month limitations period can only be charged to be an unfair labor practice through reliance on earlier events, such events are not merely evidentiary, simply laying bare a putative unfair labor practice, buth rather serve to render illegal that which was otherwise lawful. When a complaint based on an event is time-barred, to allow it to be used in the latter fashion in effect revives a legally defunct unfair labor practice and is contrary to the statute of limitations. Here, the only conduct occurring during the six months was the denial of a grievance on procedural grounds and there was no question that said denial was proper. It would be absurd to permit proper denial of an untimely grievance to resurrect a time-barred charge; therefore, the complaint will be dismissed.

01.1 01.312 47.221 74.12
01.28 03.22 71.13
01.29 09.39 71.227

III § 968(5)(B): The Board held that there are no "continuing violations" as a means of avoiding the statute of limitations.

01.1 01.29 74.12
01.28 71.13

IV § 968(5)(B): The availability of contractual grievance arbitration raises the question of deferral, not estoppel or bar. Where the merits of a dispute are not resolved or capable of being resolved by final and binding arbitration, there is nothing to defer to.

09.7 47.11 47.54 71.81 71.817
09.73 47.15 47.73 71.813 74.19
09.74 47.221 71.8 71.815

Whitzell v. Merrymeeting Educators' Ass'n, MLRB No. 80-15, 3 NPER 20-12004 (Nov. 6, 1980), aff'd sub nom. Whitzell v. Merrymeeting Educators Ass'n and MLRB, No. CV-80-124 (Me.Super.Ct., Sag.Cty., Dec. 28, 1982)

I § 964(2)(A): Reading the sections of federal law that are parallel to §§ 964(2)(A), 963, and 967(2) together, the U.S. Supreme Court has held that a labor organization, having rights as the exclusive bargaining representative of all of the employees in a bargaining unit, also has a duty to represent all of those employees in good faith and with honesty of purpose. The organization breaches this duty of fair representation when its conduct toward a unit

employee is arbitrary, discriminatory or in bad faith. Since the parallel provisions of Maine law are essentially identical with the federal law, the Board holds that a duty of fair representation is created by the Act and explicitly overruled its earlier cases holding to the contrary. The parameters of the duty of fair representation under federal law are well-developed and were adopted by the Board, except to the extent that it may appear in the future that such should not be applied.

01.28	21.7	22.41	23.6	73.113
01.32	22.3	23.0	47.31	
21.12	22.39	23.23	73.1	

II § 964(2)(A): When the alleged violation of the duty of fair representation concerns the bargaining agent's handling of a grievance, the merits of the underlying grievance are relevant in understanding the actions being contested and in placing them in proper context. For example, a clearly meritorious grievance would definitely be an influential factor, while a clearly frivolous grievance should dictate dismissal of the complaint. In the vast majority of cases, falling between the extremes, the Board would not decide the merits of the grievance. While the theory of the grievance at issue was not frivolous--the grievant could convince an arbitrator that the bargaining agreement had been violated--its primary objective was frivolous for there was no legal basis for a remedy of reinstatement or pay after expiration of the grievant's probationary contract. Since the theory of the grievance was not frivolous, the Board decided to consider the merits of the duty of fair representation complaint.

23.2	47.2	47.31	73.113
23.4	47.21	73.1	

III § 964(2)(A): A union may lawfully refuse to process a grievance or refuse to handle it in a particular manner for a multitude of reasons; however, it may not act arbitrarily in reaching its decision; that is, it may not act without reason, merely at the whim of someone exercising union authority. The union did not give perfunctory treatment to the grievance. It was processed at every stage of the grievance procedure short of arbitration, it was presented by a union business agent who, the grievant admitted, did an excellent job in advocating the merits thereof. It was not evidence of arbitrariness: (1) to strongly advocate the grievance to the employer and, later, to drop the grievance for being without merit; (2) to refuse to process a grievance to arbitration but to allow the employee to do so at his own expense; (3) to make filing for arbitration contingent upon receipt of a letter from the employee wherein the employee assumed the grievant's costs of the arbitration; (4) to fail to keep detailed minutes of the deliberation which resulted in the decision not to pursue the matter to arbitration; (5) for one or more of the decision-makers to vote on the processing of the grievance without reading the contract where the contract provisions were discussed; (6) to consider the cost of arbitration in the decision-making process; (7) to exclude the grievant from membership on the committee making the decision to process the grievance--there was no significance to this as it would not affect the employer's duty to arbitrate; (8) to vote without conducting an independent investigation of the grievance--some of the committee members spoke directly with the grievant and understood his side; (9) to fail to indicate the reason for the decision--the reason was clear based on the language of the agreement; and (10) to vote without including the grievant in the meeting where the decision was made.

21.7	23.2	23.4	47.31	73.113
21.92	23.24	47.2	47.53	
23.1	23.26	47.21	73.1	

IV § 964(2)(A): The complainant attributed several comments, to the effect that the grievance would have been processed to arbitration had the grievant been a union member, to various union officials. Had such statements been made, it would have been difficult to believe that discriminatory motives had not seriously tainted the processing of the grievance. The two union officials charged directly denied making the statements, their testimony was reasonable, they were determined by the Board to be credible witnesses, the complainant had a "selective" memory, and he destroyed evidence that would have had corroborative value for or against his claim. In the circumstances, the Board ruled that the statements concerning the grievant's non-membership in the bargaining agent were never made.

09.34	23.2	47.2	71.5	73.113
09.36	23.23	47.21	71.523	
09.362	23.4	47.31	73.1	

V § 964(2)(A): In representing the grievant, the union business agent was working for the state-wide umbrella organization and not for the bargaining agent. The state-wide organiza-

tion was not the bargaining agent and, therefore, owed no duty of fair representation to the individual employee. The business agent did say, two days after the filing date for arbitration, that, had the grievant been a union member, the business agent might have persuaded the local union to file for arbitration as a favor to a member. This statement was harmless since the time for filing for arbitration had passed and, second, the statement supported the union's position that the merits of the grievance were weak.

09.11	22.72	23.1	73.1
09.112	23.0	47.73	73.113

VI SUPERIOR COURT:
§ 968(5)(F): The Court reviews decisions of the Board only for errors of law and to determine whether the decision is supported by substantial evidence on the record. The Court held that the Board's decision was adequately supported by the record and denied the appeal.

71.512	81.12	81.331	81.50	81.5089
71.517	81.3	81.47	81.502	81.521
81.1	81.33	81.491	81.503	

VII § 964(2)(A): A union owes a duty of fair representation to its members and that duty is breached when a union's conduct toward a member is arbitrary, discriminatory, or in bad faith. Poor judgment or negligence, without more, is insufficient to establish a breach of the duty.

23.1	23.26	23.6	73.113
23.2	23.4	73.1	81.505

VIII § 968(5)(F): If an agreement article is ambiguous, the trier of fact could properly consider extrinsic evidence, including past practice and bargaining history, to determine the contract's meaning. Basing its interpretation on past practice as well as the bargaining history, the Board's construction of the contract was not clearly erroneous.

09.23	09.232	46.4	81.507
09.231	09.372	46.61	

IX § 964(2)(A): Due process is a flexible concept which must be examined in light of the facts of each case. Here, the grievant had met with several members of the committee which decided not to invoke arbitration, he fully explained his grievance, and he failed to show any material evidence which had not been previously submitted to the committee. His exclusion from the meeting where the decision was made did not violate due process.

23.2	73.1
23.4	73.113

X § 964(2)(A): In evaluating an alleged breach of the duty of fair representation in the processing of a grievance, the tribunal should examine the merits of the underlying grievance. While not dispositive of the duty of fair representation claim, the merits of the grievance place the defendant's actions in proper perspective. Here, plaintiff was a probationary employee, as such he was subject to termination with or without just cause, and no union has ever been successful in obtaining reinstatement of a probationary employee through arbitration. The union made a good faith effort to process the grievance up to arbitration, could reasonably conclude that the arbitrator would not uphold the grievance on the merits, and, in the circumstances, was reasonable in declining to invoke arbitration, while allowing the grievant to do so at his own expense. Plaintiff failed to provide the union with a letter accepting the responsibility of indemnifying the union for the costs of arbitration prior to expiration of the arbitration deadline and cannot use his own neglect as a basis for claiming arbitrary union action.

09.672	23.2	23.4	47.31
21.92	23.24	47.2	73.1

M.S.A.D. No. 52 v. S.A.D. No. 52 Unit of Council 74, AFSCME, AFL-CIO, MLRB No. 80-18, 2 NPER 20-11021 (July 2, 1980)

FACTS: The employer's bus drivers were upset over the employer's apparent failure to adequately discipline students for exiting the buses through the emergency exits, one driver

resigned over the issue, and the remaining drivers discussed taking a strike vote thereon. Upon arriving on the scene, the executive director of the union: persuaded the employees not to take a strike vote until he returned, persuaded the driver to withdraw her resignation, and got the employer to permit the withdrawal. The union official and the employer then discussed the drivers' concern and reached an amicable solution thereto. Meanwhile, there was a 10-minute delay in the buses' leaving on their run. Upon learning that the buses' departure was overdue, the union official immediately signalled for them to leave and they did so. Because of the configuration of the employer's driveway, the first bus must leave and the others follow sequentially; the first bus was driven by a person who was not a member of the union.

I § 964(2)(C): The employer alleged that the 10-minute delay in the buses' departure constituted an unlawful job action. Although a 10-minute job action unquestionably would be a violation of the Act, the Board held that, in the circumstances, there was no concerted refusal to work. The Board based its conclusion on the following: (1) the alignment of the buses was such that none of the buses could move, until the first bus did; while the drivers of the first buses may have been engaging in a work stoppage, there is no evidence that the drivers behind them were voluntarily participating therein; (2) there was legitimate confusion at the time among the employees and neither of the two employer representatives present ordered the buses to leave. The drivers could have reasonably understood that the employer was permitting the drivers to wait a few minutes while the student discipline issue was being discussed; and (3) none of the drivers ever said that they were participating in a job action.

01.23	61.	61.51	62.4	73.58
09.33	61.1	62.2	62.79	
21.8	61.2	62.231	73.31	

II § 964(2)(C): Although the employees' actions could have constituted a job action, there was no evidence that those who voluntarily participated therein were union members or that the union in any way encouraged a work action; therefore, the union was not held accountable for the employees' actions. Futhermore, the union executive director's conduct was clearly intended to, and did in fact, prevent a job action.

09.1	09.33	62.231	62.42	73.58
09.111	61.	62.37	62.79	
09.13	61.51	62.4	73.31	

III § 968(5)(B): The employer filed a motion for award of its hearing costs, alleging that the hearing was the result of the union's failure to execute a stipulation of the relevant facts, as it had promised to do at the prehearing conference. While the Board always enforces agreements made at the prehearing conference, the union did not breach its agreement here. The agreement was that the employer's counsel would prepare the proposed stipulation and counsel for the union was to review and execute the same if it accurately reflected the relevant facts. The union's attorney satisfied the prehearing agreement by reviewing the proposed stipulation and, upon finding it unacceptable, refusing to sign it.

01.29	46.17	71.25	72.7
09.22	46.31	71.251	74.352
09.380	71.228	71.252	74.355

Lisbon Education Ass'n v. Lisbon School Committee, MLRB No. 80-19 (Jan. 12, 1982)

I § 968(5)(B) & Rule 4.09: The complainant moved to withdraw its prohibited practice complaint, the respondent had no objection to said withdrawal being granted, and the motion was granted by the executive director, after consultation with and on behalf of the Board.

06.3	71.228
71.17	71.229

Teamsters Local Union No. 48 v. Town of Livermore Falls, MLRB No. 80-22, 2 NPER 20-11039 (Aug. 20, 1980)

I § 968(5)(B): The employer's post-hearing brief contained and relied on several "facts" which were not developed in the record. The Board must base its decisions on the record; therefore, the Board did not consider the brief except for the legal argument contained therein that was based on evidence in the record.

01.31 09.383 71.517
09.3 09.39

II § 965(1)(C): The prohibition against employer's making unilateral changes in the mandatory subjects of bargaining for organized employees, embodied in the statutory duty to negotiate in good faith, is inapplicable where the parties have reached impasse. In the event of a bona fide impasse, the public employer is bound to either continue existing conditions or institute the last-best offer that it has made in the bargaining process. A public employer may thus institute changes consistent with its current impasse bargaining position, whether that position is reflected in a tentative agreement or not. While proposing to retain the right to change shift schedules after notifying and meeting with the Union at the bargaining table, the employer made a significant shift schedule change, without notifying or meeting with the bargaining agent. By violating the very provisions it was then proposing in good faith that the union accept as a bilateral agreement for the assignment of work shifts, the employer was ignoring the bargaining process and, in effect, was refusing to negotiate in good faith. Two other changes were consistent with the employer's impasse position and, therefore, were lawfully implemented.

07.16 43.432 72.6 72.66
43.431 72.5 72.63 72.663

III § 965(1)(C): The employer's "business exigency" argument was rejected because, although it had three weeks' advance notice of the impending resignation, the employer made no effort to notify the union of the situation.

72.6 72.662
72.66

IV § 964(1)(A) & (E): By failing to negotiate in good faith, the employer derivatively violates § 964(1)(A), since its failure to bargain inherently interferes with the unit employees' bargaining rights.

21.4 72.18
72.1 72.5

V § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the employer, its officers, agents, and successors, shall: (1) cease and desist from making changes in working conditions for the unit employees which are inconsistent with its last-best offer prior to an impasse in negotiations; and (2) unless otherwise agreed by the parties, meet within 10 days of receipt of a request from the union to discuss shift assignments, consistent with the employer's impasse position thereon.

74.14
74.31

Local 1599, I.A.F.F. v. City of Bangor, MLRB No. 80-24, 3 NPER 20-12003 (Nov. 6, 1980)

I § 964(1)(C): This section of the Act is directed at instances where the employer has obtained, through its support of and involvement in the affairs of an employee organization, such a degree of control over the union that the employer can be said to be "sitting on both sides" of the bargaining table. No evidence of violation of this section was established in the record.

72.2 72.26
72.23

II § 964(1)(A): An employer may not lawfully "lend more than minimal support and approval" to employee efforts to decertify the incumbent bargaining agent. The extent of the employer's participation in the process determines whether the employer has violated the Act. Anything more than minimal solicitation, support or assistance in the initiation, signing, or filing of a petition seeking decertification unlawfully interferes with the employees' guaranteed rights. Employees in supervisory classifications were seeking to sever their positions from the established bargaining unit because of their dissatisfaction with their bargaining agent. In particular, said employees were upset at being outvoted by the balance of the unit employees in drafting the union's bargaining demands. Meanwhile, the employer was seeking to

effect the same severance, through the bargaining process and through a unit determination petition. The Board held that these parallel efforts were merely coincidental and were not all initiated by the employer. At a meeting initiated by the employees, the employer's personnel director answered questions concerning possible wording of a decertification petition and how the employees would be treated under the municipal personnel policy. The employees then decided to pursue the decertification at a meeting at which on-duty officers were allowed to attend. There was no evidence that the employer knew of the purpose of the meeting or that the commanding officer solicited employees' attendance at the meeting. Finally, in response to employee requests, the personnel director drafted notices stopping dues deductions. The Board concluded that the employer's efforts were minimal and did not violate the Act on the following grounds: (1) the employees' actions were due to their own initiative and were not solicited by the employer; (2) the meeting with the employer occurred at the employees' request; (3) the employer's actions were non-coercive and were taken at the request of the employees; (4) the employer did not know the purpose of the meeting which on-duty officers were allowed to attend; and (5) by discussing how the employees would be treated if they were unrepresented (following the employer's personnel policies), the employer did not negotiate with the employees in circumvention of the certified bargaining agent.

09.1 21.6 72.1 72.17
09.111 37.1 72.132 72.18

III § 968(5)(B): Since the employer's action did not violate the Act, the complaint was dismissed.

71.227

Council No. 74, AFSCME, AFL-CIO v. Bangor Water District, MLRB No. 80-26, 3 NPER 20-12008 (Dec. 22, 1980), appeal dismissed by appellant, Bangor Water District v. M.L.R.B., No. CV-81-36 (Me.Super.Ct., Pen.Cty., Apr. 8, 1981)

I § 964(1)(A) & (B): The employer's issuance of a written reprimand to the chief union employee-organizer, one day after receipt of the unit determination report, constituted unlawful interference and discrimination. The employee had been employed for 8 years, without receiving any discipline whatever, other employees did the same things charged against the employee without being disciplined, many of the incidents charged occurred months before, and the performance problems charged were due to faulty equipment and not to the employee. The employer knew that the employee was organizing the union and the timing of the reprimand could reasonably be viewed as an employer effort to "get tough" with the pro-union employees. The reprimand reasonably tended to interfere with the free exercise of the employees' protected rights and consequently violated § 964(1)(A). The employer's conduct was also discriminatory--similarly situated employees did not receive the same treatment--and it was inherently destructive of important employee rights--the right to organize and support a union--and thus violated § 964(1)(B).

35.51 72.13 72.3 72.314 72.318 72.335
35.532 72.131 72.311 72.315 72.323
72.1 72.18 72.312 72.317 72.33

II § 964(1)(A) & (B): A two-day suspension without pay was fully justified and did not violate the Act. The employee had taken an afternoon off without permission; therefore, he was absent without leave. A two-day suspension was an appropriate sanction for the misconduct.

35.51 72.13 72.3
35.532 72.131 72.35
72.1 72.18 72.365

III § 964(1)(A): Unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Several of the statements contained in a pre-election letter to the employees were patently false and misleading and could serve no other purpose than to coerce the employees into voting against the union. The employer's letter constituted a serious violation of § 964(1)(A). Among the patently false or misleading statements were: (1) if the union is elected, individual employees cannot discuss special problems directly with the employer--§ 967(2) guarantees to each employee the right to present their own grievances; (2) employees may be required to contribute to or work for political

candidates--can't be required to join the union or to make involuntary contributions; and (3) employees can be fined several thousand dollars, for failing to attend union meetings or failing to obey union bosses, and could be required to pay initiation fees up to $800--any employee may decide not to join the union and there was no evidence that the union even required initiation fees. Misrepresentations concerning union dues, assessments, and initiation fees are consistently held to interfere with employees' representational rights.

21.3 35.521 35.5214 72.18
35.51 35.5212 72.1

IV § 964(1)(A): An additional coercive element was injected into the employer's campaign letter when the employer specifically named those employees who had received favorable treatment in the past. Discussion about the benefits granted to these employees implies a threat that employees would no longer receive favorable treatment if the union is elected; such threat would be particularly clear to the employees named. Pre-election statements reasonably threatening employees with loss of benefits if they select a union violates § 964(1)(A).

35.51 35.5212 72.1
35.521 35.5218 72.18

V § 964(1)(A): The timing of the employer's letter, delivery to the employees on Friday and Saturday just prior to a 9:00 a.m. election on Monday, is further evidence of the employer's unlawful motive in sending the letter. The timing of the letter left the employees and the union insufficient time to check the veracity of and correct the falsehoods and misrepresentations. The nature of the contents of the letter and the timing of its release led the Board to conclude that the purpose of the employer's letter was to unlawfully affect the outcome of the election.

09.374 35.521 35.5216
35.51 35.5211 72.1
35.511 35.5212 72.18

VI § 964(1)(A): Although the success of the unlawful coercion is not dispositive as to whether such coercion occurred, the fact that one-third of the original union supporters had changed their minds by the time of the election is evidence that the employer's unlawful action had its intended effect.

35.51 72.18
72.1 72.313

VII § 964(1)(A): Employer statements which constitute unlawful interference, restraint, or coercion are not protected by the First Amendment of the United States Constitution. The way for employers to properly exercise their First Amendment rights in pre-election propaganda is to avoid coercive speech simply by avoiding conscious over-statements it has reason to believe will mislead its employees.

04.1 35.521 35.5214 72.18
04.6 35.5212 72.1

VIII § 968(5)(B): The Board rejected as untimely an amended complaint filed on the date of the evidentiary hearing.

71.13
71.15

IX § 968(5)(B) & Rule 4.02: The employer moved to dismiss the union's complaint on the grounds that it failed to contain a declaration by the person signing, under the penalty of perjury, that its contents are true and correct to the best of his knowledge and belief. The contention was held to have been untimely raised, being mentioned for the first time in the employer's brief. Second, the employer did not demonstrate that it was in any way prejudiced by the union's failure to comply with the rule.

06.3 71.22
71.11 71.222

X § 968(5)(C): Of those voting at the bargaining agent election, 11 voted for the union, 10 voted for no representation, and one voter wrote the word "no" in the square beneath the "no

representation" choice. Determining the irregularly marked ballot to be void, the executive director certified the union as the bargaining agent, the Board and the Superior Court affirmed the executive director's action and the matter was pending in the Law Court at the time that this order was issued. The Board held that the employer's pre-election conduct completely destroyed the laboratory conditions necessary to hold a free and fair representation election. The general rule is that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. Since the union gained a majority of the valid votes cast, the Board opted not to set aside the results of the election. Second, the employer's conduct precluded holding a fair and free election anytime in the near future. The Board is empowered to order an employer to recognize and bargain with a union without an election, where the union once had majority support and the employer's unlawful interference or coercion have the tendency to undermine such majority support and to impede the election process. In the circumstances, the Board issued a bargaining order, deeming the union to be the bargaining agent as of the date on which the union first established its majority support by filing its showing of interest with the Board. The Board stated that it would have ordered this remedy even if the union had lost the election. Should the Law Court uphold the executive director's action, the bargaining order would be rendered unnecessary. On the other hand, if the Law Court reverses the executive director's action, resulting in a tied election, the employer must nevertheless recognize and continue to bargain with the union for a reasonable period of time.

01.29 32.9 32.95 35.5211 35.5216 35.82
32.2 32.91 32.99 35.5212 35.8
32.21 32.92 35.521 35.5214 35.81

XI § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer, and its representatives and agents: (1) to cease and desist from: (a) reprimanding, disciplining, or discriminating against employees because of their support for an employee organization; (b) making false or misleading statements to its employees so as to interfere with, restrain, or coerce the employees' exercise of their organizational and representational rights; and (c) in any other manner interfering with, restraining, or coercing the employees in their exercise of the rights protected by the Act; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of: (a) remove the written reprimand from the employee's personnel file and delete all references thereto; (b) recognize, upon request, and negotiate with the union as the exclusive bargaining agent for the employees involved as of July 17, 1979; (c) the employer's general manager was to sign, date and keep conspicuously posted for a period of 60 days a notice provided by the Board, at all places where notices to the particular employees are usually posted; and (d) notify the executive director, in writing, of the steps taken in compliance with the Board's order, within 20 days of the date thereof.

74.14 74.31 74.36 74.39
74.16 74.338 74.361

Union River Valley Teachers Ass'n v. Trenton School Committee, MLRB Nos. 80-28 & -32, 2 NPER 20-11020 (May 30, 1980)

I § 968(5)(B): At the prehearing conference, the cross-complaints between the parties were ordered consolidated for purposes of hearing and decision.

71.25 71.514
71.251

II § 965(1)(C): It is evidence of a violation of the duty to negotiate in good faith if a party does not confer upon its negotiator the authority to reach at least tentative agreements. If a negotiator lacks authority to reach tentative agreements, bargaining is often a sham since nothing of substance can be accomplished at the table. Unwarranted delays often result while the negotiator transmits proposals to the decision-maker, and then relays the response to the other party. The employer's negotiator did not have authority to reach even tentative agreement on the four issues remaining just prior to impasse.

41.22 72.5 73.4
46.13 72.530 73.431

III § 965(1)(C): Further evidence of bad faith was the employer negotiator's failure to communicate the final settlement offer to his principal party, after having agreed to do so. The negotiator's action constituted a conscious effort to mislead the union negotiator and stall negotiations and demonstrated no intention of settling the agreement. The intentional misleading of the opposing party's negotiator resulted in weeks of unwarranted delay in negotiations and is evidence of extreme bad faith. The dilatory, evasive conduct subverted the bargaining process and constituted a flagrant violation of the duty to negotiate in good faith.

07.14 41.33 72.5 73.4
41.3 46.52 72.531 73.432

IV § 964(1): A party's negotiator is that party's agent and the principal is held responsible for said agent's conduct.

09.1 09.112 09.121
09.111 09.113

V § 965(1)(C) & (D): A proposal that the agreement being negotiated be in effect for 3½ years, exceeding the 3-year limit contained in the statute, was not a violation of the duty to bargain in good faith because the employer did not insist on acceptance of its proposal.

01.26 42.2 72.5 73.436
03.22 43.76 72.535
09.21 46.42 73.4

VI § 965(1)(C): The employer committed a per se violation of the duty to negotiate in good faith by failing and refusing to bargain over the union's just cause proposal--a mandatory subject of bargaining. Since the just cause proposal was a mandatory subject, the union's insistence thereon to the point of impasse did not violate the duty to bargain.

01.26 43.322 72.5 73.4
03.31 43.452 72.53 73.43
43.233 43.624 72.541 73.45

VII § 968(5)(C): The employer's bad faith bargaining forced the negotiations into fact-finding, thereby forcing the union to expend money for its share of the fact-finding costs. The Board is empowered, in restoring the status quo ante, to order a party that has bargained in bad faith to reimburse the other party for its reasonable bargaining expenses wasted as a result of the violation.

01.29 74.17 74.34
74.12 74.32

VIII § 968(5)(C): As remedies for the violations established in the record the Board ordered that the employer, and its representatives and agents: (1) cease and desist from: (a) failing to give its negotiator sufficient authority to reach tentative agreements; (b) engaging in dilatory and evasive tactics during negotiations; and (c) refusing to bargain about the union's just cause proposal; and (2) take the following affirmative action necessary to effectuate the policies of the Act: (a) reimburse the union for its fact-finding costs, together with interest of 12% per annum thereon, interest to run from 10 days after the date of the Board's order; (b) bargain, upon request, over the just cause proposal and all other unresolved mandatory subjects; (c) the Superintendent is to sign, date, and keep posted for a period of 60 consecutive days a notice provided by the Board; and (d) notify the Board, in writing, of the steps taken in compliance with the Board's order, within 30 days of the date thereof; and (3) the employer's cross-complaint was dismissed.

71.227 74.16 74.34 74.36
74.14 74.31 74.345 74.361
74.15 74.32 74.355

Teamsters Local Union No. 48 v. City of Calais, MLRB No. 80-29, 2 NPER 20-11018 (May 13, 1980)

I § 964(1)(C): This section of the Act is directed at the evil of an employer's providing too much financial or other support of, encouraging the formation of, or actually participating in, the affairs of the union and thereby potentially dominating it. It does not cover confrontations or threats as alleged here.

72.2 72.25
72.24 72.26

II § 964(1)(A): The test for unlawful interference, restraint, or coercion is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. The City Manager told two employees that anyone engaging in "Rebel rousing" or "causing upheaval" would be discharged and "after they are fired, they can file a grievance with the union and fight from the outside looking in." While the two employees testified to being intimidated and the statements might reasonably have been directed against the filing of grievances--conduct protected by the Act--the serious breakdown in the chain-of-command and the resulting threat to the public safety were held as sufficient to justify the comments. Second, when grievances were later filed, no disparaging remarks were made and no retaliatory action was taken by the employer. Third, the City Manager denied an unlawful motive and he was an intelligent witness who was not afraid to admit mistakes. The Board found the City Manager to be frank and honest and credited his testimony. In the extreme circumstances, the comments were held not to violate § 964(1)(A).

09.362 72.13 72.18
72.1 72.131

III § 964(1)(E): The charged conduct was either an unlawful unilateral change or was permitted by the collective bargaining agreement. Since the matter was the subject of a grievance that had been processed through arbitration, and a decision was then pending, the Board deferred to the arbitrator's decision on this issue.

09.23 46.61 47.54 71.811
09.25 46.63 71.8 71.815

IV § 965(1)(C): The City Manager offered to pay a unit employee above the rate set by the collective bargaining agreement in return for the employee's remaining with the department after another officer was promoted over him. The Board held that the employer's offer was a clear attempt to bypass the exclusive bargaining representative, serving to undermine the union's legal status. Bargaining directly with represented employees about wages and conditions of employment is a clear violation of the duty to bargain in good faith.

22.41 43.113 72.5
43.11 46.16 72.55

V § 964(1)(A): The offer of higher wages in return for not filing a grievance also tended to interfere with or coerce the unit employee in his basic right to file a grievance, thereby violating § 964(1)(A).

47.3 72.13 72.17
72.1 72.132

VI § 968(5)(C): As remedies for the violations established in the record, the Board ordered the City Manager, his successors, representatives, and agents, shall cease and desist from: (1) bargaining over the mandatory subjects directly with represented unit employees; and (2) interfering with, restraining, or coercing unit employees in the exercise of their right to file grievances.

74.14 74.31
74.15

Teamsters Local Union No. 48 v. Town of Kennebunk, MLRB No. 80-30, 2 NPER 20-11022, aff'd No. CV-80-413 (Me.Super.Ct., Ken.Cty., Feb. 10, 1981)

I § 964(1)(B) & (A): Discipline motivated in part by anti-union animus violates both of these sections of the Act. While there was substantial evidence of an anti-union atmosphere in the department, and there were some factors from which an unlawful motive could be inferred, the discharge was based solely on legitimate considerations. The discharge was an appropriate sanction because: the employee had ulterior motives in his approach to a female high school student, he misrepresented his intentions to a superior officer during an investigation of the incident, and misused his office to further his personal romantic interests.

72.1 72.134 72.311 72.365
72.13 72.3 72.35

II § 964(1)(D): A charge that the discharge occurred in retaliation for the filing of a prohibited practice complaint was dismissed because the discharge was based solely on proper disciplinary considerations.

72.4

III §§ 964(1)(B) & (A) & 968(5)(B): The discipline of the four union adherents the day after the certification election, as well as pre-election employer conduct, was highly suspect; however, these events were not considered since they were not charged or argued.

01.312 21.91 71.522 72.134 72.317
09.62 71.11 72.1 72.3 72.35
21.3 71.222 72.13 72.311 72.366

SUPERIOR COURT:

IV § 968(5)(C): The existence of prohibited practices must be established by a preponderance of the evidence, thereby placing the burden of proof upon the proponent. In discrimination cases, however, the federal courts shift the burden of proof to the defendant, when the plaintiff has made out a prima facie case of discrimination. The employer then has the burden of showing that the disciplinary decision was based on legitimate considerations. If the employer does this, the burden shifts back to the plaintiff to show that the proffered reason is a pretext. This shifting of the burden was correctly followed by the Board and the complainant failed to show that the asserted reason for the discharge was a mere pretext.

09.32 81.331
71.512

V § 964(1)(B): The appellant charged that the Board committed an error of law by refusing to apply a "just cause" standard to evaluate the discharge of the employee. Such a standard, in the absence of a controlling collective agreement article, is irrelevant. Ordinarily employers are free to discharge their employees for any reason, so long as anti-union animus in no way contributes to the decision. The Board's refusal to apply the "just cause" standard in a discriminatory discharge case did not constitute an error of law.

72.319 72.366 81.503
72.35 81.331

VI § 968(5)(C): The appellant charged that the Board's failure to draw certain inferences constituted reversible error. The Court held that the drawing of inferences from the evidence presented is for the trier of fact. Where an inference is supported by substantial evidence, or where the evidence conflicts and no inference is drawn, the decision of the Board is final. There was substantial evidence in the record to support the finding that the employee was discharged for legitimate reasons; the failure to draw the inference sought was not error.

09.33 71.517 81.502
09.374 81.331

VII § 968(5)(B): The appellant claimed error based on the Board's failure to draw an adverse inference from the City Manager's failure to appear and testify during the evidentiary hearing. Although the City Manager was on the employer's witness list, he was not called as a witness. Upon learning that he would not be called, the union did not request a continuance or otherwise seek to secure his presence. Since the union failed to present the City Manager, or even to seek his testimony, it was permissible for the Board not to draw the adverse inference sought.

09.36 71.523 81.502
71.517 81.331

VIII § 968(5)(F): The Board's findings of fact are final unless clearly erroneous. Findings of fact supported by credible evidence, as were the Board's, are not clearly erroneous; therefore, no error is found in the Board's decision.

09.33 81.331 81.502
71.517 81.491

IX § 968(5)(F): Pending the Court's decision, the union requested the Board to reopen the record. The Board had no jurisdiction to do so. The union then asked the Court to remand the case to the Board to reopen the record. In light of the denial of the appeal, the remand request was denied.

01.1 71.520 81.45
01.28 81.43 81.53

Teamsters Local Union No. 48 v. City of Waterville, MLRB No. 80-33, 3 NPER 20-12007 (Oct. 13, 1980)

I § 968(5)(B): At the close of the hearing, the complainant moved to amend its complaint to charge that the employer had further violated the Act through its conduct in two instances testified to during the hearing. Since the two allegations were not raised in the complaint or at the prehearing conference, and were not fully litigated at the hearing, the motion was denied. The Board noted that it is incumbent upon a complaining party to investigate its case and raise all allegations of violations prior to the hearing.

01.28 71.12 71.223 71.516
01.312 71.15 71.227
71.11 71.222 71.25

II § 964(1)(A): An employer violates § 964(1)(A) if it has engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. By requiring employees to work the day before Christmas, a departure from an eight-year-old established practice, and since this change in practice occurred just days before a bargaining agent election, the employer's action could reasonably be viewed as an expression of displeasure over the filing of the election petition and tended to interfere with the employees' right to choose a bargaining agent. There was insufficient evidence to show that the change was required by legitimate business reasons.

21.2 64.35 72.134 72.340
21.7 72.1 72.311
35.53 72.13 72.317

III § 964(1)(B): Requiring employees to work on the day before Christmas--a day which had been a paid holiday for the previous 8 years--constituted discriminatory conduct that was inherently destructive of important employee rights--the right to choose freely a bargaining agent.

35.532 72.311 72.319 72.340
72.3 72.317 72.323

IV § 964(1)(A) & (B): Changing the work duties of the chief union employee organizer, shortly after the bargaining agent election, was highly suspect; however, the employer successfully avoided a violation by establishing a legitimate business justification for the change in duties. The employee at issue was directed to stop making mail deliveries to other municipal offices on the grounds that she had been away from her office so much that she was not completing her assigned tasks.

72.1 72.18 72.35 72.363
72.13 72.3 72.359 72.365

V § 964(1)(A) & (B): Two and one-half years prior to certification of a bargaining agent, the employer established a longevity pay plan for "all full-time administrative employees, without exception." One and one-half years later, the employer extended the longevity pay plan to "all full-time non-union employees of the City." The employer terminated the longevity plan for the unit employees, less than two weeks after the certification election. Because the employees did not know that they would lose their longevity payments if they opted for representation, the abrupt termination of the pay plan reasonably tended to interfere with the free exercise of their § 963 rights, by constituting a message of retaliation for selecting a union. In addition, the change had the unlawful discriminatory effect of discouraging membership in the union by altering the wages received by three unit employees.

21.3	72.13	72.311
21.7	72.134	72.317
72.1	72.3	72.342

VI § 968(5)(C): To adequately remedy the violations established in the record, it was necessary to restore the status quo ante by making the employees, affected by discontinuance of the longevity pay plan, whole by paying them amounts equal to the longevity payments they should have received. Interest on the amount owed to each employee is to be computed by the method set forth in Florida Steel Corp., 231 NLRB 651 (1977). Thus, interest is to accrue commencing with the last day of each calendar quarter of the liability period on the total amount then due and owing at the adjusted prime interest rate then in effect, and continuing at such rate, as modified from time to time by the U.S. Secretary of the Treasury, until the full payments provided by the Board's order are paid.

74.32	74.341
74.34	74.345

VII § 968(5)(C): As remedies for the violations established in the record, the Board ordered the employer, its City Administrator, and their representatives and agents: (1) cease and desist from: (a) requiring unit employees to work on days designated as holidays for state employees, until such time as the issue of holidays is settled through collective negotiations; (b) changing longevity or other pay plans for unit employees, until the issue of pay plans is settled through collective bargaining; and (c) in any other manner interfering with, restraining, or coercing unit employees in the free exercise of § 963 rights; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of: (a) restore the longevity pay plan for unit employees, unless the issue of such pay plan has already been settled through collective bargaining; (b) make whole each unit employee adversely affected by termination of the longevity pay plan for the amount of longevity pay lost, together with interest thereon; and (c) notify the executive director, in writing, of the steps taken in compliance with the Board's orders, within 20 days of the date thereof; and (3) if the parties have not agreed on the amount of longevity pay due under the Board's order, within thirty days of the date of the Board's order, the complainant may submit evidence supporting the amount of longevity pay due each employee. Fifteen days thereafter, the employer may then respond to said filing and the Board will issue a supplemental order on the amount of longevity pay due.

74.14	74.31	74.341
74.15	74.32	74.345
74.16	74.34	74.355

Southern Aroostook Teachers Ass'n v. Southern Aroostook Community School Committee, MLRB Nos. 80-35 & -40, 5 NPER 20-13021 (Apr. 14, 1982)

I § 965(1)(C): The Act provides that public employers of teachers shall meet and consult, but not negotiate, with respect to educational policies. The Legislature clearly intended that the duty to meet and consult is subordinate to and far less restrictive than the duty to bargain. Such substantive concepts associated with the duty to bargain as the unilateral change doctrine, the duty to make counter-proposals, and the duty to attempt to resolve differences do not apply to the meet-and-consult process. The purpose of the meet-and-consult obligation is to ensure that school committees consider their employees' comments and concerns before implementing or changing educational policy. The duty to meet and consult is a mechanism for insuring employee input into non-negotiable policy areas and is designed to further the Act's purpose of improving the relationship between school committees and their employees.

41.6	41.62	41.65	72.611
41.61	41.63	42.2	72.74

II § 965(1)(C): The elements of the duty to meet and consult include: (1) notice that a change in educational policy is planned must be given to the bargaining agent so that it can invoke the meet-and-consult process in a timely manner if the unit employees wish to comment on the changes; (2) pertinent information about the planned change must be provided so that the bargaining agent and employees can understand the change and make constructive comments about it; (3) actual meeting and consulting at reasonable times and places must occur, upon receipt of a ten-day notice or other request to meet and consult by the bargaining agent. The school committee is obligated to meet and consult with an open mind, to discuss the planned change openly and honestly, and to listen to the employees' suggestions and concerns; and (4) mature

consideration must be given to the employees' input before the change is implemented and, if any of the employees' comments or concerns are meritorious, the school committee must decide in good faith whether they can be accommodated.

09.52 41.61 41.63 41.7
41.6 41.62 41.64

III § 965(1)(C): Changes in a kindergarten program, including the length of the pupil day, the degree of academic emphasis, and the number of students to be taught, are matters of educational policy about which the employer is obligated to meet and consult but not negotiate.

43.61 43.613 43.617
43.612 43.614 43.618

IV § 965(1)(C): A determination of whether a party has failed to meet and consult in good faith is based on examining the totality of the charged party's conduct throughout the process. The employer did not violate the duty to meet and consult in good faith because: (1) although it did not give the union formal notice of the proposed change in educational policy, it kept the union informed of the status of the proposal throughout its development; (2) the employer provided all information relevant to the proposed change; and (3) the employer met at reasonable times, discussed the proposed change candidly, considered the union's suggestions, and incorporated some of them in the final plan. The employer's letter to parents, accusing the union of holding up educational improvements, and the Superintendent's request, concerning the internal union matter of how many members had voted to request meet and consult, could be construed as evidence of the employer's intent not to meet and consult in good faith. The weight of the latter evidence was overshadowed by the evidence that the employer had satisfied its duty.

41.6 72.5 72.74 73.54
41.63 72.53 73.4
41.65 72.538 73.440

V § 965(1)(C): The duty to meet and consult does not include the requirement that the employer wait until impact bargaining is completed before implementing changes in educational policy. Once the duty to meet and consult has been satisfied, the change can be implemented. Otherwise, the meet-and-consult obligation would be elevated to and become indistinguishable from the duty to bargain.

41.6 41.63 72.611 72.62
41.62 43.630 72.617

VI § 965(1)(C): The evidence established that the union participated in the meet-and-consult process in good faith. There was some evidence that the union sought to delay and frustrate the process, by failing to provide a list of its questions at the first meet-and-consult session; however, the union met and consulted in a reasonable and timely fashion, asked legitimate questions, sought relevant information, and provided comments and recommendations about the proposed change. While the process took an unusually long time to complete--nearly 10 weeks--that alone does not establish that the union failed to meet and consult in good faith. The proposed changes were significant and the union's concerns were proper.

41.6 72.5 72.538 73.432
41.63 72.53 72.74 73.440
41.65 72.531 73.4 73.54

VII § 965(2)(B) & (1)(C): Mediation may be properly invoked in the meet-and-consult process, subject to the executive director's discretion in deciding whether to assign a mediator.

52.1 52.22
52.11

VIII § 965(1)(C): The test for deciding whether a party has bargained in good faith is whether the totality of the party's conduct indicates a present intention to find a basis for agreement. The union's refusal to agree to ground rules during impact bargaining is evidence of bad faith bargaining, particularly where the proposed ground rules had been successfully used by the parties before and the union had no reason for refusing to agree thereto. Second, the union's chief negotiator stated that he could make proposals but that he could

not accept proposals and that, while he may agree to something at the table, he reserved the right to change his mind later. The union negotiator reneged on one tentative agreement during the negotiations. A negotiator must be clothed with sufficient knowledge, guidelines and authority to make tentative agreements. The absence of such authority usually results in prolonging or frustrating negotiations. While possibly clothed with sufficient authority, the union negotiator chose not to exercise it. His refusal to make tentative agreements, subject only to ratification by his principal party, was tantamount to not having the authority to make such agreements and is strong evidence of bad faith. In the circumstances, the union violated § 964(2)(B) during impact bargaining.

41.2	72.5	72.531	72.539	73.431	73.440
41.22	72.53	72.535	73.4	73.432	73.441
41.31	72.530	72.538	73.43	73.436	

IX §§ 968(5)(C) & 965(1)(C): While the evidence established that the local union failed to participate in impact bargaining in good faith, there was no evidence that the parent union or its business agent had anything to do with this violation; therefore, the latter two respondents were not included within the scope of the Board's cease and desist order.

01.29	09.111	09.13	22.72	73.479	74.14
09.1	09.112	22.7	73.47	74.13	

X § 964(1)(A): The employer did not violate this section when one of its agents attended a public meeting held by the union, a meeting to which the employer had been invited, and took notes of the proceedings and of the names of the unit employees in attendance. Employer surveillance of employees engaged in union activities constitutes unlawful interference with the employees' organizational and representational rights. Such surveillance is unlawful "whether frankly open or carefully concealed." A finding of unlawful surveillance turns on the facts of the case and none was established here since: the meeting was open to the public, the employer was invited to attend, the employer's agent requested and received permission to take notes, the union business agent sat with the employer and observed the notes being taken, and the notes were not used to harass or retaliate against any union member.

72.1	72.141
72.14	

XI § 964(1)(A): Letters from the superintendent of schools to union officials, warning that union activities that had always been permitted during non-instructional work time would no longer be permitted and would result in discipline in the future, violated § 964(1)(A). Threats to discipline employees for engaging in union activities constitute unlawful interference, restraint or coercion of the employees in the free exercise of their § 963 rights. The employer's defense, that the activities at issue were not allowed by the collective agreement, was deemed pretextual and an unlawful motive was inferred, based on the following: (1) two of the "violations" occurred more than four months earlier and the employees had not been warned at that time; (2) the third "violation" was trivial; and (3) the letters were sent shortly after the unit employees had voted "no confidence" in the school department administration.

22.51	72.11	72.114	72.131
72.1	72.112	72.118	

XII § 964(1)(D): This section protects employees involved in any stage of a labor relations board proceeding from a wide variety of discriminatory actions by the employer. This is particularly true with regard to employees who have been subpoenaed to attend hearings as witnesses; the employer must give such employees a reasonable opportunity to apply for the type of available leave which the employees prefer and the employer's general obligation with respect to subpoenaed employees "is one of noninterference, nonrestraint, and noncoercion as to such employees' right and obligation to attend scheduled hearings." An employer is not obligated by § 964(1)(D) to pay the wages of its employees subpoenaed by another party to the proceeding, for such a rule would improperly require that the employer subsidize the witnesses of an opposing party. On the other hand, an employer is required by § 964(1)(D) to pay the wages and mileage fees of employees subpoenaed or otherwise compelled to attend the hearing by the employer; otherwise, the employer would unjustly "economically disadvantage" the employees for appearing at the hearing. Here, employer ordered to pay wages and mileage of witnesses/employees for days in which they appeared under employer's subpoena; no duty to pay the same for those days when employee-witnesses appeared after being released by the employer from its subpoena.

09.36	21.12	71.5	71.523
09.361	71.34	71.511	72.4

XIII §§ 968(6) & 964(1)(D): If some type of paid leave is available for employees subpoenaed to attend labor board proceedings, under either the parties' agreement or the employer's personnel policies, the employer is obligated to grant such paid leave. The employer's refusal to grant such paid leave would constitute unlawful discrimination against employees for participating in Board proceedings. If for any lawful reason no paid leave is available to subpoenaed employees, the employees must look to the subpoenaing party for reimbursement. Pursuant to § 968(6) and Rule 45(C) of the Rules of Civil Procedure, a subpoenaing party is required to pay a minimum daily witness fee and a mileage fee, round trip, to each person it subpoenas. 16 M.R.S.A. § 251. A failure to tender the requisite fees at the time of service renders service of the subpoena incomplete and the subpoenaed person is under no obligation to attend the hearing. 16 M.R.S.A. § 253; Pease v. Bamford, 96 Me. 23, 51 A. 234, 235 (1901). Had the parties' agreement clearly provided paid leave for required attendance at labor relations board proceedings, the employer's failure to grant such leave would have violated § 964(1)(D). Where, as here, the agreement was unclear on the question, the union's remedy was to pursue the issue through the contractual grievance procedure.

01.27	09.25	46.61	71.5	71.8	72.4
09.23	09.36	47.54	71.511	72.1	
09.231	09.361	71.34	71.523	72.18	

XIV §§ 964(2)(C) & 968(5)(C): During the meet-and-consult process and upon the union's advice, an employee refused to help plan for educational policy changes in her academic discipline. An employee is required to perform all duties preparatory to implementation of educational policy changes, in their particular academic area during normal work time, and a refusal to do so constitutes an unlawful work stoppage or slowdown. Since the job action resulted from the erroneous advice of the local union and the business agent, the Board's cease and desist order will also run against the union local and the state-wide union, as well as against the employee involved.

01.23	09.13	41.6	61.2	61.54	62.3
09.1	09.131	41.63	61.4	62.1	62.42
09.11	09.133	43.630	61.5	62.2	73.58
09.112	22.72	61.1	61.51	62.231	74.17

XV § 964(2)(A): A union membership's vote of "no confidence" in the school department's administration and its educational policies are expressions of opinion protected by the First Amendment and do not violate § 964(2)(A).

04.1	64.4
21.11	73.57

XVI § 968(5)(C): As a result of the violations established in the record, the Board ordered: (1) that the employer school committee, and its representatives and agents: (1) cease and desist from interfering with, restraining, and coercing employees in their exercise of § 963 rights and cease and desist from discriminating against employees involved in labor relations board proceedings; and (2) take the affirmative actions, necessary to effectuate the policies of the Act, of removing from the employees' personnel files letters threatening discipline for engaging in union activities and reimbursing the employees that it subpoenaed to attend the labor board hearing the amount of their salaries for the day in which the employer's subpoenas were in effect, plus interest thereon. The Board further ordered: (1) that the local union and its agents and members cease and desist from refusing to bargain in good faith over the impact of changes in educational policy and (2) that the local union, its parent state-wide union, and their agents and members cease and desist from causing any of the employees to refuse to help plan for changes in educational policy or to otherwise engage in a work stoppage, slowdown, or any other type of job action.

01.23	74.13	74.17	74.34
61.4	74.14	74.31	74.341
62.77	74.15	74.338	74.345

Arbour v. City of Biddeford and Council 74, AFSCME, MLRB No. 80-36, Executive Director Action (May 19, 1980)

I § 968(5)(B): In instances where the facts alleged do not constitute a violation of the Act as a matter of law, the Executive Director is statutorily authorized to dismiss the prohibited practice complaint, during the initial review of the charge upon its filing.

01.1 71.11 71.227
01.21 71.2 71.31

II § 968(5)(B): Since the operative facts upon which the charge was based occurred well over 6 months prior to the filing of the complaint, the allegations were barred by the 6-month period of limitations set forth in the Act; therefore, the Board was precluded from conducting a hearing thereon. The theory of "continuing violation" has been rejected by the NLRB and the Board as a mere attempt to circumvent the statutory limitations period.

01.1 09.62 71.227
01.28 71.13 74.12

III § 968(5)(B): The complaint charged that the employer violated the duty to bargain in good faith, by failing to discuss a grievance with a particular union on a certain date, and that said union had violated the duty of fair representation, by failing to process said grievance. Since the union had been decertified and replaced as the bargaining agent by a different labor organization some months prior to the date in question, the employer was required to deal exclusively with the newly-certified bargaining agent and could not have violated the Act by refusing to meet with the ousted union. Second, as a result of the decertification, the ousted union had no legal standing or obligation to represent the unit employees; therefore, said organization could not have violated the Act by failing to do so.

22.1 22.4 23.2 32.98 47.21 72.583 73.472
22.3 22.41 23.62 37.8 47.22 73.113
22.37 22.43 32.95 37.9 72.58 73.47

Council 74, AFSCME v. City of Bangor, MLRB No. 80-41, 2 NPER 20-11042 (Sept. 24, 1980); aff'd in part and modified, City of Bangor v. AFSCME, Council 74 and MLRB, No. CV-80-574, (Me.Super.Ct., Pen.Cty., Jan. 28, 1982); Order of Board aff'd, 449 A.2d 1129 (Me. 1982), 5 NPER 20-14000

I § 968(5)(B): Alleged violations that occurred more than six months prior to the filing of the charge with the Board are time barred; however, evidence regarding such events is admissible to provide background information. Where occurrences within the six-month limitations period may constitute prohibited practices, earlier events may be utilized to shed light on the true character of occurrences within the limitations period.

01.1 09.34 71.227
01.28 09.39 71.517
09.3 71.13

II § 962(6)(F) & (G): The Board held that two "seasonal employees," who had each worked more than 6 months within a one-year period, were public employees within the meaning of the Act. No section of the Act requires an employee to work 6 consecutive months before being entitled to the statutory rights and protections. The purpose of § 962(6)(F) is to allow the public employer 6 months in which to determine whether an employee is suited to the job, during which time the employer can discharge the employee or unilaterally change the individuals wages, hours or working conditions without being subject to the terms of the Act. These purposes were served here since the two individuals worked well over 6 months as seasonal laborers. Second, the Board held that, but for the unlawful firings at issue, both employees would have had 6 months of continuous employment since each needed only one more week to attain such tenure. The Board stated in dicta that, because the employer's unlawful action prevented the employees from attaining 6 months of continuous employment, they would have been deemed to be public employees, had they not been already employed in excess of 6 months.

15. 16.44 33.4 34.39
15.01 16.45 33.45 34.391
16.43 16.46 34.33

III §§ 963 & 964(1)(A) & (B): A discharge violates § 964(1)(A) & (B) if it is partially motivated by the employee's protected activity. The discharge at issue was entirely motivated by the employees' protected activities. The discharges resulted from employee efforts to be included in the established bargaining unit through filing a grievance, attempting to secure

unit wages and benefits, and filing a petition for unit clarification--all organizational and representational activities protected by § 963. The employer's personnel director confirmed said unlawful motive when he told the employees that they were being discharged because of the successful unit clarification that had assigned them to the unit and that, but for the petition for unit clarification, they would still be employed.

09.121	21.7	47.3	64.3	72.1	72.18	72.311	72.4
21.12	22.5	64.1	64.34	72.11	72.3	72.324	
21.2	47.	64.2	64.35	72.131	72.31	72.334	

IV § 964(1)(A) & (B): In a unit clarification decision, the Board ordered that "seasonal employees" meeting certain criteria be included in an existing bargaining unit. Rather than according four such employees unit status, including the unit wage scale and benefits, the employer discharged them. Two of the four were rehired within a few days; however, they were given no credit for accrued seniority and were placed at the lowest salary step. According to the collective bargaining agreement, each of them should, assuming satisfactory job performance, have been at a higher step on the scale. The employer's actions interfered with the employees' § 963 right to engage in the protected activity of seeking unit inclusion and also constituted unlawful discrimination as a result of the employees' engaging in union activities. The employer's conduct was both motivated by anti-union animus and was inherently destructive of important employee rights; therefore, said action violated § 964(1)(B).

21.2	36.222	64.2	72.1	72.3	72.324
21.7	36.3	64.3	72.131	72.311	72.4
34.391	36.33	64.34	72.18	72.317	

V § 968(5)(B): The date on which the statutory period of limitations begins to run is that on which the complainant learned of the unlawful conduct--in this case, that was immediately after it occurred.

01.28
71.13

VI § 965(1)(B) & (C): An employer may not lawfully change an employee's wages, hours or working conditions without first notifying the employee's bargaining agent and negotiating over such changes. As of the date that the employer received notice of the Board's unit clarification decision, assigning certain employees to an existing bargaining unit, said employees were represented by a bargaining agent and came within the ambit of the unilateral change rule. Although the parties' collective bargaining agreement permitted the employer to discharge employees, it was silent on the question of the effects of such discharge. The agreement's "zipper clause" provided that neither party could require the other to engage in mid-term negotiations over "any subject or matter referred to, or covered in this agreement." Since the effects of discharge (i.e., severance pay, vacation pay, insurance, re-call, transfer, etc.) are a mandatory subject and since the bargaining agreement was silent thereon, the union did not "clearly and unmistakably" waive the right to bargain over the effects of employee discharges. The employer violated the duty to bargain in good faith by failing to notify the bargaining agent and to negotiate therewith over the effects of the discharges, prior to implementing the same.

01.26	09.612	32.95	43.131	43.645	72.3522	72.613	72.666
01.27	09.64	36.3	43.154	43.95	72.511	72.617	
09.23	09.641	36.32	43.35	43.99	72.590	72.65	
09.231	09.642	36.33	43.52	72.3	72.6	72.651	
09.61	09.66	43.123	43.53	72.334	72.611	72.664	

VII § 964(1)(A) & (B): The question of whether a discharge was unlawful was time barred by the six-month statute of limitations of the Act. Although the discharge could not constitute the basis for a violation, the circumstances surrounding it were relevant in determining whether the employer's refusal to rehire the individual, at a time within the limitations period, was unlawful. The employee's termination evidenced anti-union animus because: (1) at the time of the discharge, the employer told the individual that, due to a Board unit clarification decision assigning certain "seasonal employees" to the bargaining unit, the employer would no longer employ "seasonal" employees; (2) the employee was never told he was being discharged because his season was over; (3) he was never told he was only being hired for a particular season; (4) in the past, he had continued to work after the particular season was over; (5) at the time of the discharge, the individual had been employed for more than 6 consecutive months and was eligible for unit inclusion; and (6) the discharge occurred on the same day that the employer received the Board's decision.

09.34	21.7	71.13	72.13	72.31	72.319	72.334
09.39	64.2	71.517	72.18	72.311	72.324	72.4
21.2	64.3	72.1	72.3	72.317	72.326	

VIII § 964(1)(A) & (B): Upon applying for re-employment the next spring, the individual mentioned in the preceding paragraph was told that the "labor dispute" was having a negative effect on his chances for reemployment and, later, he was told that the employer was going to hire a whole new crew. The employer did in fact hire a whole new crew of seasonal employees. Had he been rehired, the individual would have been in the bargaining unit because of his earlier "seasonal" tenure in excess of 6 months' duration. The Board held that the decision not to re-hire the individual violated § 964(1)(A) & (B) because it was motivated by general anti-union animus and by the employer's desire to keep the individual out of the bargaining unit.

21.2	64.3	72.3	72.324	72.4
21.7	72.1	72.31	72.326	
64.2	72.18	72.311	72.339	

IX § 968(5)(C): Upon finding a violation of the Act, the Board must issue an order that the transgressor cease and desist from the prohibited practice and provide such affirmative relief as will effectuate the policies of the Act. A properly designed remedial order seeks restoration of the situation, as nearly as possible, to that which would have obtained but for the prohibited practice.

01.29	74.31
74.11	74.32
74.17	

X § 968(5)(C): Since the employer's unlawful conduct resulted in the discharge of 4 individuals, the placing of 2 discharged but rehired individuals on the wrong step of the salary scale, and a decision not to rehire another person, the Board ordered that said individuals be offered reinstatement to the same jobs, or to substantially equivalent employment if the former jobs no longer existed, and that they be made whole for any loss of earnings and other benefits caused by the employer's unlawful conduct.

74.33	74.335	74.355
74.3331	74.336	
74.3333	74.341	

XI § 968(5)(C): Back pay awards are computed, in the manner prescribed in F.W. Woolworth, Co., on the basis of each separate calendar quarter or portion thereof, from the date of the unlawful action until the date on which the Board's order is satisfied. Loss of pay is determined by deducting, from a sum equal to that which each worker should have earned for each quarter or portion thereof, the net earnings from other employment for that period. Net earnings means earnings less expenses, such as for tranportation and room and board, incurred by the employees in connection with obtaining other work during the quarters in question. Earnings in one quarter have no effect on back pay liability for any other quarter. In determining the wage rate and benefits levels on which the back pay order should be based, each employee's true date of permanent hire, giving full credit for seniority from that time and assuming that each had received a favorable performance rating for the time covered by the order, must be used. Since the employer did not treat such employees fairly in the past, it would not be fair to make the amount of the back pay order be contingent on performance ratings by the employer. If, due to not getting proper credit for seniority, individuals are laid off due to lack of work, back pay awards also include the lay-off period. Finally, if the employees incurred any expense, such as medical expenses, that the employer would have paid but for the unlawful conduct, the employer must reimburse the employees for such expenditures, plus interest thereon.

74.17	74.341
74.32	74.344
74.34	74.355

XII § 968(5)(C): Interest on back pay awards is computed, as set forth in Florida Steel Corp., commencing with the last day of each calendar quarter of the back pay period on the total amount then due and owing, at the adjusted prime interest rate then in effect and continuing at such rate, as modified from time to time by the Secretary of the Treasury, until the transgressor has complied with the back pay order.

74.345

XIII § 968(5)(C): As a result of the violations established in the record, the Board ordered the respondent employer, its personnel director, and their representatives and agents to: (1) cease and desist from: (a) discharging or otherwise discriminating against employees because of the latter's interest in, or activity on behalf of, any labor organization; (b) failing to treat all permanent employees who perform bargaining unit work as members of the unit entitled to all the rights and privileges provided by the collective bargaining agreement; (c) refusing to hire former employees who, because of their prior tenure, would be immediately eligible for unit membership; (d) in any other manner interfering, restraining or coercing employees in their exercise of the rights guaranteed by the Act; and (e) failing to notify the bargaining agent and negotiating with it over the effects of discharging unit employees, prior to effecting such discharges, as permitted by the collective agreement; and (2) taking the affirmative action, necessary to effectuate the policies of the Act, of: (a) offer reinstatement to their former or substantially equivalent positions to employees unlawfully discharged and make all employees who were victims of its unlawful conduct whole; (b) sign, date and post a notice supplied by the Board, for the attention of the employees in the unit at issue, for 60 consecutive days and take reasonable steps to ensure that the notice is not altered, defaced, or covered with other material; and (c) notify the executive director, in writing, within 20 days from the date of the order, of the steps taken in compliance therewith. If the parties are unable to agree on the amount of the back pay order within 30 days of the date of the Board's order, the union will file with the Board: (1) a weekly list of gross back pay claimed, (2) a weekly list of actual earnings from other employment, (3) a list of expenses incurred in seeking and holding interim employment, (4) a list of benefits claimed, (5) interest claimed, and (6) documents or affidavits supporting each item. The employer will then have 15 days to respond with documents or affidavits on each disputed item. The Board will then issue a supplemental decision as necessary to implement this order.

74.14	74.32	74.336	74.345	74.361
74.16	74.33	74.34	74.355	
74.31	74.335	74.344	74.36	

XIV SUPERIOR COURT:
Finding that the Board's finding, that the discharges at issue were unlawfully discriminatory, was wholly unsupported by the record, the Court reversed the same as being clearly erroneous. The Court further determined that the Board had erred in determining the permanent hire dates for the employees affected by the Board' order and deemed them to have been permanently hired on the date of the Board unit clarification decision that assigned them to the existing unit. The balance of the Board's order was affirmed and the employer was ordered to comply therewith.

81.12	81.5087
81.331	81.5089
81.502	81.522

XV LAW COURT:
§ 966(3): The unit clarification provision of the Act provides that only the public employer or the bargaining agent may file a petition for unit clarification; therefore, the bargaining agent filed a petition seeking unit inclusion of individuals hired as "seasonal employees' who, in fact, worked on a permanent basis.

36.11
36.111
36.211

XVI § 968(5)(F): In appeals from Board orders, the Law Court reviews the Board's decision and not that of the Superior Court, where the latter court did not receive any evidence other than that presented to the Board. In such cases, the Law Court limits itself to reviewing the Board's order for clear error and the Board's findings are affirmed, if they are supported by substantial evidence in the record.

71.517	81.491	81.503	81.6
81.33	81.50	81.504	81.61
81.331	81.502	81.5089	

XVII §§ 968(5)(F) & 964(1)(A) & (B): In reviewing the Board's conclusion that the employer's actions had violated § 964(1)(A) & (B), the Court considered, as evidence in support of the

Board's holding, events which could not constitute a distinct violation because they were time-barred by the statutory limitations period. The Court held that the only reasonable conclusion from the record was that the employer had discharged the employees in question because of their efforts to obtain the benefits of membership in the labor organization--a violation of § 964(1)(A) & (B). Substantial evidence also supported the Board's conclusion that one former employee had been refused re-employment because of the employer's intent to keep him out of the bargaining unit--another violation of § 964(1)(A) & (B).

09.3	64.3	72.13	72.311	72.334
09.39	71.517	72.18	72.317	72.339
21.2	72.1	72.3	72.324	

XVIII § 965(1)(C): The effects of a discharge are a mandatory subject of bargaining. Concomitant with the characterization of a topic as being within the duty to negotiate is an obligation that, prior to making changes therein, the employer notify the bargaining agent to provide it with an opportunity to bargain over such changes. The employer's discharge of the employees in question, without prior notice to the union in order that the latter might negotiate over the effects of the discharges, violated § 965(1)(C), unless the bargaining agent previously waived the right to demand such negotiations during the term of the parties' agreement.

43.123	43.53	72.51	72.611
43.233	43.645	72.511	72.613
43.52	43.95	72.6	72.617

XIX § 965(1)(B) & (C): The "zipper clause" of the parties' agreement provided that each party "voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to negotiate with respect to any subject or matter referred to or covered in this agreement." The agreement further provided that the employer "shall have the exclusive right to . . . discharge or suspend for just cause . . . [and] to reduce or expand the working forces." While the agreement constitutes a waiver of the union's right to negotiate over a discharge for just cause itself or over changes in the size of the group of employees, it does not waive the right to negotiate over the effects of that discharge. The issues of discharge and the effects of discharge are distinct, and the waiver of one is not equivalent to the waiver of the other. Waiver clauses in collective bargaining agreements are read constrictively. Hence, the Board correctly concluded that the union had not waived its right to negotiate over the effects of the discharges at issue.

01.26	09.6	09.641	43.645	43.98	72.511	72.65	72.666
01.27	09.612	09.642	43.78	43.99	72.590	72.651	81.507
09.231	09.64	09.66	43.95	72.51	72.617	72.664	

XX § 964(1)(A) & (B): Concluding that the Board had erroneously given an earlier unit clarification decision, assigning certain employees to the established unit, retroactive effect, the Superior Court reversed the Board's holding that the employer's failure to treat said employees as members of the unit violated § 964(1)(A) & (B). Without deciding whether said employees had to be treated as members of the unit retroactively to each employee's date of permanent hire, the Law Court held that the employer's failure to treat said individuals as members of the unit, after receiving the Board's order, violated § 964(1)(A) & (B).

21.2	36.33	72.18	72.323
36.222	72.1	72.3	72.4
36.3	72.13	72.311	

XXI § 968(5)(C): Once it determines that a party has engaged in a prohibited practice, the Board has the statutory authority to take such affirmative action, including reinstatement of employees with or without back pay, as is necessary to effectuate the policies of the Act. A properly designed remedial order seeks a restoration of the situation, as nearly as possible, to that which would have obtained, but for the unfair labor practice. The Board has broad discretion in fashioning appropriate relief for prohibited practices, and the Court will not "interfere with the remedy chosen by the Board where the reasons articulated for it in the Board's decision clearly show it to be within the statutory powers of the Board."

01.29	74.11	74.32	74.355	81.331	81.521
01.32	74.12	74.34	81.1	81.332	
03.22	74.17	74.341	81.12	81.493	

XXII § 968(5)(C): Here, the Board ordered that the employees victimized by the prohibited practices be made whole for any loss of earnings or other benefits caused by the employer's

unlawful conduct. In ordering that back pay be computed as if each worker had received favorable performance ratings, the Board reasoned "because the city has not treated these employees fairly in the past, we believe it would not be fair or proper to require that the amount of back pay due be dependent upon a performance rating . . . by management." The Court held that the Board's order was not an abuse of discretion and that basing back pay and benefits as of each employee's true date of hire was necessary to make each employee whole for the months or years each spent working as a permanent, full-time employee without receiving the benefits due to such employees.

74.17	74.34	81.1	81.332
74.32	74.341	81.12	81.5087
74.33	74.344	81.331	81.521

XXIII § 968(1): The employer charged that the Chairman of the Board panel hearing this case was biased because, in unrelated litigation involving different parties, the individual signed a Law Court brief advocating adoption of the "in-part" test in discriminatory discharge cases. The rule in Maine is that pecuniary interest or relationship is a ground for disqualifying a judge. The interest must be direct and capable of demonstration rather than be merely speculative. No evidence was produced supporting a finding of prejudice under this standard. Second, the Board held that the employer's unlawful conduct was "entirely motivated" by anti-union animus; therefore, the Chairman's earlier advocacy of the "in-part" test was irrelevant. The Court held that the employer had not been prejudiced by the chairman's participation in the earlier litigation.

01.21	71.33
71.3	71.513

Teamsters Local Union No. 48 v. Town of Dixfield, MLRB No. 80-42, 2 NPER 20-11037 (Aug. 6, 1980)

I § 964(1)(A) & (B): The discharge, or failure to reappoint, an employee violates § 964(1)(A) & (B), if such action is based in any part on union activities protected by § 963. The Board examines the entire record and draws inferences from the facts in order to determine whether the discharge was motivated in any way by anti-union animus. An inference of unlawful motivation may be rebutted by evidence showing that the discharge was motivated solely by legitimate considerations.

09.32	72.1	72.3	72.324	72.339
09.374	72.134	72.311	72.332	
71.512	72.18	72.32	72.334	

II § 964(1)(A) & (B): The Board based its conclusion, that the employer's failure to reappoint the employee was not motivated even in part by anti-union animus, on the fact that the employee's job was in jeopardy long before the employer was aware of any union activity. Prior to the employer's receiving notice of the filing of a unit determination petition, the employee: had a negative attitude concerning his job, had personality clashes with the Police Chief, had challenged Police Commission decisions, had demonstrated a lack of tact and judgment, and was incapable of accepting criticism--which, together, constituted more than adequate cause for the discharge. Second, upon the Police Commission's informing him that he would probably not be reappointed, the employee launched an abusive tirade and threatened one member with physical harm.

72.1	72.314	72.35	72.365
72.3	72.315	72.361	
72.312	72.317	72.362	

III § 964(1)(A) & (B): Some of the facts could, in other circumstances, be evidence of anti-union animus. Among those were: (1) a selectman's statement at a local restaurant that unionization would be too expensive for the employer and (2) the Police Commission's questioning the Chief as to whether he was loyal to the employer or to the union. The first statement was not so openly hostile as to constitute anti-union animus and the latter fact was proper in an effort to learn whether the Chief considered himself to be part of the unit or part of management. In any event, the Commission, not the Selectmen, recommended non-renewal and said decision was made prior to the questioning of the Chief. In addition, the employer failed to follow the progressive discipline, provided in its personnel policy, in effecting the non-renewal. Since the employee's job was already in jeopardy prior to any protected activity, the Board held that such good cause was the sole reason for the discharge and dismissed the complaint.

71.227 72.312 72.317
72.1 72.314 72.362
72.3 72.315

Bath Firefighters Ass'n v. City of Bath, MLRB No. 80-44, 3 NPER 20-12002 (Oct. 17, 1980), appeal dismissed, City of Bath v. Maine Labor Relations Bd., No. CV-80-114 (Me.Super.Ct., Sag.Cty., May 2, 1983)

FACTS: For several years, the employer used a pay period ending on Thursday of each week, with payment for the week being made on Thursday of the same week. Under this system, paychecks had to be prepared on Tuesday in order to be available for distribution on Thursday. The employer notified its employees' bargaining agents of its intention to change the payroll system to provide for a one-week lag in the payment of wages. The bargaining agents demanded and the employer refused to negotiate over said change, with the latter maintaining that it was not a negotiable subject.

I § 968(5)(B): The parties stipulated at the prehearing conference that there were no issues of material fact involved herein and agreed to submit the dispute to the Board through written memoranda of law.

09.380 71.251
71.228 71.5

II § 965(1)(C): Pay plans, including the length of the pay period, the frequency of payment, and the day on which the employees receive their checks, are integrally related to working conditions and are mandatory subjects of bargaining. A unilateral change in a pay plan violates the duty to bargain.

43.11 72.5
43.124 72.6

III § 965(1)(C): There is no inherent or implied management prerogative exception from the statutory duty to bargain. While none of the limited exceptions to the unilateral change rule apply, the employer may be able to lawfully implement a new pay plan unilaterally, after negotiating thereon to the point of bona fide impasse.

43.9 72.663
72.586 72.665
72.66

IV § 968(5)(E): The complainant simultaneously filed its prohibited practice complaint with the Board and a Complaint for Injunctive Relief in the Superior Court. Finding that "it appears that Defendants have engaged and are threatening to further engage in unilateral changes in the payment of wages and salaries to its" bargaining unit employees, the Court granted a Temporary Restraining Order and, after hearing on the complainants' motion therefor, a Temporary Injunction, enjoining the employer from making "any unilateral change in payment of wages or salaries" to its organized employees until after the Board's ruling on the negotiability status of the proposed change.

74.20 83.2 83.234
74.37 83.23 83.27
74.373 83.233

V § 968(5)(C): As remedies for the employer's threatened unlawful unilateral change, whose implementation has been enjoined by the Superior Court pending the Board's ruling on the merits, the Board ordered that the employer, its City Council and City Manager, and their representatives and agents: (1) cease and desist from attempting to implement any change in its payroll system without first notifying and bargaining with the unions representing the affected employees and (2) take the affirmative action of notifying and bargaining with any union representing employees affected, before attempting to implement any change in the employees' pay plan.

74.14 74.31
74.15

Lewiston Teachers Ass'n v. Lewiston School Committee, MLRB No. 80-45, 2 NPER 20-11038 (Aug. 11, 1980)

FACTS: School nurses once employed by the Board of Health, represented by AFSCME, and covered by a multi-employer contract which included both the Board of Health and the School Committee, were hired by the School Committee. The School Committee also had a bargaining agreement with the Teachers Association which represents its professional employees. A unit clarification proceeding resulted in a determination that the nurses were in the bargaining unit represented by the Teachers Association. The employer then made unilateral changes in the nurses' working conditions, arguably to conform the same to those in the Teachers Association agreement.

I § 966(2): The findings of fact describe a multi-employer unit in Lewiston; however, since it was created by agreement, the appropriateness of the unit had never been examined by the Board. Each employer in the unit consisted of the Board of Mayor and Alderman, the Board of Finance, and one of nine boards or commissions.

11.13
41.131

II § 964(1)(A): A violation of any sub-section of § 964(1) inherently constitutes a derivative violation of § 964(1)(A); therefore, an independent violation of § 964(1)(A) need not be established in such instances.

72.1
72.18

III § 966(1) & (3): Unit descriptions, although usually included in collective bargaining agreements, are essentially timeless and have a life of their own without regard to the expiration of the agreements. This existence lasts from initiation by unit determination or agreement until changed by unit clarification or agreement. Once determined, either ab initio by the executive director or by agreement, the circumstances surrounding the formation of the unit may have changed sufficiently for a unit position to be claimed by different bargaining agents for different units. The resolution of such claims is uniquely the province of the executive director or his designee, subject to review by the board.

01.24	36.114	36.217
33.313	36.12	36.32
36.1	36.2	

IV §§ 966(3) & 964(1)(E): As a result of a unit clarification decision, school nurses, formerly employed by the municipal welfare department and hired by the school committee, were added to the teachers bargaining unit. Since the teachers' unit description included all certified professional employees of the school department, except for certain named classifications, and since they were certified professional employees, the nurses were within the scope of the recognition clause of the teachers unit agreement. Since the classification was within the scope of the recognition article for the unit to which it was assigned, the terms of the agreement which apply to the classification cannot be unilaterally reopened for negotiation during the duration of the agreement. Both parties are bound by the agreement to those terms which sensibly and reasonably apply to the classification added to the unit mid-term. Among such applicable provisions are: the grievance procedure, a just cause for discipline article, and insurance coverage.

36.222	41.34	46.641	72.590	73.478
36.33	41.8	46.642	72.664	
36.34	46.64	72.511	72.666	

V §§ 966(3) & 964(1)(E): If a unit clarification resulted in adding to a unit a classification that was not reasonably within the scope of the recognition clause of the bargaining agreement for that unit, the balance of the agreement would also not apply to them so as to foreclose mid-term negotiations over the wages, hours, and working conditions for such positions. Thus, inclusion in a unit does not automatically mean coverage by an existing contract. Despite this dicta, the Board stated later in the opinion that, in unit clarification situations, stability of labor relations is fostered by the applicability of as many generalized provisions of the relevant collective agreement as possible.

36.222	41.34	46.641	72.590	73.478
36.33	41.8	46.642	72.664	
36.34	46.64	72.511	72.666	

VI § 965(1)(B) & (C): A party is legally required to bargain over the mandatory subjects whenever demanded, unless waived or agreed to in writing for a period not to exceed three years. One type of agreement which will effect such waiver is a bargaining agreement article covering the particular topic. Another type of agreement which can bar, for a time, the raising of a subject for bargaining is a "zipper clause." The "zipper clause" in the relevant agreement stated that the agreement was the entire agreement between the parties and that all matters that were or might have been discussed were deemed to have been discussed and resolved by the agreement. Zipper clauses must be carefully analyzed and strictly construed in determining whether they constitute a clear and unmistakable waiver of the right to bargain. At the time that the bargaining agreement in question was negotiated, the nurse classification, added to the unit mid-term through unit clarification, was in a different unit represented by a different bargaining agent. Because a bargaining agent is the exclusive representative of the employees in the unit for which it was certified or recognized, neither the employer nor the bargaining agent could have legally negotiated over the nurses' working conditions at the time that the agreement was negotiated; therefore, the zipper clause did not preclude mid-term bargaining in this instance. Moreover, if a clause clearly and unambiguously waived bargaining rights with resepct to new classifications which might be added to the unit mid-term, without providing for wages and other conditions for such positions, the Board would hold such a clause to be contrary to the purpose of the Act expressed in § 961. Such a clause would contradict the bargaining agent's duty to represent all public employees within the unit and would violate sections 964(1)(A) and (2)(A). The Board would hold that such a clause is not a waiver of the bargaining rights of employees added to the unit mid-term.

01.27	09.641	21.4	23.3	46.642	72.590	73.478
09.6	09.66	21.9	41.34	72.1	72.666	
09.612	09.661	21.91	46.64	72.51	73.1	
09.64	21.12	22.3	46.641	72.511	73.113	

VII § 965(1)(last para.): This section provides that, whenever it intends to negotiate over wages or any other item requiring the appropriation of money, the bargaining agent must give the employer written notice of such intention at least 120 days prior to the end of the employer's current fiscal year. The failure to provide the required notice does not excuse the employer from the duty to bargain since it is still required to negotiate, upon demand, over items that do not involve the appropriation of money. Second, the requirement for giving the "120-day notice" applies only to negotiation or renegotiation for an entire, existing bargaining unit. It does not apply to mid-term negotiations occasioned by adding new classifications to a bargaining unit through unit clarification. In the former situation, the employer is entitled to adequate notice of intent to bargain over money matters; in the latter case, the employer is in control of when the employees are hired and the Legislature did not intend the 120-day notice requirement to apply thereto.

07.24	36.3	41.32	46.642	72.614
07.25	36.33	41.35	72.511	72.65
36.222	41.3	46.64	72.52	72.66

VIII § 965(1)(B): This section requires a party to meet within 10 days after receipt of a written notice from the other party requesting a meeting for collective bargaining purposes, unless the parties have agreed otherwise in a prior written agreement. The employer offered to meet within 10 days of receipt of the first 10-day notice and a meeting was later held; therefore, there was no violation. The employer ignored the second 10-day notice and, hence, violated this section. In the absence of clear evidence that the requesting party is abusing this provision, it will be strictly enforced.

41.3	72.52
41.32	72.537

IX § 965(1)(C): Unilateral changes in the wages, hours, and working conditions of organized employees violate the duty to bargain; however, the employer does not have to negotiate over changes that are required by state law, such as 5 M.R.S.A. §§ 109(1), 1001(10), and 1001(25) which require that school nurses employed by a school committee be covered by the Maine State Retirement System. In such a case, impact bargaining is not required prior to implementing the change.

03.3	43.136	46.643	72.617
03.33	46.2	72.535	72.66
03.35	46.21	72.589	72.667

X § 965(1)(C): The frequency of wage payments for employees added to a bargaining unit mid-term through a unit clarification was changed from weekly, as required by the agreement covering their former unit, to bi-weekly, as required by the agreement covering their new unit. Since the bi-weekly payroll provision of the bargaining agreement for the new unit can sensibly and reasonably be applied to new employees added to the unit, the employer did not violate the duty to bargain by applying this portion of the agreement to the new employees. The same analysis controlled an alleged violation concerning a change in the added employees' health insurance coverage.

09.64	21.91	36.33	43.131	72.65
11.16	36.222	41.8	72.582	72.66
21.9	36.3	43.124	72.590	72.664

XI § 965(1)(C): Citing the State Retirement Law, the employer terminated Social Security coverage for the school nurses. While the Retirement Law does preclude teachers covered by the state retirement plan from Social Security coverage, it does not preclude such coverage for school nurses. Since the bargaining agreement for the unit to which they were assigned was silent on the topic of retirement and pensions, waiver might have been found if the law treated school nurses and teachers similarly. Since it does not and since the relevant bargaining agreement is silent thereon, the employer's unilateral change in this working condition violated the duty to negotiate in good faith.

03.33	09.6	36.3	43.136	46.64	72.590
03.35	09.641	36.33	46.2	46.642	72.65
04.23	36.222	41.8	46.21	72.511	72.666

XII § 965(1)(C): The employer announced its intention to discontinue group life insurance coverage for the school nurses; however, when the bargaining agent protested the proposal, the employer did not implement it. There was no unilateral change and, hence, no violation of the duty to negotiate in good faith.

72.131	72.611
72.591	72.66

XIII §§ 962(7) & 965(1)(C): The school nurses had worked 35 hours per week for the school committee and 5 hours per week for the Board of Health and the latter body discontinued their employment. There was no evidence in the record that the school committee had anything to do with the reduction in the number of hours that the nurses worked for the Board of Health; therefore, the portion of the complaint charging a unilateral reduction of the nurses' hours against the school committee was dismissed.

09.1	11.13	72.667
09.111	72.66	

XIV § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the Respondent School Committee, its members, agents, and successors: (1) cease and desist from (a) refusing to negotiate with the nurses' new bargaining agent over those of the mandatory subjects affecting the nurses which are not settled in the current bargaining agreement, and (b) refusing to meet with the bargaining agent within ten days after receipt of a written notice requesting meeting for collective bargaining purposes; and (2) take the following affirmative action, necessary to effectuate the purposes of the Act: (a) upon request, make the school nurses whole for loss of participation in the Social Security System, first by seeking retroactive coverage as if participation had been continuous and, if that is not possible, by payment directly to the nurses of the amount that would have been contributed to Social Security by the employer had the coverage been continuous, and (b) notify the executive director in writing within 30 days of receipt of the order of the steps taken in compliance therewith. If the union does not agree that the nurses have been made whole, it should notify the executive director in writing within 45 days from receipt of the order and the executive director will establish a procedure for the submission of facts and argument to the Board on which a supplemental order can be based.

74.14	74.334
74.16	74.34
74.31	74.355

Teamsters Local Union No. 48 v. City of Bangor, MLRB No. 80-46, 3 NPER 20-12000 (Oct. 6, 1980)

I § 968(5): While it may be preferable for parties to resolve their disputes through their collectively-bargained grievance procedure, the existence or use of such procedure does not displace the Board's jurisdiction. Where necessary to adjudicate a prohibited practice, the Board may interpret a bargaining agreement, give effect to its terms, and proscribe conduct which is a prohibited practice even through it is also a breach of the agreement, remediable through the grievance procedure.

01.27 09.25 47.56 74.43
01.28 46.61 71.8
09.23 47.54 74.12

II § 968(5): Citing Collyer Insulated Wire, 192 NLRB 837 (1971), the Board refused to defer or to dismiss a case on the employer's motion, in a situation where the grievance process was not available.

47.54 71.81
71.8 71.813

III § 965(1)(C): The issue presented was whether the employer had implemented an unlawful unilateral change by requiring municipal police officers to work at the county jail, in response to an emergency situation at that facility, and compensating the officers at the overtime rate therefor. The management rights article of the parties' collective agreement reserved to the employer the right to change work assignments and another article described the unit employees' duties as being those that come under the jurisdiction of the Chief of Police, including the preservation of life and property within the city. Since the jail work assignment was made for the purpose of preserving order and protecting property within the city, it was within the scope of the duties agreed to in the parties' collective agreement; therefore, the assignment was not an unlawful unilateral change and the Board dismissed the complaint.

09.64 46.641 72.65 72.665
09.642 71.227 72.651
09.66 72.511 72.664

Teachers' Association of S.A.D. #49 v. Board of Directors of M.S.A.D. #49, MLRB No. 80-49, 3 NPER 20-12005 (Nov. 18, 1980)

FACTS: The Superintendent of Schools included comments about on-going negotiations in his regular newsletters to all staff. In two newsletters, the Superintendent indicated that the district budget would be finalized on a certain date and that it would be "prudent" for the negotiations to be completed by that time. The Superintendent also suggested that the employees should consider an alternate medical insurance carrier, knowing that the negotiating ground rules precluded such consideration during the current round of bargaining. Without notice to the bargaining agent, the Employer sent an individual contract of employment to each unit employee during bargaining, indicating the employee's current salary and the salary for the ensuing year if the bargaining agent agreed with the employer's most recent wage offer. The employees were asked to sign the contracts and return them to the employer.

I § 968(5)(B): At the prehearing conference, the parties stipulated to all the relevant facts and agreed to submit their dispute to the Board on the basis of the pleadings, stipulations of fact, exhibits, and written argument. The Board decided the controversy on that basis.

09.380 71.22 71.228
71.21 71.224 71.251

II § 964(1)(C): This section prohibits public employer support for and domination and control of public employee organizations. The employer's direct communication with employees during bargaining does not violate this section.

72.2 72.26
72.25

III § 964(1)(A): During the collective bargaining relationship, the employer retains its constitutional right to communicate directly with individual unit employees. The constitutional standard for protected speech has been codified in the NLRA [29 USC § 158(c)], the relevant

portion of which states that "expressing any views, argument, or opinion or the dissemination thereof . . . is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit." This standard is constitutionally required in situations arising under Maine law despite the absence of a section parallel to § 8(c); therefore, an expression of opinion that is noncoercive in nature is constitutionally protected.

04.1 35.521 72.13 72.55
09.393 35.5212 72.131 72.591
11.7 72.1 72.17

IV § 964(1)(E): The employer may issue individual contracts of employment to bargaining unit employees, so long as such contracts are consistent with the terms of the collective bargaining agreement. On other other hand, the employer may not bargain directly with individual unit employees because such action circumvents the bargaining agent with whom the employer must negotiate, exclusively and in good faith. The individual contracts of employment here, distributed without prior notice to the bargaining agent, created the impression that the employer was negotiating directly with the unit employees. The letters appeared to be contract offers, they required the employees' agreement that their contents were correct, and they required the employees' signatures. Although the bargaining agent cannot be insulated from outside pressures during the bargaining process, the employer cannot lawfully seek to capitalize on the employees' inability to engage in work stoppages, slowdowns, and strikes through the individual bargaining tactic used here.

46.16 72.17
61.2 72.5
64.2 72.55

V § 964(1)(A): If, it may reasonably be said, that conduct tends to interfere with the free exercise of employee rights protected by the Act, such conduct violates this section. The employer's individual contracts constituted unlawful interference, restraint, and coercion because: (1) although impasse is a two-sided situation, the contracts focused blame for failure to reach a successor agreement on the bargaining agent; (2) the contracts said that the only figure that could be mentioned for the ensuing year's salary was that represented by the employer's latest wage offer, without mentioning the union's latest position; and (3) the contracts referred to the employer's latest offer as being its "last" offer, indicating finality. In the circumstances, the individual contracts tended to circumvent the bargaining agent; therefore, they interfered with the employees' right to bargain collectively.

21.4 72.13 72.55
46.16 72.131
72.1 72.17

VI § 968(5)(C): As remedies for the violations established in the record, the Board ordered the MSAD No. 49 Board of Directors, the Superintendent of Schools and officers, agents, and successors to: (1) cease and desist from refusing to negotiate with the bargaining agent in good faith; (2) cease and desist from interfering with the free exercise of rights guaranteed by the Act by making implied threats to unit employees of loss of advantageous conditions of employment unless the bargaining agent agrees with the employer's bargaining proposals; (3) return the signed individual contracts of employment to the unit employees; and (4) notify the Executive Director, in writing, within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14 74.32
74.16 74.338
74.31

Council #74, AFSCME v. City of Bangor, MLRB No. 80-50 2 NPER 20-11041 (Sept. 22, 1980); rev'd, City of Bangor v. Council 74, AFSCME, No. CV-80-563 (Me.Super.Ct., Pen.Cty., June 11, 1981)

FACTS: The parties' collective bargaining agreement provided that, if during the term of the agreement either the Legislature amended the Act or the Law Court construed the Act to permit union security provisions in public employee collective bargaining agreements, the issue of union security would be open for mid-term negotiation. In Opinion of the Justices, 401 A.2d 135 (Me. 1979), the Justices opined that a "fair share" union security provision did not violate the parallel provisions of the State Employees Labor Relations Act. The bargaining

agent then demanded that the employer negotiate over a fair share provision and the employer refused to do so. The union successfully prosecuted a grievance thereon through arbitration and filed a prohibited practice complaint charging refusal to bargain.

I §§ 968(5)(A) & 965(1)(B): When a single act violates both the labor relations law and the collective bargaining agreement, the aggrieved party may simultaneously seek relief through the agreement's grievance procedure and through the Board's prohibited practice complaint mechanism. In most cases, when a prohibited practice complaint concerns a matter already decided by an arbitration panel, the Board simply reviews the arbitration decision under the Spielberg Manufacturing Co. standard. The Board opted not to defer here because: (1) the question of whether a party has waived its statutory bargaining rights is particularly a matter of statutory interpretation and (2) the negotiability dispute would not be settled even if the arbitration decision was affirmed by the courts.

01.27	09.25	09.66	46.63	47.86	71.815	71.822
01.28	09.6	21.9	47.54	71.8	71.82	71.823
09.23	09.64	46.61	47.8	71.811	71.821	

II §964(1)(B): In Opinion of the Justices, the Law Court construed the parallel section of the State Act not to prohibit "fair share" union security provisions. The two sections--964(1)(B) and 979-C(1)(B)--are virtually identical; therefore, the Court has construed the Act to permit such union security provisions. In light of the bargaining agent's duty to represent all unit employees without regard to union membership, the Court held that a "fair share" provision did not violate the Act. Although not a decision of precedential value, the Opinion of the Justices did "construe" the Act and was the contingency bargained for in the re-opener article. The conditional waiver of the right to bargain over union security mid-term was no longer operative when the employer failed to honor the union's ten-day notice.

03.22	24.14	24.194	24.221	43.83
09.412	24.19	24.22	43.8	

III § 965(1)(C): Inherent in a fair share provision, as in other union security provisions, is the requirement that something be done as a condition of employment; therefore, such provisions are working conditions and mandatory subjects of bargaining. The notion of fairness embodied in a fair share provision would be meaningless if such a provision were merely a permissive subject. In any event, the parties have agreed in writing to negotiate thereon and violation of such explicit agreement to negotiate over even a permissive matter probably would violate the duty to bargain.

01.26	24.194	41.34	42.46	43.8	72.54	73.442
24.14	24.22	42.1	42.47	43.83	72.589	73.477
24.19	24.221	42.2	42.48	72.5	73.4	

IV § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the City of Bangor, its officers, agents, and successors: (1) cease and desist from refusing to bargain collectively by failing to honor a 10-day notice or by refusing to negotiate over a union security provision; (2) meet with the bargaining agent within 10 days of the date of the order and negotiate over a union security provision; and (3) notify the Executive Director, in writing within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14	74.31
74.16	

V SUPERIOR COURT:
The employer appealed the Board order and while said appeal was pending the Law Court issued its decision on the employer's appeal of the related arbitration decision. In City of Bangor v. Local 926, Council 74, AFSCME, 430 A.2d 41 (Me. 1981), the Law Court held that "[t]he bargained-for trigger for mandatory negotiations on a union security clause was plainly a judicial declaration by the whole Supreme Judicial Court in a litigated case so that the construction of section 964 so declared would be precedentially binding upon all persons, including the present contracting parties." The Opinion of the Justices was merely the opinion of the several justices, acting individually, and had no precedential or stare decisis consequences. Bound by the Law Court decision, the Superior Court held that the duty to bargain mid-term had never arisen in this case, since the contingency upon which the re-opener clause was based had not occurred; therefore, the Court reversed the Board's holding that the employer had failed to negotiate in good faith in the circumstances.

03.22 81.522
09.412

Holmes v. Maine State Employees Ass'n, MLRB No. 80-52, 2 NPER 20-11040 (Sept. 8, 1980)

FACTS: Complaint charged that the bargaining agent had violated the duty of fair representation by: (1) refusing to process a grievance to arbitration and (2) discriminating against a unit employee because of past animosity by the employee against the union. The employee had previously circulated a petition among a few unit employees, challenging the union's conduct of a steward election which the employee ultimately won. A union business agent and the employer had agreed to extend the time limits for invoking arbitration to allow further discussion of three grievances. Although the bargaining agreement provided that such mutual extensions would not waive arbitration rights, the employee feared that such extension would extinguish the right to invoke arbitration. The parties settled one of the three grievances.

I § 979-H(4): At the close of the Complainant's case, the Respondent moved to dismiss the complaint, on the ground that a prima facie case had not been established, assuming all of Complainant's allegations to be true. The Board granted the motion, after deliberation.

09.33 71.227
71.11 71.512

II § 979-F(2)(B): The Board assumed, arguendo, that this section imposed a duty of fair representation on the certified bargaining agent that was enforceable through the prohibited practice complaint mechanism.

22.3 23.6 73.113
23. 73.1

III § 979-F(2)(B): No individual employee, including a union steward, has the absolute right to have a grievance go to arbitration. Otherwise, effective agreement administration would be impossible; therefore, decisions on whether to proceed to arbitration must be left to the proper exercise of discretion by the union. The mutual extension of grievance time limits is often in the best interest of all parties concerned. Here, the employer did not raise any objection to arbitrability, on the basis of missed deadlines, the parties settled one grievance and the other two were still alive. In the circumstances, there was no evidence that the bargaining agent had failed to properly process the grievances initiated by the Complainant.

09.672 22.41 23.2 47.11 47.513
21.13 22.72 23.24 47.3 47.53
22.37 22.73 23.25 47.51 47.73

Woolwich School Committee v. Woolwich Teachers Ass'n, MLRB No. 80-55, 3 NPER 20-12010 (Feb. 27, 1981)

I § 968(2): The parties reached a stipulation of the relevant facts at the hearing before the Board and submitted their dispute on the basis of the stipulated record and written memoranda of law.

09.380 71.228
46.17

II § 965(1)(C): A "fair dismissal" proposal for probationary teachers is a non-mandatory subject of bargaining. In 1976, the Law Court held that "just cause" proposals for teachers were non-mandatory subjects because the education laws vested the school committees with the "exclusive discretion regarding dismissal or nonrenewal of teachers." Winslow School Committee v. Winslow Education Ass'n, 363 A.2d 229 (Me. 1976). Later, the Legislature amended the education law, 20 MRSA § 161(5), to provide that "just cause" for dismissal or nonrenewal of non-probationary teachers is a "negotiable item." With all of the controversy surrounding the Winslow decision, the Legislature's failure to include probationary teachers in the amendment to the education laws reflected the intent to leave the exclusive discretion to dismiss or nonrenew probationary teachers with the school committees. The "fair

dismissal" for probationary teachers proposal's prima facie eligibility for mandatory bargaining is overridden by the statutory discretion vested in the school committees.

03.31 42.12 43.23 43.99
03.4 42.32 43.5
16.45 43.2 43.61

III § 965(1)(C): The fact that the subject matter of a proposal would not be subject to the contractual grievance procedure does not affect the negotiability of the proposal.

43.73
47.521

IV § 964(2)(B): The union committed a per se violation of the duty to bargain by insisting to impasse that a non-mandatory subject be negotiated. The union refused to remove the non-mandatory subject from the table for over 6 months despite the employer's request that it be removed because it was not a mandatory subject. By declining to remove the proposal, the union was insisting that it be negotiated. Impasse was reached since it was clear that the parties were deadlocked over the proposal. Insistence on bargaining a nonmandatory subject violates the duty to bargain because such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

51.01 73.41 73.45
73.4 73.436

V § 964(2)(B): The parties' negotiating ground rules provided that mediation, fact-finding, or arbitration would not be invoked until impasse was reached. The union did not breach the ground rule by requesting mediation because the type of impasse contemplated in the rule was reached. The parties had negotiated for some time over the issues in question and the union believed in good faith that settlement could not be reached without outside assistance. In any event, a party can request mediation at any time prior to arbiration, regardless of whether an impasse was reached under § 965(2) of the Act.

41.31 52.1 52.15
51.01 52.14 52.3

VI § 964(1)(E): The employer's refusal to participate in mediation for 6 weeks was a per se violation of the duty to bargain. The fact that the mediation request included a non-mandatory subject did not excuse the employer from its statutory obligation. The proper procedure would have been for the employer to participate in mediation, maintaining its position that the non-mandatory subject be removed from the table and file a prohibited practice complaint, charging the union with violation of the duty to bargain. Even if a request for mediation contained only non-mandatory subjects or if it was filed in violation of the ground rules, the employer would be statutorily required to participate in mediation. Self-help remedies, such as a refusal to participate in mediation, are not among the options provided by the Act.

41.31 52.15 72.75
52.1 72.5
52.12 72.591

VII §§ 968(5)(B) & 964(1)(E): A party's subsequent good faith bargaining does not render moot a charge that the party had earlier violated the duty to negotiate in good faith.

71.230 73.479
72.591

VIII § 968(5)(C): As remedies for the violations established in the record, the Board ordered: (1) the respondent union, its agents, members, and bargaining agents, to cease and desist from insisting on bargaining over its non-mandatory proposal to the point of impasse and (2) the complainant employer, its representatives, and agents cease and desist from refusing to participate in mediation as required by § 965(2) of the Act.

74.14
74.31

Teamsters Local Union No. 48 v. Town of Bar Harbor, MLRB No. 81-01, 3 NPER 20-12001 (Oct. 16, 1980)

FACTS: After the employees had selected the union as their bargaining agent in a certification election, the employer, without notice to the bargaining agent, discontinued the practice of giving each unit employee 15 gallons of gasoline each week and started reimbursing the employees 22 cents per mile for the miles actually travelled on the employer's business by the employees in their private vehicles.

I §§ 965(1)(C) & 964(1)(E): A weekly gas allotment system is a form of wages and is a condition of employment. The employer may not unilaterally change the working conditions of unit employees, once said unit is represented by a bargaining agent. Such a unilateral change is a violation of the duty to bargain. The burden of raising a matter for negotiation lies with the party wishing to make a change in existing conditions.

09.651 43.48 72.6 72.613 72.666
43.11 72.52 72.611 72.614
43.141 72.590 72.612 72.63

II § 964(1)(E): The employer alleged that the unilateral change at issue was required in response to an emergency--one of the recognized exceptions to the unilateral change rule. Only a serous situation requiring action before it would be possible to negotiate with the bargaining agent is contemplated by the business exigency exception to the unilateral change rule. A 10 percent reduction in the employer's annual gas allotment is not such an emergency, especially where the employer waited 6 months before responding to the "emergency."

72.662
72.667

III § 968(5)(C): As remedies for the violation established in the record, the Board ordered the Town of Bar Harbor, its Town Manager, and their officers, agents, and successors, to: (1) cease and desist from refusing to negotiate in good faith by making unilateral changes in the working conditions of unit employees represented by a bargaining agent and (2) take the following affirmative action, necessary to effectuate the policies of the Act: (a) reinstate the weekly gasoline allotment system; (b) make the unit employees whole by paying each of them an amount equal to the fair market value of 15 gallons of gas, for each week that the unilateral change was in effect, less the mileage payments made to said employees during that time; and (c) notify the Executive Director in writing within 20 days of the date of the order of the steps taken in compliance therewith.

74.14 74.32 74.355
74.16 74.34
74.31 74.345

Teamsters Local Union No. 48 v. City of Waterville, MLRB No. 81-02, Executive Director Action (Oct. 23, 1980)

I § 968(5)(B): Under the statute, the executive director dismissed a complaint alleging only acts that occurred more than 6 months prior to the filing of the complaint.

01.21 71.13
01.28 71.227

II § 968(5)(B): The mere mention of an act during a hearing before the Board within the 6-month limitation period, without the filing of a complaint charging that said act violated the statute, is inadequate to satisfy the limitations period on the Board's prohibited practice jurisdiction.

06.3
71.13

Maine State Employees Ass'n v. State of Maine, MLRB No. 81-06, 4 NPER 20-12021 (Apr. 28, 1981); appeal docketed but dismissed by appellant, No. CV-81-232 (Me.Super.Ct., Ken.Cty., Nov. 28, 1983)

I § 979-C(1)(A) & (E): An employer may properly take into consideration the wages and benefits negotiated for unit employees when deciding wage and benefit levels for unrepresented employees, and a "policy of uniformity" between unit and non-bargaining unit employees is lawful. Texas Foundaries Inc. v. N.L.R.B., 211 F.2d 791, 793 (5th Cir. 1954).

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

II § 979-C(1)(A) & (E): A "policy of uniformity" does not impermissibly breach the "wall of separation" established by the Act between unit and excluded employees. While the excluded employees received the wage increases and some of the benefits negotiated for the unit employees, the State did not negotiate with the excluded employees, did not make them subject to the grievance procedure, did not include them under any negotiated job security provisions, or otherwise extend to them any of the rights and privileges accorded to unit employees. We therefore cannot say that the State is, contrary to the intent of the Act, treating the excluded employees as bargaining unit members.

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

III § 979-A(6): Section 979-A(6), by separating State personnel into bargaining unit employees and excluded employees, does not mandate that the State make an entirely independent determination of the excluded employees' wages and benefits. Even if the State was required to make an independent determination, the record shows that various State officials did engage in considerable discussion about the wage and benefit increases to be granted to the excluded employees. The State thus did not "automatically" grant the negotiated items to the excluded employees, but did make an independent determination of the proper wage and benefit increases, deciding to grant negotiated wage increases and some of the negotiated benefits, as well as some additional benefits. The fact that "political" considerations were involved does not make the determination improper.

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

IV § 979-C(1)(A) & (E): While we appreciate that some of the unit employees feel it unfair that negotiated wages and benefits were granted to the managerial and confidential employees, we cannot say that the granting of the benefits reasonably tended to interfere with the unit employees' rights in violation of § 979-C(1)(A), or amounted to a refusal to bargain in violation of § 979-C(1)(E). An employer is entitled to attempt to satisfy its excluded employees' interests, and the State's efforts to do so here were proper.

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

V § 979-C(1)(A): The fact that some "extra" benefits--a life insurance plan and an income protection plan--were granted to the excluded employees does not constitute unlawful interference with the unit employees' § 979-B rights. It is the State's prerogative to establish the wages and benefits for the confidential and managerial employees. This prerogative was properly exercised when State officials decided to grant some of the negotiated items as well as the additional benefits. The grant of the additional benefits cannot reasonably be construed as a "message" to unit employees that the State was displeased with their bargaining activities.

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

VI §§ 979-C(1)(A) & 979-E(3): While the wishes of the employees affected is a relevant factor in a unit clarification proceeding and while the employer was seeking to have approximately 200 employees excluded from bargaining units at the time that additional benefits were extended to excluded employees, the employees' wishes on unit inclusion is only a relatively minor factor in the unit clarification process. The most important factor in unit clarifications is whether the circumstances surrounding formation of the unit have changed suf-

ficiently to warrant modification in the composition of that unit. While granting some additional benefits to excluded employees might tend to persuade unit employees to favor their being excluded from the unit, this is overshadowed by the fact that such employees would lose several important contract rights if they were removed from the bargaining unit.

16.1 33.21 33.39 36.121 72.1
16.2 33.3 36.1 36.123 72.13
33.2 33.34 36.12 36.2 72.171

VII § 979-C(1)(E): "Parity" cases hold that a policy of granting one bargaining unit the same item negotiated for a second unit represented by a different bargaining agent is unlawful because it imposes an improper burden on the second union. See, e.g., Local 1219, IAFF v. Conn. Labor Relations Bd., 171 Conn. 342, 370 A.2d 952 (1976); Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154 (Me. 1976). Absent from these cases is a fundamental element present in this case: The State has the sole discretion in determining the excluded group of employees' wages and benefits and, in making this determination, may properly look to the negotiated wages and benefits. The employers in the parity cases were not free to determine unilaterally the wages and benefits of one of the groups of employees, but were required to bargain with both groups. The State's prerogative to set the excluded employees' wages and benefits, which distinguishes this case from the parity cases, overrides the union's assertion that the State is forcing it to bargain for the managerial and confidential employees.

11.7 43.9 72.13
16.1 46.9 72.171
16.2 72.1 72.575

VIII § 979-C(1)(A): While concluding that the employer's actions did not violate the Act, the Board rejected the employer's argument that its actions with regard to managerial and confidential employees can never constitute a violation of the Act. The law is well settled to the contrary; for example, the discharge of an excluded employee can violate the organized employees' rights in certain circumstances. NLRB v. Eagle Material Handling Co., 558 F.2d 160 (3d Cir. 1977).

11.7 43.9 72.1 72.575
16.1 46.9 72.13
16.2 71.14 72.171

Council 74, AFSCME v. City of Bath, MLRB No. 81-09, 3 NPER 20-12012 (Mar. 4, 1981)

I § 964(1)(E): The employer cannot unilaterally decree that certain employees are no longer in the bargaining unit and refuse to negotiate over their wages, hours, and working conditions for that reason.

32.97 36.217
33.1 36.33
36.2 72.51

II §§ 964(1)(E) & 966(3): The mere filing of a petition for unit clarification, seeking the exclusion of certain employees from a bargaining unit, does not relieve the employer of its duty to negotiate with the bargaining agent for the wages, hours, and working conditions of such employees. The union was the bargaining agent for all of the unit employees throughout the dispute; therefore, the employer's duty to negotiate with the union continued unabated until the employer's petition is granted.

32.95 33.1 36.2 36.32 72.51
32.97 36.111 36.3 36.33

III §§ 964(1)(E) & 966(3): When an employer believes that certain employees are improperly in a bargaining unit and the employer has filed a petition for unit clarification, seeking the exclusion of said employees from the unit, the employer may lawfully condition its bargaining over the mandatory subjects for said employees on certain conditions, to wit: (1) that any agreements reached concerning said employees would not be binding, if the representation petition seeking their exclusion from the bargaining unit is granted; (2) the union would agree in writing that the employer is not waiving its right to seek exclusion of the

employees, through a representation petition, merely by negotiating over their wages, hours, and working conditions; and (3) the union agree that the employer's bargaining under the first two conditions did not constitute a prohibited practice, either as a refusal to negotiate in good faith or as a refusal to negotiate with the bargaining agent.

32.95 36.3 72.51
36.111 36.33 72.533
36.217 43.705

Council 74, AFSCME v. School Administrative District No. 1, MLRB No. 81-12, 3 NPER 20-12014 (Mar. 11, 1981), appeal docketed but dismissed by stipulation of the parties, School Administrative Dist. No. 1 v. Council 74, AFSCME, No. CV-81-146 (Me.Super.Ct., Ken.Cty., July, 1981)

I § 968(5)(B): At the prehearing conference, the parties agreed that all allegations of fact contained in the complaint and answer were true; therefore, there were no material issues of fact in the case and the parties agreed to submit their dispute to the Board on the basis of written memoranda of law.

09.380 71.251
71.228

II § 965, last ¶: The 120-day notice requirement, for the bargaining of wages or other money issues, applies to both initial and successor agreement negotiations. There may be mitigating circumstances excusing the failure to timely file a 120-day notice; however, such circumstances must truly be extraordinary. If, as here, the employer's conduct tainted a certification election, the union could serve the 120-day notice at the same time that it files its prohibited practice complaint, seeking to set aside the results of the election, or serve such notice as soon as possible after certification. In either event, the notice might be deemed as having been timely given, even if it was actually given less than 120 days prior to the end of the employer's fiscal year. Here, the union did not serve the notice until five weeks after it was certified and such notice was held to have been untimely.

07.24 09.65 32.92 35.81
07.25 09.651 35.4 35.82
09.5 32.9 35.8

III § 964(1)(E): It is a per se violation for the employer to make unilateral change in mandatory subjects of bargaining during the life of a collective bargaining relationship.

32.95 72.6
72.51

IV § 964(1)(E): Prior to the initial collective bargaining agreement, a dynamic view of the status quo applies; after the contract a static view of the status quo is controlling.

72.612
72.618

V § 964(1)(E): Wage and step increases are mandatory subjects of bargaining. The employer regularly granted its unorganized employees wage and step increases each year and both were granted to the remaining unorganized employees while being withheld from the newly-organized employees. This violated the dynamic status quo. While the amount of step increases was well established, the size of the general annual wage increases varied from year to year. Since the remaining unorganized employees were given an 8 percent wage increase for the year in question and since the only reason the newly organized employees did not receive this increase was their having opted for representation, the Board concluded that the unit employees would have received the 8 percent increase had the dynamic status quo been maintained.

43.11 72.612 74.34
43.113 72.618 74.344
43.114 74.32

VI § 968(5)(C): As remedies for the violation established in the record, the Board ordered that the employer's board of directors, its agents, members, successors, or assigns: (1) cease

and desist from making unilateral changes in the mandatory subject areas for unit employees, without first having negotiated said changes with the bargaining agent; (2) grant the appropriate wage and step increases to the unit employees, retroactive to the date on which the same would have been granted had the dynamic status quo been maintained, plus legal interest thereon; (3) maintain the wage and step increase policy until execution of a collective bargaining agreement or the point of impasse and, in the latter event, the employer may institute its best offer; and (4) notify the Executive Director, within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14 74.32 74.345
74.16 74.34
74.31 74.344

Council 74, AFSCME v. Bangor Water District, MLRB No. 81-15, 3 NPER 20-12011 (Mar. 2, 1981), appeal docketed but dismissed by appellant, Bangor Water District v. Maine Labor Relations Board, No. CV-81-36 (Me.Super.Ct., Pen.Cty., Apr. 8, 1981)

I § 968(5)(B): At the prehearing conference, the parties agreed that there were no material issues of relevant fact in this case and submitted their dispute to the Board on the basis of memoranda of law.

09.380 71.251
71.228

II § 964(1)(E): The law is well settled that an employer must bargain with the certified bargaining agent so long as the certification is valid. The mere fact that the certification is on appeal, in the absence of a stay or of an order overturning the certification, does not relieve the employer of the statutory duty to bargain. There was no ruling that the certification was invalid; therefore, the employer's refusal to bargain, pending resolution of the appeal, violated § 964(1)(E).

32.95 35.4 71.7 72.591 81.333 81.5084
32.96 35.48 72.51 81.191 81.46 81.62

III Rule 62(e), M.R.C.P.: The rule does not stay a certification, pending resolution of an appeal by the Law Court, because: (1) administrative orders underlying Superior Court judgments are not stayed by the Rule; (2) the Rule may apply only to judgments for the payment of money; and (3) the rule is designed to preserve the status quo, pending resolution of the appeal. If applied in the manner suggested by the respondent, Rule 62(e) would change the status quo as it existed at the time of the Superior Court judgment and not maintain it.

81.191 81.46 81.62
81.333 81.5084

IV §§ 964(1)(E) & 965(1)(C): The typical remedy when the employer refuses to bargain with a newly-certified union is to extend the union's certification year so that the union will have at least a full year in which to attempt to reach an agreement. In cases where bargaining is delayed after certification by the employer's dilatory tactics, the date of certification is construed to begin on the date that the employer starts to bargain in good faith. No decertification petitions or other questions concerning representation may be raised during this year.

32.142 32.95 35.82 72.591
32.9 35.4 37.13 74.39
32.91 35.8 72.51

V § 968(5)(C): As remedies for the violation established in the record, the Board ordered the Bangor Water District, its representatives and agents: (1) to cease and desist from refusing to bargain collectively with the certified bargaining agent of its employees; and (2) take the following affirmative action, necessary to effectuate the policies of the Act: (a) negotiate with the certified bargaining agent for its employees; (b) sign, date, and post the notice to employees provided by the Board for a period of 60 days and take reasonable steps to assure that said notice is not altered, defaced, or covered by other material; and (c) notify the Executive Director in writing, within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14 74.31 74.361
74.16 74.36 74.39

Teamsters Local Union No. 48 v. City of Ellsworth, MLRB No. 81-17, 4 NPER 20-12024 (May 28, 1981)

I § 964(1)(E): Under long-established practices, dispatchers had been able to select their shift assignments on the basis of seniority and the duties of the day dispatcher included typing correspondence for the Chief of Police. The employer, therefore, did not violate the duty to bargain by refusing to assign the most senior dispatcher to fill the day shift opening, on the basis of seniority alone. The ability to do the typing work was relevant and could properly be considered in making the assignment.

43.43 72.611 72.66
43.431 72.612 72.667

II § 964(1)(A): The test for unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded or failed, but is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. The totality of the employer's conduct--the refusal to assign the union activist to the day shift, although he had the most seniority; the supervisory employee's pre-election misconduct; the supervisor's comments to the union activist that he had not been assigned to the day shift because the employer was "playing games with him because he had slapped the City in the face and voted for the union"; and the several different reasons given, at different times, for the non-selection--tended to interfere with the employee's free exercise of § 963 rights.

09.12 72.1 72.131 72.18
09.121 72.13 72.134

III § 968(5)(C): As remedies for the violation established in the record, the Board ordered the City of Ellsworth, and its representatives and agents to: (1) cease and desist from interfering with the union activist's exercise of his rights under the Act, by refusing to assign him to the shift that he requested unless he passed a typing test; and (2) take the affirmative action of offering to assign the union activist to the day shift, subject to his successfully completing the usual probationary period. The shift assignment offer was to remain open for 10 days.

74.14 74.31 74.33 74.334
74.16 74.32 74.331 74.335

Teamsters Local Union No. 48 v. Bucksport School Department, MLRB No. 81-18, 3 NPER 20-12009 (Dec. 22, 1980)

I § 964(1)(E): Without prior notice to the bargaining agent, the employer discontinued the established practice of allowing its school bus driver employees to take their buses home at night. Once a bargaining agent has been certified, the employer may not make unilateral changes in the mandatory subjects of bargaining for the organized employees, without negotiating the changes with the bargaining agent. The rationale for this prohibition is that unilateral changes in the mandatory subjects circumvent the duty to negotiate and frustrate the purpose of the Act as effectively as does a flat refusal to bargain. The fact that the benefit involved may have been unilaterally conferred by the employer, and not have been previously negotiated, is irrelevant in application of the unilateral change rule.

32.9 72.51 72.612
32.95 72.611 72.62

II § 964(1)(E): The use of the employer's vehicles to get to and from work involves both wages and working conditions and is, therefore, a mandatory subject of bargaining. The employer's unilateral discontinuance of the practice of allowing the school bus drivers to take their buses home at night is a per se violation of the duty to bargain.

43.1 43.14 43.481 72.611 72.613
43.11 43.141 72.6 72.612

III § 964(1)(E): While the employer offered good reasons for the unilateral change, none of the limited exceptions to the unilateral change rule was present. The employees did not waive the right to bargain about the use of the buses by failing to raise the issue during informal negotiations. The employees had no idea that the employer was considering discontinuing the established practice and, as soon as the employees learned that the practice was terminated, their bargaining agent requested bargaining.

09.6 09.65 72.52 72.613 72.66 72.667
09.613 09.651 72.6 72.614 72.666

IV § 968(5)(C): As remedies for the violation established in the record, the Board ordered that the Bucksport School Department and its representatives and agents: (1) cease and desist from changing any aspect of the unit employees' wages, hours, and working conditions, without first notifying and negotiating with the bargaining agent, unless one of the limited exceptions to the unilateral change rule is applicable; and (2) take the affirmative action, necessary to effectuate the policies of the Act of: (a) immediately reinstating the practice of allowing the school bus drivers to take their buses home at night and maintaining the practice until the bus use policy is resolved through collective bargaining; (b) in the event the policy is not reinstated within 5 days of the date of the Board's order, the employer will be liable to pay each employee the sum of 20 cents for each mile travelled to and from work, for such time as the bus use issue is not resolved through bargaining, plus legal interest thereon; and (c) notify the Executive Director in writing within 20 days of the date of the order of the steps taken in compliance therewith.

74.14 74.31 74.34 74.355
74.16 74.32 74.345

Associated Faculties of the University of Maine v. Association of Independent Professionals, MLRB No. 81-22, 4 NPER 20-12036 (Aug. 19, 1981); Association of Independent Professionals v. Maine Labor Relations Board, 465 A.2d 401 (Me. 1983)

I § 1027(2): Board and Law Court: A group of employees, which is informal, has no constitution, no bylaws, no dues, no membership list, and is run by two co-chairs on a steering committee and whose goal is to oppose union security, is an "employee organization," within the meaning of the Act. A group is an "employee organization" if it engages in some attempt to discuss or treat with the employer, or to persuade or petition him with regard to a labor relations matter. A.I.P. tried to get the employer to resist union security clauses in future contracts and is, therefore, an "employee organization."

09.11 22.6 22.62
22.1 22.61 22.9

II § 1027(2)(A): Board and Law Court: An insurgent employee organization interferes with the rights of the unit employees to engage in protected activity when it sends a notice to all unit employees indicating, falsely, that the relevant bargaining agreement permits the employees to resign union membership and not to pay alternative fees, as provided in the agreement. The notice caused confusion in that some unit employees thought that it came from the bargaining agent and it caused the agent to lose some membership dues. By providing false information, the notice tended to undermine the legitimacy of the bargaining agent.

22.3 73.1 73.31
64.32 73.115 73.33

III § 1027(2)(A): Board and Law Court: The test for a violation of this section is whether, in the circumstances, the charged conduct reasonably tends to interfere with the employees' free exercise of the rights protected by the Act. Subjective intent to interfere with such rights is not essential to establishing a violation. Conduct which interferes with the functioning of the bargaining agent interferes with the employees' right to join and participate in the activities of that agent.

21.2 22.3 73.1 73.31
21.3 64.32 73.115 73.33

IV FIRST AMENDMENT: Board: Threats or misrepresentations which interfere with or coerce employees in the free exercise of the rights protected by the Act are without first amendment

protection. True statements by an insurgent employee organization, in opposition to the bargaining agent, and activities in support of said statements are protected by the first amendment. Law Court: Employer threats or misrepresentations, motivated by anti-union animus, are not constitutionally protected. The statement at issue was made by other employees, the bargaining unit was already organized and represented by a bargaining agent, and no actual interference or coercion was established, only a tendency toward the same.

04.1	24.12	35.521	35.537	73.1	73.117
21.11	35.51	35.5212	35.561	73.115	73.31

V § 1027(2): Board: An organization which merely provides free legal assistance to insurgent employee organizations, but is neither subject to the insurgents' control nor is directly involved in the insurgents' activities, is not an "employee organization" within the meaning of the Act.

09.11	22.1	22.9
09.111	22.6	

VI § 1029(3): Board: A Respondent, against whom the charge was dismissed, prayed for the Board to award it attorney's fees and costs incurred in defending against the complaint. Although the complaint against it was dismissed, the Board held that there was good cause to believe that the Respondent may have violated the Act; therefore, the charge was not brought in bad faith and the Board declined to award attorney's fees and costs.

74.14
74.352

VII § 1029(3) and FIRST AMENDMENT: Board: Having held that false information in a flier constituted unlawful interference, the Board ordered the distributor, an insurgent employee organization, to cease and desist from disseminating false information. Law Court: Reversed this remedy as overbroad. The first amendment means that government has no power to restrict expression because of its message, ideas, subject matter, or content. Any government restriction on freedom of expression aimed at the content of communication presumptively violates the first amendment. To enforce a content-based exclusion, the State must establish that the regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end. In some circumstances, restriction on some first amendment activity may be necessary to achieve the State's legitimate interest in ensuring labor peace and stability. The State has a compelling interest in avoiding disruption, through labor activities, of critical functions; however, no evidence of imminent disruption was presented in the record. The Board's order was not the least restrictive means to accomplish the perceived need for stability here. Where the harm feared could be averted, by a further exchange of ideas, government suppression is conclusively deemed unnecessary. Whenever more speech could eliminate a feared injury, more speech is the constitutionally mandated remedy. Here, a proper remedy would be for the Board to order that the offensive flier not be used or that a corrective notice be issued.

01.28	21.11	73.115	74.31	81.522
01.29	64.32	74.13	74.361	81.523
04.1	64.34	74.17	74.362	

VIII FIRST AMENDMENT: Law Court: The State's interests, as an employer, in regulating the speech of its employees, do not differ significantly from its interests in limiting the speech of the citizenry generally.

04.1	64.32
21.11	64.34

Associated Faculties of the University of Maine v. Association of Independent Professionals, MLRB No. 81-22, Decision and Order on Remand (Oct. 5, 1983)

I § 1027(2)(A): The Board held and the Law Court affirmed that, by distributing a leaflet that contained false information about the representation fee options available to the bargaining unit employees, an insurgent employee organization had violated this section of the Act. The Law Court overturned the Board's order as being on overbroad restriction on constitutionally protected speech and remanded the matter to the Board.

04.1 73.31
73.1

II § 1029(3): As a remedy for the violation established in the record and consistent with the Law Court's decision, the Board ordered the insurgent employee organization to cease and desist from using or distributing the flier that contained the false information. This narrow remedy protected the rights guaranteed by the Act without infringing upon the insurgent organization's right to criticize or contest the representation fee options available under the relevant collective bargaining agreement.

01.29 74.13 74.31
74.12 74.17

Waterville Teachers Association v. White, MLRB No. 81-23, 3 NPER 20-12013 (Mar. 11, 1981)

I § 968(5)(B): Prior to the prehearing conference, the parties agreed that there were no material issues of relevant fact in the case. They jointly submitted a stipulation of fact and relevant documents and agreed that the Board should decide their dispute on the stipulated record and presented their arguments in memoranda of law.

09.380 71.522
71.228

II § 964(1)(E): The issuance of individual contracts of employment, in the context of a negotiated collective bargaining agreement, does not, in and of itself, constitute a prohibited practice, so long as the terms of the individual agreements do not conflict with the provisions of the collective agreement. Here, the collective agreement contained a supremacy clause, under which any inconsistencies between the individual contracts and the bargaining agreement were resolved in favor of the bargaining agreement's terms; therefore, any alleged conflict between the two was moot. The Board distinguished the facts of this case from those in Teachers Ass'n of SAD No. 49, MLRB No. 80-49, because there was no allegation that the employer ever attempted to use the alleged inconsistencies against the unit employees in this case.

46.11 71.230 72.17 72.55
46.16 72.1 72.18

Fox Island Teachers Ass'n v. MSAD No. 8 Board of Directors, MLRB No. 81-28, 4 NPER 20-12020 (Apr. 22, 1981)

I § 965(1)(D): This section requires parties to execute in writing any bargaining agreement arrived at and a refusal to sign such an agreement is a per se violation of the duty to bargain. H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, 525-526 (1941).

07.14 46.55 73.461
09.21 72.571

II § 965(1)(D): While ordinarily there must be a meeting of minds on all issues before a party is obligated by § 965(1)(D) to sign a written contract, when a misunderstanding is "due to the fault of one party, and the other party understands the transaction according to the natural meaning of the words or other acts, both parties are bound by that natural meaning." Butcher's Union Local 120, 154 NLRB 16, 26 (1965). If the negotiators for the "mistaken" party have authority to reach final agreement, in that situation, then said party would be bound to execute a written agreement, along the terms of the tentative agreement regardless of the mistake. Here the Directors' negotiators clearly reserved the right for their principal to ratify agreements reached by said negotiators and they could properly refuse to ratify the agreement.

07.14 09.22 41.31 46.51 72.571
07.141 41.2 46.11 46.52 73.461
09.21 41.22 46.5 46.55

III § 965(1)(C): A principal party may lawfully reserve the right to ratify, so long as its negotiators are clothed with sufficient knowledge, guidelines and authority to make tentative agreements. Once a principal party has reserved the right to ratify, any agreement reached by the negotiators will not be concluded or binding until it is ratified by the principal.

07.14	09.22	41.22	46.5	46.52	73.431
09.21	41.2	41.31	46.51	72.571	73.461

IV § 965(1)(C): Where the parties' ground rules provided that agreements reached at the table were tentative and that each side's principal party--the employer's board of directors and the union's membership--reserved the right to ratify the final tentative agreement, the fact that, on one occasion in an earlier round of negotiations, a binding agreement was finalized without ratification does not establish a "past practice" of the employer waiving the right to ratify. Collective bargaining rights are waived only where there is clear and unmistakable evidence of waiver.

07.14	09.22	09.613	41.22	46.51	72.571
07.141	09.6	09.65	41.31	46.52	73.431
09.21	09.61	41.2	46.5	46.55	73.461

V § 964(1)(E): An informational statement, made by a negotiator to his principal, that the tentative agreement contains a section to which he did not knowingly agree, is not the type of advocacy against a tentative agreement which can be considered evidence of bad faith bargaining. A negotiator's failure to support the tentative agreement is evidence of bad faith bargaining; however, said evidence must be considered together with all of the other evidence relating to the nature and circumstances of the bargaining to ascertain whether the bargaining was conducted in bad faith. The employer's negotiators met with and negotiated with the bargaining agent, observed the ground rules, offered counterproposals, made compromises, accepted the union's position on a number of issues, reduced tentative agreements to writing, reached tentative agreement on all issues but one, and participated in mediation in good faith. In the circumstances, the employer did not violate the duty to negotiate in good faith.

07.14	41.2	46.51	72.53	72.532	73.440
07.141	41.22	46.52	72.530	72.538	73.442
09.21	46.5	46.55	72.531	73.433	

VI § 965(1)(D): The duty to execute a contract generally arises only when all important issues raised in negotiations are settled. Ridge Citrus Concentrate, Inc., 133 NLRB 1178 (1961).

07.14	46.55	73.461
09.21	72.571	73.462
09.22	72.572	

VII § 965(1)(C): Violations of negotiations ground rules are evidence of bad faith bargaining; however, said evidence must be evaluated in the totality of the circumstances to determine whether the bargaining was conducted in bad faith. Despite the single violation of the ground rules, the union negotiators met and bargained with the employer, otherwise observed the ground rules, offered counterproposals, made compromises, accepted the employer's position on some issues, reduced tentative agreements to writing, reached tentative agreements on all issues but one, and participated in mediation in good faith. In the circumstances, the bargaining agent did not violate the duty to negotiate in good faith.

41.31	72.531	72.54	73.440
72.53	72.532	73.431	73.442
72.530	72.538	73.433	

VIII § 964(1)(E): A lockout is the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining concessions from them. There was no evidence in the record to sustain the union's allegation that the employer violated the duty to negotiate in good faith by locking out its employees.

62.524
72.5

Palermo Teachers Association v. Palermo School Committee, MLRB No. 81-29, 4 NPER 20-12023 (May 22, 1981)

I § 968(5)(B): At the hearing before the Board, the parties reached a stipulation of relevant facts and agreed to submit their dispute to the Board on the basis of the stipulation, the pleadings, and memoranda of law.

09.380
71.228

II § 965(1)(C): Two proposals--the first, providing that a full-time teacher may not be replaced by two part-time teachers, when the two part-time positions can be filled by a full-time unit employee, and the second, providing that, when a reduction in the number of teachers is necessary, teacher contracts shall be terminated in accordance with the principal of seniority--are mandatory subjects of bargaining. The first would merely require that an available full-time teacher not be replaced by two part-time teachers and the second is a typical reduction-in-force seniority provision.

43.211 43.53 43.532 43.54
43.233 43.531 43.533

III § 964(1)(E): The school committee's unilateral restructuring of two grades, shifting from half-time to full-time instructors, is a matter of educational policy and not a mandatory subject; therefore, its implementation did not constitute an unlawful unilateral change. The bargaining agent did not plead violations of the meet and consult obligation or of the duty to bargain over the impact of the change upon the mandatory subjects of bargaining for the employees affected; therefore, said issues were not before the Board.

01.312 43.61 72.66
43.432 43.92 72.667

IV §§ 968(5)(C) & 964(1)(E): The employer refused to negotiate over the two union proposals constituting mandatory subjects; however, the parties later executed a successor collective bargaining agreement. Mootness is normally not found unless the reviewing agency is satisfied that the bargaining agreement fully cures the unfair labor practice, the solution is consistent with the policies of the Act, and there is little likelihood of the problem recurring. On the basis of the meager stipulated record, it was not possible to determine whether the parties ever negotiated over the union's proposals; nevertheless, the Board held that execution of the bargaining agreement rendered the earlier duty to bargain violation moot and dismissed the union's complaint.

71.227
71.230

Maine State Employees Association v. State of Maine and Department of Transportation, MLRB No. 81-34, 5 NPER 20-13019 (Mar. 31, 1982)

Facts: Employee had organized on behalf of the union, had handled lower level grievances, was on the state-wide bargaining team, and served as a union steward. In applying for vacancies (promotions), the employee's job experience ratings declined progressively over a three-year period and he was not promoted. Another union steward in the same employer division received a promotion and the employee promoted to the position sought by the employee was qualified.

I 979-C(1)(A): The test for violation is whether an employer engages in conduct which, it may reasonably be said, tends to interfere with the free exercise of § 979-B rights. The Board found, as a matter of fact, that there was no unlawful interference because no actual intent to interfere was established and the employee intensified his activity on behalf of the union during the time in question.

72.1 72.131
72.13 72.18

II § 979-C(1)(B): The test for violations is whether there was discrimination which had as its purpose the discouragement or encouragement of union activities. A purpose need not be proved where the discriminatory conduct has the natural consequence of such a result or where it was inherently destructive of important employee rights. Where the adverse effect of the discriminatory conduct is comparatively slight, an anti-union motive must be proved if the employer has come forward with evidence of legitimate and substantial justification for the conduct. The Board found there was discrimination here; however, it was not unlawful because it was based on preference for the employees from one of the employer's divisions over those from another division. Second, during the relevant period of time, another union steward had received a promotion, in the same regional district as that involved in this case. Third, the successful candidate chosen over the person who was the subject of this case was qualified to fill the promotional position as issue.

72.3 72.319 72.360
72.311 72.35 72.366

Maine State Employees Association v. Department of Human Services, MLRB No. 81-35, 4 NPER 20-12026 (June 26, 1981)

I § 979-C(1)(A) TEST: A finding of interference, restraint, or coercion does not turn on the employer's anti-union motive or on whether the coercion succeeded or failed, however, but is based on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." NLRB v. Ford, 170 F.2d 735, 738 (6th Cir. 1948); Teamsters Local 48 v. Town of Oakland, MLRB No. 78-30 at 3 (Aug. 24, 1978).

72.1
72.131

II § 979-C(1)(A): A supervisor asked a probationary employee who was a member of the union bargaining team whether she might not be happier in a less pressurized position and whether bargaining might not be interfering with her learning a new job. The questions reasonably tended to threaten and intimidate the employee because they suggested that the employee could not continue to be involved in the negotiations and still keep her job. The questions interfered with the employee's § 979-B rights, especially where the employee was aware that the supervisor was unhappy about the employee's being granted paid administrative leave for bargaining.

09.121 72.1 72.112
41.2 72.11 72.131

III § 979-B: Participating in bargaining is one of the employee rights guaranteed by § 979-B. An employer's attempt to solve a workload problem, where the agency is understaffed and has developed a work backlog, by suggesting that a union bargaining team member leave the team or find a new job, is a violation of § 979-C(1)(A). In such situation, the supervisor should attempt to resolve the manpower shortage through the Office of Employee Relations.

21.12 22.51 72.1 72.112
21.4 41.2 72.11 72.131

IV § 979-C(1)(A) & (B): A supervisor's meeting with employees, to inform them that an employee union bargaining team member was bargaining for all of them and that they would all have to pick up some of her workload so that she could take administrative leave for bargaining, did not constitute a violation of either § 979-C(1)(A) or (B).

72.1

V § 979-H(3): As a remedy for the violation established in the record, the Board ordered that the Department of Human Services and the State of Maine, and their representatives and agents, cease and desist from interfering with, restraining, or coercing the employee involved in the exercise of her rights protected by the Act.

74.14
74.31

Brewer School Committee v. Brewer Education Association Non-Teaching Personnel, MLRB No. 81-36, 3 NPER 20-12016, Interim Order (Mar. 19, 1981)

I § 965(2)(G): Any information, which either party relates to a mediator during the course of mediation, is privileged. Said privilege fosters free and open discussions by the parties which is essential to the integrity and efficacy of the mediation process. The request, here, was for an in camera inspection of the mediator's report, the deletion of privileged communications therefrom, and release of the balance thereof to one party. The Board holds: The disclosures made by both parties are so inherently intertwined with the impressions of the mediator and the "results of mediation" that to allow the disclosure of any portion of the mediator's report would inevitably result in the breach of the confidentiality of conversations between the mediator and each party.

09.382 52.2 71.517
09.393 52.33 72.523

II § 965(3): The purpose of mediator's report is: (1) to acquaint the executive director with the case to allow him to appoint fact-finding or, (2) if the parties, pursuant to § 965(3)(D), waive fact-finding, under Rule 5.01(B) the executive director must, before allowing arbitration, consider (a) whether substantial negotiating progress has been made and (b) whether the number of unresolved issues is reasonable and manageable for arbitration.

52.4 53.31
53.2 53.81

III § 965(2)(G): "[N]o portion of a mediator's report may be released to either party to the mediation discussed therein, over the objection of the other party."

09.382 52.2 71.517
09.393 52.33 71.523

MSAD No. 6 Board of Directors v. Saco Valley Teachers Association, MLRB No. 81-39 (May 27, 1981)

I § 968(5): The parties agreed before the Board to the withdrawal of a complaint over the use of a personal leave form. If any problems arose over the actual use of the form, the parties would resolve the same through the contract grievance procedure.

09.62 47.522 71.229 74.42
46.17 47.54 71.8
46.63 71.228 71.816

Teamsters Local Union No. 48 v. City of Waterville, MLRB No. 81-40, 4 NPER 20-12040 (Sept. 1, 1981)

I § 968(5)(B): Mootness is not found unless the reviewing agency is satisfied that the agreement reached subsequent to the violation of the duty to bargain fully cures the unfair labor practice, is consistent with the policies of the collective bargaining law, and where the record of the controversy shows that there is minimal likelihood for recurrence of the illegal conduct. The Board held that execution of a collective bargaining agreement rendered moot a violation of the duty to bargain that occurred during the negotiations that led up to the agreement, because: (1) all of the complaint's prayer for relief was satisfied by execution of the agreement; (2) the purpose of the Act is to foster the relationship between public employers and the bargaining agents representing the employer's employees and this goal was served by the parties' resolving their differences through the bargaining agreement; and (3) since there had been a change in the employer's management personnel, the violation was unlikely to recur.

01.312
71.230

II § 964(1)(A): Prior to filing a petition for decertification, a unit employee approached the City Manager and asked how to proceed with the decertification process. The City Manager told the employee to contact the Labor Relations Board to get the relevant information. The

employee did so and filed the petition. In the circumstances, the employer's neutral advice, in response to the employee's inquiry, did not constitute unlawful interference, restraint, or coercion.

09.1 09.12 37.1 72.16
09.11 09.122 72.1 72.18
09.111 35.53 72.15 72.22

Council 74, AFSCME v. Ellsworth School Committee, MLRB No. 81-41, 4 NPER 20-12030 (July 23, 1981)

I § 964(1)(E): It is a per se violation of the duty to bargain for the employer to make a unilateral change in a mandatory subject of bargaining during the life of the collective bargaining relationship. Such a unilateral change undermines the bargaining process established by the Act as much as does a flat refusal to negotiate over the subject of the change.

72.5 72.6
72.51

II § 964(1)(E): During the years prior to the certification of the union as the certified bargaining agent, the employees' health insurance had been paid in full by the employer. The cost of the coverage increased and, without notifying and bargaining with the Union, the Employer paid only the same dollar amount that it had paid the prior year. Payment of health insurance premiums is integrally related to "wages, hours, and working conditions" and is, therefore, a mandatory subject. It is a per se violation of the duty to bargain for an employer to make a unilateral change during the term of the collective bargaining relationship. The benefit provided here was not the payment of a certain dollar amount, regardless of the cost of insurance, but rather providing a certain level of insurance coverage without cost to the employees. Prior to reaching accord on the initial collective bargaining agreement, the employer must continue all benefits that were provided prior to the certification of the bargaining agent, even if the cost of said benefits has increased during the interim.

43.13 72.6 72.612 72.618
43.131 72.611 72.613 72.63

III § 965(1)(C): A proposal requiring "just cause" for discipline or discharge is a mandatory subject of bargaining as is a proposal subjecting discipline and discharge decisions to the bargaining agreement's grievance procedure.

43.2 43.233 43.322 43.73 47.01
43.23 43.32 43.5 43.99

IV § 965(1)(C): The complainant did not allege that the employer has failed to negotiate in good faith; therefore, the Board did not so hold. However, the following constituted ample evidence of a failure to negotiate in good faith: (1) initially, the employer refused to negotiate over any of the bargaining agent's proposals; (2) the union agreed to some of the employer's counterproposals, evincing a willingness to bargain, while the employer continued to refuse to agree to any of the union's proposals; (3) the employer made an unlawful unilateral change in a mandatory subject, during the negotiations; and (4) the employer unlawfully refused to negotiate over eight mandatory subjects.

01.312 72.531 72.538 72.63
72.53 72.535 72.6

V § 964(1)(E): The fact that the Board may not have previously declared a subject to be mandatory does not relieve a party of its duty to bargain. The parties must bargain if an issue is related to wages, hours, and working conditions and they can look to MLRB and to Federal precedent to determine whether a particular issue is so related. The refusal to negotiate over a mandatory subject is a per se violation of the Act.

01.28 09.12 09.73 21.4 42.11 42.4
01.29 09.7 21.12 42.1 42.12 72.5

VI § 965(1)(C): The following are mandatory subjects of bargaining:

Work Schedules: including number of hours of work per day, number of days of work per week, the days of work, posting of the work schedule, regular meal times.

No Lockouts: A lockout is the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them. Fox Island Teachers Assn. v. MSAD #8 Bd. of Directors, MLRB No. 81-28 (4/22/81). The proposal relates to whether the employer can put the employees out of work during the term of the contract and is, therefore, related to the employees' hours and working conditions. The lockout proposal is a mandatory subject of bargaining. Although lockouts are probably illegal under the Act, one legitimate reason for wanting a contract clause prohibiting lockouts is that a contract remedy, in addition to any remedy under the Act, would be available in the event of a lockout.

Bulletin Boards: Bargaining agent's use of employer's bulletin boards is a mandatory subject. The Union is the employees' sole and exclusive bargaining agent in negotiations over wages, hours, and working conditions.

Union Activities: Paid time off for Union representatives to perform various Union activities, including collecting Union dues and fees if these funds are not collected through payroll deductions; posting Union notices; distributing literature; soliciting Union membership during other employees' non-working time; attending bargaining sessions; transmitting communication to the Employer; and consulting with the employer or other union officials about enforcement of the contract all are a function of "hours of work." In addition, the transaction of Union business at the work place by the employees' exclusive bargaining agent has considerable impact on the employees' "wages, hours, and working conditions" and is, therefore, a mandatory subject.

Union Access: Union access to the unit employees, for the reasons stated above, during the employees' non-working time is a mandatory subject.

Uniforms: Required uniforms or protective clothing to be provided by the employer and replaced, as needed.

Unit Work: Unit work not to be assigned to non-unit employees, except in case of emergency.

Severance Pay: Payment to employees, upon separation.

Savings Clause: If any provision of the collective bargaining agreement is found unlawful, the remainder of the agreement is severable and remains in force.

22.5	43.11	43.431	43.48	43.7	46.24
22.51	43.117	43.44	43.482	43.84	72.78
42.3	43.123	43.442	43.483	43.86	
42.31	43.43	43.471	43.54	46.2	

VII § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the Employer: (1) cease and desist: (a) from making a unilateral change in the payment in full of the employees' health insurance premium, without first negotiating such change with the bargaining agent and (b) failing and refusing to negotiate, upon request, over the mandatory subjects described in the opinion; and (2) take the affirmative action, necessary to effectuate the policies of the Act, of (a) reimbursing each unit employee for the difference between the full health insurance premium and the amount paid by the employer, plus interest thereon at the rate of 12% per annum, computed quarterly; (b) upon request, negotiating with the union over the mandatory subjects noted in the opinion; (c) signing, dating, posting and maintaining posted, for a period of 60 consecutive days in conspicuous places, a notice provided by the Board; and (d) notifying the executive director, in writing, within 20 days of the date of the order, of the steps taken in compliance therewith.

74.16	74.34	74.36
74.31	74.345	74.361

SAD No. 5 Federation of Teachers v. Sternberg, MLRB No. 81-43, 4 NPER 20-12022 (May 14, 1981)

I § 968(5)(B): Insurgent union charged employer violated the Act by refusing said union access to the employer's bulletin boards, mailboxes, and facilities to organize employees. Incumbent bargaining agent moved to intervene and motion was granted at prehearing conference.

01.21	71.251
71.25	71.519

II Constitution, 1st Amendment: "Exclusive use" provisions in collective bargaining agreements, permitting an incumbent union use of the employer's facilities while denying the same to insurgent unions, has withstood constitutional scrutiny. Valid state interest in support thereof: ensuring labor stability and minimizing inter-union strife within the schools. Clark Cty. Teachers Assn. v. Clark Cty. School Dist., 91 Nev. 143, 145, 532 P.2d 1032 (1975), Memphis A.F.T. v. Bd. of Ed., 534 F.2d 699, 702-703 (6th Cir. 1976).

04.1 43.86 64.32 72.1 72.263
22.41 64.3 64.33 72.111

III § 965(1)(C): Use of bulletin boards and other employer facilities, by bargaining agent to communicate with unit employees, is a mandatory subject of bargaining.

43.86

IV § 964(1)(A) & (B): "Exclusive use" contract provisions generally do not constitute unlawful interference or discrimination, NLRB v. Proof Co., 242 F.2d 560, 562 (7th Cir.), Cert. Denied, 355 U.S. 831 (1957).

43.86 64.33 72.113 72.120 72.325
64.3 72.1 72.115 72.263 72.366
64.32 72.111 72.116 72.3

V § 964(1)(A): Contractual provisions which have the effect of prohibiting union-related solicitation or distribution during non-working times are, absent special circumstances, presumptively invalid. General Motors Corp., 240 NLRB 168, 170 (1979).

21.12 22.5 64.3 72.1 72.116
21.3 43.86 64.32 72.115

VI § 964(1)(A): The employer and the incumbent bargaining agent agreed, informally, that the latter would have exclusive use of the employer's bulletin boards and mailboxes and be the only employee organization allowed to conduct meetings on the employer's premises. Once said agreement was reached, the employer was obligated to enforce it by denying the insurgent organization use of said three facilities. Since the Federation has alternate means available to communicate with employees, other than the bulletin boards, mailboxes, and school buildings of the employer and including using the U.S. Mail to teachers at home or at school, leaving materials in faculty lounges, and personal solicitation during teachers workshops, the "exclusive use" provision does not violate § 964(1)(A). The provisions do not interfere unduly with Federation's § 963 rights, while minimizing inter-union strife over the use of school facilities. If said provisions would, in the future, be used to prohibit the employees from soliciting or distributing on behalf of the insurgent Federation or any other labor organization, the Board's decision may well be different. NLRB v. Mid-States Metal Products, Inc., 403 F.2d 702, 704-705 (5th Cir. 1968).

21.12 22.5 64.3 72.111 72.120
21.3 43.86 64.33 72.115 72.263
22.41 46.12 72.1 72.116

Maine State Employees Association v. State of Maine, MLRB Nos. 81-44 & -56, 4 NPER 20-12043 (Sept. 21, 1981), Rev'd sub nom. State of Maine v. Maine State Employees Association, 443 A.2d 948 (Me. 1982)

[Only portions of Board decision unaffected by Law Court Decision are indexed.]

I Board:
§ 979-D(1)(E)(1): Since the mandatory subjects of bargaining in the Maine labor relations acts are essentially identical to those in the National Labor Relations Act (29 U.S.C. § 158), the Board will look to parallel federal authority for guidance in resolving negotiability questions.

01.26 42.11
42.1

II § 979-C(1)(E): Generally, absent the unique language of the State Act, reclassifications and reallocations are mandatory subjects of bargaining. Both processes directly relate to "wages."

03.32 43.11 43.57
03.4 43.120

III § 979-D(1)(E)(2): The "spirit and intent" of the merit system principles is the broad notion of an individual's job skills being the determinative factor for the purposes of hiring and promotion, replacing the "spoils system." Within the ambit of "merit system principles" are: (1) hiring and promotion decisions being based on the competence of the individual applicants or employees, (2) internal equity in the compensation scale, based on the idea of equal pay for equal work and, correspondingly, a graduated scale of higher pay for more difficult or demanding work or for work involving greater degree of responsibility. "Merit system principles" should not be confused with or interchanged for the particular merit system in place at any given time. The former is a set of broad basic doctrines while the latter is a specific set of rules and procedures used to translate said basic theory into actual practice.

03.32 42.3 42.44 72.589
03.4 42.32 46.21 72.591

IV § 979-D(1)(E)(1): Collective bargaining and the "spirit and intent" of merit system principles are not mutually exclusive; however, the product of collective bargaining could, in specific instances, contravene said principals. Said products are prohibited by the Act.

03.32 42.3 42.44 72.589
03.4 42.32 46.21 72.591

V § 979-D(1)(E)(1): It is a per se violation of the duty to negotiate in good faith to insist to the point of impasse on bargaining over non-mandatory subjects. The rationale underlying this principle is that such insistence is, in substance, a refusal to bargain over the mandatory subjects--wages, hours, working conditions, and contract grievance arbitration.

72.541
73.45

VI Law Court:
§ 979-D(1)(E)(1): Classification or re-classification is the process by which a particular job is assigned or re-assigned to a category of similar positions. Allocation or re-allocation is the assignment or re-assignment of a classification to the appropriate grade on the compensation plan; i.e., the assignment of the Secretary II classification to pay range 17 is an allocation.

43.11 43.57
43.120

VII § 979-H(7): The Board participated as an appellee by filing a brief and presenting oral argument on the appeal of its decision. Since the Labor Relations Act vests the Board with prosecutorial duties, such participation is warranted in selected cases. Such participation should not be routine or automatic. The Board should exercise discretion on whether to so participate and do so in cases where the public interest is different from those of the parties. The Board should participate in review proceedings where its perspective will assist in the adjudication or in cases where the Board's enforcement or prosecutorial powers are implicated.

01.21 81.18 81.375
81.112 81.37

VIII § 979-D(1)(E)(2): Collective bargaining duty established by the Act "shall not be construed to be in derogation of or contravene the spirit and intent of the . . . Personnel Laws." The cited language is a term of limitation; therefore, the duty to bargaining collectively, established in § 979-D(1)(E)(1), does not extend to those occasions where such negotiations would restrict or obstruct the force and operation of the personnel laws.

03.32 42.3 42.44 72.589
03.4 42.32 46.21 72.591

IX § 979-D(1)(E)(2): The Personnel Law, in 5 M.R.S.A. § 593, imposes strict time constraints on the processing of reallocation and reclassification requests by both the Commissioner of

Personnel and the State Personnel Board (no more than 75 days for final agency action). The collective bargaining process is not amenable to such temporal restrictions since, under § 979-D(1)(E)(1), "Neither party shall be compelled to agree to a proposal or be required to make a concession." Mediation, fact-finding, and arbitration, after unsuccessful negotiations, add further time to the collective process. Since the legislative intent of expeditious resolution of reclassification and reallocation requests is clear and since such speedy resolution is inconsistent with the collective bargaining process, reclassification and reallocation requests are not mandatory subjects of bargaining, under § 979-D(1)(E)(1). Submitting such actions to the collective bargaining process would be in derogation or contravention of the spirit and intent of the Personnel Law embodied in § 593. In so holding, the Court declined to hold that such topics were prescribed or controlled by public law, within the meaning of § 979-D(1)(E)(1).

03.32	42.3	42.44	43.120	46.21
03.4	42.32	43.11	43.57	72.589

X § 979-D(1)(E)(1): The Court's holding, that the procedural obligations imposed on the Commissioner of Personnel by 5 M.R.S.A. § 593 are not subject to collective bargaining, does not imply that the totality of the 5 M.R.S.A. § 631 power (to prescribe or amend the substance of rules and regulations for personnel administration) may not be treated as subject to mandatory collective bargaining. Further, the duties imposed on the Commissioner by 5 M.R.S.A. §§ 631, 633 and 634 are not subject to the stringent time requirements found in the § 593 review of requests for reclassification and reallocation of particular positions. To the extent that the exercise of § 593 obligations requires greater expedition than does the exercise of the powers and obligations created by §§ 631, 633 and 634, the holding does not foreclose, because of the absence of significant temporal requirements in either process, the availability of collective bargaining over the matters covered in those sections of the Personnel Law.

03.32	42.3	42.44	43.120	43.57	46.21
03.4	42.32	43.11	43.47	43.9	72.589

XI Note: The effect of the Law Court's decision was modified by the Legislature, through enactment of Ch. 389, P.L. 1985, that added divisions g and h to § 979-D(1)(E)(1).

43.11	43.57
43.120	

Council 74, AFSCME v. Bangor Water District, MLRB No. 81-46, 4 NPER 20-12027 (July 2, 1981)

I §§ 965(1)(C) & 964(1)(E): The rule prohibiting unilateral changes in mandatory subjects of bargaining, once the employer's employees have selected a bargaining agent, is a venerable principle of labor law. State v. MLRB, 413 A.2d 510, 515 (Me. 1980), NLRB v. Katz, 369 U.S. 736, 742-743, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). The rationale for this rule is that a unilateral change in a mandatory subject undermines the bargaining process established by the act "much as does a flat refusal [to bargain]." NLRB v. Katz, 369 U.S., at 743. This rationale applies to any unilateral change in a mandatory subject, regardless of whether the effect of the change is adverse to or beneficial to the interests of the employees in question. Id., at 745-746.

21.4	72.6
72.51	72.616

II § 965(1)(C): The mandatory subjects, over which the duty to bargain extends, are "wages, hours, and working conditions" (§ 965(1)(C)). Holidays are integrally related to "wages, hours, and working conditions" and the issue of holidays is, therefore, a mandatory subject. Once Council 74 was certified as the employees' bargaining agent, the employer could not lawfully make any changes in the holiday schedule without first notifying and, if then requested, bargaining with the union. The employer did not change the holiday schedule when it failed to make the day after Thanksgiving a holiday. Although not a regular holiday, the employer did make the day a holiday 6 times during the last 10 years. That decision was made on a discretionary basis, 1 or 2 days before Thanksgiving, when the workload and weather conditions permitted. Here, the workload was heavy and the weather conditions favorable to do work. The decision not to grant the holiday was consistent with the practice of the last 9 years and cannot be said to amount to a change in the holiday schedule. Granting the day after Christmas as a holiday was a per se violation of § 964(1)(E). That day was not a regular holiday and had never before been given as a holiday.

42.1 43.15 72.6 72.612
42.11 43.151 72.611

III § 968(5)(C): As the remedy for the violation established in the record, the Board ordered that the Bangor Water District, its representatives and agents, cease and desist from changing the holiday schedule for its organized employees without notifying and, if requested, bargaining with the certified bargaining agent for such employees.

74.31

Biddeford Support Staff Association v. Biddeford School Committee, MLRB No. 81-47, 4 NPER 20-13002 (2-1 Decision) (Nov. 16, 1981)

Facts: Employees' names were inadvertently omitted from the voter list because, although eligible as of the date of the election, they were probationary (under the Act) when the list was prepared. The names were added to the list before the election. Based on the original list, employer's agent, who didn't know about the subsequent amendment thereto, told an employee, during the course of, but away from the site of, the election, that the employee was not eligible to vote. The employee was in fact eligible. The disenfranchishement could not possibly have been determinative of the outcome of the election.

I § 968(4) & (5)(A): The Union's prohibited practice complaint was, in substance, an objection to the conduct of a bargaining agent election and was treated as such. Since the complaint was filed within five days of the election at issue, the complaint was timely filed, within the time requirement of § 968(4) of the Act.

01.22 35.42 71.13 71.711
35.4 35.5 71.7

II §§ 964(1)(A) & 967(2): Unintentional employer misconduct during a representation election, which results in disenfranchisement of eligible voters and which is not determinative of the outcome of the election, does not automatically warrant that a new election be held. The Board declined to adopt a per se rule that unintentional voter disenfranchisement, by an employer in a representation election, requires a new election be held. In each case where the NLRB appeared to state such a per se rule, the number of disenfranchised voters could have been determinative of the outcome of the election. A different result would accrue, had the employer-caused disenfranchisement been intentional.

35.322 35.515 35.528 35.8 72.1 74.38
35.5 35.52 35.53 35.81 72.18

III §§ 964(1)(A) & 968(5)(C): The employer violated § 963 when, during the course of an election, one of its agents told an eligible employee that the employee was not eligible to vote. Since the disenfranchised voters' ballots were not potentially determinative of the election and since the employer's actions could not have had any other adverse effect on the election, the Board held that the employer's statements are de minimis violations of the Act and dismissed the complaint.

35.322 35.515 35.528 35.8 71.227 72.18
35.5 35.52 35.53 35.81 72.1

DISSENTING OPINION OF EMPLOYEE REPRESENTATIVE:

IV § 964(1)(A): The critical fact is that the employer's conduct compromised the electoral process and created the impression that the employer "had some effective connection with, if not control over, the election itself, insofar as the employer appeared to be making an official ruling which excluded employees from voting." I opt for adoption of a per se rule. It is easily understood and simply applied. A per se rule assures the parties will avoid any and all coercion or appearances of coercion and control by the parties in representation elections.

35.322 35.515 35.528 35.8 72.1 74.38
35.5 35.52 35.53 35.81 72.18

City of Westbrook v. Council 74, AFSCME, MLRB No. 81-50, 4 NPER 20-12044 (Sept. 24, 1981)

I § 964(2)(B): After 10 months of direct negotiations, mediation, and fact-finding during which the parties' negotiators had tentatively agreed to a new format for the successor agreement and 20 articles of the 28 proposed, the union membership failed to ratify a package consisting of the parties' tentative agreements and the recommendation of the fact finders. Subsequent to the membership's failure to ratify, the chief union negotiator told the City's team that "The only proposed contract that the union team could 'sell' with certainty to the union membership would be a contract with no language changes and a 10% across-the-board wage increase." Said comment was inept and unprofessional; however, since it did not represent the union's bargaining position accurately, it did not violate the Act.

09.13 22.72 46.51 73.437
09.133 41.2 73.4 73.441
22.7 46.5 73.436 73.46

II § 964(2)(B): The proper course for the union bargaining team to follow, subsequent to the membership's refusal to ratify the proposal agreement, would have been for them to have voiced the membership's specific objections to the proffered agreement. Both parties could then have returned to the table and negotiated over the particular subjects at issue.

07.152 46.5 73.46
07.28 46.51

III § 964(2)(B): Negotiators must be clothed with sufficient knowledge, guidelines, and authority to make tentative agreements where their principal party reserved the right to ratify. Had we found that the statement cited above accurately reflected the union's position, said statement would be prima facie evidence that the union negotiators either were operating beyond the negotiating guidelines set forth by the membership or said guidelines had been changed without the required notice to the employer's negotiators.

41.2 46.5 73.431 73.46
41.22 46.51 73.437
46.13 73.4 73.441

Abbott v. Maine State Employees Association, MLRB No. 81-51, 4 NPER 20-13016 (Mar. 17, 1982)

I § 979-F(2)(E): The bargaining agent for state employees must represent all bargaining unit employees fairly. The Board explicitly adopts the parameters of said duty of fair representation as outlined by the federal courts, to the extent that the same can be reasonably applied to State employee unions. Unit employees may bring a prohibited practices complaint, under § 979-C(2)(A), to enforce this right and the Board's jurisdiction to entertain such actions is found in § 979-H.

01.29 22.3 23.1 73.1
21.12 22.41 23.31 73.113
21.7 23. 23.6

II § 979-F(2)(E): The test for the union's duty of fair representation is that its conduct be "subject always to complete good faith and honesty of purpose in the exercise of its discretion" and, therefore, that its conduct not be arbitrary or capricious. The Board's role in evaluating union conduct is to apply the above standard and to answer the question faced by the union on a de novo basis. Although, on a de novo basis, the Board might reach a contrary conclusion to that reached by the union, the latter will be upheld, unless it was reached arbitrarily, discriminatorily, or in bad faith.

22.3 23.1 73.113
23. 23.6

III § 979-F(2)(E): The union's position, interpreting a contract seniority article here, was one reasonable interpretation of the language thereof; the Board, therefore, found that the union did not breach its duty of fair representation, although a contrary interpretation of said language might also be reasonable.

22.3 23.4 73.113
23. 23.6

Northern Aroostook Teachers Association v. M.S.A.D. #27 Board of Directors, MLRB No. 81-52, 4 NPER 20-13003 (Nov. 19, 1981)

I § 964(1)(A): Attendance at a union meeting by an employer, without invitation from the union, violates § 964(1)(A). Here, there was no mention of the union in the meeting announcement, the room was changed from that announced, the request that the employer leave was ambiguous at best, the Chair directed questions to the employer who answered them, and, at the first mention of the union, the employer left the meeting. Under these facts, there was no violation.

72.1 72.141
72.14 72.24

II § 964(1)(B): Test: Activity whose purpose is discouragement or encouragement of union activities, by the employer, is discriminatory in violation of § 964(1)(B). Where discrimination is the natural consequence of the employer activity or where the employer activity is inherently destructive of important employee rights, no discriminatory purpose need by proved. NLRB v. Great Dane Trailers, U.S. (1967). Where the adverse effect of the conduct is slight and the employer has come forward with legitimate and substantial justification therefor, anti-union animus must be proved. Ibid. A teacher evaluation, at the normal time of year albeit for a longer duration than that for the other teachers, in neither inherently destructive of important employee rights nor is its natural consequence discouragement or encouragement of union activity. The employer established ample legitimate justification for the lengthy evaluation and no anti-union animus was shown. The evaluation did not violate § 964(1)(B).

72.3 72.315 72.324 72.35
72.311 72.317 72.33 72.363
72.314 72.318 72.342 72.365

III § 964(1)(C): This section is intended to prohibit too much financial or other support, encouraging the formation of, or actually participating in the affairs of the union and therefore potentially dominating it by the employer. The facts herein do not constitute a violation of this section of the Act.

72.2 72.23 72.26
72.21 72.24

IV § 964(2)(A): Union petitioned employer to reprimand a school principal for statements which he made to the press. Employer alleged the union's action violated § 964(2)(A). A prerequisite to proof of such a violation is that the individual affected be a "public employee." No proof of the principal's status was offered; therefore, the allegation was dismissed.

11.15 21.12 64.4
15.113 21.6 73.1

V FIRST AMENDMENT: Originally the Board felt that it was an improper forum for the resolution of constitutional issues. Westbrook Teachers Ass'n. v. School Committee of the City of Westbrook, PELRB No. 74-17 (Aug. 21, 1974). Now, the Board will consider and resolve constitutional questions that are subsidiary to alleged violations of the Act. Council 74, AFSCME v. Bangor Water Dist., MLRB No. 80-26 (Dec. 22, 1980).

01.28 03.12
03.1 04.1

VI § 964(2)(A): Union petitioned employer to reprimand a school principal for statements which he made to the press. Union conduct did not violate § 964(2)(A) since principal had not been on employer's bargaining team for 4 or 5 years and no evidence was presented that he had ever processed a grievance. Distinguish City of Old Town v. Council 74, AFSCME, MLRB No. 75-25 (June 17, 1976).

41.2 73.57
41.21

VII § 968(5): Test for Motion to Dismiss for Failure to State a Claim: To state a claim, a complaint must aver either the necessary elements of a cause of action or facts which would entitle a plaintiff to relief on some theory. Had the union established the facts it alleged, it would have prevailed; therefore, the employer's 12(B)(6) motion must be denied.

71.11 71.22 71.227
71.211 71.222

Council 74, AFSCME v. City of Westbrook, MLRB No. 81-53, 4 NPER 20-12033 (Aug. 6, 1981)

I § 968(5)(B): Service of a prohibited practices complaint upon a respondent's attorney, who has not been given express authority by his client to accept service of process, does not constitute proper service under § 968(5)(B).

01.1 09.112 71.12
01.28 11.11 71.16

II §§ 964(1)(E) & 965(1)(C): The parties stipulated at the hearing before the Board that their negotiations had reached impasse, prior to the change at issue. Once the parties reach impasse, the employer may implement its last best offer, made during the negotiations, or it may continue existing conditions. The former is one of four recognized exceptions to the unilateral change rule.

09.380 71.228 72.6
51.01 72.586 72.663

III § 969: In this case, the employer implemented its last best offer, after impasse, in making promotions. The employer raised, as an issue, that § 969 removes the promotions process, administered by the Public Safety Commission, from the collective bargaining process, having found that the employer was following one of the exceptions. In the unilateral change rule, in making the promotions, we decline to decide the § 969 issue.

03.32 03.36 72.663
03.342 71.230

IV § 968(5)(B) & (C): Issues raised in the complaint but in substantiation of which no evidence is presented and which are not argued in post-hearing briefs are deemed as having been withdrawn.

01.312 71.229
71.17

Bridgton Federation of Public Employees v. Hamill, MLRB No. 81-54, 4 NPER 20-13013 (Mar. 3, 1982)

I § 964(1)(A): While some employer pre-election statements are so inherently coercive as to be per se violations, usually such statements have to be viewed in context to derive their meaning and effect. In examining statements, the test is "whether, under these circumstances, the employees could reasonably conclude that the employer was threatening them with economic reprisals" if they persisted in their organizational activities. In such evaluation, it is important to note the economic dependency of the employees upon the employer, giving the statements special meaning to the former. "Actual proof that any employee felt threatened or coerced is not required, where the Board finds that the employer's statement is such that a tendency to interfere can be reasonably inferred.

35.51 35.537 72.13
35.5212 72.1 72.131

II § 964(1)(A): Statements by employer's agents that benefits could return to "ground zero" and have to be bargained from there, if the union was selected, are gross violations of § 964(1)(A). The statements were unsolicited and the economically dependent employees could and did understand that they were direct threats. The statements were made in a charged and coercive atmosphere, were accompanied by other threatening and coercive statements, and were false, in that the status quo is maintained during bargaining.

35.51 35.5214 72.1 72.131
35.5212 35.537 72.13

III § 964(1)(A): Statements by employer's agents that they "would do the last screwing," that the employees would be "all done" the day after the election, if the union won, and that the town could sub-contract unit work are all, under the facts here, coercive and violative of § 964(1)(A), as threats to the employees' continued employment. Such statements destroyed the laboratory conditions necessary for a free and fair election. The allegation that employer's agents were merely expressing their "personal opinions" is not a viable defense.

09.111 09.121 35.5212 72.13
09.113 11.15 35.537 72.131
09.12 35.51 72.1

IV § 968(5)(C): There was a direct conflict between the testimony of two witnesses on whether a selectman knew of the employees' organizational efforts when he said that the unit work could be sub-contracted. Since the selectman's testimony was inconsistent, the Board credited the employee witness's version of the conversation at issue.

09.36 71.523
09.362

V § 964(1)(A): Pre-election statements by the employer that the employees don't need a union and can do better without one, in the circumstances, interfered with the right of self-organization and with the employees' right to make a free choice at the bargaining agent election.

21.12 35.51 35.534 72.1
21.2 35.5212 35.537 72.13

VI § 964(1)(A): The following evidence established that the employees felt threatened as a result of the charged employer statements: several employees testified that they perceived the statements as threatening and the employees requested a meeting with the selectmen at which they sought an assurance that no retaliation would be taken against any employee who had engaged in union activity.

35.51 72.1
35.5212 72.131

VII § 968(5)(B): The fact that a majority of unit employees signed a statement that they opposed the filing of the prohibited practice complaint does not strip the union that was unsuccessful in the bargaining agent election of standing to file and prosecute the complaint. First, the U.S. Supreme Court has noted that employees who have been subjected to unlawful threats are likely to take action damaging to the union. Second, the Act explicitly permits a single public employee or the union itself to prosecute the complaint, regardless of whether a majority of the unit employees oppose such action.

01.1 35.42
35.41 71.14

VIII § 968(5)(C): The union had filed a showing of interest signed by a majority of the unit employees and then lost the bargaining agent election, after the employer engaged in unlawful interference, restraint, or coercion during the pre-election campaign. Since the union once had majority support and because the employer's statements destroyed the laboratory conditions necessary for an election, the Board set aside the election and ordered the employer to bargain with the union. Further, the employer was ordered to cease and desist from further engaging in similar violative conduct in the future. The employer's serious violations so tainted the election process as to preclude the possibility of holding a fair election in the foreseeable future; therefore, rather than ordering a new election, a bargaining order was issued.

32.2 32.99 74.12
32.21 35.8 74.31
32.92 35.82 74.39

Maine Teachers Association v. Sanford School Committee, MLRB No. 81-55, 4 NPER 20-13001 (Oct. 7, 1981)

I § 965(4): Public employers are authorized by the act to agree to binding interest arbitration on all isues, including wages, pensions, and insurance. By providing that the parties may jointly agree to an arbitration procedure "which will result in a binding determination of their controversy," § 965(4) plainly authorizes public employers to agree to binding arbitration on all issues. If the parties do not jointly agree to a binding arbitration procedure, § 965(4) authorizes either party to compel the other party to submit their controversy to a panel of arbitrators, whose determinations with regard to salaries, pensions, and insurance are not binding. The plain language of § 965(4) shows that the Legislature intended to provide two general procedures for invoking interest arbitration: a compulsory procedure which results in nonbinding recommendations with regard to salaries, pensions, and insurance, and a voluntary procedure by which the parties may jointly agree to binding arbitration on all issues. Nothing in Superintending School Committee of Bangor v. Bangor Education Assn., 433 A.2d 383 (Me. 1981), mandates the conclusion that a public employer cannot voluntarily agree to binding interest arbitration on salaries, pensions, and insurance.

07.16 55.22 55.34 55.61 55.911
41.3 55.24 55.35 55.62 72.72
55. 55.3 55.4 55.9

II § 968(5): In interpreting the meaning of the various labor relations acts that it administers, the Board follows the rule of statutory construction that every word and phrase in a statutory provision should be given effect if possible. See, e.g., Camp Walden v. Johnson, 156 Me. 160, 163 A.2d 356, 358 (Me. 1960).

01.2 03.2
01.32 03.22

III § 965(4): Agreement by the parties to go to interest arbitration, without more, does not render said arbitration binding on all issues, specifically on salaries, pensions, and insurance. In the absence of express agreement that the arbitration shall be binding on salaries, pensions, and insurance, the award is advisory only on said issues. The employer was, therefore, free not to implement the interest arbitrator's salary and health insurance determinations.

07.16 55. 55.24 55.62 55.911 72.75
09.22 55.21 55.3 55.84 72.57
41.3 55.22 55.35 55.9 72.72

State of Maine v. Maine State Employees Association, MLRB No. 81-56, 5 NPER 20-13024, Decision and Order on Remand (May 21, 1982), appeal docketed but dismissed by appellant, Maine State Employees Association v. State of Maine, No. CV-82-281 (Me. Super. Ct., Ken. Cty., Aug 16, 1982)

I § 979-D(1)(E)(1): The Law Court's decision in State of Maine v. Maine State Employees Association, 443 A.2d 948 (Me. 1982), held that the union's reclassification and/or reallocation proposals were not mandatory subjects of bargaining under the State Employees Labor Relations Act, 26 M.R.S.A. § 979, et seq. It is a per se violation of the duty to negotiate in good faith to insist to the point of impasse on bargaining over non-mandatory subjects. The rationale underlying this principle is that such insistence is, in substance, a refusal to bargain over the mandatory subjects. Since the union insisted on negotiating over its reclassification and/or reallocation proposals to the point of impasse, it committed a per se violation of the duty to negotiate in good faith.

43.11 43.57
43.120 73.45

II 979-H(3): As the remedy for the violation established in the record, the Board ordered that the respondent union cease and desist from insisting that the employer negotiate over its reclassification and/or reallocation proposals for State employees.

74.31

Maine State Employees Association v. State of Maine, MLRB No. 82-01, 5 NPER 20-13020 (Apr. 5, 1982), aff'd sub nom. State of Maine v. Maine State Employees Association, No. CV-82-185 (Me.Super.Ct., Ken.Cty., Oct. 30, 1984)

I § 979-C(1)(A): An employer may communicate directly to employees during negotiations, subject to the following restrictions: the communications may not contain "a threat of reprisal or promise of benefit," may not interfere with the rights guaranteed in § 979-B, nor may such communications seek to bypass the bargaining agent and deal directly or indirectly with the employees. All of such statements are "without the protection of the first amendment."

04.1 72.13 72.132 72.18
72.1 72.131 72.17 72.55

II § 979-C(1)(E): It is inconsistent with the employer's duty to bargain in good faith for the employer "to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests" during bargaining. Although the flier at issue contained statements that are factually incomplete, in that they only present the employer's point of view, the complete facts were well known among the employees and the flier was not so misleading as to interfere with the free exercise of collective bargaining rights.

21.12 72.5
21.4 72.55

III § 979-C(1)(A): A flier, included by the employer together with the employees' paychecks, reasonably tended to interfere with and coerce employees in the exercise of their § 979-B rights. Because it contained erroneous information, the flier created the impression that the State's proposal was slightly more beneficial than was actually the case. The erroneous information amounts to improper interference because it makes it difficult for employees either to evaluate the State's proposal accurately or to compare it fairly with the union's proposals. The Board has long held that the making of false or erroneous statements to employees interferes with and coerces the employees in the free exercise of their protected rights. The flier was distributed to the economically dependent employees along with their paychecks, a most direct and efficient way of gaining an employee's attention and making a point. When an employer includes information with the employees' paychecks, it must scrupulously avoid careless errors of fact such as the mathematical error contained in the flier.

72.1 72.18
72.17

IV § 979-H(3): As remedies for the violations established in the record, the Board ordered that the State of Maine, its representatives and agents: (1) cease and desist from interfering with, restraining, or coercing the employees in their free exercise of the rights protected by § 979-B; (2) sign, date, post, and keep posted for 60 consecutive days the notice provided by the Board, correcting the false information contained in the employer's flier; and (3) notify the executive director, in writing within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14 74.31 74.361
74.16 74.36

Prescott v. Maine State Employees Association, MLRB No. 82-02, Executive Director Action (Aug. 12, 1981)

I § 979-H(2): Under statute and Rule 4.06, executive director may dismiss complaints alleging facts which could not, as a matter of law, constitute a violation of the Act.

01.21 71.21 71.222
71.11 71.22 71.227

II § 979-F(2)(E): To violate the duty of fair representation, a union's conduct toward a member must be arbitrary, discriminatory, or be undertaken in bad faith. Since a union member has no absolute right to have a grievance go to arbitration, the mere allegation that the bargaining agent refused to represent an employee in a grievance does not, as a matter of

law, allege a violation of the duty of fair representation. The grievance may well be without merit and the union's refusal justified.

21.51	22.39	23.2	46.6	47.21	47.513
22.37	23.1	23.24	47.2	47.51	47.53

III § 979-H(2) & Rule 4.03(4): The Board will not process a prohibited practice complaint unless it states the specific section(s) of the Act that has been allegedly violated.

01.21	71.21	71.222
71.11	71.22	71.227

Saco-Valley Teachers Association v. MSAD No. 6 Board of Directors, MLRB No. 82-04, 5 NPER 20-13022 (Apr. 30, 1982)

I § 964(1)(B) & (A): Employer refused to reappoint union president as head teacher (a non-supervisory position). Employer's reasons given for its action were pretextual: (1) interest conflict between union office and head teacher position [head teacher does not supervise teachers nor is privy to confidential information]; (2) member of "secret group" [was member of group of teachers and parents, whose purpose was to improve quality of education, but left when learned purpose of group was to oppose referendum for new school construction]; (3) did not have sufficient academic credits to qualify for the position [only 1 of 8 head teachers in the district had such credit]; and (4) teachers were dissatisfied with her performance [had received excellent performance evaluation as head teacher]. Employer argued, before Board, that reason for non-reappointment was insubordinate conduct. However, conduct cited occurred after decision not to reappoint. Since reasons given were not meritorious and in light of employer's past anti-union animus, it was clear that the reason for non-appointment was anti-union animus and was violative of § 964(1)(B). Denying an employee a position because of the employee's union activities violates § 964(1)(A) & (B).

21.3	72.134	72.311	72.317	72.32	72.33
72.1	72.3	72.312	72.318	72.321	72.333
72.13	72.31	72.315	72.319	72.324	72.338

II § 968(5)(C): Since employee was denied position because of union activities and since position denied carried with it a wage differential over and above the regular teachers' salary, Board rectifies situation by ordering employer to cease and desist from denying positions on the basis of union activities and make employee whole, by paying wage differential lost, plus interest. Interest is calculated on a quarterly basis, at prime rate announced by Secretary of the Treasury, on total sum then due and owing, including past interest due.

74.31	74.34	74.345
74.32	74.341	

III § 965(1)(C): The composition of personal leave forms is an educational policy matter about which the school committee is obligated to meet and consult but not negotiate. The record shows that the employer fully satisfied its duty to meet and consult before changing the form: They notified the union about the proposed changes in the form, met and consulted with the union about the new form, and incorporated some of the union's suggestions in the new form. Having satisfied the duty to meet and consult, the employer's "unilateral" implementation of the new form was entirely proper.

41.6	41.64	72.589
41.63	43.61	72.74

IV § 964(1)(A): Employer's directive that union activity was not to be conducted during the work day, except for at lunch, was merely a continuation of past policy. Were there evidence that the directive amounted to the imposition of new policy designed to interfere with or curtail the employees' union activities, then our conclusion might well be different. Here, however, the employer did not violate § 964(1)(A) of the Act.

72.1	72.114
72.11	72.118

Maine State Employees Association v. State of Maine, MLRB No. 82-05, 5 NPER 20-14010 (Dec. 22, 1982); rev'd, State of Maine v. Maine State Employees Association, 499 A.2d 1228 (Me. 1985)

(Only portions of Board decision unaffected by Law Court are indexed.)

I § 979-D(1)(B): Although it does not have the statutory jurisdiction to hear and decide contract grievance arbitration cases, the Board must review the relevant collective bargaining agreement to determine whether the parties have waived their statutory right to negotiate over the mandatory subjects during the term of the agreement.

01.1 09.6 46.64
01.27 09.64

II § 979-D(1)(B): Where subjects are specifically addressed in the provisions of the collective bargaining agreement, no "mid-term" duty to bargain over said issues exists. In examining the agreement to determine whether a party has, thereby, waived its right to bargain mid-term over mandatory subjects, the Board does not impose its own view of what the terms and conditions of the agreement should be but merely examines whether a party has given up the statutory safeguards requiring bargaining.

09.23 09.6 09.612 41.34 46.641 72.590 73.478
09.231 09.61 09.64 46.64 72.511 72.666

III § 979-D(1)(B): A party may waive its right to demand mid-term negotiations, over unilateral changes which affect the mandatory subjects of bargaining, through assent to a "zipper clause" which covers said unilateral change. For such waiver to be effective as a bar to negotiations, the evidence of waiver must be clear and unmistakable.

09.23 09.6 09.612 41.34 72.511 72.65 72.666
09.231 09.61 09.64 46.64 72.590 72.664 73.478

IV § 979-D(1)(B): A sentence in the conclusion of negotiations article of the parties' collective bargaining agreement stated that the parties "agree that this Agreement is the entire Agreement, terminates all prior Agreements or understandings and concludes all collective negotiations during its term" is an integration clause. The purpose of such a clause is to limit the agreement between the parties to that which is within the four corners of the document and to exclude parol evidence which could contradict or amend the written agreement. This sentence does not waive statutory mid-term bargaining rights on topics not discussed in the collective bargaining agreement.

09.23 09.391 09.612 41.34 72.51
09.231 09.6 09.64 46.64 72.511
09.232 09.61 09.641 46.641 72.590

V §§ 979-D(1)(B) & 979-H(3): Waiver is an affirmative defense; therefore, the party raising such defense bears the burden of producing evidence sufficient to establish the validity thereof.

09.32 09.61 72.590 73.478
09.6 71.512 72.666

VI § 979-D(1)(E)(1): This section creates an obligation to confer and negotiate in good faith with respect to wages, hours, and working conditions, the mandatory subjects of bargaining. Concomitant with the characterization of a subject as within the duty to negotiate is a duty of the employer to notify the union to provide it with an opportunity to bargain over it, prior to making any unilateral change in such subjects.

21.4 72.6
72.5

VII § 979-D(1)(B): When a collective bargaining agreement "covers" a mandatory subject and a "zipper" clause precludes mid-term bargaining over subjects referred to or covered in the agreement, such subjects may not be raised mid-term as they have been waived. Such coverage in the agreement, together with the aforementioned "zipper" clause, does not waive either party's right to negotiate over the effects or impact of any related unilateral change. "The

issue covered in the agreement and its effect are distinct, and the waiver of one is not equivalent to the waiver of the other."

09.23	09.61	41.34	46.643	72.590	72.666
09.231	09.612	46.64	72.51	72.65	73.478
09.6	09.64	46.641	72.511	72.664	

VIII § 979-D(1)(B): "Zipper" clauses are to be strictly construed. A waiver of statutory rights may not be found unless the waiver is "clear and unmistakable" and there also be a conscious relinquishment by the union, clearly intended and expressed to give up the right. Where a statutory right is involved, the law of [The First] Circuit is that a waiver should be express, and that a mere inference, no matter how strong, should be insufficient.

09.23	09.6	09.612	41.34	71.517	72.666
09.231	09.61	09.64	46.64	72.590	73.478

IX Law Court:
§ 979-D(1)(B): The duty to bargain continues throughout the collective bargaining relationship, unless the parties have agreed otherwise in writing. Although it does not have grievance jurisdiction, the court approves of the Board's review of the collective bargaining agreement to determine whether the parties have waived their rights to mid-term bargaining.

01.1	09.23	09.64	46.64	72.590	72.666
01.27	09.6	41.34	72.51	72.65	73.478

X § 979-D(1)(B): The zipper clause at issue provided that both parties waived mid-term bargaining over matters that: (1) could have been raised in the pre-agreement negotiations; (2) were raised and rejected at that time; or (3) were specifically addressed in the agreement. Since the right over mid-term impact bargaining over the management decisions permitted by the agreement could have been raised in the pre-agreement negotiations, that right was clearly and unmistakably waived through agreement to the above zipper clause. The right to mid-term impact bargaining over other management decisions was reserved in the agreement.

09.6	09.64	09.66	46.64	72.51	72.65	73.478
09.61	09.641	09.662	46.641	72.511	72.651	
09.612	09.642	41.34	46.642	72.590	72.666	

XI § 979-H(1): If the same conduct constitutes both a contract violation and a prohibited practice, the injured party should pursue its contract grievance remedy as the legislatively recognized "desirable method" for resolving the dispute.

01.27	09.23	46.6	47.56	72.5
01.29	09.25	47.54	71.8	72.65

XII § 979-D(1)(B): The Board held that there is a clear distinction between a situation where a party to a contract wishes to preserve the status quo and one where a party wishes to change it. In those cases involving a unilateral change, the employer relies on the existence of a zipper clause in the collective bargaining agreement not simply to establish that the contract precludes bargaining over new subjects during the term of the contract, but also, and more importantly, to establish that the agreement gives the employer unfettered power to change any term or condition not contained in the contract. The NLRB has clearly stated that a zipper clause will not ordinarily be construed to grant the employer such unfettered power; however, the zipper clause is given effect where the employer is using the contract as a shield to protect against a bargaining demand and not as a sword to justify a change. The Law Court rejected this "sword/shield" analysis of zipper clauses as an intrusion by the Board which would effectively negate an otherwise valid contractual provision.

09.6	09.642	41.34	46.642	72.65	73.478
09.64	09.66	46.64	72.51	72.651	
09.641	09.662	46.641	72.590	72.666	

Bradbury v. Washburn Teachers' Association, MLRB No. 82-08, 4 NPER 20-13014 (Mar. 15, 1982)

I §§ 967(2) & 964(2)(A): The bargaining agent has a duty to represent all bargaining unit employees fairly and said employees' rights to said representation is enforceable under § 964(2)(A), protecting the employees' § 963 rights, through the prohibited practice procedure.

22.3 23.6 73.113
23. 73.1

II § 968(2)(B): Since the complainant appeared pro se, the Board excused his failure to plead the section of the Act allegedly violated in his complaint. The complainant presented enough evidence to set forth a prima facie allegation of violation of the union's duty of fair representation; therefore, the Board deemed the complaint as having been amended to allege a violation of § 964(2)(A).

23.6 71.222
71.11 73.113

III §§ 967(2) & 964(2)(A): The union's duty of fair representation is breached when its conduct is arbitrary, discriminatory, or is in bad faith.

23. 73.113
23.1

IV §§ 967(2) & 964(2)(A): The union's philosophical position in this case, that only properly certified personnel be hired, is reasonable, in that its end is to foster better quality education for students.

23. 23.4
23.1 73.113

V §§ 967(2) & 964(2)(A): The union did not breach its duty of fair representation in this case. The employee was asked to leave union meetings and he did so voluntarily; the union offered the employee a procedure for representation against the union and the employee never requested said representation; and several union members' attendance at the employer's board of directors' meeting, to discuss the union's position against the employee, was not prompted by the union. Had the employee requested representation from the bargaining agent in his action against the union, the union would have been obligated to process such application in the same manner and following the same procedures as it would any other request for representation from bargaining unit employees.

09.1 09.112 09.131 21.7 22.74 73.113
09.111 09.13 09.673 22.39 23.

M.S.A.D. #45 v. M.S.A.D. #45 Teachers Association, MLRB No. 82-10, Interim Order (Jan. 12, 1982), aff'd, Nos. CV-82-34 & CV-82-71 (Me. Super. Ct., Ken. Cty., June 9, 1982)

I § 964(1)(A) & (B): The employer's unilateral discontinuance of the past practice of having the school secretary take messages for union officers concerning union business, while continuing to take non-union related messages for other employees, constitutes a clear violation of the two sections and justifies an immediate cease and desist order, at the close of the first day of hearing.

01.29 71.31 72.114 72.3 72.342
01.311 72.1 72.13 72.318 74.31
71.3 72.11 72.134 72.324 74.37

II § 964(1)(A), (B) & (D): The employer required the union to serve subpoenas on the union's own witnesses, to testify before the Board, and, if the witnesses had no leave time available, they had their pay docked. The employer's conduct constitutes an interference with the association's members' appearance as witnesses for legitimate union purposes. The witnesses affected appeared in response to subpeonas and were necessary witnesses. The employer is to cease and desist therefrom and make employee/witnesses whole for any wages lost. Since a future hearing was scheduled in this case, it was necessary to issue this interim order at the end of the first day of hearing.

01.29 09.361 71.31 72.1 72.18 72.326 74.31
01.311 21.12 71.5 72.11 72.3 72.342 74.37
09.36 71.3 71.523 72.13 72.324 72.4

III Superior Court:
§ 968(4) & (5)(B): The Board did not violate the Freedom of Access Law by going into executive session for purposes of deliberation. The sections cited clearly contemplate private deliberation, after public hearing, and that a decision be issued. The deliberative process of a quasi-judicial body, such as the Board, would be seriously hindered, if its deliberations were public. The public policy of the Freedom of Access Law is satisfied by the Board's public hearing on the merits and by the written decision.

01.2	07.52	07.54	71.31	71.51	81.5089
03.3	07.521	71.3	71.5	81.1	

MSAD No. 45 v. MSAD No. 45 Teachers Association, MLRB No. 82-10, 5 NPER 20-13028 (Sept. 17, 1982)

I § 964(2)(A) & (B): The Board held that by pursuing two grievances, writing to the Commissioner of Education, by publicizing the fact that the district hired an uncertified guidance counselor, and by requesting to meet and consult about the filing of the guidance vacancy, the union did not violate § 964(2)(A) or (B). The hiring of teachers is a non-negotiable subject of bargaining. MSAD 36 v. MSAD 36 Teachers Ass'n, 428 A.2d 419 (Me. 1981). A mere attempt to bargain over an illegal subject is not a violation of the Act. The law is well settled that a party may not insist to impasse upon bargaining over a non-mandatory subject; "such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." The record shows that the union's actions were, for the most part, legitimate attempts to protect the integrity of the collective bargaining agreement and raise questions about the legality of the employer's actions. The proper action for an employer faced with an attempt to force it to bargain about a non-negotiable subject is simply to ignore the attempt.

03.3	41.6	42.32	64.34	72.541	73.4
03.31	41.62	42.44	64.35	72.58	73.41
03.4	41.65	64.2	64.4	72.589	73.45
21.51	42.3	64.32	64.7	73.1	

II § 968(6): A witness's testimony was contradicted by all of the other evidence in the record, including the witness's own prior statements and actions and the documentary evidence. The Board concluded that the witness's testimony was not credible and rejected it.

09.36	71.5
09.362	71.523

III § 964(1)(E) & (A): The employer refused to provide information pertinent to a union grievance. "The duty to bargain collectively . . . includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining agent." Such information includes that relevant to the administration and policing of the contract in general as well as that pertinent to any potential or actual grievance. The Board concluded that the employer's refusal to provide pertinent information constitutes a violation of its duty to bargain as well as unlawful interference with the teachers' free exercise of their right to bargain collectively. The Board ordered the employer to cease and desist from refusing to provide relevant information needed by the union for the performance of its duties as the bargaining agent and to take the affirmative action of providing such information whenever requested by the union.

21.11	41.7	72.18	72.77
21.4	72.1	72.5	

IV § 964(1)(A) & (E): The record shows that the employer, without the knowledge of the union, entered into an agreement with a bargaining unit employee which provided significantly greater benefits than those provided in the collective bargaining agreement. The law is settled that individual negotiations with bargaining unit employees bypasses the exclusive bargaining representative in violation of § 964(1)(A) & (E).

46.16	72.17	72.55
72.1	72.5	

V § 968(5)(B): The employer's defense to the foregoing charge is that it is time-barred by § 968(5)(B). Said section states in pertinent part that "no hearing shall be held based upon

any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint." The union discovered the alleged violation on April 7 and did not file the complaint until November 23. The Board concludes that the allegation is barred by the six-month statute of limitations contained in § 968(5)(B) and that it must, therefore, be dismissed.

01.1 01.29 71.227
01.28 71.13

VI § 964(1)(A): The employee states that he would report to the employer statements made at union meetings. The employer and said employee had a close relationship, had entered into several deals between themselves, and the employer used information provided by the employee against the union. The employees at least implicitly agreed with the employer to report on union activities. Such an agreement for the surveillance of union activities constitutes unlawful interference of employee rights in violation of § 964(1)(A). The knowledge that an employee was reporting their activities to the employer obviously would have a strong chilling effect on the free exercise of the union members' protected rights. The employer was ordered to cease and desist from using employees to report on union activities.

09.1 09.113 09.122 72.1 72.141
09.11 09.12 21.3 72.14

VII § 965(1)(C): In MSAD 36 v. MSAD 36 Teachers Assn., 428 A.2d 419 (Me. 1981), the Court held that 20 MRSA § 161(5) reflects "a specific legislative intent to reserve to the school board and superintendent responsibility for filling teaching positions" and that a school board could not lawfully limit this responsibility through an agreement with a teachers association. Matters governed by statute are "non-negotiable" subjects about which a school district is neither obligated to negotiate nor to meet and consult. The employer properly refused to meet and consult over a hiring decision herein.

03.3 41.6 41.65 42.44 72.589
03.31 41.62 42.3 43.2
03.4 41.63 42.32 43.21

VIII § 968(5)(C): As remedies for the violations established in the record, the Board ordered that MSAD No. 45, and its representatives and agents: (1) cease and desist: from refusing to provide information to the union that is necessary for the performance of its duties as the bargaining agent; from using employees for surveillance of union acivities and meetings; and from in any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the Act; and (2) take the affirmative actions of: (a) promptly furnishing to the union, upon request, all information necessary for the union to perform its duties as bargaining agent; (b) sign, date, post, and maintain posted for 60 consecutive days a notice provided by the Board; and (c) notify the executive director in writing, within 20 days of the date of the order, of the steps taken in compliance therewith.

74.14 74.31 74.361
74.16 74.36

Waterville Teachers Association v. Waterville Board of Education, MLRB No. 82-11, 4 NPER 20-13011 (Feb. 4, 1982)

I § 965(1)(C): In examining a party's adherence to the duty to bargain in good faith, the Board examines the totality of the circumstances to find "a present intention to find a basis for agreement." Among the factors considered are: whether the charged party met and negotiated with the other party at reasonable times, observed the ground rules, offered counterproposals, made compromises, accepted the other party's positions, put tentative agreements in writing, and participated in the dispute resolution procedures.

72.5 72.532 72.538 73.43 73.439 73.442
72.53 72.535 72.539 73.433 73.440
72.531 72.537 72.54 73.436 73.441

II § 965(1)(C): A party does not violate the duty to bargain in good faith where, having reserved the right to ratify tentative agreements reached by its negotiators, it rejects said tentative agreements and makes counterproposals.

07.14 46.5 72.536 73.431 73.46
46.13 46.52 72.57 73.437

III § 965(1)(C): Negotiators must be clothed with sufficient knowledge, guidelines, and authority to reach tentative agreements, subject to ratification by their principal party. Here, the fact that the negotiators had to check with their principal, before reaching tentative agreement on many issues, does not establish that they lacked proper authority because they were able to reach such agreement on most issues without such consultation.

41.2 46.13 72.530 72.57 73.437
41.22 72.53 72.536 73.431

IV § 965(1)(C): A negotiator's failure to support a tentative agreement, when the agreement is being considered by the principal party, is evidence of bargaining in bad faith. Here, the totality of the evidence outweighed this one factor and the employer did not bargain in bad faith. While the negotiator's failure to support the agreement was improper, this conduct was not so egregious as to override the evidence of bargaining in good faith.

41.2 72.53 72.536 73.437
46.13 72.530 73.431

Holmes v. Town of Old Orchard Beach, MLRB No. 82-14, 5 NPER 20-13029 (Sept. 27, 1982), aff'd sub nom. Town of Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Association, Nos. CV-82-613 & CV-83-481 (Me. Super. Ct., York Cty., Oct. 27, 1983)

I § 962(7): While the Town Council negotiated the collective bargaining agreement and appropriated the monies required to fund the agreement, the Public Safety Commission had final authority over the operation of the police department. In the circumstances, both entities exercised final authority over negotiable issues; therefore, both are public employers within the definition of § 962(7).

03.32 11.11 11.13 11.33
03.36 11.12 11.32

II § 968(5)(B): In the absence of a definitive ruling from the Law Court interpreting any given section of the Act, the Board will look for guidance to parallel federal law, found in the NLRA and decisions thereunder, to resolve the question of interpretation.

03.22

III § 964(1)(B): In order to resolve confusion over whether the "in part" or "dominant motive" test should be used, the Board adopts the NLRB's Wright Line test in dual-motive discipline/discharge situations. The Wright Line test, as applied by the Board, provides that the complainant is required to "make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." Here, the town manager's threat "to get" the union president, the manager's statement that no successor agreement would be reached so long as the president remained as the union's chief negotiator, blaming the union president for a cruiser fire when no other employee involved was disciplined, and the town manager's overriding the town financial advisor's advice to balance the budget by laying off all specials and one regular officer by laying off two officers, including the union president, set forth such a prima facie case of anti-union animus inspired discrimination. The town's allegation, as an affirmative defense, that the layoffs were financialy required would have been ample legitimate justification of the employer's action. The employer's proffered rationale was not established by a preponderance of the evidence. The town spent nearly as much money replacing laid-off officers with part-time employees and additional overtime for other officers as would have been spent to keep two officers employed. The employer sought to fill vacancies with others and did not offer the laid-off officers employment during the layoff, although they remained on the eligibility list therefor. The town also ended its fiscal year with a $150,000 surplus.

72.3 72.311 72.316 72.32 72.336 72.358
72.301 72.312 72.317 72.324 72.337 72.365
72.31 72.315 72.318 72.334 72.35

IV § 964(1)(B): The intent to discriminate against an employee for his union activity by laying him off is deemed transferred against the more junior employee if he was laid off to allow the employer to then lay off the more senior employee, against whom the anti-union animus is actually directed.

72.3 72.311
72.31 72.316

V § 964(1)(A): A discriminatory layoff, in violation of § 964(1)(B), has the natural effect of interfering with that employee's § 963 rights and is, therefore, violative of § 964(1)(A).

21.3 72.13 72.18
72.1 72.134 72.3

VI § 968(5)(C): Upon finding that the layoffs were the result of anti-union animus and would not have occurred but for such improper motivation, the Board ordered the employer to cease and desist from basing employment decisions upon anti-union animus. Since such remedy is prospective only, the Board also ordered laid-off employees made whole for salaries, plus interest, benefits, and seniority lost during the layoff period, less net earnings from other sources. The interest rate was to be paid according to a formula outlined in the decision. Also, the employer was ordered to post a notice, where notices are normally posted for information of unit employees, that it will not discriminate in employment decisions on the basis of union activity in the future. The employer was ordered to notify the executive director in writing, within 20 days of the date of the order, of the steps taken in compliance therewith. If the parties were unable to agree on the amount due to make each employee whole, under the above order, within 30 days of the date thereof, the Board retained jurisdiction to establish the amount so due.

74.16 74.32 74.335 74.34 74.343 74.345 74.361
74.31 74.33 74.336 74.341 74.344 74.36 81.18

Town of Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Association, 461 A.2d 1054 (Me. 1983)

FACTS: The Superior Court dismissed an appeal from a Board prohibited practice order because the Appellant had failed to file its appeal within 15 days of receipt of the Board's order, having filed the appeal on the 16th day. No. CV-82-613 (Me. Super. Ct., York Cty., Dec. 27, 1982). The Appellant appealed the dismissal order to the Law Court.

I LAW COURT:
§ 968(5)(F): This section provides that either party may seek Superior Court review of a Board prohibited practice decision, by filing a complaint, pursuant to Rule 80B of the Rules of Civil Procedure, "within 15 days of the effective date of the decision." The term "effective date" is not defined in the statute. The Court holds that the "effective date" is the date on which the decision is served on a party. Service by mail is completed upon posting. Rule 80B incorporates all of the other Rules of Civil Procedure. Rule of Procedure 6(e) provides: "Whenever a party . . . is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail . . ." three days are added to the prescribed period. Since the service of the decision herein was made by mail, which was completed upon posting, the filing period was extended by three days and thus did not expire until 18 days after posting of the decision by the Board.

74.16 81.13 81.191 81.34 81.5089
81.11 81.14 81.31 81.35

II § 968(5)(F): Although an administrative construction of a statute by the agency charged with implementing it is often a valuable aid to the judiciary, such a construction is never conclusive on the court.

01.31 03.22 81.493
03.2 81.19 81.505

Holmes v. Town of Old Orchard Beach, MLRB No. 82-14, 6 NPER 20-14034, Supplemental Decision and Order (Aug. 3, 1983), aff'd sub nom. Town of Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Association, Nos. CV-82-613 & CV-83-481 (Me. Super. Ct., York Cty., Oct. 27, 1983)

I §§ 964(1)(B) & 968(5)(C): The decision on the merits held that the employer had unlawfully discharged two employees and ordered that the affected employees be made whole, including an offer of immediate reinstatement to duty, full back pay, money spent seeking alternative employment, and back benefits such as holiday pay, sick leave accumulation, medical insurance, retirement contributions, vacation accumulation, seniority accumulation, and interest due on financial items, less amounts earned during the period of unlawful discharge.

01.29 74.32 74.335 74.34 74.344
74.11 74.33 74.336 74.341

II § 968(5)(C): In the case of a discriminatory discharge, a make-whole remedy is required to effectuate the Act's policy of restoring the situation as nearly as possible to that which would have obtained, but for the unfair labor practice. Here, the Board retained jurisdiction to determine the amount of a make-whole order, if the parties were unable to agree thereon. Appeal of the case on the merits to Superior Court did not strip the Board of jurisdiction to do so because: (1) filing an appeal does not stay the Board's order and no stay was sought from the Court; (2) under the Act, the Board has primary jurisdiction to fashion a remedy for established prohibited practices; and (3) the Court may review the remedial order at the same time as it examines the Board's decision on the merits, under § 968(5)(D).

01.28 71.241 74.17 81.19 81.4 81.43
01.29 74.12 81.18 81.191 81.41 81.46

III § 968(5)(C): Interest due on make-whole orders and formula applying the same as set forth in detail.

74.336
74.345

IV § 968(5)(C): The award of reasonable counsel fees was required to effectuate the policies of the Act for the compliance phase of the case because the employer offered no valid reason why it had not attempted to settle the amount of the make-whole order, thereby obviating the need for a supplemental proceeding before the Board. No counsel fees were awarded for the case on the merits because the employer's case there was meritorious, on its face, and was not clearly frivolous.

01.29
74.352

Associated Faculties of the University of Maine v. University of Maine, MLRB Nos. 82-15, -16 & -22, 5 NPER 20-13030 (Sept. 27, 1982)

I § 1029(2): Since three prohibited practice cases involved the same parties and similar issues, the prehearing officer ordered that the cases be consolidated for hearing.

01.21 71.251
71.25 71.514

II § 1026(1)(C): This section sets forth, as mandatory subjects of bargaining, wages, hours, and working conditions. Concomitant with the duty to bargain over said subjects is a prohibition against the employer's making unilateral changes in mandatory subject areas.

72.5
72.6

III § 1026(1)(C): The test for whether a topic comes within the ambit of the mandatory subjects of wages, hours, and working conditions is "to be interpreted in a limited sense which does not include every issue that might be of interest to unions or employees. In order for a

matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms or conditions of employment." The materiality or significance of an employer-provided service, where the service is optional with the employee, is determined by the presence or absence of such facts as: the extent to which the service materially affects the employees' living conditions, the presence or absence or feasible alternatives to the employer-provided service available to the employees, the value of the employer-provided service, and the extent to which the employer-provided service has been presented by the employer as an alternative to cash compensation.

42.1 42.47 43.1
42.11 42.48

IV § 1026(1)(C): Employer-supplied parking, where most employees drive to work in their own cars, where a shortage exists in employer-supplied parking, and where little alternative parking exists, is a mandatory subject and the employer violated § 965(1)(C) by unilaterally increasing the parking fee charged to unit employees for said parking. Although relatively slight, the fee increase was not de minimis because, over time, the increase "can amount to a substantial sum" and, were the subject non-mandatory, precedent could result in substantial future increases.

43.14 72.584
43.143 72.661

V § 1026(1)(C): The University argued that a private and special law, which permits the board of trustees "to make rules and regulations for the control, movement and parking of vehicles" on University property permits the University to unilaterally alter the parking fee. The University argued that said private and special law repealed, by implication, the University bargaining Act, to the extent that the latter includes parking fees as mandatory subjects of bargaining. In Maine, repeal by implication is not favored by the courts. Where possible, the courts will give effect to both statutes allegedly in conflict. A consistent reading of the two statutes here is that the University may set a parking fee; however, to the extent that such fee applies to its organized employees, the University must bargain over the amount of the fee with the bargaining agent(s) representing the University's employees.

03.2 03.3 03.4 42.3 42.44 46.21 72.667
03.22 03.31 07.13 42.32 46.2 72.591

VI § 1026(1)(C): Athletic locker rental fees, for employees at the University, is not a mandatory subject of bargaining. Unlike the parking situation, there is no inherent need for University employees to use the lockers. The lockers are used during non-working time and are merely a convenience for those employees wishing to avail themselves of the University's athletic facilities for their own recreation and enjoyment. Athletic locker use is not limited to unit employees but is available to the general public, on the same "first-come, first-served" basis. The union neither established nor tried to argue that any relationship exists between the employee use of athletic lockers and working conditions.

43.14
43.144

VII § 1029(2): Generally speaking, the statute administered by the Federal Labor Relations Authority, the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), is markedly different from the Acts administered by the Board; therefore, the Board would not generally look to the Authority's decisions in interpreting Maine law.

03.2 04.2
03.22

VIII § 1026(1)(B): A party may waive its right to demand bargaining over a mandatory subject. To be an effective bar to bargaining, the waiver must be "unmistakably clear." The collective bargaining agreement provided that employee job descriptions could be changed by the University, with input by the affected employee(s), when the unit employees' duties have changed. Here, the residency requirement for complex directors was changed by the University, after the position's duties had changed and after the affected employee had consulted with the University thereon. Since the job description was changed after the occurrence of the condition precedent contained in the collective agreement and in accord with the procedure mandated therein, the union waived the right to bargain thereover and the University did not violate the duty to bargain in implementing said change.

09.6	09.64	43.41	72.51	72.664
09.61	09.642	46.64	72.590	
09.612	09.66	46.641	72.65	

IX § 1029(3): As remedies for the violation established in the record, the Board ordered that the University of Maine, its representatives and agents: (1) cease and desist from using the unilaterally implemented parking fee increase, (2) restore the former parking fees, and (3) rebate the difference between the new parking fees and the former fee to each unit employee that paid the new fee.

74.14	74.32
74.31	74.34

Council 74, AFSCME v. Board of Directors, M.S.A.D. No. 34, MLRB No. 82-24, 5 NPER 20-13023 (May 19, 1982)

I § 965(4): A party's request for interest arbitration, on an issue upon which the negotiating parties had already reached agreement through collective bargaining, is contrary to § 965(4) and any resulting award is null and void. Neither party is under any obligation to abide by the terms of such an award. The purpose of the Act in general and of the interest arbitration provision in particular is to assist employers and bargaining agents in reaching agreement on the terms of collective bargaining agreements. If the parties do not have a "controversy" which prevents them from reaching agreement on a term or provision of their contract, they are not authorized by § 965(4) to seek interest arbitration. Execution of a contract means that the collective bargaining process over the terms of the contract has come to an end, that each party must live with the provisions of the contract during the life of the agreement, and that the statutory right to use interest arbitration to create contractual language no longer exists. If this were not the case, then considerable instability would be injected into every collective bargaining relationship, as either party could ultimately seek interest arbitration anytime if it decided that it did not like a provision in its contract.

09.22	55.3	55.62	55.84	72.75
55.	55.34	55.8	55.9	73.55
55.24	55.4	55.83	55.94	

II § 965(4): Once parties have reached agreement on the provisions of a contract, they are precluded during the life of the contract from attempting to change the terms of the contract through interest arbitration. There are two exceptions to this rule: (1) Parties may expressly agree during negotiations to be bound by the language imposed by an interest arbitration award, and then execute a contract embodying their agreements on all other issues, Caribou School Dept. v. Caribou Teachers Assn., 402, A.2d 1279 (Me. 1979); and (2) the parties might ultimately resort to interest arbitration, during the term of their contract, if one of the provisions of the contract is declared illegal in a judicial proceeding and, having agreed to renegotiate replacement language, the parties are unable to agree there to the point of impasse.

46.2	55.24	55.35	55.8	55.9
46.24	55.3	55.4	55.83	
55.	55.34	55.62	55.84	

Town of Limestone v. Council 74, AFSCME, MLRB No. 82-25 (Apr. 14, 1982)

I § 965(1)(E): The parties had a ground rule providing that they were to meet to attempt to resolve bargaining differences, prior to resorting to mediation. The employer served the union with a 10-day notice, the parties met, and the union made some concessions, prior to calling in a mediator. On the facts, the Board held that the union had complied with the ground rule and therefore did not fail to bargain in good faith.

41.3	41.33	52.3	73.43	73.439	73.55
41.31	52.12	73.4	73.433	73.442	

Brunswick Teachers Association v. Brunswick School Board, MLRB No. 82-28, 5 NPER 20-13027 (Aug. 9, 1982)

I § 964(2)(B): The union insisted, to the point of impasse, upon bargaining over proposals that seniority be the determining factor in reductions-in-force and that senior teachers laid off, if qualified, be given the right of first refusal to fill future vacancies. In light of the Supreme Judicial Court's decisions in MSAD No. 36 v. MSAD No. 36 Teachers Assn., 428 A.2d 419 (Me. 1981), and Paradis v. MSAD No. 33 School Board, 446 A.2d 46 (Me. 1982), the Board must conclude that the seniority proposals are non-mandatory subjects of bargaining. Title 20 M.R.S.A. § 161(5) grants school boards the non-delegable right to terminate teaching positions "when changes in local conditions warrant the elimination of the teaching position." Although the employer may enter into a contract voluntarily, the termination of teaching positions is a matter governed by statute, with the only limitation being the implied duty of school boards to exercise their power "in good faith for the best interests of education in the district"; proposals such as the union's seniority proposals which would restrict or fetter the school board's power are non-negotiable. The employer properly refused to bargain over said proposals.

NOTE: The 110th Legislature, first regular session, amended 20 M.R.S.A. § 161(5) to allow negotiated seniority provisions to be one factor used in making layoff decisions, thereby reversing the Law Court and the Board (Ch. 147, Public Laws of 1983).

03.3	42.3	43.51	43.531	43.61	72.589	73.45
03.31	42.32	43.52	43.532	46.2	73.4	
03.4	43.5	43.53	43.533	46.21	73.436	

II § 965(1)(C): The mere reference in a statute to a particular issue does not automatically mean that the issue is a non-negotiable subject. The Law Court has held that "the mere fact that a particular subject matter may be covered by legislation does not exclude it from collective bargaining." Superintending School Committee of Bangor v. Bangor Education Association, 433 A.2d 383, 386 (Me. 1981). "[T]here is no reason why the mandatory provision [for collective bargaining] should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment." State v. MLRB, 413 A.2d 510, 516 (Me. 1980). Where a statute explicitly reserves to the public employer the exclusive authority to take a particular action, the employer cannot lawfully delegate said authority through bargaining and proposals requiring such delegation are non-negotiable.

03.3	03.4	42.32	43.61	46.21
03.31	42.3	42.44	46.2	

III § 964(2)(B): It is settled law that a party commits a per se violation of its duty to bargain by insisting to impasse that a non-mandatory subject be negotiated. "Such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." The per se rule is applied entirely apart from any determination of whether the party acted in good or bad faith." Thus, the union's claim that they acted in good faith is irrelevant. A finding of impasse was based on: (1) the union had insisted on negotiating over its proposal for over 8 months, (2) the employer steadfastly refused to negotiate thereon, and (3) the union initiated a prohibited practice complaint and mediation to try to force the employer to negotiate over the proposal.

51.01	73.4
52.12	73.45

IV § 968(5)(C): As the remedy for the violation established in the record, the Board ordered that the union, and its agents, members, and bargaining agents cease and desist from insisting to the point of impasse that the employer negotiate over the union's seniority proposal.

74.14
74.31

M.S.A.D. No. 22 Board of Directors v. Tri-22 Teachers Association, MLRB No. 82-33, 5 NPER 20-14003 (Oct. 5, 1982)

I § 964(2)(B) & (1)(E): A bargaining team must be clothed with "sufficient knowledge, guidelines and authority to make tentative agreements." In examining bad faith bargaining charges, the Board reviews the totality of the charged party's conduct during negotiations to determine whether the party had "a present intention to find a basis for agreement." The

following incidents are evidence of bad faith bargaining: The employer statement repeatedly made at the table that its purpose was to bargain, not to discuss problems; the employer's refusal to explain the basis of its proposals and to "justify positions taken by reasoned discussions"; the employer's antagonistic and abusive behavior, at the table, in ridiculing the union's chief negotiator and in denigrating other union team members (misconduct of this nature has been held to justify the refusal of a party to even meet for negotiations); the employer statement that it would discuss but never agree to several mandatory topics (classic example of surface bargaining, where a party goes through the motions of collective bargaining with no intention of reaching agreement on the matters under discussion); and the union's statement that it had no authority to negotiate any reductions in the current contract language (mandatory subjects must be negotiated, whether they involve gains or losses from the current contract level). Despite the union's statement, the union did bargain in good faith. No order was entered against the employer because the union neither charged the employer with bad faith bargaining nor sought an order against the employer.

01.312	41.3	72.5	72.531	72.538	73.43	73.436
41.2	41.7	72.53	72.533	73.4	73.431	73.440
41.22	72.4	72.530	72.535	73.41	73.432	

II § 964(1)(E) & (2)(B): Predictably unacceptable proposals do not justify an inference of bad faith if they do not foreclose future negotiations, unless the proposals are so harsh or patently unreasonable as to frustrate any possibility of agreement. Insistence upon a proposal, which the insisting party knows the other party cannot accept, is evidence of bad faith bargaining.

72.52	73.41
72.535	73.436

III § 968(5)(C): It is appropriate for the Board to take notice of a party's prior labor relations record, when fashioning remedies.

74.17

IV § 964(2)(A) & (B): The test for a violation on the prohibition of the union bypassing the employer's bargaining team is: (1) Did the union attempt to meet with the full board of directors in fact rise to the level of bypassing the directors' representative, and (2) Did the attempt have more than a negligible effect on the authority of the directors' bargaining team? The Board holds that the union's attempt to meet with the directors was an attempt to bypass the bargaining team. Although a union may request to meet with the employer at any time during negotiations, the purpose of the meeting cannot be to negotiate about the issues pending before the parties' bargaining teams. The union wanted to meet for "a serious discussion of all issues," and we infer that included in the request were at least some of the many issues which the two bargaining teams had been unable to resolve. Any attempt to deal with the directors over such issues would have the effect of undermining the bargaining team's authority to deal with these matters. Even though the employer's bargaining team was engaging in bad faith bargaining, the union was obligated by § 965(1) to continue to attempt to negotiate with the bargaining team, while at the same time, if it so chose, attempting to rectify the bargaining team's misconduct through its statutory remedies. If in fact the union wanted to meet with the directors to discuss the bargaining team's negative attitude--a proper subject for a meeting so long as the union did not attempt to interfere with the directors' selection of the bargaining representatives--then the union should have clearly and unambiguously so stated in its letter. The Board concluded that the union's request to meet for a serious discussion of all issues constitutes a breach of the union's duty to bargain, in violation of § 964(2)(B). The Board recognized that discussions, between the union and the employer, may be fruitful, particularly when the bargaining teams are unable to resolve their differences, and did not intend by this decision to preclude parties from entering into such discussions, when both parties wish to do so.

41.2	72.55	73.4
41.21	72.56	73.57

V § 968(5)(C): As a remedy for the violation established in the record, the Board ordered that the union, its business agent, and their agents and members cease and desist from attempting to discuss issues pending in contract negotiations with the employer's full board of directors, unless the directors indicate a willingness to engage in such discussions.

74.14
74.31

Teamsters Local Union No. 48 v. Town of Bar Harbor, MLRB No. 82-35, 5 NPER 20-14004 (Nov. 2, 1982)

I § 964(1)(E): The bargaining team must be given "sufficient knowledge, guidelines and authority to make tentative agreements. If the negotiators are mere conduits or messengers between the principal party and the other party's bargaining team, without sufficient authority to negotiate and make tentative agreements, the principal is guilty of bad faith bargaining." The employer's negotiators made several tentative agreements and later repudiated them unilaterally or the tentative agreements were rejected, without explanation, by the town council. The bargaining team either made tentative agreements beyond the scope of its authority or bargaining authority, once given, was later withdrawn. In either case, the employer failed to bargain in good faith.

41.2 72.5 72.539 73.431
41.22 72.530 73.4 73.441

II § 964(1)(E): A ground rule provided that tentative agreements be reduced to writing and that the employer would be responsible for the preparation of such agreements. The employer failed to prepare tentative agreements after they were reached. Contravention of negotiating ground rules is evidence of bad faith bargaining and supports the Board's holding that the employer bargained in bad faith.

41.31 72.54 73.442
72.5 73.4

III § 965(1)(D): This section provides that employers and bargaining agents have "a mutual obligation to execute in writing any agreements arrived at, the term of any such agreement to be subject to negotiation but shall not exceed 3 years." Said section applies only to the final agreement bargained by the parties and not to tentative agreements reached during negotiations on portions of the prospective collective bargaining agreement.

46.11 46.55 73.461
46.13 72.571

IV §§ 964(1)(E) & 968(5)(C): A failure to participate in fact-finding in good faith constitutes a violation of § 964(1)(E). The employer's chief negotiator refused, when asked to do so prior to fact-finding, to agree that certain issues, which had in fact been tentatively agreed to, had been settled through tentative agreement. Six of the 18 issues submitted to the fact-finders had in fact been settled through tentative agreement; however, the union was forced to submit said issues to the fact-finders because of the employer's refusal to acknowledge said tentative agreements. The Board held that the employer failed to particpate in fact-finding in good faith, ordered the employer to cease and desist therefrom, and ordered the employer to compensate the union "a fair and reasonable assessment of the expense incurred by the union as the direct result of the improper conduct." One-third of the issues before the fact-finders were only there because of the employer's misconduct; therefore, the employer was ordered to pay one-third of the union's fact-finding costs.

53.1 53.24 72.75 74.17 74.34 74.40
53.21 72.5 73.55 74.31 74.355

V § 964(1)(E): "Surface bargaining," a violation of § 964(1)(E), occurs "when a party goes through the motions of collective bargaining with no intention of reaching agreement on the matters under discussion." The town council stated, during bargaining, "why give him anything until they agree to all our language" and the employer's chief negotiator stated, prior to the request for fact-finding, that if the union prevailed at fact-finding the town would not pay any raises nor agree to any retroactive effect for the successor agreement. The Board held that said statements, together with the employer's unilateral repudiation of tentative agreements, establish that the employer engaged in "surface bargaining."

72.5 72.531 72.539 73.43 73.436
72.53 72.535 73.4 73.432 73.441

VI § 964(1)(E): The duty to bargain wages is not limited to bargaining wage increases but it also includes negotiating wage decreases or wage equalization among the unit positions. The employer, by bargaining for no wage increase for two unit employees, was attempting to equalize the wages for unit employees and, therefore, did not violate § 964(1)(E).

42.1 43.11 43.119 72.591
43.1 43.111 72.52

VII § 964(1)(A): Under the doctrine of respondeat superior, an employer is vicariously liable and responsible for the acts and statements made by its employees within the scope of their employment. The public works superintendent, within the scope of his employment, reprimanded a union member and made a statement to several union members which was threatening in nature and was likely to stir up discontent with the union. Both acts, had they not been promptly repudiated by the town manager, would violate § 964(1)(A). Said prompt repudiation by the town manager clearly established that the superintendent's actions were not made in the course of his employment and, therefore, the employer is not liable therefore.

09.1 09.111 09.114 09.121 72.13 72.18
09.11 09.113 09.12 72.1 72.131

VIII § 964(1)(B): The NLRB's Wright Line test, applied to determine whether § 964(1)(B) was violated, provides: (1) the complainant must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision, and (2) once a prima facie case is established, the burden will shift to the employer to demonstrate, as an affirmative defense and by a preponderance of the evidence, that the same action would have been taken in the absence of protected conduct. The employer herein clearly gave preferential treatment to the only non-union employee in the unit; however, said preferential treatment predated the creation of the bargaining unit by several years; therefore, whatever the reason therefor, the preferential treatment was not the result of union activity and the union failed to establish a prima facie case.

72.3 72.31 72.317 72.331 72.362
72.301 72.311 72.318 72.35 72.366

Portland Firefighters Ass'n v. City of Portland, MLRB No. 83-01, 6 NPER 20-14028 (June 24, 1983); aff'd, 478 A.2d 297 (Me. 1984)

I §§ 964(1)(E) & (A) & 964(2)(B): Board: It is a violation of the duty to bargain to either refuse to bargain over the mandatory subjects or to insist, to the point of impasse, on negotiating over non-mandatory subjects. Either course of conduct by the employer violates § 964(1)(E) and inherently interferes with the employees' right to engage in collective bargaining in violation of § 964(1)(A). Such conduct by the bargaining agent violates § 964(2)(B).

21.4 72.18 72.541 73.4 73.477
72.1 72.5 72.589 73.45

II § 965(1)(C): Board: Mandatory subjects of bargaining are those which are significantly and materially related to wages, hours, working conditions, or contract grievance arbitration.

42.1
42.12

III § 965(1)(C): Board and Law Court: Proposals relating to employee safety or workload are mandatory subjects. Proposals concerning the minimum number of firefighters per shift, per station, or per truck are not sufficiently related to the number of firefighters at the scene of a fire needed to perform necessary tasks to be mandatory subjects. The number of firefighters at the scene of a fire is sufficiently related to safety and workload that work rules concerning the number of firefighters needed to perform each task at the first scene are mandatory subjects.

43.46 43.476 43.64
43.47 43.56

IV § 965(1)(C): Board: The employer's defense, that minimum manning is not a mandatory subject because it is a "management prerogative," was explicitly rejected. The Law Court has held that the Act does not contain a management prerogative exception to the duty to bargain.

43.56
72.665

V § 964(2)(B): Board and Law Court: The union violated the duty to bargain by insisting, to the point of impasse, that the employer negotiate over minimum manning proposals, a non-mandatory subject. The union refused to negotiate at all, unless the employer agreed to bargain over minimum manning per shift, per station, or per truck.

43.56 73.4
51.01 73.45

VI § 968(5)(B): Board: As a remedy for the violation, the Board ordered the union to cease and desist from insisting, to the point of impasse, that the employer negotiate over certain non-mandatory minimum manning proposals.

74.31

VII § 968(5)(F): Law Court: The Board's findings of fact will be upheld, unless they are clearly erroneous. The Courts accord the Board "considerable deference" in its construction of the Act.

03.2 81.33 81.50 81.505
03.22 81.331 81.502 81.5089
81.3 81.493 81.503

Lundrigan v. State Department of Personnel, MLRB No. 83-03, 5 NPER 20-14013 (Feb. 4, 1983); aff'd sub nom, Lundrigan v. Maine Labor Relations Board, 482 A.2d 834 (Me. 1984)

I § 979-H(2): The Board held and the Law Court affirmed that acts which occurred more than 6 months prior to the filing of the prohibited practice complaint are time-barred by the 6 month statute of limitations contained in the State Act.

01.28 09.67 71.13
09.62 21.92 71.227

II § 979-H(2): The Law Court held that pursuing a grievance under the contract, prior to seeking redress through a complaint before the Board, does not toll the statute of limitations in the State Act. "[C]ontractual rights grounded in a bargaining agreement and similar statutory rights are legally independent and, as such, are enforceable concurrently in two different forums."

01.28 09.63 21.92 47.01 47.32 71.13
09.62 09.67 46.6 47.15 47.54 71.8

III § 979-H(2): The Law Court held that this section of the Act empowers the Executive Director or the Board to dismiss a complaint without hearing, if the facts alleged do not constitute a violation of the Act, as a matter of law. Such a decision is a ruling of law that will be reversed only if it is arbitrary, capricious, or is characterized by abuse of discretion. 5 M.R.S.A. § 11007(4)(C)(6).

71.11 71.22 71.227 81.12 81.33 81.50 81.522
71.2 71.222 71.251 81.191 81.331 81.503

IV § 979-H(2): Board held that, in reviewing the respondent's motion to dismiss, based on an averment that the facts alleged in the charge do not constitute a violation of the Act as a matter of law, the motion is deemed to be a motion for summary judgment; therefore, all of the complaint's allegations of fact are treated as having been established for the purposes of ruling on the motion. No fact hearing is required to rule on such motion.

09.378 71.2 71.22 71.227
71.11 71.211 71.222 71.251

V § 979-F(2)(E): Board and Law Court: The Act creates a duty of fair representation on the part of the bargaining agent that is enforceable by the Board. To constitute a breach of the duty, the bargaining agent's conduct toward the unit employees must be arbitrary, discriminatory, or be undertaken in bad faith. Thus, the union may not ignore a meritorious grievance or process it in a perfunctory manner. Nevertheless, a wide range of reasonableness must be allowed, subject to complete good faith and honesty of purpose in the exercise of such discretion. Mere negligence, poor judgment, or ineptitude are insufficient to establish a breach of the duty.

21.7 22.39 23.2 23.4 23.62 47.3 73.113
22.3 22.41 23.25 23.6 47.21 47.53
22.37 23.1 23.26 23.61 47.223 73.1

VI § 979-F(2)(E): The Board held and the Law Court affirmed that the union did not breach its duty of fair representation. The union pursued the employee's grievance through arbitration and presented witnesses, 34 exhibits, and written argument to the arbitrator. The union's refusal to seek production of a particular document, to present certain arguments, or to allow the employee to say everything he wanted, at the arbitration hearing, did not violate the duty of fair representation, in the circumstances. The document and arguments that the employee wanted raised were irrelevant, counterproductive, contrary to fact, or were not based on the bargaining agreement. The union's attorney properly exercised his discretion in refusing the employee's demands.

21.7 22.37 23.24 23.4 47.3 73.1
22.3 22.39 23.25 47.223 47.53 73.113

VII § 979-H(7): The Law Court determined that, since the Superior Court sits as an intermediate appellate court in reviewing the Board's orders, the standard of review in the Law Court is the same as in the Superior Court; i.e., the Board's rulings of law will be reversed if they are arbitrary, capricious, or characterized by abuse of discretion. 5 M.R.S.A. § 11007(4)(C)(6). As the agency empowered to enforce the Act, reviewing courts will give the Board "considerable deference" in its construction of the Act.

03.2	81.191	81.47	81.503	81.522
03.22	81.33	81.493	81.505	81.6
81.12	81.331	81.50	81.5089	81.61

Ross v. Portland School Committee, Order on Respondents' Motion to Quash Subpoena, MLRB No. 83-04 (Dec. 6, 1982)

FACTS: The Board issued a subpoena duces tecum for the production of documents at a pre-hearing document exchange between the parties supervised by a member of the Board's staff. A motion to quash parts of the subpoena was considered by the Board.

I § 968(6): In considering a request for production of documents, the Board weighs the potential benefit accruing from their production against the burden imposed upon the party required to produce them.

Records confidential under Federal Law: Certain educational records are confidential under Federal Law and may only be released in response to a subpoena, after notice is given to all affected students and their parents. No particularized need was shown for production of such records and the burden of producing them was patent. The latter far outweighed any potential evidentiary benefit and the requested production was quashed.

Personnel records confidential under State Law: Under State Law, personnel records kept by the employer may only be released with the permission of the employees whose files are sought. Since the union seeking production of the records is the employees' bargaining agent, it knows the identity of the affected employees, and has equal access to the employees to attempt to gain their approval for release of the files; the union has the duty to seek such approval prior to requesting their production by subpoena.

03.31	07.52	71.2	71.34	83.123	83.163
03.32	07.521	71.25	71.4	83.124	
04.2	09.3	71.252	83.1	83.16	

II § 968(6): When a request for production of documents fails to identify the documents sought with reasonable clarity and particularity, the request may be deemed to be a "fishing expedition" and it will be quashed.

09.3	71.25	71.34	83.1	83.16
71.2	71.252	71.4	83.123	83.163

III § 968(6): A subpoena duces tecum may require production of existing documents but not the creation of document summaries for the purpose of litigation.

09.3	71.25	71.34	83.1	83.16
71.2	71.252	71.4	83.123	83.163

Ross v. Portland School Committee, MLRB No. 83-04, 6 NPER 20-14038 (Aug. 29, 1983)

FACTS: A local union president charged that an involuntary transfer violated 26 M.R.S.A. § 964(1)(A), (B) & (C). The union president had filed several controversial grievances and had persuaded the School Committee to reverse several decisions of the Superintendent and his staff. The employer argued that the transfer was necessitated by budget cuts (there had been 85 layoffs and 142 transfers, most of an involuntary nature, during a four-year period) and that the specific transfer resulted from a decline in student enrollment at the president's school coupled with an opening at another school, which the president was qualified to fill.

I § 964(1)(B): Although not involving the imposition of discipline, the involuntary transfer resulted in an increased workload and could, in some circumstances, violate this section of the Act.

72.331
72.342

II § 964(1)(B): The test for evaluating "mixed motive" discrimination cases is that set forth in NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S. Ct. 2469 (1983), and adopted by the Board in Holmes v. Town of Old Orchard Beach, MLRB No. 82-14, 5 NPER 20-13029 (Sept. 27, 1982), aff'd, Case Nos. CV-82-617 and CV-83-481 (Me.Super.Ct., York Cty., Oct. 27, 1983). That test is as follows: The complainant has the burden of proving that the employee's protected conduct was a substantial or a motivating factor in the employer's decision. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of § 964(1)(B) and, derivatively § 964(1)(A), by proving by a preponderance of the evidence that the employer's action rested on the employee's unprotected conduct as well and that the same employer action would have been taken in any event. Proof that the employer would have taken the action in any event amounts to an affirmative defense on which the employer bears the burden of proof by a preponderance of the evidence.

09.33 71.512 72.18 72.311 72.324 72.365
71.211 72.1 72.301 72.323 72.35

III § 964(1)(B): Applying the above test, the Board held that the involuntary transfer was motivated by anti-union animus for three reasons: (1) one reason given by the employer for the transfer was the president's reduced teaching load--a benefit accorded to the president by the bargaining agreement; (2) the reasons offered by the employer varied from one meeting to the next--if the reasons proffered for employer action vary during successive explanations, they may be deemed pretextual; and (3) the Superintendent made a statement implying that the transfer had been punitive in nature.

72.301 72.323 72.331
72.311 73.324

IV § 964(1)(B): Under the second tine of the discrimination test, the employer avoided an adjudication of violation by proving that the transfer, although motivated by anti-union animus, would have occurred in any event. The employer satisfied its burden by showing: (1) the decline in student enrollment; (2) the necessity for budget cuts; (3) the necessity of transferring two teachers from the president's school; (4) the problems, totally unrelated from her union activities, that the president had had with the school's administration; (5) the fact that, when the president had had problems with building administrators prior to being involved in any union activity, she had been involuntarily transferred; and (6) valid educational reasons supported the transfer.

72.301 72.35 72.353 72.361
72.318 72.352 72.358 72.365

V § 964(1)(B) and (A): Since the violation of § 964(1)(A) was only plead as a derivative violation of § 964(1)(B), dismissal of the latter charge resulted in dismissal of the former.

72.1
72.18

VI § 964(1)(C): This section of the Act is directed at the evil of the employer's providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence of any such conduct was established in the record.

72.2 72.24 72.26
72.23 72.25

City of Bangor v. Bangor Fire Fighters Association, MLRB No. 83-06, 6 NPER 20-14033 (Aug. 2, 1983)

I §§ 964(2)(B) and 965(1)(C): Following the reasoning outlined in Portland Firefighters Ass'n v. City of Portland, MLRB No. 83-01, the Board held that the Union's "per truck" minimum manning proposal is not a mandatory subject of bargaining. In addition to the Portland Firefighters analysis, the Board found a supplemental factor persuasive. A community's overall level of firefighting protection is a political decision to be made by a municipality's elected officials. Should the municipal officials, in response to perceived constituent demand to keep tax rates low, decide to provide minimal fire-fighting protection, that decision is not subject to collective bargaining. The level of fire-fighting protection is directly related to the number of men available at the scene of the fire. If that number is

insufficient, optimal techniques will not be possible, the fire will be more intense, and the resulting loss greater. If the number is inadequate, those present should not be expected to perform the same work which should, within reasonable safety and workload limits, be done by a greater number of fire fighters.

42.47 43.64 43.95
43.56 43.92

II § 964(2)(B): The Union's insistence on bargaining over its minimum manning proposal, a non-mandatory subject, in the face of repeated employer requests that it be withdrawn, violated the duty to bargain. Such insistence violates the duty to bargain because insistence on bargaining over non-mandatory subjects is, in substance, a refusal to bargain over mandatory ones.

73.45

III § 968(5)(C): As a remedy for insisting, to the point of impasse and into fact-finding, on bargaining over non-mandatory subjects, the Board usually allocates the share of fact-finding costs incurred thereby and awards that amount to the blameless party. This was not done here because both parties insisted, into fact-finding, on bargaining over non-mandatory subjects and any allocation would have been too speculative.

01.29 53.43 72.75 73.55
53.21 72.541 73.45 74.355

IV § 964(2)(A): The Board held that a proposal that payment of "fair share" be a condition of continued employment is a mandatory subject of bargaining. In Churchill, the Law Court declared a 100% union security clause to be contrary to the Act but reserved judgment on whether a "fair share" proposal is permitted by the Act. In Abood, the U.S. Supreme Court held that an agency shop provision, whose sole purpose was to provide non-union bargaining unit employee financing for the bargaining agent's collective bargaining and contract administration functions, is constitutional, under the balancing test analysis applied to First Amendment questions. In the Opinion of the Justices, the several members of the Law Court applied Abood and concluded that an 80% "fair share" clause is not violative of the U.S. and State Constitutions or of the State Act.

03.1 21.11 24.12 24.152 24.191 43.83
03.12 21.6 24.13 24.17 24.194 73.1
04.1 24.1 24.14 24.19 24.221

V § 964(2)(A): The Board agreed with U.S. Supreme Court's suggestion, in Abood, that public employee unions, who enjoy the benefits of "fair share" provisions, should have bona fide internal procedures where objecting non-member unit employees may challenge the reasonableness of the level of the "fair share" deductions. The fact that the percentage of the service fee is fixed by the collective bargaining agreement does not make that level conclusive upon a non-member who puts the amount in issue in an appropriate judicial proceeding or bona fide internal union rebate procedure. In the latter, since the Union possesses all of the relevant facts and records, it must justify the percentage of the "fair share" deduction to reflect the Union's approximate collective bargaining and contract administration costs. The right to relief includes: (1) a rebate for the proportion of the fee paid in excess of collective bargaining and contract administration costs, and (2) reduction of future fees due by the same proportion.

21.6 23.4 23.61 24.1 24.17 24.19 24.195
22.3 23.5 23.62 24.13 24.18 24.191 24.221
22.32 23.6 23.7 24.15 24.181 24.194 73.113

VI § 964(2)(B): The duty to bargain collectively includes a duty to provide relevant information needed in the bargaining process. The Union need not provide information about its finances to the employer during negotiations over an agency shop proposal because the percentage level of the wage deduction has no impact whatsoever on the employer. The employer would not become directly involved with the "fair share" procedure until it was forced to discharge employees for non-compliance therewith. Those discharges would not occur until after the reasonableness of the "fair share" deduction level has been resolved, through the Union's bona fide internal fee level challenge procedure.

22.32 24.1 24.13 43.83 73.477
23.63 24.12 41.7 43.841 73.56

VII § 964(1)(E): Since the employer conditioned its bargaining over the Union's "fair share" proposal (a mandatory subject) upon receipt of the Union's financial information (a non-mandatory subject) to the point of impasse, the Employer violated the statutory duty to bargain.

22.32 72.541
41.7

Sanford Firefighters Association v. Town of Sanford, MLRB No. 83-07, 5 NPER 20-14009 (Dec. 3, 1982)

I §§ 964(1)(E) & 965(1)(D): The duty to bargain includes the § 965(1)(D) obligation of the parties "to execute in writing any agreements arrived at."

41.3 72.571
46.55 73.461

II § 965(1)(D): The parties agreed to particular contract language on longevity pay; however, they are in wide disagreement on the meaning of the provisions agreed to. The disagreement resulted from an honest misunderstanding stemming from a mutual breakdown in communications. Since there was no meeting of the minds on how longevity pay was to be paid, despite good faith negotiations by the parties, the employer cannot be said to have refused to reduce any agreement regarding the method of payment to writing.

09.22 46.55 72.587 73.461 73.479
09.231 72.571 72.591 73.475

III § 964(1)(E): Parties, believing that they have reached final agreement but later discovering that agreement was not reached on one issue in the prospective collective bargaining agreement, have two options available: (1) return to the table and negotiate a mutually satisfactory resolution of the issue, or (2) sign the new agreement, reserving the right to grieve the meaning of the disputed provision and then get an arbitrator's interpretation of the provision. In the circumstances, the Labor Relations Board has no authority to determine which of the parties' interpretations of the pertinent language is correct.

01.27 09.23 41.34 46.62 72.572
07.14 09.231 46.55 46.63 73.461
07.141 41.3 46.61 72.571 73.462

Lewiston Teachers Association v. Lewiston School Committee, MLRB No. 83-08, 5 NPER 20-14011 (Jan. 14, 1983)

I § 964(1)(E): When an employer creates a new position during the term of a collective bargaining agreement and the position is included in an existing bargaining unit, the employer must engage in mid-term negotiations with that unit's bargaining agent over the position's wages, hours, and working conditions. If the position is not included in the bargaining unit or if its unit status is unclear, the employer is under no obligation to negotiate with the bargaining agent about it.

36.121 41.34 72.5
36.222 46.93 72.591

II §§ 966(1) & 968(4): The bargaining unit status of positions created during the term of a collective bargaining agreement should, unless the parties are able to agree thereon or unless the position clearly falls within the bargaining agreement recognition clauses's description of the bargaining unit, be decided by a Labor Relations Board hearing examiner, in the first instance, and not by the full Board. The Board's authority, under § 968(4), is to review the hearing examiner's rulings and determinations and not to make such decisions itself. Since the unit status of the newly-created position was ambiguous and since there was no hearing examiner's ruling thereon, the employer did not violate the duty to bargain by refusing to negotiate over the wages, hours, and working conditions for said position.

01.21 01.24 36.121 46.93 72.591
01.22 33.1 36.222 72.5

III §§ 962(6) & 966: An employee holding two positions with the same employer may be included in a bargaining unit for purposes of one position, even though the second position held is excluded from the unit or is in a different unit. The fact that an employee's primary position is included in a given unit is relevant, but not dispositive, in determining whether the employee's secondary position should be included in the same unit.

33.33 34.3
33.46

AFSCME, Council 74 v. Cumberland County Commissioners, MLRB No. 83-09, 6 NPER 20-14029 (June 30, 1983)

I §§ 968(5)(C) & 964(1)(E): By ratifying, executing, and enjoying the benefits of a collective bargaining agreement, knowing that the agreement contained a provision drafted by the employer which was allegedly different from that negotiated by the parties, the Union is estopped from challenging the employer's draft of such provision. A Union, whose membership has enjoyed the benefits of a collective bargaining agreement, cannot later repudiate a provision of that agreement under the doctrine of estoppel.

09.22 09.64 09.71 46.5 46.55 72.590
09.62 09.7 09.74 46.51 71.230 72.591

II § 964(1)(B) & (A): The employer has plenary and essentially unfettered discretion, subject only to the budgetary process, to grant or to deny employment benefits to its unorganized employees. The employer does not unlawfully discriminate against its organized employees, in violation of § 964(1)(B), by granting benefits to its unorganized employees which are more generous than those negotiated for its organized employees. Such action by the employer does not unlawfully interfere with the unit employees' exercise of § 963 rights, in violation of § 964(1)(A).

11.7 72.171 72.366
72.1 72.318 72.575

III §§ 964(2)(B) & 965(1)(D): Section 964(2)(B), incorporating the provisions of § 965(1)(D), requires the parties to reduce their collective bargaining agreements to writing and to execute the same. A prerequisite to the applicability of this section is that the parties must have already reached final agreement on the entire collective bargaining agreement. Here, the employer made an offer on the vacations article and the union presented a counter-offer. Under the common law and the Restatement 2d of contracts, and consistent with the parties' ground rules, this course of dealing did not result in an agreement on that article--although both parties mistakenly thought otherwise. A unilateral mistake of fact will not excuse a party from the § 965(1)(D) duty; however, a mutual mistake will do so. Since there was no agreement between the parties on the vacations article, the union did not violate § 965(1)(D), when, for a time, it refused to execute the agreement containing a vacations article.

09.22 41.31 46.52 72.571 73.461
09.24 46.5 46.55 72.572 73.462
41.3 46.51 72.57 73.46

Auburn Firefighters Association v. Morrison, MLRB No. 83-10, Interim Order (Dec. 29, 1982)

I § 968(5)(B) & Rule 4.07: The notice of prehearing conference was sent certified mail, the return receipt was signed by a secretary in the City Manager's office who failed to convey the notice to City officials and the notice was lost or misplaced. As a result, the Complainant appeared at the prehearing conference and the Respondent failed to appear. The Board denied Complainant's motion for default judgment because, in the past, default had only been ordered where a party had deliberately failed to attend a prehearing conference or had otherwise disregarded the Board's rules and procedures. Here, the failure to appear was due to the Respondent's negligence and was not intentional.

01.29 09.122 71.25 74.17
06.3 71.240 71.252

II § 968(5)(B) & (C) & Rule 4.07: Since the Complainant appeared at the prehearing conference as scheduled, the Board ordered the Respondent to pay the Complainant attorney's fee and the reasonable cost incurred in attending the prehearing conference. The Board further ordered expedited handling of the case on the merits, to avoid the Complainant's suffering any injury as a result of the Respondent's violation of the rule.

01.29 06.3 71.25 74.17 74.355
01.311 71.240 71.252 74.352

Auburn Firefighters Association v. Morrison, MLRB No. 83-10, 5 NPER 20-14014 (Mar. 9, 1983)

I § 964(1)(E) & (A): A unilateral change by the employer in a mandatory subject of bargaining is a circumvention of the duty to negotiate which frustrates the objectives of the duty as much as does a flat refusal to bargain. Unilateral changes in mandatory subjects of bargaining contravene the duty to bargain, in violation of § 964(1)(E), and result in interference with the exercise of bargaining rights, in violation of § 964(1)(A).

72.1 72.6
72.18 72.611

II §§ 964(1)(E) & 965(1)(C): A light duty work program for employees who were injured in the line of duty affects the employees' hours and working conditions, since the employees were not previously required to work at all while unable to perform their normal duties. In light of the past practice and since the program was implemented without negotiations with the union, the implementation was an unlawful unilateral change. The light duty work program was not required by the Workers Compensation Act, 39 M.R.S.A. § 66-A, and was contrary to the collective bargaining agreement which stated that employees injured in the line of duty who are incapacitated will receive full pay until they return to duty, qualify for disability, or retire and receive a pension.

03.3 03.4 42.32 43.133 72.611 72.667
03.37 42.3 42.44 43.1331 72.615

III § 965(1)(C): The mere fact that a particular subject matter may be covered by legislation does not exclude it from collective bargaining. It is only when the legislation explicitly prohibits the employer from bargaining about the subject that the subject is removed from the realm of bargaining.

03.3 42.3 42.44 46.21
03.4 42.32 46.2

IV § 965(1)(B): Waiver of the statutory right to bargain--in a management rights clause, zipper clause, or other waiver clause--must be "clear and unmistakable" to be given effect. Here, the employer proposed a light duty work program, during the collective bargaining negotiations, and quickly withdrew the proposal. This conduct rebuts any waiver notion in connection with that program.

09.23 09.6 09.65 09.662 43.78 72.590 72.666
09.231 09.612 09.66 21.9 72.51 72.65
09.232 09.613 09.661 21.91 72.511 72.651

V § 968(5)(C): As a remedy for an unlawful unilateral change and in order to "restore the situation, as nearly as possible, to that which would have obtained but for the prohibited practice," the Board ordered the employer to terminate the unlawfully implemented program until such time as it had been negotiated with the union. The remedy was deemed to be necessary to effectuate the policies of the Act.

74.31
74.32

VI §§ 964(1)(E) & 965(1)(C): Sick leave verification policies--including telephone calls or home visits by the employer--are mandatory subjects of bargaining. The employer's unilateral adoption of a sick leave verification policy here was not an unlawful change because it was allowed by the relevant collective bargaining agreement. An employee, who had called in sick

through a friend and who could not be found for two weeks, properly had his pay withheld until the question of the legitimacy of his injury was resolved.

09.64 09.74 21.91 46.641 72.590
09.642 21.4 43.168 72.5 72.651
09.7 21.9 46.64 72.511 72.664

VII §§ 964(1)(E) & 965(1)(C): Retroactivity of a contract directly affects wages, hours, and working conditions and, therefore, is a mandatory subject of bargaining. Any refusal by the employer to either bargain about retroactivity of the terms of a contract or to execute an agreement because it contains a retroactive clause will constitute a flagrant violation of § 964(1)(E). Since the employer has not, to date, refused to negotiate over retroactivity, its statement that it might refuse to do so did not violate the duty to negotiate in good faith.

07.14 07.2 43.77
07.141 42.12 46.43

Bangor Education Association v. Bangor School Committee, MLRB No. 83-11, 5 NPER 20-14015 (Mar. 29, 1983)

I § 968(5)(B): At the prehearing conference, the parties reached a stipulation of the relevant facts and agreed to submit their dispute to the Board, through written memoranda of law. The parties' agreement was incorporated into the prehearing order.

09.380 71.25
71.228 71.251

II § 964(1)(E) & (A): The unilateral change rule prohibits the employer from making unilateral changes in the mandatory subjects of bargaining after expiration of the collective bargaining agreement. A unilateral change by the employer in a mandatory subject of bargaining is a circumvention of the duty to negotiate which frustrates the objectives of the duty as much as does a flat refusal to bargain. Unilateral changes in mandatory subjects contravene the duty to bargain, in violation of § 964(1)(E), and result in interference with the exercise of bargaining rights, in violation of § 964(1)(A). It is clear that an expired collective bargaining agreement continues to define the status quo as to wages and working conditions and that the employer is required to maintain that status quo until the parties negotiate a new agreement or bargain in good faith to impasse.

09.2 46.44 47.77 72.134 72.611 72.641
21.13 47.16 72.1 72.18 72.618 72.663
46.42 47.514 72.13 72.6 72.64

III §§ 964(1)(E) & 965(1)(C): The expired collective bargaining agreement provided that the employer was to pay 100% of the health insurance premium, to maintain a stated benefit level, and to pay the full additional premium for family coverage. This, therefore, was the status quo and, although the premium for such level of coverage had increased, the employer was bound to pay the higher premium to maintain the same level of coverage. Had the employer agreed to pay a specified amount for health insurance, rather than to provide a specific level of coverage, then the employer, upon the contract's expiration, would only be obliged to pay the amount stated in the collective agreement, regardless of the increase in the premium.

43.131 46.44 72.612 72.641
46.42 72.611 72.64

IV §§ 964(1)(E) & (A) & 965(1)(C): The law is well settled that health insurance premiums are an aspect of employee wages and are a term and condition of employment which survives the expiration of the collective bargaining agreement. By requiring the employees to pay the additional premium, to maintain the level of benefits specified in the expired agreement in the face of a premium increase, the employer unilaterally changed the health insurance plan in violation of § 964(1)(E) and (A).

43.131 72.1 72.134 72.64
46.42 72.13 72.18 72.641

V § 968(5)(C): As a remedy for the violation noted above, the Board ordered the employer to cease and desist from making unlawful unilateral changes in the mandatory subjects of bargaining and, affirmatively, to restore the status quo by making the employees whole for any monies paid by the employees to maintain the health insurance at the benefit level specified in the expired collective bargaining agreement. This remedy was required to restore the situation, as nearly as possible, to that which would have obtained but for the prohibited practice. In the event that the employer did not make the ordered restitution within a specified period of time, interest was to be computed in accordance with the formula set forth in Council 74, AFSCME v. City of Bangor, MLRB No. 80-41, at 11-12 (Sept. 24, 1980), aff'd 449 A.2d 1129, 1136-1137 (Me. 1982). These remedies were necessary to effectuate the policies of the Act.

74.16 74.32 74.345
74.31 74.34 74.355

Maine State Employees Association v. City of Lewiston, MLRB No. 83-14, 5 NPER 20-14016 (Feb. 23, 1983); aff'd sub nom., Council 74, AFSCME v. Maine State Employees Association, 476 A.2d 699 (Me. 1984)

I Rule 3.02(B): Board and Law Court: The Rule, a codification of that announced by the NLRB in Excelsior Underwear, Inc., requires the employer to furnish a list of the names and addresses of bargaining unit employees who will be eligible to vote in the representation election at least 10 working days prior to the election. The list must contain only eligible employees, within the definition of § 962(6), who are included in the relevant unit.

35.31 35.32 35.322 35.51 35.53
35.316 35.321 35.323 35.515 72.18

II Rule 3.02(B) and § 964(1)(A): Board and Law Court: By including a sufficient number of ineligible persons on the Excelsior list, sufficient to affect the outcome of the election, the employer violated the Rule and interfered with the rights of unit employees protected by § 963, in violation of § 964(1)(A).

21.7 35.323 35.515 72.18
35.322 35.51 35.53

III § 964(1)(A): Board: The test for a violation of this section does not turn on the employer's intent or on whether the interference succeeded or failed but whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of employee rights under the Act.

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IV Rule 3.02(B): Board: A party does not waive its right to object to the accuracy of the Excelsior list by not challenging the voters prior to their voting. Here, the challenging party had no knowledge of the list's inaccuracy at the time of the election.

09.6 35.32 35.330 35.4 35.515
09.62 35.322 35.37 35.42 35.53
35.14 35.323 35.371 35.51 71.711

V § 968(5)(C): Remedies: Board and Law Court: A violation of the Excelsior requirement, through the inclusion by the employer of a number of ineligible persons on the list sufficient to affect the outcome of the election, required the Board to set aside the election and to order that a new election be held. The employer is required to provide a new, accurate list for the second election.

35.322 35.53 35.81
35.323 35.8 74.38

VI Rule 3.02(B) and § 967(2): Board: Employees who had been ineligible to vote in the first, tainted election because they were probationary employees at that time, who will become public employees [within the meaning of § 962(6)], prior to the second election, held pursuant to the Board's order, will be eligible to vote in the latter election.

15.01 35.31 35.32 35.8
16.45 35.316 35.321 35.81

VII § 968(5)(F): Law Court: Statute allows appeal of prohibited practice decisions, from Superior Court to Law Court, despite fact that not all issues have been decided, without violating the Court's "final judgment rule." Good statutory analysis is provided in the opinion, differentiating between appeals from different types of Board orders.

81.191 81.331 81.333 81.494 81.5084
81.33 81.332 81.49 81.508 81.61

VIII § 968(5)(F): Law Court: In considering appeals from the Board's decisions, it is proper for the Law Court to review the Board's decision, and not that of the Superior Court, since the latter Court was acting as an intermediate appellate Court.

81.1 81.47 81.6
81.191 81.49 81.61

IX § 968(5)(C): Remedies: Law Court: Once a prohibited practice is found, the Board has broad discretion, within the statutory authority of ordering "affirmative action," in fashioning an appropriate remedy. A properly designed remedial order seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the unfair labor practice. The determination of what affirmative relief, if any, will effectuate the policies of the Act is, in the first instance, committed to the "informed discretion" of the Board. Where the Board articulates the reasons for the remedy chosen and said rationale clearly shows it to be within the Board's statutory powers, the remedy will not be disturbed by the Courts.

01.29 74.12 74.17 81.50
74.11 74.13 74.38 81.505

Ritchie v. Town of Hampden, MLRB No. 83-15, 6 NPER 20-14032 (July 18, 1983); aff'd and enf'd, sub nom., Town of Hampden v. Maine Labor Relations Board, Nos. CV-83-353 and CV-82-407 (Me.Super.Ct., Pen.Cty., Sept. 14, 1984); appeal to Law Court docketed but dismissed by stipulation of the parties, Town of Hampden v. Ritchie, Law Docket No. Pen-84-4 (Jan. 22, 1985)

I § 964(1)(B) & (A): The discharge of an employee because of his union activities not only violates § 964(1)(B) but also has the inherent result of interfering with the exercise of rights protected by § 963, in violation of § 964(1)(A).

72.1 72.18 72.334
72.13 72.33

II § 964(1)(B): The Board reaffirms use of the NLRB's Wright Line test, as approved by the U.S. Supreme Court in Transportation Management Corp., for violations of § 964(1)(B) in dual-motive discipline cases. Under this test, the Board requires that the complainant make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established and the employer is unable to rebut it, the burden will shift to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct. The employer's burden is, in essence, an affirmative defense in the action which it must carry by a preponderance of the evidence.

09.32 72.301
71.512 72.365

III § 964(1)(B): The following facts constituted the complainant's prima facie showing that his protected activities were a motivating factor in the employer's decision to fire him:

a. The employee was well known as the leading union activist.
b. He had been the union president and chief negotiator for five years.
c. He had presented grievances on behalf of the union.
d. Unorganized employees had approached him for representation.
e. He had represented unorganized employees before the Labor Relations Board.

f. The Town Manager's statement that he was "tired of the employee and the damn union" was direct evidence of unlawful hostility.
g. The timing of the employer's actions, shortly after departure of the only other 2 union adherents.
h. The employee had been disciplined for conduct which had been tolerated for approximately 5 years.

72.31 72.314 72.318 72.324
72.311 72.315 72.32 72.4
72.312 72.317 72.321

IV § 968(5)(B): There was a direct contradiction between the testimony of the Complainant and that of the Town Manager on whether the latter made the statement listed as item "f" in the preceding paragraph. Having observed the demeanor of both witnesses, the Board found that the Complainant was a particularly honest and reliable witness; therefore, the Board credited his testimony on the disputed point.

09.36 09.362
09.361 71.523

V § 964(1)(B): Although the employee's falsification of official police records was wrong, could have resulted in an innocent citizen receiving a traffic ticket, and might, in other circumstances, justify dismissal of the employee, the Board found that the employee's misconduct was provoked by the employer. The discharge was merely the culmination of the employer's efforts to get rid of the union adherent and, in the Board's judgment, would not have occurred in the absence of the employee's engaging in protected activity.

72.32 72.324 72.35 72.365
72.321 72.334 72.356

VI § 968(5)(C): As a remedy for the above violations, the Board ordered the employer to cease and desist from discriminating against the employee because of his protected activities and from interfering with his exercise of § 963 rights. Because a properly designed remedial order seeks "a restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice," the Board ordered the employer to offer reinstatement to the discharged employee and make him whole for any loss of earnings and benefits caused by the discharge. Back pay with interest was to be computed in the manner outlined in Council 74, AFSCME v. City of Bangor, MLRB No. 80-41, at 11-12 (Sept. 24, 1980), aff'd 449 A.2d 1129 (Me. 1982). Since the employee had engaged in serious misconduct, the Board did not make him entirely whole but, in effect, reduced the discharge to a 30-day suspension without pay, citing Sanford Highway Unit, 411 A.2d 1010, 1016 (Me. 1980), as authority. These remedies were deemed to be necessary to effectuate the policies of the Act. The Respondent was to notify the Executive Director in writing, within 20 days of the date of the order, of the steps taken in compliance therewith. If the parties were unable to agree on the amount of back pay and benefits due within 20 days, the Complainant was to submit: (1) a weekly list of gross back pay claimed, (2) earnings in mitigation of damages, (3) list of expenses incurred seeking and holding interim employment, (4) benefits claimed, (5) interest claimed, and (6) documents or affidavits supporting each item. Fifteen days later the employer could file documents or affidavits disputing each item. The Board would then issue a supplemental order for back pay, interest, and benefits due.

09.371 74.17 74.33 74.335 74.341 74.345
74.11 74.31 74.331 74.336 74.343 74.355
74.16 74.32 74.332 74.34 74.344

VII § 968(5)(F): Court: Since the Board's findings of fact were supported by substantial evidence and there were no errors of law, the Board's order was enforced in its entirety and the employer's appeal was dismissed.

81.1 81.3 81.41 81.503 81.521
81.12 81.33 81.50 81.5087
81.19 81.331 81.502 81.5089

Woodward v. Town of Yarmouth, MLRB No. 83-16, 6 NPER 20-15000 (Oct. 5, 1983)

I § 964(1)(A): The Board dismissed allegations of unlawful interference, restraint and coercion because most of the employer conduct charged predated the employee's involvement in any activity protected by the Act.

72.1

II § 964(1)(B): The Board followed its earlier precedent in evaluating this "dual motive" discipline case. To establish unlawful discrimination, the complainant must show by a preponderance of the evidence that engaging in activities protected by the Act was a substantial or a motivating factor in the employer's action. Even if this is the case and the employer is unable to rebut it, the employer can avoid being held in violation of the Act by proving by a preponderance of the evidence that its action rested on the employee's unprotected conduct as well and that said action would have been taken in any event. The complainant failed to sustain his burden of proof under the first part of the above test because most of the employer's charged conduct preceded the employee's involvement in any activity protected by the Act.

09.32	71.512	72.312	72.323	72.362
71.211	72.301	72.317	72.324	

III § 964(1)(A): The circulation of a petition among bargaining unit employees, during times when neither the person circulating the petition nor the person whose signature is being solicited are not working, is conduct protected by the Act, if the petition concerns the wages, hours, and working conditions of the unit employees. On the other hand, the employer may lawfully prohibit circulation of a petition, during times when either the person circulating the petition or the person whose signature is being solicited are working. The mere circulation of a petition during non-working times cannot be deemed to be disruptive of the employer's operations and, thereby, serve as legitimate grounds for discipline.

21.5	64.2
22.5	64.34

IV § 964(1)(E): Concomitant with the duty to bargain in good faith is the rule prohibiting the employer from making unilateral changes in the mandatory subjects of bargaining for unit employees. The rationale for the rule is that a unilateral change in a mandatory subject is a circumvention of the duty to bargain that frustrates the purpose of the Act as effectively as does a flat refusal to negotiate over the subject affected. To establish a violation, three elements must be present: (1) an established policy or practice concerning a mandatory subject, (2) a change therein by the employer, and (3) without the employer's having first notified the bargaining agent thereof to allow the agent a reasonable opportunity to demand negotiations thereon. While the assignment of work shifts is a mandatory subject, the complainant was unable to establish the existence of any consistent practice or policy conerning shift assignments; therefore, the employer's action could not constitute an unlawful unilateral change. On the other hand, the parties' bargaining agreement covered a particular position and provided wages for that classification. The employer either eliminated said classification or, contrary to long-established practice, has left the position vacant for a lengthy period of time. The employer's action, in either event, implicates the wages of a unit position and was taken without any advanced notice to the bargaining agent; therefore, the employer's action constituted an unlawful unilateral change, in violation of the duty to negotiate in good faith.

43.431	43.52	72.611	72.613	72.652
43.432	72.6	72.612	72.65	72.667

V § 964(1)(D): This section of the Act protects persons who have filed petitions or complaints with, or given evidence before, the Board. Most of the employer's charged conduct predated the employee's contact with the Board and, therefore, could not have violated this section. By issuing a written warning to the complainant, within a half-hour after the employer was served with the complaint, and by ordering the complainant to attend a meeting in his superior's office, the day after the first day of hearing in the case before the Board, the employer violated this section of the Act. The timing of the employer's actions and the actions themselves constituted a thinly veiled threat of retaliation against the complainant for his attendance and testimony before the Board.

72.4

VI § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the Town of Yarmouth, and its representatives and agents: (1) cease and desist from:

(a) failing and refusing to negotiate with the bargaining agent over the elimination of the unit classification at issue and (b) discriminating against the complainant or from threatening, intimidating, or coercing him because he filed and prosecuted the complaint before the Board, and (2) take the affirmative action of: (a) reinstituting the position at issue and maintaining it until its elimination has been negotiated with the bargaining agent or filling the position within a reasonable time and (b) withdrawing the warning given to the complainant the same day as the employer was served with the complaint and expunge any reference thereto or as a result thereof from the complainant's personnel file and from all of the employer's records, as if the warning had never been issued.

74.14 74.32
74.31 74.338

Washburn Teachers Association v. Barnes, MLRB No. 83-21, 6 NPER 20-14039 (Aug. 24, 1983)

I §§ 968(5) & 965(1): Execution of a collective bargaining agreement, subsequent to the filing of a prohibited practice complaint alleging bad faith bargaining, does not render the complaint moot because later acts of the parties do not mitigate prior unlawful conduct.

09.62 71.230
71.13

II § 965(1): In examining whether a party has failed to negotiate in good faith, the Board looks at the totality of the circumstances to determine whether the charged party's conduct indicates "a present intention to find a basis for agreement." The Board deemed the violation flagrant in this instance because: (1) the Employer refused, for over two months, to give union information required for it to function as the bargaining agent--an especially egregious violation because the Board had ordered the employer to provide the union with other information pertinent to its duties, three months earlier; (2) the Employer failed to meet within 10 days of receipt of a written notice requesting bargaining (a per se violation of § 965(1)(B)); and (3) the employer violated a ground rule barring public bargaining.

07.5 41.31 72.5 72.531 72.54
07.51 41.32 72.52 72.537 72.77
41.3 41.7 72.53 72.538

III § 964(1)(A): Section prohibits employer interference with rights protected by the Act. One such right is the right to engage in collective bargaining; therefore, violation of the duty to bargain constitutes a violation of § 964(1)(A), derivatively.

21.4 72.18
72.1

IV § 965(1)(B): Failure to meet within 10 days after receipt of written notice requesting bargaining is a per se violation of the duty to bargain which is not excused by a negotiating impasse having been previously reached.

41.32 72.52 72.586
51.4 72.537

V § 964(2)(A): The mere service upon an employer of a prohibited practice complaint and of a summons and complaint, seeking enforcement of an earlier Board order by the Superior Court, does not constitute unlawful restraint or coercion.

71.16
73.57

VI § 965(4): A party's failure to abide by the time requirements for selecting an interest arbitrator is evidence of bad faith bargaining; however, such evidence was insufficient to establish a violation because the totality of the circumstances indicated that the union had a present intention to reach an agreement on the successor collective bargaining pact.

41.32 55.41 72.72 73.43 73.52
55.3 55.61 72.75 73.432 73.55
55.34 72.538 73.4 73.440

VII § 968(5)(C): It is appropriate to consider a party's past prohibited practices in fashioning a remedy for subsequent violations. Here, the employer presented only a frivolous defense, the employer's violations were willful and flagrant as well as violative of an earlier Board order. The Board ordered the following remedy: cease and desist, posting, and payment of the successful complainant's investigation, preparation, and litigation expenses, including reasonable attorney's fees, witness fees, travel expenses (mileage, meals, and overnight expenses incurred in attending the Board hearing), record preparation and printing costs. Costs to be paid by a date specified in the order; otherwise Board will reconvene to ascertain the amount due and interest will accrue thereon.

01.29 74.13 74.17 74.345 74.353
74.12 74.16 74.31 74.352 74.361

Council 74, AFSCME v. Richardson, MLRB No. 83-22, 6 NPER 20-14030 (June 30, 1983)

I § 968(5)(C): Parties obviated necessity of a fact hearing by stipulating to all relevant facts and entering into a consent order to correct the admitted prohibited practice.

09.380 46.17 74.42
09.62 71.228

II § 964(1)(A), (B), (C) & (E): The parties stipulated that the employer violated § 964(1)(A), (B), (C) and (E) by: cancelling the Union president's attendance at a training program; demoting, changing the work assignment, and removing a police cruiser from the Union president; threatening a probationary employee with extension of probation or loss of employment because of expressed interest in the Union; meeting with union members and attempting to negotiate a mandatory subject--hours--without Union involvement; threatening employees over their issuance of press releases related to collective bargaining and union activity; and unilaterally ending the past practices of allowing the use of the employer's telephones for necessary personal or union business and of providing meals to on-duty corrections employees.

21.11 43.215 64.2 72.13 72.17 72.311 72.342
43.14 43.42 64.35 72.131 72.171 72.324 72.5
43.141 43.422 72.1 72.134 72.2 72.331 72.55
43.162 43.481 72.11 72.152 72.3 72.333 72.6

III § 968(5)(C): The parties entered into a consent order where, in response to the above violations, the Board would order: the employer to cease and desist from interfering with the exercise of § 963 rights, specifically to stop engaging in the above practices; reinstate the status quo ante for the employee who was discriminated against; and retain jurisdiction for 60 days to monitor compliance with the order.

74.31 74.33 74.42
74.32 74.355

Council 74, AFSCME v. State of Maine, MLRB No. 83-24, 6 NPER 20-14040 (Aug. 30, 1983)

I §§ 979-A(6) & 979-C(1)(A): Supervisory employees with collective bargaining rights under the Act are "public employees" and, as such, may solicit showings of interest without having such solicitation activity ascribed to the employer. This is in marked contrast to the situation under the NLRA where supervisors have no bargaining rights and, therefore, their soliciting on behalf of a union constitutes unlawful interference. The Employer's solicitation rule here, which limits supervisors to soliciting only within their own unit, strikes a proper balance between the supervisors' rights under the Act and the interest of maintaining the Employer's neutrality during organizing campaigns.*

09.1 16.3 21.5 35.533 35.562 72.112 72.116
09.111 21.2 22.5 35.534 64.2 72.113 72.117
09.113 21.3 32.227 35.538 64.3 72.114
09.121 21.4 35.53 35.561 72.11 72.115

II § 979-C(1)(A): The record failed to establish that the employer favored one union over another during an organizing campaign in contravention of this section of the Act. Whenever

the employer learned that its solicitation policy had been violated, for example, it took immediate action to correct the problem, including the imposition of discipline on offenders and the issuance of a general order to all supervisory employees.

35.53 35.534 72.111
35.533 72.1

*The employer properly limited employee organizers to soliciting employees while the latter were not working, and non-employee organizers to soliciting in non-work areas of its premises.

Lamiette v. City of Auburn, MLRB No. 83-25, Executive Director Action (Dec. 16, 1985)

I Rule 6.05: Since the complaint was pending for over two years, without being prosecuted, the Executive Director ordered that it be dismissed.

01.21 71.1
01.28 71.227

Maine State Employees Association v. Bangor Mental Health Institute and State of Maine, MLRB No. 84-01, 6 NPER 20-15004 (Dec. 5, 1983)

I § 979-C(1)(A) & (E): An employer violates these portions of the Act by dealing directly with its organized employees concerning their working conditions. Such direct dealing not only violates the duty to bargain with the employees' exclusive bargaining agent but also tends to undermine the agent's status in the eyes of bargaining unit employees and, hence, violates § 964(1)(A).

21.4 22.41 72.13 72.5
21.7 72.1 72.17 72.55

II § 979-D(1)(E)(1): Shift assignments directly involve hours or work; therefore, the process by which such assignments are made is a mandatory subject of bargaining.

43.43 43.432
43.431 43.444

III § 979-C(1)(A) & (E): A supervisor's meeting with bargaining unit employees to resolve the employees' work schedule violated the Act because the supervisor went beyond merely soliciting volunteers to fill an uncovered shift, stated that the shift coverage would be settled by the end of the meeting, and, when someone suggested that the shift assignment be made in accordance with the collective bargaining agreement, wrote on the blackboard "least senior person--unfortunate one--scapegoat." This expression of disdain for the agreement indicated an intent to ignore its terms and is direct evidence of an intent to resolve the problem through direct negotiation with the employees. The mere presence of the union president at the meeting, as one of the unit employees, does not indicate that the supervisor was negotiating with the union over shift assignments and a subsequent offer to negotiate with the union did not obviate the violation because the union's status had already been undermined. There was direct bargaining with the employees, although there was no exchange of proposals in the classic sense. The employer can violate the prohibition merely by sending letters to the unit employees, if the effect is to deal with them directly.

09.121 21.92 22.71 43.431 72.1 72.5 72.613
09.65 22.41 22.74 43.432 72.13 72.55 72.66
09.651 22.7 43.43 43.444 72.17 72.590 72.666

IV § 979-D(1): The business exigency exception to the duty to bargain is inapposite here because the "emergent" situation faced by the employer--the lack of coverage on a particular shift--had been transpiring for nearly two months and the employer had failed to discuss the problem with the bargaining agent in a timely fashion. Furthermore, articles of the bargaining agreement may have governed the situation.

72.65 72.662
72.66

V 979-D(1): The employer's duty to bargain includes the obligation to provide the bargaining agent with information required for it to discharge its responsibilities on behalf of the unit employees. This duty does not require providing information already in the possession of the bargaining agent.

41.7 72.77
72.5

VI § 979-H(3): The Board ordered the following remedy for the employer's direct dealing with unit employees: cease and desist from: (1) unlawful interference with the exercise of statutory rights by bypassing the bargaining agent and (2) from failing to negotiate with the bargaining agent over the mandatory subjects.

74.31

Council 74, AFSCME v. Richardson, MLRB No. 84-04, 6 NPER 20-15001 (2-1 Decision) (Nov. 8, 1983)

Board Majority Opinion

I § 964(1)(B): There are limited instances when, as is the case under the NLRA in connection with supervisory employees, employer discrimination in retaliation against excluded employees will nevertheless violate the Act. Such instances occur when the action taken against the excluded individuals may be so prejudicial to covered employees' rights as to warrant action to protect the latter rights and include the following situations:

1. When an excluded employee is disciplined for testifying before the Board or during the processing of an employee's grievance.
2. When an excluded employee is disciplined for refusing to commit a prohibited practice.
3. When an excluded employee who hired his own crew is discharged as a pretext for terminating his pro-union crew.

The Board will not allow an employer to accomplish something through the discipline or discharge of excluded employees which it could not lawfully accomplish by the same actions with respect to covered employees.

01.1 15.01 16.2 72.1 72.4
01.29 16.1 16.43 72.171

II § 964(1)(B): The general rule is that discriminatory actions by an employer against excluded employees do not violate the labor relations law. Here, there was no allegation that the employer's actions had any effect at all on covered employees and none of the circumstances mentioned above was present; therefore, the exception to the general rule regarding the treatment of exempt employees does not apply. Such exception must be narrowly drawn; otherwise, excluded employees will ultimately be brought under the protection of the Act, contrary to the plain intent of the Legislature.

72.1 72.4
72.171

III § 968(5): Since the allegations failed to state a claim upon which relief could be granted by the Board, the prohibited practice complaint was dismissed without an evidentiary hearing having been conducted.

71.11
71.227

Employee Representative's Dissent

IV § 964(1)(B): Agrees with majority's narrow construction of Board protection for excluded employees. Of the excluded employees involved here, one had been the victim of unlawful restraint and coercion in an earlier Board case and the other was discharged one day after he appeared for the scheduled hearing in that case--a case where respondent Richardson admitted committing several prohibited practices before the scheduled hearing was convened. The allegations of the instant complaint, together with the facts in such earlier case, were sufficient for the Board to conduct an evidentiary hearing on the merits of the complaint.

01.1 72.1 72.4
01.29 72.171

V § 964(1)(B): The protection accorded to excluded employees who appear and testify at Board proceedings applies here. In such cases, the courts have recognized that Labor Boards must be empowered to protect exempt employees from retaliation for their having given testimony because such protection of the sources of information necessary to protect the rights of unit employees is an inherent part of such protection. The individual appeared at a Board hearing and was discharged the next day. Such timing, together with the allegations of the complaint, were sufficient for the Board to convene an evidentiary hearing on the merits of the case.

72.1 72.4
72.171

Teamsters Local Union No. 48 v. Town of Winthrop, MLRB No. 84-06, 7 NPER 20-16006 (2-1 Decision) (Nov. 16, 1984); motion for stay pending appeal denied, Town of Winthrop v. Maine Labor Relations

Board, No. CV-84-538 (Me.Super.Ct., Ken.Cty., Dec. 11, 1984); aff'd on the merits, Nos. CV-84-528 & -538 (Me.Super.Ct., Ken.Cty., July 11, 1985)

Board Majority Opinion

I § 964(1)(B): The Board applied the Wright Line test in this dual motive discharge case. To establish unlawful discrimination, the complainant must prove by a preponderance of the evidence that protected conduct was a substantial or a motivating factor in the imposition of discipline. Even if the complainant is successful and the employer is unable to rebut the complainant's evidence, the employer may, nevertheless, avoid adjudication of violation by establishing by a preponderance of the evidence that the discipline would have been proper in any event, in the absence of the protected conduct. Under the first prong of the test, the majority held that "latent and unrecognized" anti-union animus was a motivating factor in the discharge of two bargaining unit employees. Under the second prong of the test, the discharge of an employee with a long history of employment problems, primarily concerning an inability to adhere strictly to the truth--an especially serious problem when it concerns a police officer--was upheld, while a second discharge was reduced to a three-week suspension without pay by the Board.

09.32 71.517 72.301 72.311 72.334 72.356
71.512 72.3 72.31 72.321 72.35 72.365

II § 968(5)(C): Although cause was found for the imposition of some discipline against a bargaining unit employee, the Board held that, but for the employee's membership in the union, he would not have been discharged and would have received a less severe sanction for the cause shown. The Board modified the discharge into a three-week suspension, without pay, and ordered the subsequent reinstatement of the employee with back pay, benefits, and interest, for the period from expiration of the suspension through an offer of reinstatement, less any offset for earnings from third-party sources during that period. The Board also ordered the Employer to cease and desist from engaging in unlawful discrimination and, derivatively, unlawful interference, restraint, or coercion. The Board further ordered the employer to sign, date, post, and keep posted for a period of 30 days a notice provided by the Board.

01.28 72.301 74.33 74.335 74.345
01.29 72.334 74.331 74.341 74.36
72.3 74.31 74.332 74.343 74.361

III § 964(1)(B) & (A): An important element in discriminatory discipline cases is the disparity in discipline received by non-union, as compared with that received by union, employees for substantially similar infractions. Any marked disparity in treatment between the two groups can readily chill or discourage union membership. Such disparity was evident and was considered by the Board in reducing a discharge to a suspension without pay.

72.1 72.131 72.3 72.318 74.17
72.13 72.18 72.31 72.321

IV § 964(1)(D): At the Board hearing, an employee/witness became upset and stated that he feared that the employer would retaliate against him for testifying on behalf of the complainant union. The Board assured the witness that he would be protected from such retaliation. The next day, the employee was suspended from duty and he was ultimately discharged. The Board majority found the timing of the discipline "ill conceived" and, although there was cause for the suspension and the Board does not offer blanket protection for employee misconduct merely because the employee also testified before the Board, the Board's promise of protection was considered by the Board in fashioning its remedy.

72.4
74.17

Employee Representative Dissent

V § 964(1)(B) & (A): Agrees with majority's application of first tine of Wright Line test; however, the majority engaged in speculation as to what the employer action would have been, absent anti-union animus. Such speculation was unwarranted, since reference could readily be made to the lack of discipline meted out to non-union employees for more serious infractions. Since non-union employees received no discipline for transgressions as serious, if not more so, of the union adherents, under the second prong of the Wright Line test the union adherents would have been similarly treated, absent unlawful animus.

72.1 72.3 72.321
72.18 72.311 72.334

VI § 964(1)(D): This section protects both the integrity of the Board's procedures and the rights of public employees to file actions with and to give testimony before the Board. The Employer's proffered explanation for imposing discipline one day after an employee testified at a Board hearing was incredible in the circumstances. The majority committed an error of law in merely treating this violation as a "consideration" in fashioning the remedy for the unlawful discrimination. A better remedy for violation of this section would have been the award of full back pay, benefits, and interest, for the period from the suspension to the date of the Board's order.

72.4 74.33 74.332 74.345
74.17 74.331 74.341

VII SUPERIOR COURT:
§ 968(5)(D): The Court denied the employer's motion for stay of the Board's order, pending appeal.

74.371
81.46

VIII § 968(5)(D): The standard of review applicable to the Board's decisions is that its findings of fact will be upheld, if there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion--the substantial evidence test. Inconsistent evidence does not prevent an agency's findings of fact from being sustained, if there is substantial evidence to support them.

09.32 71.517 81.19 81.331 81.502
71.512 81.12 81.33 81.50 81.5089

IX § 968(5): Credibility determinations are uniquely within the province of the factfinder because of that body's opportunity to observe the witnesses' demeanor and conduct at the hearing. As the factfinder, the Board may reject even uncontroverted testimony because of the witnesses' lack of credibility.

09.36 71.523 81.502
09.362 81.493

X § 964(1)(B): The Court affirmed the Board's use of the Wright Line test in dual motive discipline situations. The Board's findings under both prongs of the Wright Line test are findings of fact and were fully supported by the record; therefore, the same were affirmed.

72.301 81.33 81.502 81.5087
81.1 81.331 81.5083

XI § 968(5)(C): The "for cause" limitation, on the Board's authority to order reinstatement of employees discharged as a result of unlawful employer conduct, is restricted to analysis of "cause" for the particular sanction imposed by the employer. A finding of cause for the imposition of some discipline does not necessarily support the particular sanction imposed by the employer and such a finding of cause does not prevent the Board from fashioning an appropriate remedy in the circumstances of each case.

01.28 72.35 74.33 74.332
01.29 74.12 74.331

Teamsters Local Union No. 48 v. Rumford/Mexico Sewerage District, MLRB No. 84-08, 6 NPER 20-15008 (Mar. 12, 1984)

I § 964(1)(A): The granting of unscheduled salary or benefit increases during an organizational campaign is a prohibited practice, if done to influence the employees' choice of a bargaining representative. On the other hand, salary and benefit changes scheduled before the commencement of organizational activity or those customarily granted to employees at a

certain time each year must be granted, even if implementation occurs during the organization campaign. Here, the wage and benefit increases were unscheduled in that they had not been planned prior to the advent of union activity; however, the record established that the employer was unaware of the union organizational activity when the increases were granted. The Board concluded that, lacking knowledge of the union activity, the increases could not have been intended to affect employee sentiment in connection with selection of a bargaining representative; therefore, the increases did not violate the Act.

35.51 35.525 35.532 72.1 72.133 72.312
35.511 35.53 35.541 72.13 72.18

II § 964(1)(A): The Superintendent's statements that the Board of Trustees was upset with the employees' choice of a bargaining agent, that it would take at least two years to negotiate a contract, that non-union employees would be rewarded, and that the "Trustees would be bastards about everything" violated the Act. Regardless of whether the statements were true, their clear intent was to interfere with the employees' rights to support a union and to engage in collective bargaining. The employer is responsible for statements made by its managerial employees in the context of employee relations matters, especially where, upon learning of the statements, the employer makes no effort to repudiate them.

09.1 09.114 09.121 21.3 72.1
09.113 09.12 21.2 21.4 72.131

III § 964(1)(A) & (B): The employer had an established practice of allowing its employees to receive personal calls during working hours. Without offering any valid reason, the Employer failed to forward a call from a union business agent to the union steward. The employer's action may reasonably be viewed as an attempt to interfere with the employees' right to communicate with their bargaining agent and an attempt to discriminate against the steward because of his position with the union; therefore, the employer's action violated these sections of the Act. The employer offered no valid reason why it did not forward the call.

35.538 72.11 72.134 72.312 72.342
43.86 72.111 72.18 72.318
72.1 72.13 72.3 72.324

IV § 968(5)(C): As a remedy for the violations found, the Board ordered the employer to: cease and desist from making threatening or coercive statements to its employees about their protected activities; cease and desist from failing to forward calls to unit employees during working hours;* and take the affirmative action of reinstating the policy of allowing unit employees to receive calls during working hours, until said policy is changed through collective bargaining.

74.31
74.32

*cease and desist from otherwise interfering with, restraining or coercing the unit employees in their exercise of the rights guaranteed by the Act.

Washburn Teachers Association v. Barnes, MLRB No. 84-09, Executive Director Action (Nov. 28, 1983)

I § 968(5)(B): After reviewing the prohibited practice complaint, the Executive Director determined that the facts alleged did not constitute a prohibited act as a matter of law and dismissed the complaint.

01.21 71.22 71.227
71.11 71.222

Maine Teachers Ass'n v. Saco School Committee, MLRB No. 84-10, 6 NPER 20-15007 (Mar. 9, 1984)

I § 968(5)(B): At the prehearing conference, the parties agreed that there were no material issues of relevant fact in this case, and decided to submit their dispute to the Board through a stipulation of fact and written memoranda of law. The parties' agreement was incorporated into the prehearing conference memorandum and order.

09.380 71.251
71.228

II § 965(1): The purpose of the statutory requirement that a bargaining agent must provide the employer with a written notice of intent to bargain financial items at least 120 days prior to the conclusion of the previous operating budget is to give the employer adequate opportunity to provide funds for such items in the next budget. Here, the union could not give the 120-day notice in a timely fashion since it was certified as bargaining agent 17 days prior to the end of the fiscal year and it gave the notice two days later. Despite persuasive policy arguments as to why the 120-day notice requirement should not apply to newly-certified bargaining agents, the statute does not differentiate between newly-certified agents seeking to negotiate initial agreements and incumbent agents bargaining successor contracts. The union's failure to give a timely 120-day notice makes monetary items permissive subjects for the next fiscal year. However, the employer was obligated to bargain about non-monetary items for the next fiscal year and to negotiate, if requested, over monetary items for the year after that.

[Note: § 965(1) was subsequently amended and newly-certified bargaining agents now need only give written notice of intent to bargain over financial items at least 30 days prior to the end of the prior fiscal year. Ch. 46, P.L. 1985]

07.143 09.651 42.22 72.589 73.41
07.24 41.32 42.47 72.591 73.436
07.25 42.2 72.581 73.4 73.477

III § 965(1): It is unlawful to insist, to the point of impasse, on negotiating about topics which are not mandatory subjects of bargaining because such insistence is, in substance, a refusal to bargain over mandatory subjects.

73.4 73.45
73.436

IV § 965(1): Impasse is a term of art which must be determined on a case-by-case basis. Essentially, it is shown by a state of facts in which the parties, despite the best of faith, are simply deadlocked and unable to effect movement in their negotiations.

51.01

V § 965(1): Here, the union failed to serve a timely 120-day notice, thereby converting financial items for the ensuing fiscal year into permissive subjects. Over a series of sessions and at the union's insistence, the parties became deadlocked over bargaining over the monetary issues; therefore, the union violated the duty to bargain in good faith by insisting, to the point of impasse, on bargaining over non-mandatory subjects.

07.24 41.32 42.22 73.4 73.45
07.25 42.2 51.01 73.436 73.477

VI § 968(5)(C): As a remedy for the union's insistence on bargaining over non-mandatory subjects to the point of impasse, the Board ordered the union to cease and desist from insisting on bargaining over financial issues for the next fiscal year.

74.31

Sanford Fire Fighters Ass'n v. Town of Sanford, MLRB No. 84-12, 6 NPER 20-15006 (Jan. 25, 1984)

I § 968(5)(B): The employer gave the union notice of its intent to make a change in the working conditions of the bargaining unit employees. Approximately one month later and two months after that the changes were implemented by the employer--discrete events occurring at particular times. Over six months after the second of these events, the union filed a prohibited practice complaint challenging the employer's action. The Board held that the phrase "no hearing shall be held based upon any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint with the executive director" required dismissal of the complaint.

01.28 09.51 09.651 21.91 71.227
09.5 09.62 21.9 71.13 71.516

II § 968(5)(B): Time-barred events may only be considered by the Board in 2 instances: (1) where earlier events shed light on conduct occurring within the 6-month limitation period, or (2) where conduct within the 6-month period can become a prohibited practice only through reliance on an earlier prohibited practice. Neither situation is present here.

09.3 09.39 71.516
09.374 71.13

III § 968(5)(B) and Rule 4.03(4): A blanket allegation by the union that the employer's conduct violated §§ 963, 964, and 965 of the Act, some of which relate to the rights of management, lacks sufficient specificity to be of any use either to the Board or to other parties in understanding the essence of the complaint. Section 968(5)(B) and Rule 4.03(4) require greater specificity for an actionable prohibited practice complaint.

01.28 71.22
71.11 71.222

Sanford Federation of Teachers v. Sanford School Committee, MLRB No. 84-13, 6 NPER 20-15009 (Mar. 20, 1984)

I § 968(5)(B): The parties waived evidentiary hearing and submitted their dispute to the Board through a stipulation of relevant fact and memoranda of law.

09.380
71.228

II § 968(5)(C): Following its own earlier decisions, the Board held that teacher preparation and planning periods were a matter of educational policy; therefore, the proposals concerning the same are not mandatory subjects of bargaining. Since preparation and planning time proposals could affect the length of the school day, require the use of various types of substitutes for the presence of teachers, and infringe on the ability of the school administration to schedule classes and student activities, the proposals are matters of educational policy. Although such proposals affect teacher working conditions, that is overridden by the "foundational educational value judgments" inherent in the proposals, under the Law Court's analysis in Biddeford, 304 A.2d 387 (Me. 1973).

03.31 42.21 43.44 43.618 72.58 73.477
42.2 42.42 43.61 43.621 72.589

III § 965(1)(C): The mere fact that a non-mandatory subject was bargained about and was included in a collective bargaining agreement does not mean that it must be negotiated for future contracts. Reaching agreement on a permissive subject does not transform that topic into a mandatory subject.

09.7 42.2 42.46 46.24 72.589
09.74 42.45 46.15 72.58 73.477

IV § 968(5): An issue not plead in a party's prohibited practice complaint nor substantiated by the evidence in the record and which is raised for the first time in a party's post-hearing brief is deemed frivolous by the Board.

01.312 71.15 71.223
71.11 71.222 71.227

Bangor Fire Fighters Ass'n v. City of Bangor, MLRB No. 84-15, 6 NPER 20-15011 (Apr. 4, 1984)

I § 965(1): The Board previously held that implementation of a light duty work program without first notifying and, if requested, negotiating thereon with the bargaining agent constitutes

an unlawful unilateral change in the affected employees' hours and working conditions, in violation of § 964(1)(E). The basis of this holding is that an employer's unlawful unilateral change in a mandatory subject of bargaining is a circumvention of the duty to negotiate which frustrates the objectives of the duty as much as does a flat refusal to bargain. This principle applies to a unilateral change in an existing light duty work program which materially affects the employees' wages, hours, or working conditions.

03.37	43.46	72.6	72.613	72.666
43.133	43.64	72.611	72.65	
43.168	72.5	72.612	72.651	

II § 965(1): While the employer has had a light duty work program for several years, in the case of 22 of 25 injured employees in the past, the employer checked with the employee or his doctor and, when the employee is able to perform light duty, the employer and the employee mutually agreed to the employee's return to light duty. In the past, the three employees were ordered to perform light duty work when there was an extreme shortage of employees or when the injured employee was found working for a third party while on disability leave--situations not present here. The employer changed the established practice by ordering two employees to perform light duty, rather than attempting to reach a mutually agreeable return date.

43.133	43.46	72.6
43.168	43.64	72.612

III § 968(5): As a remedy for the employer's unlawful unilateral change in its light duty work program, the Board ordered reinstatement and maintenance of the status quo ante, until any change in the program is negotiated with the bargaining agent and ordered the employer to cease and desist from making unilateral changes in its light duty work program, without first negotiating said changes with the bargaining agent.

74.31
74.32

IV § 968(5): The employer's argument that the Board is without jurisdiction to entertain a mid-term unilateral change charge unless the union has first exhausted the contractual grievance mechanism is rejected. The filing of a prohibited practice complaint and the processing of a grievance are separate and distinct avenues of relief. Since the union decided not to pursue its grievance to arbitration, as is its right under the collective bargaining agreement, there was no arbitral process to which the Board could defer here.

01.1	09.23	47.18	71.8
01.28	09.25	47.32	71.813
01.32	47.01	47.54	71.816

Maine State Employees Association v. State of Maine, MLRB No. 84-17, 9 NPER ME-18000 (July 17, 1986), rev'd, State of Maine v. Maine State Employees Association, 538 A.2d 755 (Me. 1988)

I §§ 979-D(1)(E) & 979-H(2): Board: A complaint alleging a refusal to bargain in violation of the Act is not rendered moot by the subsequent execution of a collective bargaining agreement.

71.11	71.222
71.13	71.230

II § 979-D(1)(E): Board: A party commits a per se violation of the duty to bargain by insisting to impasse that a non-mandatory subject be bargained. Such insistence is, in substance, a refusal to negotiate about the mandatory subjects. Under the Acts administered by the Board, non-mandatory subjects must, upon request of the other party, be dropped at the beginning of fact-finding.

51.01	72.541	73.45
72.5	73.4	

III § 979-D(1)(E) and (4): Board (Reversed by Law Court): Since the topic of State employee pensions may properly be submitted to interest arbitration under the express terms of the

Act, since interest arbitration follows fact-finding, and since proposals concerning non-mandatory subjects must be abandoned at the outset of fact-finding, the topic of State employee pensions is a mandatory subject of bargaining under the Act. In reaching its award, the State Act directs the interest arbitrator to consider, among other factors, pensions currently enjoyed by State employees. Since the only pensions for State employees funded by the State are those administered by the Maine State Retirement System, proposals concerning the Retirement System benefits are mandatory subjects under the Act. In so holding, the Board expressly reversed its relevant holding in MSEA v. State of Maine, MLRB No. 82-05, 5 NPER 20-14010 (Dec. 22, 1982).

03.35 43.117 43.137
03.4 43.136 51.01

IV § 979-D(1)(E): Board: Further supporting the Board's holding that State employee pensions are a mandatory subject of bargaining is the fact that employee pensions and retirement benefits are mandatory subjects of bargaining under the Municipal Employees Act and the NLRA.

03.35 43.136
43.117 43.137

V § 979-D(1)(E)(1): Board (Reversed by Law Court): Under the State Act, all matters relating to the State employment relationship are mandatory subjects of bargaining, except those matters which are prescribed or controlled by public law. The Law Court has held that two types of statutes are prescriptive or controlling: (1) statutes setting forth broad public policies which are superior to employee collective bargaining rights, and (2) statutes which prohibit particular results which might be sought through bargaining. The statutes setting forth current State employee retirement eligibility and benefit levels neither set out broad public policies nor explicitly prohibit the results being sought by the Union's proposals; therefore, such proposals are not prescribed or controlled by public law.

03.35 42.3 42.44 43.136 46.2
03.4 42.32 43.117 43.137 46.21

VI § 979-H(3): Board: Since the violation of the duty to bargain was followed by execution of a collective bargaining agreement and the parties were seeking the Board's negotiability determination as a guide for future negotiations, the Board ordered the Employer to cease and desist from refusing to negotiate over the type of proposals declared to be mandatory subjects herein.

74.17
74.31

VII § 979-H(7): Law Court: In cases where the Superior Court's review of a Board decision is limited to review of the record before the Board, the Law Court will review the same record to determine any issue presented on appeal.

81.191 81.48 81.6
81.47 81.491 81.61

VIII § 979-H(7): Law Court: Controversies which are capable of repetition, but which do not easily lend themselves to final judicial review as they arise, may be addressed even if moot, if the controversy is one which is continuing between the parties or is highly likely to arise again.

81.11 81.34 81.49 81.61
81.13 81.371 81.6

IX § 979-D(1)(E): Law Court: The State Act requires bargaining over retirement issues, to the extent that such issues are not prescribed or controlled by public law. The use of specific numbers in the retirement statutes which relate to State employee retirement eligibility and benefit levels preclude all eligibility and benefit levels other than those stated; therefore, such statutes prescribe or control such eligiblity and benefit levels. On the other hand, a section of the retirement law provides that, through collective bargaining, the mandatory employee contribution to the Retirement System may be paid by the employer; therefore, the issue of whether the employer or the employees will make such payment is a mandatory subject of bargaining.

01.26	03.4	42.44	43.137	46.21
01.28	42.3	43.117	43.139	
03.35	42.32	43.136	46.2	

Maine State Employees Ass'n v. State of Maine, MLRB No. 84-19, 7 NPER 20-15019 (July 23, 1984)

FACTS: In the past, State employees performing work beyond that described in their job classification could, under the terms of the collective bargaining agreement, file a request for reclassification ("FJA-1"). Until their requests were decided, the employees continued to perform all job duties and any wage increase resulting from the reclassification was retroactive to the date on which the FJA-1 was filed. Without notifying the employees' bargaining agent, the employer modified this practice by requiring supervisors to immediately strip away any duty not contained in an employee's current job classification, upon that employee's filing of an FJA-1.

I § 979-D(1): The duty to bargain over mandatory subjects prohibits the employer from making unilateral changes which materially affect bargaining unit employee's wages, hours, or working conditions, without first notifying and, if requested, negotiating thereon with the bargaining agent, throughout the collective bargaining relationship. The change at issue materially affected the employees' working conditions because, upon exercising their contractual rights to file an FJA-1, their duties were changed and, in some cases, duties performed for several years were removed from them. The duties were not removed for any typical business reason, such as a reorganization or a change in agency mission, but solely because the employee filed an FJA-1. The change also affected the employees' wages as follows: (1) during the job audit triggered by the FJA-1, the personnel department would consider all duties then being performed--after the change, fewer duties were being performed and fewer reclassification requests were granted, thereby decreasing the employees' opportunity for higher wages, and (2) when granted earlier, reclassifications were retroactive; however, if the additional duties had been removed pending ultimate action on the FJA-1, even if the reclassification was approved, the employees would not be eligible for a retroactive wage increase.

43.11	43.31	43.41	43.46	72.6	72.613
43.113	43.311	43.42	72.5	72.611	
43.122	43.312	43.422	72.51	72.612	

II § 979-D(1): The employer's contention, that the change was permitted by the collective bargaining agreement's maintenance of benefits article which allowed changes to be made "to comply with law," was rejected because the general language in the statutes cited by the employer neither required nor authorized the change at issue.

03.3	42.3	42.44	46.21
03.4	42.32	46.2	

III § 979-D(1): The employer's contention, that the union waived the right to object to the change by its agreement to a management rights clause where the employer retained the exclusive right "to direct the work force," is rejected. Waiver of the statutory right to bargain in a management rights clause, zipper clause, or other waiver clause must be clear and unmistakable to be effective. The contractual language must be specific for waiver to be found and waiver only applies to specific items mentioned: "a waiver should be express, and . . . a mere inference, no matter how strong, should be insufficient." The change at issue was not mentioned in the bargaining agreement. The failure to mention a right in a bargaining agreement does not constitute a waiver of it, even if there is a clause stating that the contract represents the entire agreement between the parties. The duty to bargain as to subjects which were neither discussed nor embodied in the collective agreement continues throughout the term of the agreement. Since the union did not consciously relinquish the right to bargain over the change at issue in the pre-agreement negotiations nor in the terms of the agreement, such right was not waived.

09.61	09.641	09.66	46.64	72.651
09.612	09.642	09.661	46.642	72.664
09.613	09.65	09.662	72.511	72.665
09.64	09.651	41.34	72.65	72.666

IV § 979-C(1)(E) & (A): An employer's making a unilateral change in the mandatory subjects of bargaining, without prior notice to the affected employees' bargaining agent, violates the

duty to bargain over those subjects much as does a flat refusal to bargain. Since unlawful unilateral changes interfere with the employees' right to engage in bargaining, they constitute unlawful interference with the exercise of the rights protected by the Act as well as violate the duty to bargain in good faith.

21.4 72.13 72.18 72.6
72.1 72.134 72.5 72.611

V § 979-H(3): As a remedy for the unlawful unilateral change found, the Board ordered the employer to cease and desist from continuing to follow the changed practice and, further, to reinstate the status quo ante, until the change at issue has been negotiated with the bargaining agent. The concurring opinion agreed with everything above; however, because of the widespread impact of the unlawful change, the member felt that the employer should have been directed to post a copy of the Board's order at all work locations.

74.17 74.32 74.361
74.31 74.36

Maine State Employees Ass'n v. Baxter State Park Authority, MLRB No. 84-20, 7 NPER 20-15014 (May 16, 1984)

I § 979-H or 968(5): As the quasi-judicial agency charged with implementing the Act, the Board is authorized to interpret the Act. Town of Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Ass'n, 461 A.2d 1054, 1056 n.2 (Me. 1983).

03.22 81.505
81.493

II § 979-H(2) or 968(5)(B) & Rule 4.07: The section permitting the convening of a prehearing conference authorizes the prehearing officer to exercise discretion, without the intervention of but subject to review by the Board, in, among others, dismissing the complaint, attempting to resolve disputes between the parties, or recommending an order to the Board. The Board's interpretation of the identical language of the Municipal and State Acts is supported by Rule 4.07 which provides that, once the parties are given due notice of a prehearing conference or of a hearing, the prehearing officer or the Board, in the case of a hearing, are authorized to dismiss the complaint, if the complainant fails to appear, or to enter a default judgment, if the respondent fails to appear.

01.21 09.62 71.251 71.31 71.511
01.22 71.240 71.252 71.5 71.522
06.3 71.25 71.3 71.51

III § 979-H(2) or 968(5)(B): When a party fails to appear for a scheduled prehearing conference or hearing, an order dismissing the complaint or entering a default judgment may, consistent with the requirements of due process of law, be entered ex parte. The essence of due process is that a party be afforded reasonable notice and opportunity to be heard; therefore, whether a party is actually heard is irrelevant. A party's failure to appear for a scheduled matter inherently results in the entry of an ex parte order. While the notice previously given to a non-appearing party here may well satisfy all due process requirements, the section of the Act authorizing Board review of the prehearing officer's actions affords the party against whom a default order has been entered an opportunity to be heard on the propriety of the prehearing officer's order. At least in cases resulting from a party's failure to appear at the prehearing conference, the Board's review is de novo.

01.21 03.1 04.1 71.25
01.22 03.12 71.240 71.252

IV § 979-H(2) or 968(5)(B): The term "default" includes a party's failure to plead by answer as well as a failure to appear to assert one's rights at scheduled proceedings. Such failure requires the prehearing officer or the Board to exercise discretion in response to the party's conduct. Such discretion contains three components: (1) whether to impose a sanction, (2) upon whom--party or counsel or both, and (3) what sanction to impose. The purposes of such sanctions are to penalize non-compliance with a Board order, remedying the effect of non-compliance on the innocent party or exacting compliance by the recalcitrant party, and serving as a deterrent to similar conduct by the same offender or others. Here, the pre-

hearing officer's exercise of discretion in dismissing the complaint was upheld because: the prehearing officer waited 25 minutes, then he telephoned the office of the complainant's attorney and informed the staff of the attorney's failure to appear, and, despite the fact that other attorneys were available, no counsel appeared on behalf of the complainant.

06.3 09.123 09.133 71.240 71.251
09.12 09.13 22.71 71.25 71.252

V § 979-H(2) or 968(5)((B) & Rule 4.06: The Rule outlining the prehearing officer's authority provides that, unless failure to appear at the conference is due to excusable neglect, such failure may result in dismissal of the complaint or entry of default judgment. Of necessity, a party failing to appear cannot be heard on the question of "excusable neglect" when the default order is first entered. Such defense must be raised during the Board's review of the prehearing officer's order. Excusable neglect is usually only found where the neglect causing lack of knowledge is beyond the control of the party or counsel charged to act for that purpose or, when the neglect is that of the party charged to act, some extraordinary circumstance exists to justify such neglect. The misplacing of the prehearing conference notice due to heavy involvement in other business is held not to constitute excusable neglect, within the meaning of Rule 4.06, because it does not involve extraordinary circumstances.

01.21 06.3 71.25
01.22 71.240 71.252

VI § 979-H(2): Since the Complainant failed to appear at the prehearing conference and the failure to so appear was not due to excusable neglect, the Board affirmed the prehearing officer's entry of default against the complainant and his dismissal of the complaint.

71.227 71.25 71.252
71.240 71.251

Maine State Employees Ass'n v. State Development Office, MLRB No. 84-21, 7 NPER 20-15017 (July 6, 1984), aff'd, 499 A.2d 165 (Me. 1985)

I § 979-C(1)(A) or 964(1)(A): The Law Court approved of the Board's traditional test for violations of this section. An employer, regardless of subjective intent to violate the law or of whether its efforts are successful, engages in unlawful interference, restraint, or coercion if its conduct reasonably tends to interfere with the free exercise of employee rights under the Act. While not controlling, factors deemed significant were that the employer had no unlawful motive and its actions did not deter the employee's exercise of rights under the Act. Despite the chronological coincidence between the employee's actions and those of the employer, there was no causal connection between them. The discharged employee's job performance had been only marginally satisfactory for several years and, for that reason, he was denied a merit increase and was given a reevaluation period in which to improve his performance. The employee's work did not improve and he was discharged. Under the circumstances, the employer's action did not tend to interfere with the free exercise of employee rights under the Act because any employee knowing the facts would see no connection between the discharge and any participation in activities protected by the Act.

72.1 72.134 81.521
72.13 72.18

II § 979-C(1)(B) or 964(1)(B): The Law Court approved the Board's use of the Wright Line test in "dual-motive" disciplinary situations. Under the Court's restatement of the test--a clarification to avoid confusing language--the complainant has the burden of proving by a preponderance of the evidence that the employee's protected activity was a substantial or a motivating factor in the imposition of discipline. If the complainant establishes the requisite degree of causal connection, the employer can avoid a violation by establishing by a preponderance of the evidence that the discipline rested on the employee's unprotected conduct as well and that the discipline would have been imposed in any event. The Board assumed arguendo that the employee's filing a request for reclassification and his filing two grievances, rights afforded under the relevant collective bargaining agreement, constituted protected activities under the Act. The Board held that merely because the employee's protected activity happened to coincide with the imposition of discipline, that, without more, did not satisfy the complainant's burden under the first part of the Wright Line test.

09.32 21.5 47.33 72.301 72.326 81.521
09.33 21.51 71.212 72.317 72.334
21.12 47.1 71.512 72.32 72.360
21.13 47.3 72.3 72.323 72.665

III § 979-H(7) or 968(5)(F): The Law Court has held that judicial review of the Board's decisions is subject to the Maine Administrative Procedure Act, 5 M.R.S.A. § 8002(2), and Maine Rule of Civil Procedure Rule 80C. On review, the Board's findings of fact will be upheld unless they are clearly erroneous.

09.32 81.191 81.331 81.5089
81.12 81.3 81.50 81.61
81.19 81.33 81.502

Geroux v. City of Old Town, MLRB No. 84-24, 7 NPER 20-15016 (June 18, 1984)

I § 968(5)(B) & Rule 4.04: Service of the prohibited practice complaint on the respondent is of fundamental importance because it is the basis on which the Board's jurisdiction is acquired. Failure of service deprives the Board of power to act on the complaint. Service of process gives interested parties notice of the pendency of the proceeding and an opportunity to be heard therein. Section 968(5)(B) requires that the respondent be served before the complaint is filed with the Board and Rule 4.04 requires that proof of service be provided to the Board. Here, the complaint incorporated several exhibits by reference and said exhibits were essential for an understanding of the nature of the charge; therefore, the failure to serve such exhibits upon the respondent constituted insufficient service of process and precluded the Board's consideration of the complaint.

01.1 01.312 71.12 71.22
01.28 71.11 71.16

II §§ 964(1)(A), (C) & (D) & 968(5)(B): Section 964(1)(A) prohibits the employer from interfering with, restraining or coercing employees in the free exercise of the rights protected by the Act. Section 964(1)(C) is directed at management's: providing financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. Section 964(1)(D) protects employees involved in any stage of a Labor Relations Board proceeding from a wide variety of discriminatory actions by the employer. Since the complaint did not allege that the employer had interfered with, restrained, or coerced any employee in the exercise of rights protected by the Act or that the employer had ever encouraged or supported the union or that the employee had ever been involved in any proceeding before the Board for which the employer might be retaliating, the complaint failed to state a cliam upon which relief could be granted and it was, therefore, dismissed.

71.11 71.222 72.1 72.4
71.22 71.227 72.2

III § 968(5)(B): A complaint dismissed for failure of proper service may not be amended as there is nothing left to amend.

71.15
71.223

Teamsters Local Union No. 48 v. Town of Kittery, MLRB No. 84-25, 7 NPER 20-15018 (July 13, 1984)

I § 964(1)(C): This section prohibits the employer from: providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence that the Employer had ever participated in or otherwise supported the union was presented; therefore, this aspect of the charge was dismissed.

72.2 72.26
72.25

II § 964(1)(D): This section protects the right of public employees and public employee organizations to file complaints or petitions with or to give testimony before the Board by prohibiting any retaliation therefor by the public employer. Since none of the employer's conduct was alleged to have been in response to employee involvement in proceedings before the Board, this portion of the charge was dismissed.

72.4

III § 964(1)(A): A finding of unlawful interference, restraint or coercion does not turn on the employer's motive or on whether the coercion succeeded but is based on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

72.1

IV § 964(1)(A): The Police Chief made a statement at a mandatory employee meeting that the only Teamsters he ever knew were criminals who were either dead or in jail; however, he said he had never encountered Teamster police unions prior to coming to Maine. Department heads' statements, especially when uttered at mandatory meetings, can be very coercive and destructive of rights guaranteed by the Act. Such statements, even if couched in terms of "personal opinion" and not as official policy, may be attributed to the employer, unless they are promptly repudiated by a higher level representative of the employer. The statement at issue did not violate the Act because: (1) the remark was elicited by the persistent questioning of a bargaining unit employee, (2) it was explicitly limited to the Chief's experience with the Teamsters Union in the private sector, (3) the answer was not given in a tense, emotionally charged atmosphere but was part of the give and take on a broad range of subjects, and (4) the statement was not made during an election campaign or when a representation election was pending, when union representation would have been a "hot" issue.

09.1	09.113	09.12	35.5212	72.131
09.11	09.114	09.121	72.1	72.18

V § 964(1)(A): During the course of collective negotiations, bargaining unit employees proposed a different work schedule. Outside of the bargaining process, the Police Chief approached each unit employee and stated that, if the union's shift proposal was adopted, the unit employees would lose their jobs. Under the objective test for violations of § 964(1)(A), the only reasonable effect of the statement was to dissuade the unit employees from exercising their statutory right to engage in collective bargaining; therefore, the statement violated § 964(1)(A).

72.1	72.15	72.16
72.131	72.151	72.17

VI § 964(1)(A): Bargaining unit employees, in addition to the actual grievant, were in the habit of signing grievances to express their support therefor. After receiving a few grievances, the Police Chief stated that he saw who was signing grievances and, if certain Partolmen stopped signing, they would get further ahead. The bargaining unit employees' right to file grievances is a basic right protected by the Act. Applying the objective test noted above, the Board held that the natural result of the remark was to interfere with the right to file grievances by suggesting that greater results would be achieved in the absence of grievances; therefore, the statement violated § 964(1)(A).

21.12	47.1	47.33	72.1	72.131
21.51	47.3	64.2	72.13	

VII § 968(5)(B): To remedy the above violations, the Board ordered the Police Chief to: (1) cease and desist from interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights protected by the Act by suggesting outside of the collective bargaining process that employees would lose their jobs unless they modified or abandoned certain bargaining proposals and by opining that employees would get further ahead, if they stopped signing grievances; (2) because of the seriousness of these violations, sign and post a notice of the Board's order; and (3) notify the Executive Director in writing, within 20 days of the date of the Board's order, of the steps taken in compliance therewith.

74.15	74.31	74.361
74.16	74.36	

Maine State Employees Ass'n v. Baxter State Park Authority, MLRB No. 84-28, 7 NPER 20-15020, Interim Order (July 23, 1984)

I § 979-H(2): The Executive Director dismissed a prohibited practice complaint that was essentially identical with one dismissed for the complainant's failure to appear at the pre-hearing conference. The Executive Director based his decision on the grounds that the dismissal was an adjudication on the merits and the doctrine of res judicata barred the second complaint. The word "dismissed" in the context of a judicial or quasi-judicial order is inherently ambiguous because its use, without modification, gives rise to the question of whether the pleading at issue was dismissed with prejudice. A convention may be developed, as was done for the courts in Rule 41(b)(3) of the Maine Rules of Civil Procedure, to avoid confusion in the use of the word "dismissed." In light of the severity of the dismissal with prejudice sanction and because there was no established convention on the meaning of the unmodified word "dismissed" in Board orders, as a matter of policy the Board decided that, prospectively, whenever a prohibited practice complaint is dismissed, such dismissal will be with prejudice unless otherwise stated in the dismissal order. The Executive Director's order was reversed and the matter was ordered to be scheduled for prehearing conference. [Note: Rule 4.07 was amended effective September 1, 1985, to incorporate the Board's above holding, as notice to all litigants in practice before the Board.]

01.21	09.4	09.411	71.15	71.251
06.3	09.41	09.43	71.227	

Teamsters Local Union No. 48 v. Town of Wells, MLRB No. 84-29, 7 NPER 20-16002 (Oct. 9, 1984)

I §§ 962(7) & 964(1): Since the Town Manager's charged conduct arose out of and was performed by him within the course of his employment with the Town, the Town Manager is a public employee within the meaning of the Act and the Town is liable for his charged conduct, if proven.

09.1	09.111	09.12	11.12
09.11	09.113	09.121	11.15

II § 964(1)(B): This was a typical "dual motive" disciplinary case where the union alleged that the employer's actions were motivated by the employee's protected activity and the employer contended that its conduct was solely the result of legitimate personnel concerns. In such cases, the Board uses a modified Wright Line test for alleged violations of § 964(1)(B). Under this standard the complainant must establish by a preponderance of the evidence that the employee's protected conduct was a substantial or a motivating factor in the imposition of discipline. If the complainant is successful and the employer is unable to rebut the complainant's case, the employer can avoid an adjudication by proving by a preponderance of the evidence that the discipline rested on the employee's unprotected conduct as well and that the discipline would have been imposed in any event.

09.32	72.3	72.311	72.32	72.35
71.512	72.301	72.312	72.323	72.365

III § 964(1)(B): The employee in question had filed a petition for unit clarification--conduct protected by the Act. The union attempted to establish the requisite causation under the first part of the Wright Line test by averring: (1) although the employee's job performance remained unchanged after the filing of the petition, he was only disciplined after the filing; (2) the employer had imposed discipline without first investigating the employee's side of the complaints received against him; and (3) certain documents, later used in partial justification of the discharge, were not in the employee's personnel file when he examined it (suggesting recent fabrication of pretextual reasons for the discharge). Had the union been successful in establishing these allegations, it may well have established the requisite causation; however, the employer successfully rebutted each of the allegations and the Board found the employer's testimony credible. Having failed to satisfy its burden under the first part of the Wright Line test, the complainant's § 964(1)(B) charge was dismissed.

09.33	21.12	36.111	72.301	72.315	72.323	72.361
09.362	21.2	64.2	72.311	72.317	72.334	72.365
09.374	21.3	71.523	72.312	72.319	72.35	
09.379	31.2	72.3	72.314	72.32	72.355	

IV § 964(1)(A): A finding of unlawful interference, restaint, or coercion does not turn on the employer's motive or on whether the coercion succeeded, but it is based on whether the employer engaged in conduct which, it may reasonably be said, tended to interfere with the free exercise of employee rights under the Act. Here, the employee had a serious attitude problem for some time before the employee engaged in any protected activity and, despite repeated verbal and written reprimands, failed to correct the problem. The Board concluded that, in the circumstances, the employer's actions were fully warranted and did not tend to unlawfully interfere with the employee's rights protected by the Act.

72.1 72.131
72.13 72.18

V § 964(1)(A): The complainant alleged that four specific statements by the Town Manager violated this section. Since the complainant had the burden of proving its case by a preponderance of the evidence and since the context of each statement was not established, the Board had to examine only the statements themselves. Applying the above objective test, the Board was unable to conclude that any of the statements were inherently coercive; therefore, the § 964(1)(A) charge was dismissed.

09.32 09.374 72.1
09.34 71.512 72.131

VI § 964(1)(C): This section prohibits employers from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence was presented tending to establish a violation of this section.

72.2 72.26
72.25

VII § 964(1)(D): This section protects the right of public employees and their employee organizations to file and prosecute petitions and complaints and to give testimony before the Board by prohibiting employer retaliation therefor. Since the complainant's allegation of violation of this section rested on the same evidence as the first contention in support of its § 964(1)(B) charge and since the latter averment was successfully refuted, no violation of § 964(1)(D) was established. There was no evidence establishing that the employer's action was in any way motivated by the filing of the unit clarification petition.

72.4

VIII § 964(1)(F): This section prohibits public employers from blacklisting employee organizations or their members for the purpose of denying employment to the latter. There was no evidence that the employer attempted or in fact dissuaded any other employer from offering employment to the employee in question and the only relevant evidence was that the Town Manager had given the employee a good recommendation; therefore, this charge was dismissed.

72.78

Geroux v. City of Old Town, MLRB Case No. 84-31, 7 NPER 20-16000, Interim Order (Sept. 10, 1984)

I § 968(5)(B): The prehearing officer may provide for the Board to consider motion(s) to dismiss for failure to state a claim in a proceeding separate from the hearing on the merits.

01.21 71.11 71.227 71.251
01.31 71.222 71.25

II § 968(5)(B): In considering a motion to dismiss for failure to state a claim upon which relief may be granted, the Board must accept as true all allegations contained in the complaint.

09.32 71.211 71.227
71.11 71.222

III § 964(1)(A): While an attempt to circumvent the bargaining agent may well constitute a violation of this section, the employer's statutory duty to deal exclusively runs to the

bargaining agent and not to any particular officer, agent, or body thereof. The City Manager's attempts to resolve an employee grievance with the union grievance committee, a body whose authority is recognized in the contract's grievance procedure, rather than with the union president, did not constitute an unlawful attempt to circumvent the bargaining agent.

22.1 22.6 22.71 72.1
22.41 22.7 47.1 72.17

IV § 964(1)(C): The complaint charged that the employer violated § 964(1)(C) by dominating or interfering with the union in the handling of an employee grievance. An employee had filed a grievance alleging that he and two others had been paid at the wrong step of the salary scale and seeking to be paid at the correct step plus back pay. After unsuccessfully seeking to resolve the grievance with the City Manager, the union president sent the grievance to the next step of the grievance procedure--a joint labor-management grievance committee. The City Manager wrote a letter to the joint committee stating, in relevant part, that "[a]s a charge to the Committee the subject of their deliberation is limited to the subject matter of the Union Grievance Committee statement that 'there is a language problem.'" Without finding a violation, the Board held that the allegations concerning the City Manager's attempt to limit the joint grievance committee's inquiry to an issue other than those raised in the employee's grievance, coupled with the averment that the City Manager stopped dealing with the union president when the latter pressed the original grievance, raised a material issue of fact requiring a hearing on whether the City Manager's actions unlawfully dominated or interfered with the union's handling of the grievance.

47.1 72.2 72.76
47.521 72.23

V § 964(1)(D): The allegation that this section was violated failed to state a claim because the section protects employees who are involved in some proceeding before the Board and the complaint fails to allege that the affected employees have ever been involved in any Board proceeding, prior to the employer conduct complained of.

72.4

Geroux v. City of Old Town, MLRB No. 84-31, 7 NPER 20-16007 (Nov. 27, 1984)

I § 964(1)(C): The City Manager's unsuccessful attempts to return an employee grievance to the first step of the contractual grievance procedure and to limit the inquiry of a joint labor-management committee (the fourth step of the grievance procedure) to an issue other than that raised in the grievance did not rise to the level of unlawful domination or interference. Despite the City Manager's efforts, the labor-management committee gave the employee and his representative full opportunity to present the grievance and decided the grievance on its merits.

47.1 72.23
72.2

Gray-New Gloucester Teachers Ass'n v. MSAD #15 Board of Directors, MLRB No. 85-01, 7 NPER 20-15018 (Oct. 11, 1984)

I § 968(5)(B): In considering a motion to dismiss for failure to state a claim, the Board accepts all allegations in the complaint as true.

71.11 71.222
71.211 71.227

II § 965(1)(B): The duty to bargain over subjects neither discussed nor embodied in the terms of the parties' collective bargaining agreement continues throughout the term of the contract. A party may waive its right to bargain about a particular subject during the term of an agreement. Waiver of the statutory right to bargain in a management rights clause, zipper clause, or other waiver clause must be clear and unmistakable. By agreeing to a contract article stating that all salaries contained in the contract are minimum amounts and that, in its discretion, the employer may pay additional sums to individual employees, the bargaining agent waived its right to mid-term bargaining over implementation of a "merit pay" plan, a mandatory subject of bargaining. Under the plan, those employees deemed meritorious by the employer would receive an annual stipend in addition to their salaries under the collective bargaining agreement.

01.27 09.6 09.64 43.11 46.642 72.590
09.21 09.61 09.641 43.115 72.51
09.23 09.612 09.66 46.64 72.511
09.231 09.613 41.34 46.641 72.58

III § 965(1)(B): In examining the parties' collective bargaining agreement to ascertain whether a party has waived its statutory duty to bargain, the Board will, in appropriate circumstances, apply the parol evidence rule to exclude extrinsic evidence of the parties' intent as expressed in the agreement. Where the contract appears on its face to completely integrate the understanding of the parties, and does so in unambiguous language, the intent of the parties is established by the agreement alone and parol evidence may not be introduced over objection to prove that the language used has some extraordinary meaning.

01.27 09.23 09.232 09.391
09.21 09.231 09.372 72.590

IV § 965(1)(C): In dicta, the Board expressed caution regarding the unsettling effects of "merit pay" plans on labor relations because such plans are subject to abuse and favoritism and frequently cause considerable dissension among unit employees.

43.115

Maine State Employees Ass'n v. Maine Dept. of Inland Fisheries & Wildlife, MLRB No. 85-02, 8 NPER ME-16010 (Jan. 17, 1985), rev'd, Me. Dept. of Inland Fisheries v. Me. State Emp. Ass'n, 503 A.2d 1285 (Me. 1986)

[Portion of Board decision unaffected by Law Court is indexed along with the Court's decision]

Board:

I § 979-C(1)(E): The duty to bargain over mandatory subjects of bargaining requires the employer to negotiate thereon and precludes the employer from making unilateral changes therein. The rationale behind the latter rule is that a unilateral change circumvents the duty to bargain as much as does a flat refusal to negotiate.

72.5
72.6

II § 979-C(1)(E): The policy of allowing off-duty use of the employer's motor vehicles by its employees is a fringe benefit relating to the employees' working conditions; therefore, such policies generally are mandatory subjects of bargaining.

43.141

III § 979-C(1)(E): To be effective, a waiver of a statutory right must be clear and unmistakable. Here, the bargaining agent demanded negotiations three days after being notified that the employer intended to discontinue the practice of allowing its employees to use the employer's motor vehicles during off-duty time. The bargaining agent's prompt request to negotiate over the proposed change refutes any inference that it may have waived its right to bargain.

09.6 09.613 09.651 72.590
09.612 09.65 72.58 72.666

IV § 979-C(1)(B): This section prohibits discriminatory employment decisions by the employer in retaliation for the employees' engaging in conduct protected by the Act. Since no evidence was presented that the employer's action was in any way motivated by the exercise of rights protected by the Act, this charge was dismissed.

72.3 72.319 72.362
72.31 72.35 72.366

Law Court:

V § 979-D(1)(E)(1): The Act's exemption of "those matters which are prescribed or controlled by public law" from the scope of mandatory bargaining prohibits the parties from negotiating an agreement where a statutory provision "explicitly and definitively prohibits the public employer from making an agreement as to a particuilar term or condition of employment."

03.3 42.3 46.2 46.22 72.667
03.4 42.32 46.21 72.66

VI § 979-D(1)(E)(1): Since a statute limited Game Wardens' use of the employer's motor vehicles to "official business" and since that term is the common antonym of "personal business," the statute prescribed or controlled the subject of off-duty motor vehicle use and precluded negotiations over the employer's change of its long-standing practice allowing such use when the change was made to comply with the statute.

03.3 42.3 46.2 46.22 72.667
03.4 42.32 46.21 72.66

VII § 979-D(1)(E)(1): The Legislature's funding and implementation of a subsequent collective bargaining agreement, which permits all covered law enforcement employees to use the employer's motor vehicles during non-duty time, did not repeal an earlier statute prohibiting such use by Game Wardens.

07.1 07.13
07.12 07.131

Educational Directors' Unit of Lewiston v. City of Lewiston, MLRB No. 85-03, Prehearing Order (Sept. 10, 1984)

I § 968(5)(B): Since issues fundamental to the outcome of a prohibited practice case, including the ability of a party to retain independent counsel to represent its interests, were then pending before the Superior Court, the prehearing officer continued the prehearing conference, at least pending the Court's ruling on one party's ability to retain counsel.

01.21 71.25 71.513
71.241 71.251 71.83

Educational Directors' Unit of Lewiston v. City of Lewiston, MLRB No. 85-03 (Mar. 31, 1986)

I Rule 4.09: The complainant moved to withdraw its prohibited practice complaint. Since the other parties expressed no objection to the granting of said motion, the Board granted the

motion without prejudice, pursuant to the terms of Rule 4.09. The Executive Director issued an order on behalf of the Board.

01.21 71.229
71.17

Single v. Town of Sanford, MLRB No. 85-04, 7 NPER 20-16005 (Oct. 18, 1984)

I § 964(1)(A): A finding of unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded or failed, but is based on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights protected by the Act.

72.1

II § 963: The right to file and process grievances is a right protected by this Section.

21.12 46.6 47.3
21.51 47.1

III § 964(1)(A): The Board held that the following facts constituted a violation of this Section: At a pre-shift roll call, a police captain, while slapping a nightstick in his own hand, glared at the union treasurer and grievance spokesman for several minutes. The roll call took place on an afternoon prior to an evening grievance hearing before the Selectmen. Three of the four grievances scheduled to be heard involved the same employer representative noted above. Said employer representative was scheduled to and did testify at the grievance hearing and the union treasurer handled the grievances on behalf of the union.

09.1 09.12 21.51 72.18
09.11 09.121 72.131

IV § 968(6): In evaluating conflicting testimony in the record and crediting one witness's testimony over another's, the Board observed the forthrightness and demeanor of the witnesses, the interest or relative disinterest of each witness in the outcome of the Board proceeding, and the "selective" memory of the witness whose testimony was ultimately discredited.

09.36 71.523
09.362

V § 964(1)(A): No violation was found based on employer's changing the union representative's shift assignment two days after the grievance hearing since a legitimate reason justified said shift change.

72.1

VI § 964(1)(B): This section bars discrimination in any term or condition of employment in retaliation against the exercise of rights guaranteed by the Act. No evidence was presented establishing a violation of this section.

72.3

VII § 964(1)(C): This section prohibits the employer from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and, thereby, potentially dominating it. No evidence establishing a violation of this section was produced in the record.

72.2 72.26
72.25

VIII § 968(5)(C): Remedy for employer's unlawful interference, restraint or coercion was an order that the employer cease and desist therefrom.

74.31

Saco Valley Teachers Ass'n v. M.S.A.D. No. 6 Board of Directors, MLRB Nos. 85-07 & -09, 8 NPER ME-16013 (Mar. 14, 1985)

I § 965(1)(B): Under this section, the duty to bargain continues throughout the collective bargaining relationship and a party must meet for collective bargaining purposes, within 10 days of receipt of a written request for the same, unless the parties have otherwise agreed in a prior written contract.

72.51

II § 965(1)(B): A party may waive its right to demand negotiations during the term of a collective bargaining agreement over unilateral changes which affect the mandatory subjects of bargaining by agreeing to a "zipper clause" which covers such changes. To be an effective bar to negotiations, a waiver must be clear and unmistakable.

09.231 09.61 46.64 72.590 72.666
09.6 09.662 72.51 72.65

III § 965(1)(B): A zipper clause is a contractual device designed to preserve the status quo and thereby to promote the improved relationship between employers and their employees through stable collective bargaining agreements. Properly invoked, a zipper clause serves as a shield against negotiations during the term of a contract; however, such a clause cannot properly be used to preclude negotiations over the employer's own unilateral actions, unless said actions are permitted in the collective agreement. Broadly phrased zipper clauses purporting to bar all mid-term negotiations have been held to preclude bargaining over matters discussed in the agreement and over matters specifically negotiated and knowingly abandoned during the pre-agreement negotiations.

09.6 09.662 46.642 72.62 72.666
09.641 46.64 72.511 72.65
09.642 46.641 72.590 72.651

IV § 965(1)(B): Although the collective bargaining agreement may permit the employer to make unilateral changes in mandatory subjects of bargaining during the term of the agreement, such authorization does not preclude mid-term negotiations over the impact of such changes on the mandatory subjects of bargaining.

09.64 72.590 72.65
46.643 72.617

V § 965(1)(C): The duty to bargain includes an obligation that the employer notify the bargaining agent prior to implementing changes in mandatory subjects. Notice by the employer to the bargaining unit employees does not satisfy the employer's duty to notify the bargaining agent of proposed changes in mandatory subjects; however, if such notification results in the union's receipt of actual notice of the proposed change, such actual notice may be considered in evaluating a claim of waiver by inaction.

09.651 72.6 72.666
72.52 72.613

VI § 965(1)(B) & (C): Despite a timely request therefor, impact bargaining need not be completed prior to implementation of changes permitted by the collective agreement which affect mandatory subjects. On other other hand, the statutory obligation to meet and consult over educational policy decisions normally must be completed prior to implementation of such decisions.

41.6 46.643 72.74
41.63 72.617

VII § 965(1)(B): The relevant zipper clause prohibited mid-term negotiations over matters covered in the agreement and over "any other item." Since the collective agreement did not

authorize the employer to make the changes at issue and since the record failed to establish that the parties had bargained over said changes and that the right to challenge said changes had been knowingly abandoned, the Board held that the right to demand mid-term negotiations over said changes had not been waived. The mere fact that an issue was raised in negotiations and was not incorporated in the collective agreement does not establish that said issue was knowingly abandoned.

09.6	09.661	46.64	72.511	72.65
09.641	09.662	46.642	72.590	72.666

VIII § 965(1)(C): Board quotes extensively from Justice Wernick's Biddeford test for "educational policies," within the context of this section of the Act.

03.31	43.61
03.4	

IX § 965(1)(C): A bargaining unit employee suggested and, with input from the unit employees affected, the employer implemented an after-school tutorial program. Under this program each major academic discipline was assigned one afternoon each week. Students in danger of failing a course are required to attend at least four afternoon sessions in that course. As a condition of their employment, the teachers were always expected to assist students requiring extra help during study halls and after school. Since the tutorial program is intimately related to the success of the educational process and the ultimate quality of education received by the students, the Board held that establishment of the program was an educational policy decision. Since it was an educational policy decision, the employer could lawfully implement said program without first negotiating the substance of its decision with the bargaining agent; however, such decisions are subject to the meet and consult process and impact bargaining.

03.31	41.6	43.614	46.643	72.589
03.4	43.61	43.630	46.65	72.617

X § 965(1)(C): In the unique circumstances here--where the educational policy was suggested by a unit employee, was developed with input from the unit employees affected and, despite not having been given formal notice thereof, the bargaining agent had ample pre-implementation actual notice of the proposed change and did not demand to meet and consult thereon--the Board concluded that the meet and consult obligation was not violated.

03.31	09.65	41.63	43.630	72.590	72.74
03.4	09.651	41.64	46.65	72.613	
09.6	41.6	43.61	72.52	72.614	

XI § 965(1)(C): Although the parties are required to "meet and consult but not negotiate with respect to educational policies," the employer must give advanced notice of its consideration of proposals to make educational policy decisions and, upon receipt of a ten-day notice requesting the same, negotiate over the impact of implementing such educational policy decisions upon the mandatory subjects of bargaining. While impact bargaining need not be completed prior to implementation of educational policy decisions, the employer's continued refusal to negotiate over the impact of the tutorial policy after its implementation violated the duty to bargain.

03.31	41.6	41.64	43.630	72.5	72.617
03.4	41.63	43.61	46.643	72.52	

XII § 965(1)(C): The "parents night" at issue consisted of parents tracking a typical day in their children's class schedule, over a two-hour period. Each class period was reduced in length, permitting the parents to meet each of their children's teachers and to learn something about each teacher's plans for the coming school year. Students did not participate in the program. A policy requiring mandatory attendance of teachers at the "parents night" clearly relates to the mandatory subjects of "hours" and "working conditions." While parental involvement in and support for the educational process is beneficial to students' academic success, the employer failed to establish that the specific policy is so related to educational policy considerations as to outweigh the attendance policy's prima facie eligibility for mandatory collective bargaining. Since it was a mandatory subject, the employer's refusal to negotiate over the substance of the mandatory attendance policy violated the duty to bargain.

03.31 43.44 43.61 43.620 72.52
03.4 43.444 43.614 72.5

XIII § 965(1)(D): This section requires the parties to reduce to writing and to execute the negotiated collective bargaining agreement, after agreement has been reached on all constituent issues by negotiators vested with authority to reach such final agreement. Since the parties never reached agreement here, neither of them could have violated this section.

46.55 73.461
72.571

XIV § 968(5)(C): As remedies for the employer's failure to give notice prior to implementing a change in educational policy and a change in working conditions and the employer's failure to negotiate thereon as requested, the Board ordered the employer to: (1) cease and desist from failing and refusing to meet, within 10 days after receipt of a written request to negotiate, within the meaning of § 965(1)(C), over the impact of the former on the mandatory subjects of bargaining and over the substance of the latter; and (2) to reinstate the status quo ante in connection with the change in the employees' working conditions, until such matter is negotiated with the bargaining agent.

74.31
74.32

Council 74, AFSCME v. Town of Brunswick, MLRB No. 85-08, 8 NPER ME-16014 (Apr. 19, 1985)

I § 965(1)(E): This section provides that, if a bargaining agent seeks to negotiate over issues "requiring appropriation of money," it must serve written notice of such intent at least 120 days before the conclusion of the employer's current fiscal operating budget; otherwise, the employer has no duty to bargain over such issues. This rule applies to both initial and successor agreements and is designed to prevent the unbalancing of municipal budgets by increases in costs that were not foreseen and provided for when the tax rate was set. This rule applies to newly-certified bargaining agents, including those certified within the 120-day period; therefore, the employer was justified in refusing to negotiate over proposals that would have entailed the appropriation of money since no timely 120-day notice was given.

07.24 41.32 42.22 72.51 72.589
07.25 42.2 72.5 72.58 72.591

II § 965(1)(C): In instances where a bargaining unit is newly organized and no collective bargaining agreement has been negotiated, the "dynamic status quo" must be maintained; that is, benefits customarily given or already provided for by arrangements in effect at the time of certification must be continued. Under this principle, the employer must continue its normal and customary practices regarding the mandatory subjects. Here, a salary increase had customarily and regularly been granted to unorganized employees on July 1, for several years, and the employer granted a 6% increase to the remaining unorganized employees on that date; therefore, the employer was required to grant the newly-organized employees a 6% salary increase. Prior to becoming organized, the bargaining unit employees received a step increase each year on their anniversay dates; therefore, the newly-organized employees had to be granted the scheduled step increases, under the dynamic status quo. The employer's failure to continue these practices until new ones were negotiated with the bargaining agent was a per se violation of the duty to bargain.

72.5 72.612 72.63
72.6 72.618

III § 965(1)(C) & Rule 4.09: With limited exceptions, once a bargaining agent is in place, the employer may not make unilateral changes in mandatory subjects. It is irrelevant that the change was intended to implement a plan adopted before the union was certified; otherwise, the sections of the Act designed to protect employees from retaliation for joining a union would be undermined. No violation was found based on the employer's increasing of the unit employees' work hours because neither that fact nor the alleged violation flowing from it were averred in the prohibited practice complaint. While Rule 4.09 authorizes the Board to permit complaints to be amended, at any time on such terms as may be just and consistent with due process of law, since the record did not establish that the bargaining agent either

objected to the unilateral change or demand negotiations thereon, the Board declined to treat the complaint as if it were amended to include this charge.

01.312 21.12 43.44 71.15 72.5 72.666
09.5 21.3 43.444 71.223 72.52

IV § 968(5)(C): As remedies for the employer's making unlawful unilateral changes in the working conditions of bargaining unit employees, the Board ordered the employer to cease and desist from making such changes without first negotiating over them with the bargaining agent. As remedies for the employer's failure to preserve the dynamic status quo, by failing to grant the usual and customary annual across-the-board wage increase to the bargaining unit employees and by failing to grant annual step increases to said employees, the Board ordered the employer to implement the general wage increase and the anniversay step increases and to make the unit employees whole, including legal interest on all arrearages, for the employer's failure to implement such increases in a timely manner. The employer was to report to the executive director, within 20 days of the Board's order, of the steps taken in compliance with said order.

74.16 74.32 74.341
74.31 74.34 74.345

City of Portland v. Portland Firefighters Association, MLRB No. 85-10 (June 14, 1985)

I Rule 4.09: Complainant moved to withdraw its prohibited practice complaint, with prejudice. The motion was granted by the Board and the Executive Director issued an order on behalf of the Board.

01.21 71.229
71.17

Single v. Town of Sanford, MLRB No. 85-14, Executive Director Order (Mar. 18, 1985)

I Rule 4.09: Complainant moved to withdraw his prohibited practice complaint. The respondent having no objection thereto, the Executive Director granted the complainant's motion and the complaint was ordered withdrawn, without prejudice.

01.21 71.229
71.17

Slavick v. Associated Faculties of the University of Maine, MLRB No. 85-16, Executive Director Order (May 31, 1985 and June 3, 1985)

I Rule 4.03(4): Where an alleged prohibited practice is predicated upon a violation of policies or plans extrinsic to but incorporated by reference in the parties' collective bargaining agreement, those plans or policies, or copies of the pertinent parts thereof, must be filed with the complaint. Without such documents, the complaint fails to set forth "a clear and concise statement of the facts constituting the complaint," and it may be dismissed for failure to comply with this Rule.

09.379 71.222
71.11

II § 1029(2): The complainant knew, or should have known, all of the operative facts giving rise to his prohibited practice complaint over six months prior to its being filed; therefore, the executive director held that the complaint was barred by the six-month statute of limitations contained in the Act.

01.21 09.62 71.13 71.227
01.28 23.21 71.2 71.522

III § 1025(2)(B): A violation of the duty of fair representation turns on whether the bargaining agent's conduct toward a unit employee was arbitrary, discriminatory, or was taken in bad faith or whether the employee's grievance was processed in a perfunctory fashion. Although the merits of the grievance--as opposed to the way in which it was handled--are generally not controlling, the merits are relevant to the inquiry. For example, a clearly meritorious grievance should, in most instances, have prompted the union to act while a clearly frivolous grievance should usually dictate dismissal of the DFR complaint.

21.12 23.2 23.4 47.3 73.113
21.7 23.23 23.6 47.31
23.1 23.25 23.61 47.53

IV §§ 1025(2)(B) & 1029(2): The grievance at issue here was frivolous since the employee was asking the bargaining agent to prosecute a matter which was time-barred by the collective agreement. The executive director ruled that the complaint failed to allege a prima facie violation of the duty of fair representation and dismissed the same.

09.23 23.2 47.3 47.53 73.113
09.231 23.6 47.31 47.73

V §§ 1025(2)(B) & 1029(2): A union member's knowledge of all of the facts concerning an alleged contract violation is imputed to the bargaining agent, for the purpose of determining the time within which a grievance may be filed. Otherwise, the member possessing such knowledge could prolong the viability of a grievance, contrary to an agreement's timeliness limitations, by secreting the facts constituting the grievance from the bargaining agent.

09.1 09.13 09.62 47.3 73.113
09.11 09.131 23.32 47.31
09.111 09.5 23.6 47.73

VI § 1029(2): A typographical error in the executive director's order dismissing a prohibited practice complaint was corrected through issuance of an erratum order.

01.21 71.2 74.3
01.31 71.227

Pullen v. Town of Winthrop, MLRB No. 85-17, 8 NPER ME-17002 (Aug. 13, 1985)

I § 962(7): Since the charged conduct concerning the Town Manager and the Chief of Police allegedly arose out of or were performed by them in the course of their employment with the public employer, said individuals are public employers, within the meaning of the Act, and the public employer is responsible for their conduct. The surveillance activity, undertaken by supervisory employees against the known union supporter, was performed while on duty, using the police cruiser, with the employer's tacit assent; therefore, the employer is accountable for this activity.

09.1 09.111 09.12 09.122 11.15
09.11 09.113 09.121 11.12

II § 968(5)(B): While alternative means exist for securing compliance with the Board's orders, one means of doing so is through a subsequent prohibited practice complaint.

01.29 74.20 81.11 81.18
74.12 81.1 81.112 81.20

III § 964(1)(A): The test for alleged violations of this section does not turn on the employer's motive or on whether the coercion succeeded or failed, but is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights protected by the Act.

72.1

IV § 964(1)(A): The Board viewed the employer's actions here in light of the fact that, in Case No. 84-06, the Board had held that Pullen had been unlawfully discharged as a result of anti-

union animus. Since he was not blameless in that case, the Board ordered his discharge reduced to a three-week suspension without pay. The employer's actions here occurred shortly after Pullen's return to duty in compliance with the Board's earlier order. With the earlier case as background, the following facts were held to constitute a violation of this section: (1) Pullen was the only employee subjected to off-duty surveillance to determine whether he was in compliance with the employer's residency requirement (evidence that the employer was "building a case" for the employee's discharge); (2) despite going to great lengths to establish the employee's violation of the residency requirement, the employer never gave the employee any warning or opportunity to correct his conduct (this fact permits an inference that the reason given for the discipline was pretextual); and (3) the reason given for the termination was inconsistent with other evidence given by the employer. Further supporting the Board's conclusion were: (1) varying reasons being given for the discharge; and (2) after the earlier Board case, Pullen was known to be an active union supporter and the circumstances of this termination here "gave a message" to other unit employees that engaging in rights protected by the Act may result in discharge.

21.13	72.13	72.18	72.314	72.321
21.3	72.134	72.311	72.317	72.334
72.1	72.14	72.312	72.318	

V § 968(5)(C): Having concluded that the employer violated § 964(1)(A) by terminating Pullen, the Board ordered the employer to: (1) cease and desist from interfering with, restraining, or coercing Pullen in his exercise of the rights protected by the Act; (2) offer Pullen reinstatement to his former position, purge his personnel file, and make him whole for earnings lost as a result of the unlawful discharge, plus interest accrued thereon; (3) post a notice; (4) notify the executive director within 20 days of the Board's order of the steps taken in compliance therewith; and (5) if the parties are unable to agree on the amount of the make-whole amount due under the terms of the Board's order within 30 days, the parties were to return to the Board for its determination thereof.

74.16	74.33	74.338	74.344	74.361
74.31	74.335	74.34	74.345	
74.32	74.336	74.341	74.36	

Teamsters Local Union No. 48 v. Eastport School Department, MLRB No. 85-18, 8 NPER ME-17003 (Oct. 10, 1985)

I § 968(5)(B): At the prehearing conference, the parties settled the dispute that gave rise to an unlawful discrimination charge; therefore, said allegation was withdrawn. The parties further agreed that there were no material issues of relevant fact presented in the case, the evidentiary hearing would be waived, and the dispute would be presented to the Board on the basis of a stipulation of relevant facts and argued through memoranda of law.

09.380	71.17	71.229	71.251
09.62	71.228	71.25	

II § 962(7): Since the charged conduct concerning the superintendent of schools arose out of and was performed during the course of his employment with the public employer, the superintendent is a public employer within the meaning of the Act.

09.1	09.111	09.12	11.12
09.11	09.112	09.121	11.15

III § 964(1)(E): Unilateral changes by the employer in mandatory subjects violate the duty to bargain because such changes circumvent the duty to negotiate and frustrate the objectives of the Act as much as do flat refusal to bargain. To violate § 964(1)(E), the Employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects. An employer's action is unilateral if it is taken without prior notice to the bargaining agent of the employees involved in order to afford the representative a reasonable opportunity to demand negotiations on the contemplated change.

09.651	21.4	72.6	72.612
21.12	72.5	72.611	72.613

IV § 964(1)(E): The employer's unilateral installation of time clocks and requiring hourly employees to use the same did not violate the duty to bargain. The employees had always been

required to record their time at work manually on time cards and were paid accordingly. By unilaterally initiating a more dependable method of enforcing its long-standing work rules the employer did not change any mandatory subject; however, a change in the work rules th selves would, if done unilaterally, violate the duty to bargain.

43.43 43.431 43.432 43.44 43.444 43.47 72.6 72.612 72.66 72.667

V § 968(5)(B): In deciding matters of first impression, the Board should look for guidance to parallel federal law found in the National Labor Relations Act and decisions thereunder.

01.26 03.22 04.2 42.11 42.4

VI § 964(1)(A) & (B): Had unlawful discrimination been present or if the natural result of the employer's action had been to interfere with, restrain or coerce the bargaining unit employees in their exercise of the rights protected by the Act, the Board may well have found that the employer's unilateral installation of time clocks violated the Act.

72.1 72.13 72.18 72.3 72.342 72.3523 72.359

VII § 964(1)(C): This section is directed at the evil of the employer providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence of such employer action was presented here.

72.2 72.25 72.26

Maine State Employees Association v. State of Maine, MLRB No. 85-19, 8 NPER ME-17004 (Dec. 2, 19[illegible])

I FACTS: As a result of the U.S. Supreme Court's Garcia decision, applying the Federal Labor Standard Act's wage and hour provisions to public sector employees, the State, after extensive discussions with the bargaining agent, sought to limit its FLSA overtime exposure through issuance of a Gubernatorial Executive Order. Said Order limited the hours of "non-standard" employees to FLSA maxima, without said employees losing the 16 percent differential which they had been paid in lieu of overtime premium. The bargaining agent charged that the employer's action constituted an unlawful unilateral change in violation of the duty to bargain.

04.25

II § 979-D(1)(E)(1): Unless permitted by the parties' collective bargaining agreement, a unilateral change in a mandatory subject of bargaining during the term of the agreement is the equivalent of a refusal to bargain.

09.642 46.64 72.51 72.511 72.6 72.65 72.664

III § 979-D(1)(B): In State of Maine v. MSEA, 499 A.2d 1228 (Me. 1985), the Law Court held that the broad grant of authority to the employer by a collective bargaining agreement's management rights clause expressly permitted the employer to make certain changes during the term of the agreement. The agreement's conclusion of negotiations article provided that, during the term of the agreement, neither party could attempt to compel negotiations over matters specifically addressed in the agreement, over matters that could have been raised during the pre-agreement negotiations, and over matters that were so raised. Since the change at issue was held to be within the scope of actions permitted by the management rights article, it was "specifically addressed" in the agreement and could not be the subject of mid-term bargaining, unless both parties agreed to such mid-term negotiations. The relevant management rights and conclusion of negotiations articles were identical to those reviewed by the Law Court.

01.27 09.23 09.6 09.612 09.64 09.642 09.66 09.661 09.662 46.64 46.641 46.643 72.590 72.65 72.651 72.664 72.666

IV § 979-D(1)(B): A broad management rights article in the pertinent collective bargaining agreements, which contained a non-exhaustive list of rights retained by the employer including powers to "determine the mission of agencies," "direct the work force," and to take such action as is "necessary to carry out the mission of the agency in situations of emergency," permitted a decision at the highest levels of political authority to limit the State's FLSA overtime liability by prohibiting employees from working more hours than the FLSA maxima, without first receiving authority to do so from their supervisors. The only alternative open to the employer would have been to incur a "substantial deficit," an unlawful result under the State Constitution. Although obviously affecting the hours of bargaining unit employees, the Board held that since the agreement permitted the employer to take such action, mid-term, the agreement's broad zipper clause permitted implementation of the limitation without negotiating the same with the bargaining agent.

01.27 09.6 09.642 72.590 72.666
04.25 09.612 46.64 72.65
07.26 09.64 46.641 72.664

V § 979-D(1)(E)(1): Although containing a broad zipper clause, the pertinent collective bargaining agreement explicitly reserved to the bargaining agent the right to negotiate mid-term over changes made by the employer, under authority conferred by the agreement, in the unit employees' work hours. Here, the employer gave the bargaining agent ample advanced notice of its intention to limit its FLSA overtime liability, several discussions concerning alternative means of doing so were held between the employer and the bargaining agent, and it became clear that the action actually taken by the employer was the one most likely to be implemented. Despite having received such notice, the bargaining agent never demanded to bargain over the impact of the employer's decision upon the mandatory subjects for the employees affected; therefore, the employer did not violate the duty to bargain by implementing its decision without first negotiating its impact with the bargaining agent.

09.6 09.65 46.643 72.590 72.65
09.642 09.651 72.52 72.617 72.666

Lewiston Firefighters Ass'n v. City of Lewiston, MLRB No. 85-20, Executive Director's Order (Aug. 29, 1985)

I §§ 968(5)(B) & 964(1)(A) & (D): The Board normally does not defer to arbitration cases involving alleged violations of § 964(1)(A) and (D); however, absent extraordinary circumstances such as an allegation of conflict of interest between the discriminatee and the bargaining agent, the Board deferred such a case, upon the joint request of the parties.

01.21 09.63 47.3 47.54 71.81 72.4
09.62 09.672 47.32 71.8 72.1 74.43

II § 968(5)(B): In deferring to arbitration, the Board retained jurisdiction, pending review of the arbitrator's award, at either party's request within 30 days of the date of such award.

01.21 74.43
71.9

Teamsters Local Union No. 48 v. Town of Fort Fairfield, MLRB No. 86-01, 9 NPER ME-17008 (Jan. 24, 1986)

I § 964(1)(E): Unilateral changes by the employer in mandatory subjects of bargaining of organized employees violate the duty to bargain in that they circumvent the obligation to negotiate and frustrate the objectives of the Act as much as do flat refusals to bargain. To be unlawful, an employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects of bargaining. An employer's action is unilateral if it is taken without prior notice to the bargaining agent in order to afford said agent a reasonable opportunity to demand negotiations on the contemplated change.

09.65 72.5 72.611 72.613
09.651 72.6 72.612 72.63

II § 964(1)(E): On the facts of this case, the complainant failed to establish an unlawful unilateral change because, although the employer's action concerned the assignment of overtime--a mandatory subject--and the action was undertaken unilaterally, the complainant failed to establish any long-standing practice from which the employer's action could be said to diverge.

43.445 72.66
72.612 72.667

III § 964(1)(E): All of the elements necessary to establish an unlawful unilateral change were present in another instance; however, since the employer department head was newly hired and was unfamiliar with established practices and, upon being informed of the established practice, immediately reinstated it, the Board held that the employer's action did not violate the Act.

09.111 72.66 72.667
09.114 72.661

IV § 964(1)(B): The Board applied the Wright Line test in the dual-motive disciplinary case. To establish a violation of § 964(1)(B), the complainant must establish by a preponderance of the evidence that the employee's protected activity was a substantial or a motivating factor in the discipline. If this is established and the employer is unable to rebut it, the employer may still avoid an adjudication by establishing by a preponderance of the evidence that the discipline also rested on the employee's unprotected conduct and would have been imposed in any event. Here, the complainant alleged: (1) a long-standing shift-swapping policy was in effect; (2) an employee had recently been named as shop steward and member of the union negotiating team; (3) the employee complied with the policy; and (4) he received a written reprimand. Had the union successfully established its allegations, it may have satisfied its burden of proof under the first tine of the Wright Line test; however, the record revealed that the employee had failed to comply with the policy and, therefore, the reprimand was justified.

09.32 72.3 72.312 72.324 72.35 72.366
71.512 72.301 72.317 72.335 72.365

V § 964(1)(A): A violation of this section does not turn on whether the coercion succeeded, but is based on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of rights protected by the Act. No violation of this section was established because: (1) the employee involved had violated an established practice and the reprimand was deserved; (2) prior to issuance of the reprimand, the employer interviewed all witnesses and fully investigated the facts; (3) the employer ignored an equally serious violation by the same employee; (4) at each stage, the employee was advised of his right of appeal to the next step of the grievance procedure; and (5) the discipline was appropriate to the offense and the employee's prior record and was consistent with other discipline imposed by the employer. In the circumstances, the Board held that it cannot be reasonably said that the employer's action tended to interfere with the free exercise of the rights protected by the Act.

72.1 72.18 72.315
72.13 72.314 72.318

VI § 964(1)(C): This section prohibits the employer from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the bargaining agent and thereby potentially dominating it. No evidence relating to a violation of this section was presented.

72.2 72.24 72.26
72.21 72.25

VII § 964(1)(D): This section protects the rights of employees to file complaints or petitions with, or to give testimony before, the Board by protecting employees involved in any stage of a Board proceeding from any discriminatory action by the employer. No evidence was presented that any of the employees involved had ever filed anything or appeared as a witness before the Board; therefore, the employer could not have violated this section.

72.4

Teamsters Local Union No. 48 v. Boothbay/Boothbay Harbor Community School District, MLRB No. 86-02, 9 NPER ME-17009 (Mar. 18, 1986)

I § 965(1)(C): Both the decision to sub-contract bargaining unit work and the impact of that decision on the wages, hours, and working conditions of the employees affected are mandatory subjects of bargaining.

43.123 43.422 43.52 43.645
43.42 43.5 43.54 43.95

II § 964(1)(E): Unilateral changes by the employer in the mandatory subjects circumvent the duty to bargain and frustrate the objectives of the Act as much as do flat refusals to negotiate. The unilateral change rule applies throughout the relationship between the certified bargaining agent and the employer. Prior to the initial collective bargaining agreement, the dynamic status quo must be maintained in connection with the mandatory subjects; that is, benefits customarily changed at periodic intervals or provided for under arrangements in effect at the time of certification must be changed at the usual time (in a manner consistent with the established practice) or must be maintained, in the latter case. After expiration of the parties' agreement and during negotiations for a successor agreement, the static status quo must be maintained; that is, upon expiration of an agreement, the level of wages, hours, working conditions and contract grievance procedure in effect at the time of such expiration must remain in effect until they are superceded by the successor agreement, not by force of the agreement but by operation of the static status quo.

09.23 09.642 46.44 47.514 72.51 72.618 72.64
09.231 21.4 46.64 47.77 72.6 72.62 72.641
09.24 46.42 47.16 72.5 72.613 72.63

III § 964(1)(E): If the employer gives the bargaining agent ample advanced notice of its intention to make a unilateral change in a mandatory subject, in order to allow the bargaining agent a reasonable opportunity to demand negotiations over the contemplated change and/or over the impact of said change on the mandatory subjects for the employees affected, and the bargaining agent fails to demand such negotiations, the employer may then implement the change unilaterally, without violating the duty to bargain.

09.65 72.52 72.614
09.651 72.613 72.666

IV § 964(1)(B): The parties' collective bargaining agreement explicitly permitted the employer to sub-contract bargaining unit work, so long as such sub-contracting did not result in reduction of the hours of the unit employees. The Law Court has interpreted a similar agreement article as permitting the employer to sub-contract unit work; however, the impact of such decision should not decrease the hours of the unit employees. The Board held that the expired agreement's sub-contracting article (which remained in effect through application of the static status quo) therefore permitted the employer to sub-contract unit work. Since the bargaining agent had demanded to negotiate over severance pay for the unit employees (an impact of the sub-contract decision) and the employer failed and refused to negotiate thereon, such refusal violated the duty to bargain.

09.23 09.66 43.645 72.64 72.666
09.64 43.123 46.643 72.65
09.642 43.54 72.617 72.664

V § 968(5)(C): Although aware that the usual remedy for an unlawful unilateral change is a cease and desist order, reinstatement of the employees affected, and full back pay and interest, the Board ordered that, in this instance, the employer: cease and desist from refusing to negotiate over the mandatory subjects and to pay one month's severance pay to each of the former unit employees. This remedy was deemed appropriate because: (1) the employer's poor financial position justified the sub-contract decision, (2) no anti-union animus was shown, (3) the only impact bargaining demanded by the bargaining agent was negotiation over severance pay, and (4) the bargaining agent and the employees abandoned their grievance over the propriety of the employer's conduct.

72.662 74.31
74.17 74.34

Lewiston Teachers Association v. Lewiston School Committee, MLRB No. 86-04, 9 NPER ME-17011 (June 30, 1986)

I § 965(1)(B): An offer to negotiate does not constitute a demand to bargain, within the meaning of the Act.

41.3
72.52

II § 965(1)(C): Prior to implementing a change in educational policy, the employer must give the bargaining agent such reasonable notice as to permit the union an opportunity to demand that the employer meet and consult over the contemplated change and negotiate over the impact of such policy change on the mandatory subjects of bargaining of the employees affected. Although it must be commenced within 10 days of receipt of a written demand therefor, impact bargaining need not be completed prior to implementation of the educational policy decision. The employer is also required to bargain, within 10 days of a request, over any new impact flowing from educational policy decisions, post implementation, if such impact was not reasonably forseeable prior to or at the time of implementation. Since meet and consult and mandatory impact bargaining obligations are independent, circumstances constituting waiver of meet and consult notification will not automatically excuse the notification required to facilitate impact bargaining.

03.31 09.651 41.64 72.52 72.590
09.642 41.6 43.630 72.58 72.617
09.65 41.63 46.643 72.589 72.74

III § 965(1)(B): The employer must meet to negotiate over the impact of educational policy decisions upon the mandatory subjects of bargaining of the employees affected, within 10 days of the employer's receipt of a written demand therefor.

46.643 72.614
72.52 72.617

IV § 965(1)(C): The Board quotes extensively from Justice Wernick's Biddeford decision, setting forth the dichotomy between educational policy and mandatory subjects of bargaining. Essentially, all matters directly related to the wages, hour, and working conditions of educational employees are prima facie eligible for mandatory bargaining. Since virtually all mandatory subjects for educational employees will inherently impact upon the organization, supervision, direction, and distribution of such personnel, such contact alone is not sufficient to remove such topics from the scope of mandatory bargaining. In addition to such inherent contacts, managerial and policy-making contacts can subordinate working condition features and accomplish exclusion from mandatory bargaining only if, on balance, the latter contacts are of such qualitative or quantitative importance to substantially override the prima facie eligibility for mandatory bargaining.

01.26 42.1 42.2 42.42 43.630
03.31 42.12 42.21 43.61

V § 965(1)(C): The Board deemed education policy matters to be permissive subjects about which an education employer may, but is not required to, negotiate with the bargaining agent.

03.31 42.22
42.2 43.61

VI § 968(5)(B): In instances of material issues of relevant fact, the Board can resolve such issues by crediting the testimony of a witness over that of others.

09.36
71.523

VII § 965(1)(C): The length of instructional time is a matter of educational policy; however, proposals concerning compensation for work in excess of seven hours per day, compensation for each required preparation period in excess of a certain number per day, compensation for more than a stated length of instructional time, payment for mandatory attendance at evening open houses, stipends for itinerant kindergarten teachers, and payment for instructional materials for involuntarily transferred teachers are all pure wage issues and are on the extreme "working conditions" end of the educational policies standard. The Board's holding explicitly did not limit the employer's right, after satisfying the meet and consult obligation, to unilaterally determine: the length of the teachers' work day; the number of preparation periods allowed or required; the amount of instructional time required of teachers; the existence, frequency, and mandatory attendance at open house evenings; whether kindergarten teachers may be required to travel among the schools; or whether teachers may be involuntarily transferred--all educational policy decisions.

03.31 43.122 43.61 43.620 46.643
41.6 43.352 43.617 43.621
43.11 43.48 43.618 43.630

VIII § 965(1)(C): Conveying the identity of the supervisors to the employees being supervised is a mandatory subject; however, the selection and number of supervisors and the degree of supervision exercised are matters of educational policy. Since the proposal contained mandatory and non-mandatory aspects and since they were indivisible, the Board deemed the proposal to be a non-mandatory one.

03.31 43.624
43.45

IX § 965(1)(C): Proposals concerning teachers' religious, political, and academic freedom and the right to privacy contained inseparable mandatory and non-mandatory aspects; therefore, such proposals were held to be non-mandatory. Teachers do not lose their constitutional religious, political, or privacy rights as a result of their occupations; however, the employer may, as a matter of educational policy, limit certain first amendment expression consistent with the goal of not disrupting the educational process.

04.1 43.61
21.11 43.611

X § 965(1)(C): A proposal that, in effect, required reappointment of involuntarily transferred teachers interferes with the employer's right to set the standard of educational services, through selection of employees and assignment of work.

03.31 43.352 43.98
43.2 43.61

XI § 965(1)(C): Some aspects of teacher evaluations--the frequency, form, impact of new evaluation programs, receiving an advance copy of evaluation criteria, and notice of the identity of evaluators--are mandatory subjects of bargaining. The performance evaluation is the most fundamental tool to assure a high quality educational program and is of such qualitative importance that a proposal to bargain over the selection of teacher evaluators and determination of the evaluators' qualifications is a matter of educational policy.

03.31 43.45 43.452 43.61 43.94
43.232 43.451 43.453 43.624 43.98

XII § 965(1)(C): A refusal to remove non-mandatory subjects from the bargaining table, on demand, constitutes a violation of the duty to bargain. The demand to remove permissive subjects may be made at any time prior to factfinding.

41.3 72.5 73.4
43.61 72.541 73.45

XIII § 968(5)(C): Since the employer refused to negotiate over various topics held by the Board to be mandatory subjects, the Board ordered the employer to cease and desist from such refusal and, upon request of the bargaining agent, to negotiate thereon. Since the bargaining agent insisted, to the point of impasse, upon bargaining over topics held by the Board to be permissive subjects, the Board ordered the union to cease and desist from insisting on negotiating thereon. Because the violative conduct of both parties led to their bargaining impasse, neither posting nor any other remedy was ordered.

74.17
74.31

Teamsters Local Union No. 48 v. City of South Portland, MLRB No. 86-05, 9 NPER ME-17007 (Jan. 14, 1986)

FACTS: The employer unilaterally created two new supervisory employee positions and, with advanced notice to the unit employees, required the employees to provide the employer with keys to their lockers at work. The former decision was permitted by the parties' collective bargaining agreement; however, the decision had a significant impact on the working conditions for some unit employees. The parties' agreement was silent on the second change.

I § 964(1)(A): Concluding that the employer's actions did not tend to interfere with the free exercise of employee rights protected by the Act, the Board dismissed the portion of the charge alleging a violation of this section.

71.227
72.1

II § 964(1)(C): This section of the Act prohibits the employer from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the bargaining agent and, thereby, potentially dominating it. No allegation of fact sufficient to set forth a prima facie case of a violation of this section was made; therefore, this portion of the charge was dismissed.

71.227 72.23 72.25
72.2 72.24 72.26

III § 965(1)(E): Despite having advanced notice of one change and the other change being permitted by the parties' collective bargaining agreement, the bargaining agent never requested to bargain over the substance and impact of the former change nor over the impact of the latter. At the hearing, the Board indicated that said failure to demand bargaining might be dispositive. Despite having been given the opportunity to amend the factual allegations in its complaint, the complainant failed to do so; therefore, the Board held that the failure to demand negotiations precluded a violation of the duty to bargain on the part of the employer.

09.64 09.651 46.643 72.58 72.617 72.666
09.65 46.642 71.227 72.590 72.664

Maine State Employees Association v. State of Maine, MLRB No. 86-09, 9 NPER ME-17010, Interim Order (Apr. 23, 1986)

I § 979-H: While the Legislature has recognized that the agreed-to grievance and arbitration procedure is the preferable method for parties to pursue in resolving disputes, in the event that a single act may violate both the Act and the parties' collective bargaining agreement, the Act explicitly provides that the Board's prohibited practice jurisdiction "shall not be affected by any other means of adjustment or prevention that has or may be established by agreement, law or otherwise."

01.27 46.6 71.8
09.63 47.54

II § 979-H & 979-D: The thrust of the complaint was that the employer made an unlawful unilateral change, in violation of both § 979-D and the maintenance of benefits article of the parties' collective bargaining agreement. The employer's defense was that its action was permitted by two other articles of the agreement. Since the duty to bargain charge will turn on interpretation of the parties' agreement, the Board deferred to the agreement's grievance procedure to resolve the dispute. A grievance was timely filed and the arbitration hearing had been scheduled. The Board retained jurisdiction, pending the outcome of the grievance, in order to take appropriate action should further proceedings be required.

01.27 46.6 71.8 71.811 71.815 74.43
09.413 47.54 71.81 71.813 71.9

III § 979-H: Deferral is the preferable course when the alleged prohibited practice may also constitute a breach of the bargaining agreement. This approach gives full effect to the parties' agreement to arbitrate their disputes--a concept fundamental to the collective bargaining process.

01.27 47.54
46.6 71.8

IV § 979-H: The Board has refused to defer in the following instances: where a discrimination charge is involved; where unlawful interference, restraint, or coercion is charged; where a conflict of interest between the employee involved and the bargaining agent is alleged; where no bargaining agreement violation is alleged; where an unlawful strike is alleged; where the grievance procedure is unavailable; and where the dispute involves the interpretation of the Act and the Board is unsure of whether deferral will settle the matter.

47.54 71.81 74.43
71.8 71.813

Coulombe v. City of South Portland, MLRB No. 86-11, 9 NPER ME-18008 (Partial Dissent) (Dec. 29, 1986)

I § 968(5)(B): The six-month limitations period contained in the Act begins to run when the complainant knew, or reasonably should have known, of the occurrence which allegedly violated the Act. While the employer decided to make a change in April, 1985, the bargaining agent did not learn of this decision until it was first implemented in August, 1985. Since the complaint was filed within six months of the August date, it was timely filed within the statute of limitations of the Act.

01.28 71.13
01.32

II § 968(5)(B): Issues raised in a complaint or answer, which are not mentioned at either the hearing before the Board or in the post-hearing argument of the party raising them, are deemed as having been withdrawn. The Board's prohibited practice jurisdiction is not affected by the expiration of the grievance filing period contained in the parties' collective bargaining agreement.

01.28 71.17
71.13 71.229

III § 968(5)(A) & (B): The Board has no jurisdiction to consider grievance arbitration cases. In cases where the employer has allegedly violated the duty to bargain by implementing an unlawful unilateral change during the term of a collective agreement, the Board must interpret the parties' agreement to determine whether the change was permitted thereby. Where a single act or occurrence constitutes both a prohibited practice and a violation of the parties' agreement, the Board is empowered to act despite the existence of a grievance arbitration remedy under § 968(5)(A). Where redress is sought through both the grievance procedure and the Board's prohibited practice jurisdiction, the Board will, in appropriate circumstances, defer to the arbitral process. No grievance had been filed in this case; therefore, deferral was not possible and the Board considered the merits of the case.

01.27	09.62	09.642	47.32	71.813	72.65
01.28	09.64	46.64	47.54	72.590	72.664
01.32	09.641	46.641	71.8	72.6	

IV § 965(1)(B) & (C): The mandatory subjects of bargaining are wages, hours, working conditions, and contract grievance arbitration. The duty to bargain over said topics continues throughout the certification of the bargaining agent, provided the parties have not otherwise agreed in a prior written contract. If the parties' collective agreement does not include a zipper clause, the duty to bargain continues throughout the term of the agreement, except as to those matters covered by the agreement or which were negotiated away during the bargaining for that agreement or a successor agreement.

09.64	09.66	42.1	46.641	72.511	72.65	72.666
09.641	09.661	42.12	46.642	72.590	72.651	
09.642	41.34	46.64	72.51	72.6	72.664	

V § 965(1)(C): The duty to bargain includes a prohibition against the employer's making unilateral changes in the mandatory subjects of bargaining. Such unilateral changes are a circumvention of the duty to negotiate which frustrate the objectives of the Act much as do flat refusals to bargain. In order to violate the duty to bargain, an employer's action must: (1) be unilateral; (2) be a change from a well-established practice; and (3) involve one or more of the mandatory subjects. An employer's action is unilateral if it is taken without prior notice to the bargaining agent sufficient to afford the union a reasonable opportunity to demand negotiations on the contemplated change.

72.6	72.612
72.611	72.613

VI § 965(1)(C): The employer's argument that certain decisions are so closely related to the operation of the governmental entity that they constitute a management prerogative which is not subject to the duty to bargain is rejected because there is no management prerogative exception to the duty to bargain.

72.591
72.665

VII § 965(1)(C): When the employees' continued employment is conditioned upon their adherence to certain rules, regulations, and requirements, those rules are inherently and significantly related to the employees' conditions of employment and are subject to mandatory bargaining. Specifically, the Board held that the following are mandatory subjects: work rules, the violation of which could result in discipline; and a rule requiring physical exams as a condition of continued employment. Leaving open the question of whether the employer is free to unilaterally determine the terms and conditions of employment for new hires with less than six months' tenure, the Board held that such rules as continue to be enforced against employees with more than six months' tenure are mandatory subjects.

16.45	43.47	43.64
43.231	43.475	43.99

VIII § 965(1)(C): In determining whether changes implemented by the employer actually deviated from long-established practices, the Board examined both the parties' collective agreement and the actual practices that characterized the employment relationship. In instances where circumstances have evolved over a long period of time which vary a significant element of the employment relationship from that described in the relevant bargaining agreement and where the parties, aware of those circumstances, have chosen to ignore them when negotiating a series of successor agreements, the Board will examine the actual long-standing practices as well as the applicable bargaining agreement, in determining whether a management action violates the unilateral change rule.

09.23	09.372	09.641	72.612	72.666
09.231	09.391	09.662	72.65	73.478
09.232	09.64	71.517	72.651	

IX § 965(1)(C): The relevant bargaining agreement provided that the unit employees could only be required to perform firefighting work. Despite this provision, the employees had actually

been performing ambulance work at a certain patient care level for several years. The employer was attempting to increase the level of patient care being provided by requiring unit employees to procure and maintain a higher level of emergency medical technician certification as a condition of continued employment. Since the employees could not be required to do more than firefighting work under the bargaining agreement and since the employees could have grieved or filed a prohibited practice complaint to preclude the employer from requiring them to do ambulance work when such work was first introduced and failed to do so for several years, the bargaining agent had waived the right to object to the practice. Under the unilateral change rule, that waiver cannot be used as an excuse from the duty to bargain over changes in practices beyond those that had become "long established" between the parties. The established practice had been that employees were required to maintain a certain level of emergency medical technician certification during the time that they were actually required to perform ambulance work (their first few years of employment). A requirement that employees secure and maintain a higher level of certification throughout their employment (including the period after which they were no longer required to perform ambulance work) constituted an unlawful unilateral change. This change affected conditions of employment, it constituted a departure from the parties' long-established practices, and it was implemented without prior notice to the bargaining agent; therefore, the changes violated the duty to bargain.

09.5	09.642	43.215	43.47	72.511	72.612	72.666
09.64	09.65	43.4	43.475	72.590	72.613	
09.641	09.651	43.42	43.64	72.6	72.65	

X § 964(1)(C): Also varying from the parties' established employment relationship were: completion of certain training requirements as prerequisites to receipt of step increases; a requirement that employees maintain a valid driver's license; a requirement that each employee successfully pass an annual physical examination and agility test; and a requirement that employees not purchase, use, or sell any illegal drug. The parties' bargaining agreement provided for annual step increases without specific training requirements, and, while the other three requirements applied to prospective and probationary employees, there was no evidence that they had ever been enforced as conditions of continued employment. The bargaining agreement's prior practices article limited the rights retained by the employer in the management rights article and precluded the changes at issue.

09.64	43.113	43.47	72.511	72.664
09.641	43.214	43.473	72.612	72.666
09.642	43.215	43.64	72.65	

XI § 964(1)(C): The employer alleged that the bargaining agent waived the right to demand negotiations over the changes at issue by stating, during the round of negotiations that resulted in the parties' current bargaining agreement, that the union didn't care what the employer did with probationary employees. To constitute an effective waiver of the statutory duty to bargain, the waiver must be established by evidence of a clear and unmistakable relinquishment of a known right. While the union's statement may have waived any objection to the employer's treatment of probationary employees, the changes at issue would affect the working conditions of non-probationary unit employees, and the union's statement does not unambiguously waive the rights of unit employees. During the same round of negotiations, the employer proposed that participation in a physical fitness program be a condition of continued employment. No agreement was reached on the employer's proposal; however, an article providing for voluntarily employee participation in a physical fitness program was incorporated into the agreement. By withdrawing its proposal and agreeing to the voluntary program, the employer consciously relinquished its right to demand negotiations over a mandatory physical fitness program during the term of the bargaining agreement.

09.64	09.66	09.662	72.590	73.478
09.641	09.661	46.642	72.666	

XII § 964(1)(C): Individual contracts of employment may not be used to forestall collective bargaining or to limit or condition the terms of the bargaining agreement. Individual contracts cannot be effective as a waiver of any benefit conferred by the collective agreement without violating the very purpose of the Act--promoting collective bargaining. The fact that the employer implemented the unilateral changes at issue, by having prospective employees execute individual contracts of employment, did not alter the statutory bargaining rights involved.

21.4	21.92
21.9	46.16

XIII § 964(1)(A): The test for a violation of this section is whether the employer engages in conduct which, it may reasonably be said, tends to interfere with the free exercise of rights protected by the Act. Unlawful unilateral changes not only violate the statutory duty to bargain but also inherently tend to interfere with the employees' exercise of the bargaining rights protected by the Act; therefore, the unlawful unilateral changes implemented by the employer violated § 964(1)(A).

72.1 72.18
72.134

XIV § 964(1)(C): This section prohibits the employer from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence of a violation of this section was presented.

72.2 72.23 72.26
72.21 72.25

XV § 968(5)(C): In exercising its remedial authority, the Board seeks a restoration of the situation, as nearly as possible, to that which would have obtained but for the commission of the prohibited practice. Since nearly all the provisions of the individual employment agreements at issue violated § 964(1)(E) & (A), the Board ordered the employer to cease and desist from enforcing the individual agreements against individuals who have become public employees in the bargaining unit and, further, to return each of the signed contracts to the individuals who signed them, once said individuals become public employees in the bargaining unit.

74.17 74.338
74.31

Opinion, Dissenting In Part, by Alternate Employer Representative McGill:

XVI § 964(1)(C): Although not dissenting with the majority over either the emergency medical technician certification issue or the step increase issue, the member argued that the management rights article permitted the employer to implement new work rules. The pre-employment agreement merely informed the employees that certain conduct would constitute just cause for discipline or discharge. In any event, the employer is not required to negotiate with the bargaining agent that certain conduct will be just cause for discipline, prior to implementation of that determination.

09.64 43.47 46.16 72.664
43.231 43.99 72.589 72.665

XVII § 968(5)(A): The Board should exercise its deferral authority broadly. When the bargaining agent charges an unlawful unilateral change, mid-term, and the employer asserts the bargaining agreement as its defense, the case is appropriate for deferral. Having agreed to arbitration as the means of resolving their disputes, parties should not be allowed to circumvent the grievance arbitration mechanism by resorting to the Board's prohibited practice jurisdiction. Since the employer refused to allow the bargaining agent to pursue the instant issues through the grievance process, the Board could not defer in this case.

46.6 47.54 71.8 71.811 71.816
47.32 47.56 71.81 71.813

M.S.A.D. No. 54 Education Association v. M.S.A.D. No. 54, MLRB No. 86-12, 9 NPER ME-18004 (Oct. 8, 1986)

I § 968(5)(B): At the prehearing conference, the parties agreed that the case did not present any relevant issues of material fact; therefore, they submitted their dispute to the Board on the basis of a stipulated record and memoranda of law. During deliberations, the Board required additional relevant facts that were provided through a supplemental stipulation by the parties.

01.21 71.228
09.380

II § 965(1)(C): Bargaining proposals containing both mandatory and non-mandatory subjects are proper; however, it is a per se violation of the duty to bargain to insist, to the point of impasse, upon bargaining over non-mandatory subjects.

72.52 72.541 73.41 73.45
72.535 72.589 73.436

III § 965(1)(C): Outside of the educational employment context, the NLRB and most state boards have held that limitations on employee smoking are mandatorily negotiable. In the educational setting, state boards are split on this question. Applying Justice Wernick's Biddeford educational policy/mandatory subject dichotomy, the Board held that a ban on teacher smoking in areas normally restricted from student access or view is a mandatory subject. The Workplace Smoking Act of 1985, 22 M.R.S.A. § 1580-A, stated that, by January 1, 1986, Maine employers "shall establish, or may negotiate through the collective bargaining process" a written policy concerning smoking in each place of employment. While the duty to bargain may be amended by the Legislature, in view of the remedial nature of the labor relations law, the Board held that such alterations ought not be likely inferred. Interpreting the Workplace Smoking Act consistently with the labor relations law, the Board concluded that the cited language from the former meant that where employees are represented by a bargaining agent, the employer's ability to implement a smoking policy is limited by the duty to bargain. Where the employees are unrepresented, the employer may implement a smoking policy unilaterally.

03.22 03.4 42.42 43.476 46.2 72.5
03.3 42.1 43.47 43.61 46.21

IV § 965(1)(B): The duty to negotiate over the mandatory subjects continues throughout the collective bargaining relationship; however, said duty may be waived by agreement. An agreement article providing that, during the term of the agreement, anything not covered therein is reserved as a management right, was held not to be sufficiently clear to waive mid-term bargaining over a mandatorily-negotiable smoking policy. In pursuit of the goal of giving purpose and meaning to the langauge which the parties have negotiated into their agreements, the Board requires that waiver of a statutory right be clear and unmistakable. Waiver of a statutory right, as opposed to waiver of a contractual right, must be established by evidence of clear relinquishment, whether by the express terms of an agreement or by necessary implication. When parties incorporate "boilerplate" language into their agreements, they are to be held accountable for understanding the application of such language, including the generally accepted meaning accorded labor relations terms of art.

09.23 09.61 09.64 21.4 72.51 72.651 73.478
09.231 09.612 09.641 46.64 72.590 72.664
09.6 09.613 09.642 46.642 72.65 72.666

V § 968(5)(C): As a remedy for the employer's unlawful unilateral implementation of a workplace smoking policy, the Board ordered the employer to cease and desist from enforcing the mandatory subject aspect of said policy, reinstate the status quo ante, to delete any reference to any discipline meted out as a result of the unlawfully implemented policy and, upon request of the bargaining agent, negotiate over the substance of any smoking policy for teachers concerning areas normally restricted from student access and view.

74.31 74.338
74.32

Maine Teachers Association/National Education Association v. State Board of Education, MLRB No. 86-14, 9 NPER ME-18005 (Nov. 18, 1986)

I § 1029(2): At the prehearing conference, the parties agreed that the case did not involve any relevant issues of material fact and, waiving an evidentiary hearing, submitted the dispute to the Board on the basis of a stipulated record and memoranda of law.

09.380 46.17
09.62 71.228

II § 1026(1)(C): Salary schedules for bargaining unit employees fall within the scope of the mandatory subject of wages. The unilateral implementation of changes in mandatory subjects,

without first notifying and affording the bargaining agent the opportunity of demanding negotiations thereon, is a circumvention of the duty to bargain that frustrates the objectives of the Act as much as does a flat refusal to bargain.

21.4 43.120 72.611
43.11 72.6 72.613

III § 1026(1)(C): The Board declined to rule on whether the employer was statutorily required to negotiate over the salary schedule for employees within their first six months of employment; however, since the salary schedules at issue were to continue in effect after the employees became public employees, they constituted a mandatory subject.

16.45 43.120
43.11

IV § 1027(1)(E): The four recognized exceptions to the unilateral change rule are: impasse, business exigency, waiver, and traditional practice.

09.6 72.662 72.664 72.667
72.66 72.663 72.666

V § 1026(1)(B): The duty to negotiate over mandatory subjects which are neither discussed nor embodied in the terms of the collective bargaining agreement continues throughout the collective bargaining relationship. A party may, through agreement to management rights, zipper, or other waiver clauses, waive its right to bargain mid-term over any mandatory subject; however, to be effective, such waiver must be a clear and unmistakable relinquishment of the statutory right, either by express agreement language or by necessary implication.

09.612 09.641 46.641 72.511 72.651
09.613 09.642 46.642 72.590 72.664
09.64 46.64 72.51 72.65

VI § 1026(1)(B): Absent extraordinary circumstances, a single instance of failure to exercise the option to demand negotiations over a unilateral change at some time in the past will not be construed as a clear and ummistakable waiver. Second, any implied waiver of the right to demand negotiations over the mandatory subject at issue is refuted by the bargaining agent's prompt demand to negotiate thereon, upon learning of the employer's action.

09.613 09.651 72.52 72.614
09.65 72.511 72.590 72.65

VII § 1026(1)(B): The Board held that an unsuccessful proposal during negotiations to preserve the statutorily-guaranteed right to negotiate over the salary schedule for newly-created positions did not constitute a clear and unmistakable waiver of that right. To hold that the mere refusal by the employer to agree to a proposal constituted waiver of statutory rights on the part of the bargaining agent would merely encourage employers to resist inclusion of as many subjects as possible in the bargaining agreement and would discourage bargaining agents from presenting subjects in bargaining.

09.66 09.662 46.641 72.511 72.65
09.661 46.64 46.642 72.590 72.651

VIII § 1029(5)(C): Having held that the employer implemented an unlawful unilateral change in a mandatory subject of bargaining, the Board ordered the employer to cease and desist from refusing to bargain over said change and, upon request of the bargaining agent, negotiate over the change at issue.

74.31

Kittery Employees Association v. Strahl, MLRB No. 86-16, 9 NPER ME-18002 (Aug. 6, 1986)

I § 968(5)(B): At the prehearing conference, the parties were unable to identify any material issues of relevant fact; therefore, the matter was submitted to the Board on the basis of a stipulated record and memoranda of law.

09.380 35.46 71.25
35.45 71.228

II §§ 968(5)(B) & 964(1)(A): An employer's unlawful pre-election interference, restraint, or coercion is not rendered moot merely because the employees affected opted for bargaining agent representation in the election. This holding recognizes that such pre-election conduct is not likely to be soon forgotten by the unit employees and the resultant chilling effect on the exercise of rights protected by the Act may continue long after the bargaining agent election. Under a similar analysis, execution of a bargaining agreement does not render moot a charge that one of the parties violated the duty to negotiate in good faith during the pre-agreement negotiations.

09.12 35.5212 72.1
35.521 71.230 72.13

III § 964(1)(A): A finding of unlawful interference, restraint, or coercion does not turn on the employer's motive or on whether the coercion succeeded or failed, but is based on whether the employer engaged in conduct which, it may reaasonaby be said, tends to interfere with the free exercise of employee rights protected by the Act.

21.12 21.3
21.2 72.1

IV § 964(1)(A): A public employer's expression of non-coercive opinion, during the pre-election campaign, is of constitutional dimension; however, threats of retaliation based on misrepresentation and coercion are without first amendment protection. To remain within the scope of protected speech, the employer need only avoid conscious overstatements, which it has reason to believe will mislead the employees, as well as coercive utterances. Misleading and inaccurate statements may constitute a violation of this section, especially where the union does not have sufficient time before the election to respond.

04.1 35.521 35.5216 72.13
35.511 35.5212 72.1 72.18

V § 964(1)(A): The Board held that the following portions of the employer's pre-election letter violated the Act: (1) a statement that, should a bargaining agent be selected, employees would be unable to discuss special situations directly with the employer, and (2) if a bargaining agent was selected, salary increases and fringe benefit adjustments, contemplated well before the advent of any union activity, could not be implemented. Whether factually correct or not, the latter statement constitutes a threat of economic reprisal, especially in the minds of economically-dependent employees.

35.521 35.531 47.3 72.13
35.5212 35.537 72.1 72.131

VI § 964(1)(A): The Board held that the following statements in the employer's pre-election letter did not violate the Act: (1) a non-inflamatory statement outlining the main purposes for which "fair share" deductions are made, and (2) statements accurately reflecting that, during bargaining, neither party is required to agree to any particular proposal and that current benefit levels may be decreased as well as expanded.

35.521 35.537 72.13
35.5212 72.1

VII § 964(1)(B): This section prohibits employers from encouraging or discouraging membership in any employee organization through discriminatory action in regard to hire or tenure of employment or any term or condition of employment. Since the drafting and dissemination of pre-election propoganda had no effect on hire, tenure, or any term or condition of employment, it did not violate this section of the Act.

72.3 72.336
72.33

VIII § 964(1)(E): Violations of this section are generally based on a party's failure or refusal, upon receipt of a written request therefor, to negotiate over a mandatory subject or upon a

public employer's making an unlawful unilateral change in a mandatory subject. Neither alternative was present here.

72.5 72.6
72.52

IX § 964(1)(C): This section prohibits the employer from providing too much financial or other support to, encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No conduct relating to a violation of this section was established.

72.2 72.23 72.25
72.21 72.24 72.26

X § 968(5)(C): As a remedy for the employer's violation of § 964(1)(A), through pre-election propaganda where the employees opted for bargaining agent representation, the employer was ordered to cease and desist from making the sort of coercive statements at issue in this case.

74.31

Sewall v. Portland Water District, MLRB No. 86-17, 9 NPER ME-18003 (Aug. 19, 1986)

I §§ 968(5)(B) & 962(6): In dicta, the Board suggested that its prohibited practice jurisdiction may extend to protect confidential and other excluded individuals from employer retaliation against them for their giving testimony adverse to the employer in a Board proceeding [§ 964(1)(D)] or for their refusal to commit a prohibited practice.

01.1 16.1 71.14 72.4
01.28 16.2 72.171 74.12

II § 962(6): Since exclusion from the definition of "public employee" results in a complete deprivation of statutory rights, such exclusions will be strictly construed.

01.1 03.22 21.12 33.4 33.43 74.12
01.28 15.01 33.1 33.41 33.45

III § 962(6)(D): Determination that an individual is a department or division head so as to constitute an exclusion from the coverage of the Act turns on: (1) is the individual the administrator of a department or division, and (2) is the individual appointed to office pursuant to statute, ordinance, or resolution, for an unspecified term, by the executive head or body of the public employer. The Board held that an employee appointed to serve an annual term, subject to the pleasure of the chief executive officer, was appointed for an indefinite term. The employee's department head status was based on: he coordinated the management position in collective bargaining with the employer's organized employees, he was the chief administrator of the bargaining agreement for the blue collar unit, he was the sole participant on behalf of the employer in the third step of the grievance procedure, he screened all applicants for employment, he designed and revised performance and psychological evaluations for all employees, he developed and enforced a safety training program for the employer, his duties affected most of the employer's 200 employees, and he considered himself to be a department head.

15.01 16.11 16.41 33.41
16.1 16.4 33.4 33.45

IV § 962(6)(C): A supervisory employee who serves as the employer's chief negotiator for a blue collar unit is a "confidential employee," within the definition of § 962(6)(C), and, as such, cannot be included in any bargaining unit. The purpose of the confidential exclusion is to avoid a conflict of loyalties, between those for the employer and those for the bargaining agent, in individuals who, as an inherent part of their duties, have access to the employer's confidential collective bargaining or employee relations ideas, positions, or policies which, if disclosed to the bargaining agent, could provide the latter with unfair advantage or leverage in its relationship with the employer. An individual who is "confidential" is not a public employee and cannot be included in any bargaining unit, even those with which he/she does not act in a confidential capacity.

15.01 16.21 33.35 33.43
16.2 16.22 33.4

V §§ 968(5)(C) & 962(6): Since the complainant was a department head and a confidential employee within the meaning of the Act, the complainant lacked standing to prosecute the complaint; therefore, the Board dismissed the complaint for lack of jurisdiction.

01.1 71.14 74.12
01.28 71.227

Council 93, AFSCME v. City of Bath Board of Education, MLRB No. 86-21, 9 NPER ME-18001 (July 22, 1986)

I § 968(5)(B): Grounds for appeal from a prehearing order, contained in the notice of appeal to the Board, that were not pursued at the hearing before the Board were deemed to have been withdrawn.

01.312 71.229 71.251 71.71
71.17 71.25 71.7 71.712

II § 968(5)(B) & Rule 4.05: The sufficiency of process of an answer, under Rule 4.05, is properly raised by way of motion to dismiss, motion for summary judgment, motion for judgment of default, or motion to strike the answer.

71.12 71.224
71.16

III § 968(5)(B) & Rule 4.07: A determination of excusable neglect, so as to excuse a party's failure to appear for a prehearing conference, is properly left to the Board for resolution. The failure to appear at issue was due solely to the union official's neglect compounded by inadequate internal office arrangements to avert such a problem. Second, upon being notified of the failure to appear and prior to entry of the default, the union neither sent an alternate representative nor requested a recess or a continuance. The union's failure to appear was not due to excusable neglect and the dismissal of the complaint, with prejudice, by the prehearing officer was upheld.

01.22 71.240 71.252
21.25 71.251

AFSCME, Council 93 v. Maxine Maynard, MLRB Nos. 86-22, -25 & 86-A-03, 9 NPER ME-18014 (Mar. 10, 1987)

I § 964(1)(A): A public employer violates this section if it engages in conduct or makes statements which, it may reasonably be said, tend to interfere with the free exercise of rights protected by the Act. Statements which either threaten employees with loss of employment benefits or which promise to improve working conditions, as inducements for the non-selection, circumvention, or ouster of a bargaining agent violate this section. Such statements are coercive, even if they are couched in terms of being the speaker's "personal opinion."

21.3 35.53 35.537 72.1 72.131
35.5212 35.531 35.541 72.13 72.132

II §§ 964(1)(A) & 968(4): A person "acts on behalf of" an employer, so as to make the employer responsible for his actions, if the individual acts at the behest of and is subject to control by the employer. Here, a bargaining unit employee told other unit members that, if the bargaining agent was decertified, the employees would be "treated royally" by the employer. Had the union been successful in attributing this comment to the employer, a violation of § 964(1)(A) would have been established. While requiring the highest standards of election conduct to insure the laboratory conditions necessary for a free and untrammeled choice in representation elections, the Board is reluctant to overturn an election solely on the basis of uncorroborated hearsay evidence. The hearsay establishing employer involvement

here was contradicted by direct testimony and, although having the opportunity of doing so, the complainant failed to call the employer's agent, who allegedly made the violative statement, as a witness before the Board. In the circumstances, the complainant failed to establish that the statements at issue had emanated from the employer; therefore, the statement did not constitute a violation of the Act by the employer.

01.22	09.111	09.33	09.376	35.5212	35.8	71.73
09.1	09.12	09.34	35.4	35.56	35.81	74.17
09.11	09.122	09.36	35.49	35.561	71.72	74.38

III §§ 964(1)(A) & 968(4): The union charged that the employer violated § 964(1)(A) by: (1) permitting a unit employee to solicit signatures for a decertification showing of interest, during work times and at work locations, and (2) by allowing unit employees to use the employer's facilities, premises, office equipment, telephones, and the school department courier service in their effort to decertify the bargaining agent. Since no evidence was presented that the employer had any knowledge of the employees' activities, much less condoned the same, the charge was dismissed.

09.12	35.5218	35.533	37.15	72.112	72.114	72.18
09.122	35.53	35.534	72.1	72.113	72.120	

IV § 964(1)(B): This section prohibits the employer from encouraging or discouraging membership in any employee organization through discrimination in regard to hire, tenure, or any term or condition of employment. No employer action concerning hire, tenure, or conditions of employment was alleged; therefore, this charge was dismissed.

72.3	72.35
72.319	72.366

V § 964(1)(C): This section precludes the employer from providing too much financial or other support of, or encouraging the formation of, or actually participating in the affairs of the union and thereby potentially dominating it. No evidence of a violation of this section was introduced.

72.2	72.24	72.26
72.21	72.25	

VI § 964(2)(A): Since the prohibition contained in this section is phrased in terms identical with those of § 964(1)(A), the same test applies in evaluating alleged violations of either section. A public employee or public employee organization violates § 964(2)(A) if it engages in conduct or makes statements which, it may reasonably be said, tends to interfere with the free exercise of employee rights protected by the Act.

35.55	73.1
35.56	73.115

VII § 964(2)(A): The typing of the names of bargaining unit employees on a showing of interest, which is in the form of a list of the employees, before the employees signed the same, may be subtly coercive. As a matter of policy, the Board disapproves of the use of employee list-type showings of interest and calls the use of separate cards, each signed by a different employee, to be a "preferable practice." Since the employees' names were typed on a second showing, required to correct problems in an earlier showing, such typing was not unlawfully coercive, in the circumstances.

32.2	32.22	32.223	37.15	73.31
32.21	32.221	32.227	73.1	

VIII § 964(2)(A): The incumbent bargaining agent charged that the phrase "as per request" on a showing on interest suggested that the Board supported the decertification effort and constituted unlawful interference, restraint, or coercion. The Board maintains strict neutrality in bargaining agent elections and pre-election propaganda suggesting Board support for one side may well violate § 964(1)(A) or 964(2)(A). It was clear from the context that the "request" was a requirement of the Board's rules; therefore, the Board was not represented as favoring any position. Second, freedom of choice is inherent in the petition process as used in federal, state, and municipal elections and, when faced with a petition, reasonable per-

sons know that they are free to sign or to refrain from signing the same. The challenged phrase did not reasonably tend to interfere with the free exercise of employee rights.

32.2 32.227 35.51 35.5214 37.15 73.31
32.22 35.346 35.5213 35.528 73.1

IX § 964(2)(A) & Rule 2.01: While, in some circumstances, delivery of the executed showing of interest to the employer would constitute unlawful interference, restraint, or coercion, the Board held that the petitioning employee's interpretation of a paragraph on an MLRB form, as requiring service of the petition and showing of interest on the employer, was not unreasonable. The Board was reluctant to hold that reasonable reliance on a Board form should constitute a violation of the Act, especially since the showing was, pursuant to the same interpretation, also served on the incumbent agent that the petition was seeking to decertify. In order to avoid recurrence of the problem, the Board changed its form to clearly indicate that the showing of interest should be submitted only to the Board.

32.2 35.56 73.1
32.227 37.15 73.31

X Rule 2.01: The rule requires that decertification petitions be in writing, be signed, be acknowledged before a notary public, and contain a declaration that the representations contained therein are true, under the penalty of perjury. The rule was satisfied when a petition was acknowledged but not signed in the presence of the notary.

31.4 32.11 37.11
31.41 37.1

XI § 964(2)(A): A charge that a decertification petitioner interfered with, restrained, or coerced the other unit employees by listing herself as "Shop Steward" on the decertification petition was dismissed because there was no evidence that any unit employee ever saw the petition; therefore, they could not have been misled by the representation. Second, the petitioner had been elected as the shop steward and, although not reelected, she was never informed of the second election and she was the only person to function as steward for the unit; therefore, she reasonably believed that she was the shop steward at the time.

32.227 35.5218
35.51 73.1

XII § 964(2)(A): The use of an official ballot, containing the State Seal and the name of the Board, in pre-election propaganda could mislead or confuse voters into believing that the Board supported one side in a representation election. Such use by the successful party to an election would justify setting aside the election results and conducting a second election, under the Board's long-standing precedent. The NLRB has recently abandoned such a per se rule where the altered ballot clearly identified its partisan source on its face. The Board did not opt between these approaches because the examplar ballot at issue was not an official Board ballot. The examplar in question did not contain the name of the Board, nor the State Seal, nor the words "official ballot." The examplar clearly distinguished its authors from the Board as its source and it was signed by its authors.

32.227 35.521 35.5213
35.51 35.5211 73.1

XIII § 964(2)(A): The bargaining agent did not violate this section by excluding decertification petitioners from a meeting of its officers, even if the petitioners were local officers. When the bargaining agent and a unit employee are in direct conflict over a particular issue, the union may exclude the employee from meetings where the union's course of action, strategy and tactics in connection with that issue will be discussed. Such exclusion facilitates open discussion of the options open to the union, without jeopardizing the union's position by revealing its strategy and the intricacies of its case to the opposing party.

21.3 22.21 23.5 35.552
22.2 23.4 35.55 73.1

XIV § 968(5)(C): In the past, the Board has awarded attorney's fees to a party when the opposing party's case was frivolous. Although the complainant's actions were dismissed for lack of sufficient proof, the complainant presented enough evidence in support of its allegations for the Board to conclude that the complaints were not frivolous.

74.17
74.352

Kittery Employees Ass'n v. Eric Strahl, MLRB No. 86-23, 9 NPER ME-18010 (Jan. 27, 1987)

I § 964(1)(A): An employer violates this section if it engages in conduct or makes statements which, it may reasonably be said, tends to interfere with the free exercise of employee rights protected by the Act. The employer stated that it was "unfortunate" that the employees had selected a former town manager to represent them. Since the statement at issue contained neither promise of benefit nor threat against the employees, since there was no representation election pending, and the employer continued to negotiate with the bargaining agent, the statement did not constitute unlawful interference, restraint or coercion.

72.1 72.131
72.13 72.132

II § 965(1)(B): A party's failure to meet for purposes of collective bargaining, within 10 days of receipt of a written request for such a meeting, is a per se violation of the duty to bargain. The union's request was in writing and cited the relevant provision of the Act. Since the employer failed to meet within 10 days of receipt of the bargaining agent's request, the employer committed a per se violation of § 964(1)(B) and this violation is evidence of a failure to negotiate in good faith.

41.3 72.52
41.32

III § 965(1)(C): Concomitant with the duty to bargain is a prohibition against public employers making unilateral changes in the mandatory subjects of bargaining for organized employees. To violate the unilateral change rule, the employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects. A change is unilateral if it is made without advance notice to the bargaining agent sufficient to allow it a reasonable opportunity to demand negotiations on the contemplated change. The employer violated § 965(1)(C) by unilaterally increasing the established salary of a unit position. It is irrelevant that the salary increase was effected through an individual contract of employment because such contracts may not be used to alter the scope of mandatory bargaining nor to foreclose negotiations on mandatory subjects.

43.11 72.5 72.611 72.613 72.63
43.113 72.6 72.612 72.616

IV § 965(1)(C): The test for negotiating in good faith is whether the totality of the charged party's conduct indicates a present intention to find a basis for agreement. Among the relevant factors are whether the charged party: met and negotiated at reasonable times, observed the ground rules, offered counterproposals, made compromises, accepted the other party's positions, put tentative agreements in writing, and participated in dispute resolution procedures. Here, the employer failed to meet within 10 days of receipt of a 10-day notice, but met immediately upon being informed of the rule; several sessions were required to reach agreement on ground rules; however, this was the first round of negotiations between the parties, the parties participated in mediation, and, with the mediator's help, agreed to ground rules. The employer responded piecemeal to the bargaining agent's comprehensive proposal; without a ground rule requiring a comprehensive response, such response is not unlawful, particularly since the employer did respond to all of the union proposals within a reasonable time. In the circumstances, the totality of the employer's conduct did not violate the duty to negotiate in good faith.

41.31 72.531 72.535 72.538 72.75
72.53 72.532 72.537 72.52

V § 965(1)(C): A party's negotiator must be vested with sufficient authority to reach tentative agreements at the table. In instances where the negotiator lacks such authority, he is merely a conduit between the other party and the decision-maker, substantial delays often result, and the party failing to confer the required authority is in violation of § 965(1)(C). Here, the Town Manager had authority to reach tentative agreements without consultation with the Town Council, subject to the Council's ratification. This was the same quantum of authority that the Town Manager had in successfully negotiating successor

agreements for other units. Since knowledge of the employer's financial circumstances and political climate is inherent in the Town Manager's position, the authority conferred on him might be adequate and, in the absence of evidence that the Town Manager could not reach tentative agreements at the table, no violation was found. The Board cautioned that the employer may be on danagerous ground because the failure to keep the principal party informed of the give-and-take of negotiations may well result in its unreasonable refusal to ratify the final tentative agreement with the inevitable conclusion that the negotiator lacked sufficient authority--a violation of the duty to negotiate in good faith.

07.14	41.22	46.51	72.530	73.431
41.2	46.5	46.52	72.57	73.46

VI § 964(1)(E) & (A): An unlawful unilateral change in a mandatory subject and a failure to meet within 10 days of receipt of a written notice requesting a meeting for collective bargaining purposes not only violate the duty to bargain but also inherently interfere with the employees' right to bargain collectively, in violation of § 964(1)(A).

21.12	41.32	72.133	72.18
21.4	72.1	72.134	72.6

VII § 964(1)(B): This section bars employers from encouraging or discouraging membership in any employee organization through discriminatory action in regard to hire, tenure, or conditions of employment. The only action taken by the employer was an unlawful unilateral increase in the salary of one unit position. This change could, in some circumstances, constitute unlawful discrimination; however, no evidence was presented that the employer's action was in any way motivated by any protected conduct. Absent such motivation, the charge was dismissed.

72.3	72.311	72.365
72.31	72.32	

VIII § 964(1)(C): This section prohibits employers from providing too much financial or other support of, encouraging the formation of, or actually participating in, the affairs of the union and thereby potentially dominating it. No evidence of such activity was presented.

72.2	72.24	72.26
72.21	72.25	

IX § 968(5)(C): In exercising its remedial authority, the Board seeks a restoration of the situation, as nearly as possible, to that which would have obtained but for the commission of the prohibited practice. Although the usual remedy for a proven unlawful unilateral change is an order reinstating the status quo ante, no such order was issued here because the employer admitted that the matter changed was a mandatory subject, itself repealed the change, and took the position before the Board that the change could only be implemented through negotiations with the bargaining agent. As remedies, the Board ordered the employer to cease and desist from: (1) making unilateral changes in the wages, hours, and working conditions of bargaining unit employees, and (2) failing to meet within 10 days of receipt of a written notice from the bargaining agent, requesting a meeting for collective bargaining purposes.

74.17	74.32
74.31	

Lombard v. Dresser, MLRB No. 87-03 (Dec. 11, 1986)

I § 979-H(2): Parties reached an agreement in settlement of their dispute during the course of the hearing before the Board. The Board incorporated the agreement into its order, retained jurisdiction over the matter, and ordered the parties to report on their compliance with the agreement.

09.62 71.228
46.17 74.42

Quintal v. State of Maine, Department of Transportation, MLRB No. 87-A-06 (87-09), 9 NPER ME-18011 (Jan. 27, 1987)

FACTS: A pro se complainant received a notice, by certified mail, informing him of the date, time, and location of the prehearing conference and stating that failure to attend the conference could result in dismissal of the complaint. Shortly thereafter, counsel for the respondents requested that the complainant agree to postponement of the prehearing conference--the complainant refused to so agree. The next day, the complainant received the notice of evidentiary hearing from the Board. The notice of hearing stated that "[t]he Board requires five (5) copies of any document or exhibit not previously marked for identification at the prehearing conference, which meets the requirements of Board Prohibited Practice Complaint Rule 4.07, that is intended to be offered into evidence at the hearing." Apparently believing that the letter scheduling the evidentiary hearing was a letter granting respondents' request for continuance of the prehearing conference, over the complainant's objection, the complainant failed to appear at the prehearing conference and was defaulted with prejudice by the prehearing officer.

I Rule 4.07(A): The rule provides that failure to appear at a prehearing conference by the complainant may be grounds for dismissal of the complaint or, if by the respondent, may be grounds for entry of default judgment. Unless stated otherwise, dismissal or default is with prejudice and the order is final, unless the Board finds that the failure to appear was the result of excusable neglect. A finding of excusable neglect is left to the discretion of the Board reviewing the executive director's order. Here, the complainant's failure to appear was based on assumptions that were not reasonable; hence, the neglect was not excusable. The letters clearly related to two separate proceedings, the notice of prehearing cautioned of the possible consequences for failure to appear, and any confusion could have been readily resolved by phoning the Board's office. The order of dismissal was affirmed.

01.21 09.62 71.240 71.251
01.22 71.227 71.25 71.252

Pembroke Education Association v. Pembroke School Committee, MLRB No. 87-13 (Mar. 10, 1987)

I § 968(5)(B): Parties reached an agreement in settlement of their dispute during recess of proceeding before the Board. Substance of the agreement was incorporated into Board's order dismissing both the complaint and the counterclaim.

46.17 71.228
71.227 74.42

Windham School Committee v. Windham Educators' Association, MLRB Nos. 87-14 & -15, 9 NPER ME-18015 (Apr. 17, 1987); aff'd sub nom. Windham Educators' Association v. Windham School Committee, No. CV-87-153 (Me. Super. Ct., Ken. Cty., Sept. 30, 1987)

FACTS: Frustrated at working without a collective bargaining agreement and being unable to reach accord on a successor agreement for several months, the union membership voted to participate in a "job action" that would consist of: (1) discontinuance of the established practice of escorting students to lunch and adherence to the contractual "duty-free" lunch; (2) refusal to attend scheduled staff meetings; (3) refusal to participate in accreditation meetings held during periods of release time during the normal school day; and (4) conducting activities during activity periods that are part of the normal school day.

I § 968(5)(B) & (C): Because this case involved an alleged work stoppage, the Board heard the matter on an expedited basis, waiving the prehearing conference, shortening the time in which the response could be filed, and requiring the filing of post-hearing briefs within one week of the date of the hearing.

01.23 61.1
01.311 62.1

II § 965(1)(C): The parties' expired collective bargaining agreement provided that the employer could require teachers to attend all meetings as required by any of their supervisors. After expiration of a bargaining agreement and by application of the static status quo, the level of wages, hours, working conditions and contract grievance arbitration procedures in effect at the time of expiration must remain in effect until they are superseded by the successor agreement. The employer's right to require teacher attendance at meetings called by their supervisors affects both hours and terms of employment; therefore, such right survived expiration of the agreement. Had the record established that any teacher had failed to attend a meeting at which attendance was required by the teacher's supervisor, such "job action" would have violated § 964(2)(C)(i).

43.42 46.44 61.2 62.1
43.44 61.1 61.51 73.58

III § 965(1)(C): Employees cannot, even with adequate notice, unilaterally cease performing long-standing duties, even though those duties are not expressly required by the parties' collective bargaining agreement. The concept of "past practices" promotes the improvement of the employment relationship by incorporating those aspects of the parties' employment obligations that have been traditionally and tacitly performed into the terms of the parties' written collective bargaining agreement.

01.27 09.232 46.11 62.1 73.58
09.23 09.233 61.1 62.2

IV §§ 965(1)(C) & 964(2)(C)(1): The question of teacher supervision of students during recess and lunch periods is inherently connected with the avoidance of civil liability for injury to students as well as protection of school property; therefore, said issue is a matter of educational policy, as is the question of scheduling of a duty-free lunch. Upon the direction of the superintendent that they continue doing so, the teachers were obligated to continue escorting students to lunch and their failure to do so constituted an unlawful "work stopage," in violation of § 964(2)(C)(1).

03.31 43.619 61.2 61.56 73.58
43.61 61.1 61.51 62.1

V §§ 965(1)(C) & 964(2)(C)(1): Teacher participation in student activities periods, which are part of the normal school day, is a matter of educational policy. Teacher participation in accreditation work and in needs assessments as part of the school improvement plan, both occurring during the normal student school day, are matters of educational policy. The employer directed the teachers to participate in these activities, the bargaining agent did not request to meet and consult thereon; therefore, the teachers' refusal to be involved in the activities constituted an unlawful work stoppage, in violation of § 964(2)(C)(1).

03.31 43.61 43.614 61.2 61.56 73.58
41.6 43.613 61.1 61.51 62.1

VI § 964(2)(C) & (B): The union's use of an unlawful work stoppage for the purpose of coercing the employer into concluding an agreement that it might not otherwise make constitutes a per se violation of the duty to negotiate in good faith.

62.1 62.31 73.440
62.2 73.4 73.58

VII § 964(1)(A): In some circumstances, disciplinary measures that are disproportionate to the harm purportedly sought to be avoided support an inference that the ostensible justification for the discipline is pretextual and the discipline has the natural effect of interfering, restraining, or coercing employees in their exercise of the rights protected by the Act.

Here, the employer closed the school for two days and threatened to place letters of reprimand in the teachers' files and to dock the teachers two days' pay. The employer's action was not its only recourse; however, it was a reasonable response to the employees' illegal job action and was not a response to legitimate union activity. In the circumstances, the employer's action did not violate § 964(1)(A) of the Act.

62.5 62.524 72.1 72.131
62.52 62.525 72.13 72.18

VIII § 964(1)(C): This section precludes the employer from providing too much financial or other support of, encouraging the formation of, or actually participating in the affairs of the union and, thereby, potentially dominating it. No evidence of a violation of this section was presented.

72.2 72.24 72.26
72.21 72.25

IX § 968(5)(C): As remedies for the violations established in the record, the Board ordered that the respondent union and its members cease and desist: (1) from refusing to (a) escort children en route to lunch, (b) participate in Wednesday afternoon activities periods, and (c) participate in accreditation activities; and (2) from refusing to negotiate in good faith, by engaging in unlawful work stoppages in an effort to coerce the employer in negotiations. The Board further ordered the respondent union to reimburse the employer for the personnel expenses incurred by the employer as a result of the unlawful job action.

61.4 62.77 74.34
62.7 74.31 74.355

X SUPERIOR COURT:
§§ 968(5)(F) & 964(2)(C)(1): The Court held that the Board's findings of fact were fully supported by the evidence in the record. The employees never asserted their right to a duty-free lunch hour and then provided the employer with the opportunity to determine when that hour would be. They simply refused to perform necessary work during the lunch period; therefore, the Court affirmed the Board's conclusion that the employees had engaged in an unlawful work stoppage, without having to decide whether the matter was one of educational policy or was a mandatory subject of bargaining. The balance of the Board's conclusions were held to be correct, as a matter of law, and were affirmed and the appeal was denied.

61.51 81.19 81.503 81.526
81.12 81.502 81.5089

Auburn Firefighters Association v. Valente, MLRB No. 87-19, 14 NPER ME-18017 (Sept. 11, 1987); appeal docketed but dismissed by employer, City of Auburn v. Auburn Firefighters Association, No. CV-87-407 (Me. Super. Ct., And. Cty., Oct. 21, 1987)

I § 962(7): Since the charged conduct concerning the Assistant City Manager arose out of and was performed by her in the course of her offical duties with the City of Auburn, the Assistant City Manager is a public employer within the definition of § 962(7).

09.12 11.15
09.121

II § 964(1)(E) & (2)(B): The Act requires the public employer and the certified bargaining agent to negotiate in good faith with respect to wages, hours, working conditions, and contract grievance arbitration.

42.1 73.4
72.5

III § 965(1)(C): Unilateral changes by the employer in the mandatory subjects of bargaining violate the duty to bargain because they are a circumvention of the duty to negotiate that frustrate the purposes of the Act as much as do flat refusals to bargain over the mandatory subjects. To be unlawful, the employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects of

bargaining. An action is unilateral if it is taken without prior notice to the bargaining action sufficient to afford the union a reasonable opportunity to demand negotiations on the contemplated change.

72.6 72.612
72.611

IV § 965(1)(C): Despite taking the position in negotiations that the uniform allowance should be discontinued, the employer never notified the union that the allowance would be terminated when due to be paid. The union first heard of the termination when it was implemented; therefore, the employer's notice was not adequate, within the context of the unilateral change rule. Second, payment of the uniform allowance on the same day each year was a long-established practice, having been paid each of the preceding four years. Third, where employees are required to wear uniforms, uniform allowances are a form of wages, and are a mandatory subject. While unclear from the record whether uniforms were required, they had always been worn by the employees. All of the elements required for an unlawful unilateral charge were established in this case.

43.483 72.611 72.613
72.6 72.612 72.63

V § 965(1)(C): The Board has recognized four exceptions to the unilateral change rule. These exceptions are: (1) when a bona fide impasse has been reached between negotiating parties, (2) when business exigencies require immediate action, (3) when the union has waived the right to bargain over the unilateral change, and (4) when the unilateral change results from a traditional practice.

72.66 72.663 72.667
72.662 72.666

VI § 965(1)(C): The employer alleged that the negotiations had reached impasse and discontinuation of the uniform allowance was consistent with the employer's "last/best" offer on the subject at the bargaining table. The impasse exception requires that the parties' negotiations have reached a bona fide impasse; that is, that, despite the best of faith, the parties are simply deadlocked. To reach bona fide impasse, the parties must first satisfy the statutory duty to negotiate in good faith with respect to the mandatory subjects of bargaining.

51.01 72.663
72.63

VII § 965(1)(C): The determination of whether an impasse exists is a mixed question of law and fact to which no mechanical definition can be applied. Among the factors considered in determining whether impasse exists are: the bargaining history, the good faith of the parties in the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations.

51.01
72.663

VIII § 965(1)(C): Among the factors that indicate whether the parties have negotiated in good faith, in satisfaction of the statutory requirement, are whether the parties have: met and negotiated at reasonable times, observed the negotiating ground rules, offered counter-proposals, made compromises, accepted the other party's positions, explained and provided justification for their own positions, reduced tentative agreements to writing, and participated in the dispute resolution procedures. Here the parties met seven times and exchanged original proposals, neither party offered counterproposals, made compromises, or accepted any of the other party's positions. While the duty to bargain in good faith does not require either party to make any particular concession or to adopt any particular position, the parties are obliged to make some reasonable effort to compromise. The parties' failure to reach tentative agreement here is particularly indicative of a lack of good faith because many of the parties' proposals were substantially identical. The parties failed to negotiate in good faith.

72.53 72.535 72.538 73.432 73.439
72.531 72.536 72.54 73.433 73.440
72.532 72.537 73.43 73.437 73.442

IX § 965(1)(C): The Board concluded that there was no bona fide impasse in the totality of the circumstances. This conclusion is based on: (1) this was the first round of negotiations between the parties; therefore, the bargaining history was not helpful; (2) the parties had not negotiated in good faith; (3) the negotiations were relatively short--six sessions in a three-month period; and (4) the parties were not in agreement that impasse had been reached--the union had recently requested mediation, indicating that it felt agreement could be reached.

51.01 73.474
72.663

X § 964(1)(E) & (A): Unlawful unilateral changes not only violate the duty to negotiate in good faith but also tend to interfere with the unit employees' exercise of the bargaining rights guaranteed by the Act; therefore, such changes violate § 964(1)(A) as well as § 964(1)(E).

21.4 72.13 72.18
72.1 72.134 72.6

XI § 968(5)(C): In exercising its remedial authority, the Board seeks restoration of the situation, as nearly as possible, to that which would have obtained but for the commission of the prohibited practice. As remedies for the violations established in the record, the Board ordered that the respondents Paula Valente and the City of Auburn, and their representatives and agents: (1) cease and desist from making unlawful unilateral changes in the wages, hours, and working conditions of unit employees, (2) pay the annual uniform allowance to the unit employees within 30 days of the date of the order, and (3) cease and desist from interfering with, restraining, or coercing unit employees in their exercise of the rights guaranteed by the Act.

74.11 74.16 74.31 74.34
74.14 74.17 74.32 74.355

Lombard v. AFSCME, Council 93, MLRB No. 87-20, Executive Director Action (Apr. 30, 1987); aff'd, MLRB No. 87-20 (June 16, 1987)

I Executive Director:
§ 979-H(2): The executive director reviewed and dismissed the complaint for the following reasons: (1) the complaint was not acknowledged before an officer authorized to administer oaths in the State of Maine and the complaint did not contain a declaration that its contents were true, to the best of the complainant's knowledge and belief, as required by Rule 4.02; (2) the complainant failed to provide the requisite number of current collective bargaining agreements pertaining to the unit involved, as required by Rule 4.03(3); (3) the complaint fails to allege specific sections of the Act purportedly violated, as required by Rule 4.03(4); (4) the complaint appears to allege a violation of the duty of fair representation; however, the bare allegation that the union refused to represent the complainant before the Board, without an allegation of a wrongful motive for such refusal, is inadequate, as a matter of law, to allege violation of the duty of fair representation; and (5) the complaint lacked the specificity of allegation required by Rule 4.03(4).

03.21 23.6 71.21 71.222
23.4 71.11 71.22 71.227

II Board:
§ 979-H(2): In reviewing the executive director's dismissal of a complaint, the Board accepts as true all allegations contained in the complaint. The Board affirmed the dismissal for the reasons set forth in numbers 4 and 5 of the executive director's decision.

01.22 71.222
23.6 71.227

Local 785, International Association of Firefighters v. City of Lewiston, MLRB No. 88-01, Prehearing Conference Order (Aug. 11, 1987)

I § 968(5)(B): The parties agreed and the prehearing officer ordered that, since the issues giving rise to the prohibited practice complaint were being submitted to grievance arbitration, the Board would defer consideration of the complaint, until after completion of the grievance arbitration process. At that time, unless either party establishes cause for further action by the Board, the executive director will dismiss the complaint. The parties were ordered to take prompt action to obtain resolution of the grievance arbitration process.

01.21 46.17 71.25 71.8 71.816 74.43
09.62 47.54 71.251 71.813 71.9

Maine State Employees Association v. Judicial Department of the State of Maine, MLRB Nos. 88-02 & -04, Executive Director Action (Dec. 7, 1987)

I § 1289(2): After receipt of prohibited practice complaints filed pursuant to the Judicial Employees Labor Relations Act, the executive director conducted an investigation, consisting of discussions with the parties' counsel and the request for and review of documentary exhibits and affidavits. As a result of the investigation, the executive director determined that prima facie cases of violation of the Act had been alleged and he recommended a proposed settlement in each case. Ultimately, the parties submitted their on-going negotiations for a successor collective bargaining agreement to the Act's mediation-arbitration process, reached accord on the successor agreement and, with the approval of the Board, the complainant withdrew its complaints without prejudice.

01.21 11.4 71.2 71.229
09.371 71.17 71.21

International Brotherhood of Police Officers, Local 545 v. City of Lewiston, MLRB No. 88-06 (Mar. 9, 1988)

I § 968(5)(C): During the hearing before the Board, the parties reached agreement on their dispute, submitted a written settlement agreement to the Board, and agreed that the prohibited practice complaint be withdrawn with prejudice. The Board acceded to the parties' request and dismissed the complaint with prejudice.

46.17 71.227 71.229
71.17 71.228

Maine State Employees Association v. Maine Department of Human Services, MLRB No. 88-07 (Sept. 13, 1988)

I § 979-H(2): The Board had deferred consideration of a prohibited practice complaint until completion of the grievance arbitration process over a grievance concerning the subject matter of the complaint. After issuance of the arbitrator's decision, the complainant moved to dismiss the complaint with prejudice. Since there were no allegations that the grievance or arbitration procedures were not fair and regular or that the result reached was repugnant to the Act, the Board dismissed the complaint with prejudice.

47.54 71.227 71.82 71.824
47.86 71.8 71.821

Auburn Teachers Association v. Auburn School Committee, MLRB No. 88-12 (June 8, 1988)

I § 968(5)(C): Immediately prior to the convening of the evidentiary hearing before the Board, the parties reached agreement on their dispute. The parties read their settlement, which included dismissal with prejudice of the complaint and the counterclaim, into the record. In accord with the parties' agreement, the Board dismissed, with prejudice, both the complaint and the counterclaim.

46.17 71.225 71.228
71.17 71.227 71.229

Rosebush v. Council 93, AFSCME, MLRB No. 88-14; Rosebush v. Bangor Water District, MLRB Nos. 88-15 & -16, Executive Director Action (May 25, 1988)

I § 968(5)(B): The executive director reviewed three prohibited practice complaints and dismissed each of them, without prejudice, for the following reasons: (1) the complaints did not contain a clear and concise statement of the facts constituting the complaint, including the date and place of each act alleged, the names of persons who allegedly engaged in them, and the sections of the Act alleged to have been violated; (2) the complaints did not each contain a declaration, under penalty of perjury, that its contents were true; (3) the complainant's signature was not acknowledged before a Notary Public; (4) the complaints did not state the relief being sought; (5) the complaints had not been served on the respondents, prior to being filed; and (6) the complainant failed to provide four copies of the complaint and of the collective bargaining agreement relating to the unit involved in the complaints. The complaints were returned to the complainant with instructions that the deficiencies could be cured and the complaints could be refiled within the six-months statute of limitations contained in the Act.

01.21 71.11 71.16 71.21 71.222
71.1 71.15 71.2 71.22 71.227

Representation Cases

AFSCME and Augusta (UD and Election appeals) 81-A-03
AFSCME and Bangor (UC appeal) 79-A-02
AFSCME; Bangor Water District and (Election appeal) 80-A-02
AFSCME; Bath and (UC appeal) 81-A-01
AFSCME; Biddeford and Teamsters and ((UC appeal) 87-A-05
AFSCME and Brewer (UC appeal) 79-A-01
AFSCME v. Cape Elizabeth Police Dept. (Election appeal) 70-A-02
AFSCME and Gardiner Water District (Election appeal) 75-A-02
AFSCME and Lewiston (Election appeal) 81-A-04
AFSCME v. Maine, State of 78-A-01
AFSCME; Merrymeeting Employees Assn. and MSAD #75 and (Election appeal) 88-EA-01
AFSCME and MSAD #1 (Election appeal) 86-A-03
AFSCME; MSAD #1 and MSAD #1 Assn. of Bus Drivers and (Election appeal) . 71-A-01
AFSCME; MSEA and Lewiston and Lewiston School Dept. and 83-A-04
AFSCME and MSEA and Lewiston and Lewiston School Comm. (Interim Order) . 85-A-03
AFSCME and MSEA and Lewiston and Lewiston School Comm. (UD appeal) . . . 85-A-03
AFSCME; MSEA and Office of State Employee Relations and 77-A-05
AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER and MTA and United Marine Division and MSNA (Interim Order) (Interlocutory Decision) (UD appeal) 77-A-02
AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER and MTA and United Marine Division and MSNA (UD appeal) 77-A-02
AFSCME and MSEA and Teamsters and Maine, State of (Interlocutory Decision and Order) 84-A-01
AFSCME and MSEA and University of Maine (UD appeal) 77-A-04
AFSCME; Phippsburg School Dept. and (Election appeal) 87-A-02
AFSCME and Teamsters and Cumberland County (UD appeal) 84-A-04
AFSCME; Teamsters and Maine, State of, and MSEA and (UD appeal) 84-A-02
AFSCME; Teamsters and Portland Water District and (Election appeal) . . 87-A-04
Associated Faculties of the University of Maine; University of Maine and Faculty Association of the University of Maine School of Law and . . 78-A-04
Auburn; Auburn Firefighters Assn., Local 797 and (UD appeal) 83-A-07
Auburn Firefighters Assn., Local 797 and Auburn (UD appeal) 83-A-07
Augusta; AFSCME and (UD and Election appeals) 81-A-03
Augusta; Augusta Firefighters Assn., Local 1650 and (UC appeal) 85-A-02
Augusta Firefighters Assn, Local 1650, and Augusta (UC appeal) 85-A-02

Baker Bus Service and Teamsters (UD appeal) 78-A-05
Bangor; AFSCME and (UC appeal) 79-A-02
Bangor and IAFF, Local 1599 (UD appeal) 80-A-03
Bangor Water District and AFSCME (Election appeal) 80-A-02
Bath and AFSCME (UC appeal) 81-A-01
Berwick and Teamsters (UD appeal) 80-A-05
Biddeford and AFSCME and Teamsters (UC appeal) 87-A-05
Brewer; AFSCME and (UC appeal) 79-A-01
Brewer; Teamsters and (UD appeal) 77-A-06
Brunswick; Brunswick Police Communications Operators Assn. and (UD appeal) 77-A-03
Brunswick Assn. of Paraprofessionals, etc., and Brunswick School Comm. (UD appeal) 75-A-03
Brunswick Police Communications Operators Assn. and Brunswick (UD appeal) 77-A-03

Brunswick School Comm.; Brunswick Assn. of Paraprofessionals, etc., and (UD appeal) 75-A-03

Cape Elizabeth Police Dept.; AFSCME and (Election appeal) 70-A-02
Caribou Board of Ed. v. Caribou Teachers Assn. (UD appeal) 71-A-02
Caribou Teachers Assn.; Caribou Board of Ed. and (UD appeal) 71-A-02
Cumberland County; AFSCME and Teamsters and (UD appeal) 84-A-04

East Grand Teachers Assn.; MSAD #14 and (UC appeal) 83-A-09
E. Millinocket School Comm.; Medemill Teachers Assn. and (UD appeal) . . 70-A-01
Ellsworth; Teamsters and (Election appeal) 78-A-02

Faculty Association of the University of Maine School of Law; University of Maine and Associated Faculties of the University of Maine and . . . 78-A-04
Fairfield and Teamsters (UD appeal) 78-A-08
Fox Islands Electric Cooperative, Inc.; IBEW, AFL-CIO and (UD appeal) . 87-A-01

Gardiner Water District; AFSCME and (Election appeal) 75-A-02

IAFF, Local 797, and Lewiston-Auburn 911 Comm. (UC and Election appeals) 83-A-03
IAFF, Local 1599; Bangor and (UD appeal) 80-A-03
IBEW, AFL-CIO and Fox Islands Electric Cooperative, Inc. (UD appeal) . . 87-A-01

Jay and Teamsters (Election Appeal) 78-A-11

Kennebunk and Teamsters (UD appeal) 83-A-01
Kittery and Teamsters (UD appeal) 83-A-02

Lakes Teachers Assn. and Mount Vernon School Board (UC appeal) 78-A-03
Lebanon and Teamsters (UD appeal) 86-A-01
Lee Academy Board of Trustees and Lee Academy Ed. Assn. (UD appeal - Jurisdictional Decision) 87-A-07
Lee Academy Ed. Assn.; Lee Academy Board of Trustees and (UD appeal - Jurisdictional Decision) 87-A-07
Lewiston; AFSCME and (Election appeal) 81-A-04
Lewiston; AFSCME and MSEA and Lewiston School Comm. and (Interim Order) 85-A-03
Lewiston; AFSCME and MSEA and Lewiston School Comm. and (UD appeal) . . 85-A-03
Lewiston; MSEA and Lewiston School Dept. and AFSCME and 83-A-04
Lewiston-Auburn 911 Comm.; IAFF, Local 797 and (UC and Election appeals) 83-A-03
Lewiston Board of Ed.; Lewiston Night & Summer School Teachers and (UD appeal) 73-A-02
Lewiston Board of Finance & Fire Comm. v. Lewiston Fire Dept., Unit B (Election appeal) 72-A-01
Lewiston Fire Dept., Unit B; Lewiston Board of Finance & Fire Comm. and (Election appeal) 72-A-01
Lewiston Night & Summer School Teachers and Lewiston Board of Ed. (UD appeal) 73-A-02
Lewiston School Dept.; MSEA and Lewiston and AFSCME and 83-A-04
Lewiston School Comm.; AFSCME and MSEA and Lewiston and (Interim Order) 85-A-03
Lewiston School Comm.; AFSCME and MSEA and Lewiston and (UD appeal)) . . 85-A-03

Maine, State of; AFSCME v. 78-A-01
Maine, State of; AFSCME and MSEA and Teamsters and (Interlocutory Decision and Order) 84-A-01

Maine, State of; MSEA and (Motion to Stay Fact-Finding Proceedings) . . 78-A-07
Maine, State of, and MSEA (UC appeal) 78-A-09
Maine, State of, and MSEA (Interim Order) (UC appeal). 82-A-02
Maine, State of, and MSEA (UC appeal) 82-A-02
Maine, State of, and MSEA (Executive Director Action) (UC appeal) . . . 86-A-02
Maine, State of, Dept. of Transportation; Quintal v. 87-A-06
Maine, State of; Teamsters and AFSCME and MSEA and (UD appeal) 84-A-02
Maine Federation of Nurses and Health Care Professionals, AFT, AFL-CIO;
Penobscot Valley Hospital and (UD appeal) 85-A-01
Medemill Teachers Assn. v. E. Millinocket School Comm. (UD appeal) . . . 70-A-01
Merrymeeting Employees Assn. and AFSCME and MSAD #75 (Election appeal) 88-EA-01
Mount Vernon School Board; Lakes Teachers Assn. and (UC appeal) 78-A-03
MSAD #1; AFSCME and (Election appeal) 86-A-03
MSAD #1 and AFSCME and MSAD #1 Assn. of Bus Drivers (Election appeal) . 71-A-01
MSAD #1 Assn. of Bus Drivers; MSAD #1 and AFSCME and (Election appeal) . 71-A-01
MSAD #14 and East Grand Teachers Assn. (UC appeal) 83-A-09
MSAD #16 Board of Directors; MSAD #16 Library Employees Assn. and
(UD appeal) 82-A-03
MSAD #16 Library Employees Assn. and MSAD # 16 Board of Directors
(UD appeal) 82-A-03
MSAD #33; United Paperworkers International Union and (UD appeal) . . . 77-A-01
MSAD #43 Board of Directors and MSAD #43 Teachers Assn. (UC appeal) . . 84-A-05
MSAD #43 Teachers Assn.; MSAD #43 Board of Directors and (UC appeal) . . 84-A-05
MSAD #75; Merrymeeting Employees Assn. and AFSCME and (Election appeal) 88-EA-01
MSEA; AFSCME and Lewiston and Lewiston School Comm. and (Interim Order) 85-A-03
MSEA; AFSCME and Lewiston and Lewiston School Comm. and (UD appeal) . . 85-A-03
MSEA; AFSCME and MSTA and Retail Clerks Int'l Assn. and OSER and MTA
and United Marine Division and MSNA and (Interim Order) (Interlocutory
Decision) (UD appeal) 77-A-02
MSEA; AFSCME and MSTA and Retail Clerks Int'l Assn. and OSER and MTA
and United Marine Division and MSNA and (UD appeal) 77-A-02
MSEA; AFSCME and Teamsters and Maine, State of, and (Interlocutory
Decision and Order) 84-A-01
MSEA; AFSCME and University of Maine and (UD appeal) 77-A-04
MSEA and Lewiston and Lewiston School Dept. and AFSCME 83-A-04
MSEA and Maine, State of (Motion to Stay Fact-Finding Proceedings) . . . 78-A-07
MSEA; Maine, State of, and (UC appeal) 78-A-09
MSEA; Maine, State of, and (Interim Order) (UC appeal) 82-A-02
MSEA; Maine, State of, and (UC appeal) 82-A-02
MSEA; Maine, State of, and (Executive Director Action) (UC appeal) . . . 86-A-02
MSEA and Maine, State of (Motion to Stay Fact-Finding Proceedings) . . . 78-A-07
MSEA and Office of State Employee Relations and AFSCME 77-A-05
MSEA; Teamsters and Maine, State of, and AFSCME and (UD appeal) 84-A-02
MSNA; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER
and MTA and United Marine Division and (Interim Order) (Interlocutory
Decision) (UD appeal) 77-A-02
MSNA; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER
and MTA and United Marine Division and (UD appeal) 77-A-02
MSTA; AFSCME and MSEA and Retail Clerks Int'l Assn. and OSER and MTA
and United Marine Division and MSNA and (Interim Order) (Interlocutory
Decision) (UD appeal) 77-A-02
MSTA; AFSCME and MSEA and Retail Clerks Int'l Assn. and OSER and MTA
and United Marine Divsion and MSNA and (UD appeal) 77-A-02
MTA; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER

and United Marine Division and MSNA and (Interim Order) (Interlocutory Decision) (UD appeal) 77-A-02
MTA; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER and United Marine Division and MSNA and (UD appeal) 77-A-02

Northern Aroostook Voc. Ed.; Saint John Valley Coop. Bd. and (UD appeal) 83-A-05

Office of State Employee Relations; MSEA and AFSCME and 77-A-05
Old Orchard Beach Police Dept. Decert. Election (Election appeal) . . . 75-A-01
OSER; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and MTA and United Marine Division and MSNA and (Interim Order) (Interlocutory Decision) (UD appeal) 77-A-02
OSER; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and MTA and United Marine Division and MSNA and (UD appeal) 77-A-02

Penobscot Valley Hospital and Maine Federation of Nurses and Health Care Professionals, AFT, AFL-CIO (UD appeal) 85-A-01
Phippsburg School Dept. and AFSCME (Election appeal) 87-A-02
Portland; Teamsters and (UD appeal) 78-A-10
Portland Administrative Employee Assn.; Portland Superintending School Comm. and (UD appeal) 87-A-03
Portland Public Library and Portland Teachers Assn. (UD appeal) 81-A-02
Portland School Comm.; Portland Teachers Assn. and (UD appeal) 73-A-01
Portland Superintending School Comm. and Portland Administrative Employee Assn. (UD appeal) 87-A-03
Portland Teachers Assn.; Portland Public Library and (UD appeal) 81-A-02
Portland Teachers Assn. and Portland School Comm. (UD appeal) 73-A-01
Portland Water District; Teamsters and AFSCME and (UD appeal) 87-A-04

Quintal v. Maine, State of, Dept. of Transportation 87-A-06

Retail Clerks Int'l Assn.; AFSCME and MSEA and MSTA and OSER and MTA and United Marine Division and MSNA and (Interim Order) (Interlocutory Decision) (UD appeal) 77-A-02
Retail Clerks Int'l Assn.; AFSCME and MSEA and MSTA and OSER and MTA and United Marine Division and MSNA and (UD appeal) 77-A-02

Sabattus and Teamsters (UD appeal) 82-A-01
Saco and Teamsters (UC appeal) 83-A-08
Saint John Valley Coop. Bd. and Northern Aroostook Voc. Ed. (UD appeal) 83-A-05
State Employees Appeal of Unit Determination Report of 9/22/76 (Interim Order) (State Police) 77-A-02
State Employees Appeal of Unit Determination Report of 9/22/76 (Decision and Order on Motions to Dismiss) 77-A-02

Teamsters; AFSCME and Cumberland County and (UD appeal) 84-A-04
Teamsters; AFSCME and MSEA and Maine, State of, and (Interlocutory Decision and Order) 84-A-01
Teamsters and AFSCME and Portland Water District (Election appeal) . . . 87-A-04
Teamsters; Baker Bus Service and (UD appeal) 78-A-05
Teamsters; Berwick and (UD appeal) 80-A-05
Teamsters; Biddeford and AFSCME and (UC appeal) 87-A-05
Teamsters and Brewer (UD appeal) 77-A-06
Teamsters and Ellsworth (Election appeal) 78-A-02

Teamsters; Fairfield and (UD appeal) 78-A-08
Teamsters; Jay and (Election appeal) 78-A-11
Teamsters; Kennebunk and (UD appeal) 83-A-01
Teamsters; Kittery and (UD appeal) 83-A-02
Teamsters; Lebanon and (UD appeal) 86-A-01
Teamsters and Maine, State of, and AFSCME and MSEA (UD appeal) 84-A-02
Teamsters and Portland (UD appeal) 78-A-10
Teamsters; Sabattus and (UD appeal) 82-A-01
Teamsters; Saco and (UC appeal) 83-A-08
Teamsters; Waterville Police Dept. and (UD appeal) 78-A-06
Teamsters and Wells (UC appeal) 84-A-03
Teamsters; Yarmouth and (UD appeal) 80-A-04

United Marine Division; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER and MTA and MSNA and (Interim Order) (Interlocutory Decision) (UD appeal) 77-A-02
United Marine Division; AFSCME and MSEA and MSTA and Retail Clerks Int'l Assn. and OSER and MTA and MSNA and (UD appeal) 77-A-02
United Paperworkers International Union and MSAD #33 (UD appeal) 77-A-01
University of Maine; AFSCME and MSEA and (UD appeal) 77-A-04
University of Maine and Associated Faculties of the University of Maine and Faculty Association of the University of Maine School of Law . . . 78-A-04

Waterville Police Dept. and Teamsters (UD appeal) 78-A-06
Wells; Teamsters and (UC appeal) 84-A-03

Yarmouth and Teamsters (UD appeal) 80-A-04

Medemill Teachers Association v. East Millinocket School Committee, PELRAB No. 70-A-01 (Jan. 12, 1970)

Appealed from East Millinocket Professional Discussion Comm. and East Millinocket School Comm., MLRB No. 70-UD-02 (Dec. 4, 1969)

FACTS: The bargaining agent sought to include a school nurse in the teachers bargaining unit. The Commissioner of Labor and Industry (whose duties included those now performed by the Executive Director of the Maine Labor Relations Board) held that the nurse should not be included in the unit and the bargaining agent appealed.

I § 966(1) & (2): The primary purpose of the Act in connection with unit determinations is, in the absence of agreement between the public employer and its employees, on bargaining unit configuration, to provide a uniform basis for the determination of appropriate units. In furtherance of that goal, the [executive director] is required to make appropriate unit determinations, in the event of a dispute, applying the statutory standards.

01.21
01.24
33.1

II § 966(2): The statute provides that all of an employer's professional employees may, but are not required to, be included in the same unit. The two statutory criteria for making unit determinations are: (1) to insure to employees the fullest freedom in exercising the rights guaranteed by the Act and (2) to insure a clear and identifiable community of interest among the employees concerned. The first criteria does not mean the fullest freedom, unrestrained by and in utter disregard of the second criteria.

15.12	33.3	34.31
33.2	33.393	34.4
33.21	34.16	

III § 966(2): A community of interest exists where all parties are interested in the same subject matter and the same facts and rules govern them all. The term "community of interest" means an identity of interest among all parties, wherein each and all are reciprocally concerned and from which each and all derive benefit and sustain a mutual responsibility. The school nurse is primarily concerned with preventative and remedial medical attention of students and the teachers are primarily interested in the students' intellectual development; therefore, the teachers and the school nurse do not share an identity of interest and were properly not included in the same unit.

15.1	33.2	33.34
15.121	33.21	33.4
15.126	33.3	

IV § 968(4): The [executive director] alone is statutorily empowered to make unit determination decisions and such decisions will be affirmed unless they are: (1) contrary to law, (2) contrary to the evidence, or (3) constitute an abuse of discretion. Here, the [executive director] weighed all of the relevant evidence and considered the controlling statutory principles; therefore, the unit determination decision is affirmed.

01.21	32.7	32.74	71.72
01.22	32.72	33.1	71.73
01.24	32.73	71.7	71.74

AFSCME, Council 74, AFL-CIO v. Town of Cape Elizabeth, Police Department, No. 70-152 (Me. Super. Ct., Cum. Cty., June 2, 1970) & PELRAB No. 70-A-02 (Oct. 24, 1970)

Election Appeal

FACTS: The petitioning union in a bargaining agent election was aware, at least two days prior to the election, of employer promises of benefits to unit employees, if the union was not elected as the bargaining agent. Despite being aware of such unlawful conduct, the union did not object to the election being held as scheduled. The union was not selected as the bargaining agent and appealed to Superior Court. The Court dismissed the appeal as untimely

because the union failed to exhaust its administrative remedy and the union then appealed to the forerunner of the Labor Relations Board.

I SUPERIOR COURT:
§ 968(4): An employee organization which is unsuccessful in a bargaining agent election has standing to seek judicial review in representation proceedings. Otherwise, only the employees involved could seek such review and the purposes of the Labor Relations Act would soon be defeated.

22.9	35.41	81.113	81.371
35.4	81.111	81.37	81.372

II § 968(4): The [Labor Relations Board] has sole and exclusive original jurisdiction to review representation matters and the plaintiff's failure to pursue its appeal with the [Board], pursuant to § 968, precludes the court from exercising jurisdiction on such matters.

01.1	01.32	81.11	81.332	81.5084
01.2	35.4	81.3	81.333	81.526
01.22	71.7	81.31	81.34	

III BOARD:
§ 968(4): At least two days prior to the election, the union was aware that the Chief of Police had twice approached a unit employee and made promises of reward and benefits, if the employee voted against the union, a clear violation of § 964(1)(A). Despite having such knowledge, the union did not object or challenge the election's being conducted as scheduled. A party, aware of any violation of law or irregularity of substance or procedure before and during a bargaining agent election, must make its objection to the official conducting the election, prior to the closing of the polls, so that corrective action can be ordered. Since the objection was not brought to the attention of the [Board] official conducting the election prior to the closing of the polls, the alleged violation was not timely plead as the basis for an objection, challenge, or protest; therefore, the election was held to have been valid and the certification that no bargaining agent was elected was affirmed.

35.3	35.41	35.51	35.52	35.541	35.8	72.1
35.32	35.42	35.512	35.525	35.6	71.7	72.13
35.4	35.5	35.515	35.53	35.61	71.711	72.132

M.S.A.D. No. 1 and AFSCME, Council 74, AFL-CIO and M.S.A.D. No. 1 Association of Bus Drivers, Custodians and Mechanics, PELRAB No. 71-A-01 (Jan. 22, 1971)

Election Appeal

FACTS: The results of the initial election were: AFSCME-14, Association-12, no representative-3. A run-off election was immediately conducted and the results were: AFSCME-16, Association-13 and AFSCME was certified as the bargaining agent. The Employer appealed on the grounds that the voter list it provided contained the names of two supervisors and one probationary employee who were not eligible to vote. The Employer first raised its objection with the [Board] election official, after the conclusion of the initial election in which one supervisor and the probationary employee voted without objection. The election official ruled that the initial election results would stand because the objection was untimely. The same list was used for the run-off election and the supervisor and the probationary employee again voted without challenge.

I § 967(2): Since the election was conducted by secret ballot and his vote could not possibly have been outcome-determinative, the fact that the supervisor voted had no effect on the other employees.

35.31	35.5	35.562
35.329	35.56	

II § 967(2): The NLRB's election rules and regulations are not binding on the [Board] and they will be used as persuasive precedent only in cases where it is deemed necessary to prevent injustice.

35.32

III § 967(2): The statute is silent concerning the notice required and the time for holding a run-off election. The run-off should be held as soon as possible after, and preferably on the same day as, the initial election. The notice of the original election constitutes legally sufficient notice of a subsequent run-off election held at the same location, on the same day, and involving the same employees as the initial election; however, a statement concerning this contingency should be included in the notice.

35.32 35.327 35.91
35.325 35.9 35.92

IV § 967(2): Although the number of employees who did not vote in the initial election was sufficient to be outcome-determinative in the run-off and although those employees received no notice of the run-off, their rights were not violated. The non-voting employees received the same notice as did the other employees and the former chose not to appear and vote. They cannot now demand another re-run so that they can exercise the rights that they previously chose to ignore. Despite the procedural defect present here (the notice of election did not mention the possibility of a run-off election being conducted, if required), the intent and purpose of the statute was complied with and the results of the run-off election were affirmed.

35.32 35.91
35.325 35.92
35.9

Caribou Board of Education v. Caribou Teachers Association, PELRAB No. 71-A-02 (July 30, 1971), appeal docketed but withdrawn, Caribou Teachers Association v. Public Employees Labor Relations Appeals Board and Caribou Board of Education, No. 738 (Me. Super. Ct., Ken. Cty., June 27, 1973)

Appealed from MLRB No. 71-UD-09 (June 18, 1971)

FACTS: The forerunner to the executive director assigned a guidance counselor to the same unit as teachers and the forerunner to the Board reversed, holding that the guidance counselor and the teachers did not share the requisite community of interest level.

I § 966(2): The [Board] held that the guidance counselor and the teachers did not share a clear and identifiable community of interest because the guidance counselor: (1) had duties that were originally performed by the principal, (2) performed inservice instruction, (3) had a separate office and controlled confidential files, (4) performed no classroom teaching, (5) supervised some teachers, (6) attended school committee meetings as an administrator, (7) like the principals, negotiated for his salary, (8) was not on the teachers' salary scale, (9) had work hours that varied from those of the teachers, (10) required specialized training and (11) sometimes mediated between teachers and students.

15.1 33.3 33.335 33.343
15.123 33.33 33.34 34.16
15.129 33.333 33.342 34.4

Board of Finance and Fire Commission of the City of Lewiston v. Lewiston Fire Department, Unit B, PELRAB No. 72-A-01 (Mar. 23, 1972)

Election Appeal

FACTS: Two municipal bodies had separate but equal jurisdiction over a municipal department. Although one of the controlling bodies voted to reject the proposed unit agreement and the other did not vote to approve the unit agreement, nevertheless, the department head signed an agreement on appropriate bargaining unit that was then filed with the forerunner to the executive director. A bargaining agent election was held, an employee organization was certified as the bargaining agent for the "agreed-to" unit, and the employer challenged the results of the election.

I § 962(7): When two separate municipal bodies have separate but equal jurisdiction over a municipal department and each body must authorize all agreements and contracts entered into on behalf of the department, both municipal bodies, together, constitute the public employer of the employees in the department.

11.11
11.12
11.13

II §§ 966(1) & 967(2): Since both of the bodies that constituted the public employer failed to authorize the department head to execute the agreement on appropriate bargaining unit on behalf of the employer, the department head had neither express nor implied authority to bind the employer to said agreement. Since the subsequent bargaining agent election was based on the unit agreement, the election itself and the certification issued as a result thereof were legally invalid and without force and effect on the employer.

07.14	09.11	09.12	09.22	33.05
07.141	09.112	09.121	31.3	71.711
09.1	09.113	09.2	32.98	

III § 968(4): Although the apparent lack of cooperation and coordination between the two separate bodies comprising the public employer and between the public employer and its agent resulted in considerable expenditure of time and money by the public employees and the [executive director], the [Board] is without statutory authority to take any corrective action or issue any remedial order against the public employer in the representation appeal context. The [Board] could only grant or deny the appeal on the basis of the evidence presented. In the circumstances, the appeal was sustained and the certification was revoked.

01.22	35.8
01.28	71.7
01.29	

Portland Teachers Association and Portland School Committee, PERLB No. 73-A-01 (Mar. 15, 1973)

Appealed from MLRB No. 73-UD-02 (Dec. 8, 1972)

FACTS: The executive director created a unit consisting of several supervisory employee classifications in the Portland School Department and the employer appealed on the grounds that two of the positions were department or division heads, within the meaning of § 962(6)(D), and that all of the positions were supervisory and, under § 966(1), were excluded from the coverage of the Act.

I § 962(6)(D): In determining whether specific classifications constituted department or division heads, the Board looked to the relative position of said classifications within the employer's organizational structure. Positions in the intermediate managerial level (two or more tiers removed from the chief executive officer) were deemed as not being department or division heads. Second, the mere fact that a person is employed under a posting and subsequent resolution by a hiring committee or public body does not constitute an appointment for an indefinite term, within the meaning of § 962(6)(D). Otherwise, substantial numbers of public employees, whose "appointments" and/or salaries are subject to en masse annual review by a school committee, would be excluded from the coverage of the Act, a result contrary to the legislative intent embodied in § 962(6) of the Act.

15.01	16.06	33.45
15.11	33.382	
16.05	33.4	

II § 966(1): The mere fact that employees perform the supervisory duties set forth in § 966(1) does not, in and of itself, exclude such employees from the coverage of the Act. Supervisory employees are public employees, within the definition of § 962(6). Employees exercising supervisory duties should be excluded from a unit that includes employees supervised by said supervisory employees. [The statute was subsequently amended to clarify the ambiguity that was the basis of the employer's averment that supervisory employees were excluded from the coverage of the Act.]

15.01 33.382 34.19
16.3 33.4
16.32 33.42

Night School and Summer School Teachers of the Lewiston School Department and Lewiston Board of Education, PELRB No. 73-A-02 (May 18, 1973)

Appealed from MLRB No. 73-UD-08 (Jan. 19, 1973)

FACTS: The executive director ruled that night school and summer school teachers were not public employees, within the definition of § 962(6), and could not, pursuant to § 966(1), be included in any bargaining unit. The employee organization seeking to represent such employees appealed.

I § 962(6)(F): The evening school program at issue consisted of two semesters, each less than six months in duration, and employment in one semester did not assure employment for the next semester. The fact that the teachers were included in a pool from which those who would teach the next semester were selected, and that said pool was in continuous existence, did not warrant a different result. Being a member of the pool is neither tantamount to actual employment nor does it provide an assurance of continued employment. In the absence of any hiring or administrative patterns that seemed designed to undermine the continuity of employment for the requisite six-month period, the Board held that, in the circumstances, the evening school teachers were not employed for more than six months and fell within the exclusion set forth in § 962(6)(F).

15.01 16.405
15.19 34.39

II § 962(6)(G): Teachers who teach summer school are "seasonal" employees, within the meaning of § 962(6)(G), in that they work only a short, fixed season every year. Second, said employees are employed for less than six months; therefore, such employees are also excluded from the definition of public employee, under § 962(6)(F).

15.01 16.405 34.391
15.16 16.46

In Re: Old Orchard Beach Police Department Decertification Election, PELRB No. 75-A-01 (Dec. 16, 1974), appeal docketed but dismissed under Rule 41b, M.R.C.P., Council 74, AFSCME, AFL-CIO v. P.E.L.R.B. and Old Orchard Beach Patrolmans' Association, No. 74-608 (Me. Super. Ct., Ken. Cty, Jan. 7, 1977)

Election Appeal

I § 967(2): When a decertification petition is properly filed within the window period of a collective bargaining agreement, the election should be held as soon as possible and may be conducted prior to the expiration of the agreement. The purpose of conducting the election as soon as practicable is to eliminate any uncertainty concerning the bargaining agent's status at a time when serious negotiations should commence.

01.2 32.96 37.5
32.141 35.32 46.44
32.9 37.13

II § 967(2): If the incumbent bargaining agent is decertified during the term of a collective bargaining agreement, under the scenario discussed in the preceding paragraph, and no new bargaining agent is selected, the decertified employee organization must, by virtue of the agreement, continue to administer the same until its expiration. The decertified union has no right to bargain for a successor agreement or an extension of the existing agreement. Such representation for agreement administration purposes serves to protect the unit employees' access to the agreement's grievance procedure. Should an insurgent employee organization be certified prior to expiration of the agreement, that organization becomes the bargaining agent for the unit and it will administer the expiring agreement, as well as negotiate for the successor agreement. This holding serves to foster the statutory policy of

promoting stability and predictability in the employer-employee relationship, until expiration of the old agreement.

21.13	22.43	32.95	41.9	46.6
22.3	23.2	37.8	46.15	
22.37	32.9	37.9	46.44	

III §§ 967(2) & 965(1)(E): In the event of a decertification/certification in the scenario discussed in paragraph one above, the newly-certified bargaining agent assumes the rights and responsibilities of the prior bargaining agent, under both the agreement and state law. One right of the new organization is to negotiate over matters requiring the appropriation of money for a successor agreement, if the required 120-day notice was properly given by the ousted organization.

22.3	37.9	41.9
22.43	41.3	
37.8	41.32	

IV Rule 3.02(B): The rule requires the public employer to furnish a list of eligible employees to each party involved in an election, at least seven days prior to the election. Although the employer failed to comply with the rule, the objection was not raised before or during the election, the employee organization was represented at the election, and no prejudice was shown to result from the employer's violation. In the circumstances, the Board dismissed the objection.

35.32	35.42
35.322	35.515
35.4	71.711

Council 74, AFSCME, AFL-CIO and Gardiner Water District, PELRB No. 75-A-02 (Dec. 12, 1974)

Election Appeal

FACTS: Pursuant to the Board's decision in Trafton v. Gardiner Water District, PELRB No. 74-10 (Apr. 1, 1974), the executive director conducted a bargaining agent election. Of the seven eligible employees present and voting, three voted for representation, three for no representation, and one voter entirely blacked-in and placed an "X" in the box favoring representation. On the grounds that the state of the latter ballot made it impossible to determine voter intent, the executive director withheld certification and submitted the ballot to the Board to determine the ballot's validity. The Board found the following facts relevant: (1) all voters voted with a pencil that had an eraser on it, (2) no voters indicated that they had spoiled a ballot and wanted a new ballot, and (3) the instructions on the ballot required each voter to place an "X" or a check mark in the box corresponding to their choice.

I § 967(2) & Rule 3.06: Two employees presented themselves at the polling place whose names were not on the voting list. They were permitted to vote through the challenged ballot procedure. After the close of the polls, the executive director asked and the parties agreed that the two had been employed for less than six months on the date of the election. The two ballots were properly ruled as "challenged and set aside," under Rule 3.06.

35.3	35.321	35.346	35.375
35.32	35.322	35.37	

II § 967(2) & Rule 3.06: The rule promulgated by the Maine courts is that doubts concerning the legitimacy of ballots should be resolved in favor of the voter, unless a fraudulent purpose clearly appears. The ballot at issue did not warrant rejection on the grounds of the existence of a distinguishing mark because the test for such rejection is that it "appear that the mark is such as to distinguish the ballot from others and that it was made intentionally as a distinguishing mark." Bartlett v. McIntire, 108 Me. 161, 79 A. 525 (1911). The Board held that the ballot at issue did not contain a distinguishing mark but, rather, the voter, without having read the instructions and consistent with completing a standardized test form, filled in the box and, later, attempted to make an "X" in the box to comply with the instructions. Finding the ballot valid, the Board ordered the executive director to issue the certification reflecting that the union had been selected as the bargaining agent in a four to three vote.

35.3 35.343 35.49
35.32 35.346
35.34 35.37

Brunswick Association of Paraprofessionals and Non-Teaching Personnel and Brunswick Superintending School Committee, PELRB No. 75-A-03 (Oct. 10, 1975)

Appealed from MLRB No. 75-UD-22 (May 28, 1975)

I § 962(6)(G): The school secretaries, clerks, and aides at issue worked between 37 and 45 weeks per year; therefore, such employees are not temporary, seasonal, or on-call within the meaning of the statutory exclusion. Such employees are "part-year" employees and they had been employed for over six months at the time of the unit determination. The Board distinguished this case from Night School and Summer School Teachers of the Lewiston School Department and Lewiston Board of Education, PELRB No. 73-A-02 (May 18, 1973), because the employees in that case were hired on a semester basis and their employment ended at the end of each semester, thereby failing to provide a period of continuous employment of six months or longer in duration, as required in § 962(6)(F).

15.01 15.18 16.46 34.15 34.391
15.1 16.405 16.47 34.34
15.14 16.43 16.48 34.39

II § 966(1): The Board affirmed the executive director's exclusion from the bargaining unit of supervisory employees who exercised supervision over some of the employees included in the unit.

16.3 33.38
16.32 33.42

III § 968(4): The Board sits in an appellate capacity when it reviews the executive director's actions in representation proceedings, pursuant to § 968(4). The Board's review should be based on the evidence and allegations presented at the hearing before the executive director. To hold otherwise would open the appeal procedure to a continuous never-ending flow of new allegations.

01.21 32.7
01.22 71.7
01.28

United Paperworkers International Union and M.S.A.D. No. 33, MLRB No. 77-A-01 (Dec. 14, 1976)

Appealed from MLRB No. 77-UD-06 (Sept. 8, 1976)

FACTS: An employee organization petitioned for the determination of a bargaining unit composed of the kitchen supervisors, cafeteria workers, bus driver/custodians, bus drivers, and janitors employed by M.S.A.D. No. 33. The executive director granted the petition and the employer appealed the inclusion in the unit of two bus driver/custodians whose salary was funded by the federal government through the Comprehensive Employment and Training Act.

I § 966(1): The CETA funded employees received the same wages, hours, and benefits as the other bus driver/custodians and they shared a community of interest with the latter. To create a separate unit of CETA funded employees would result in unnecessary fragmentation and would result in depriving CETA employees of the fullest freedom in exercising the rights guaranteed by the Act. In the circumstances, the appeal was denied.

04.2 15.15 15.35 15.64 21.4 33.323 34.35
04.24 15.17 15.45 15.85 21.7 33.34
15.1212 15.171 15.55 16.4 33.21 33.343

In the Matter of the Appeal of the Unit Determination Report of September 22, 1976 Regarding State Employees, MLRB No. 77-A-02, Interim Order ("Decision and Order on State Police Services Unit") (Jan. 17, 1977)

Appealed from MLRB No. 75-UD-04, et al. (Sept. 22, 1976)

FACTS: The executive director established seven appropriate state employee bargaining units. This interim order disposes of the portion of the appeal concerning the State Police Unit.

I § 979-G(2): After reviewing the entire appeal, the Board noted that none of the parties had objected to the assignment of troopers, corporals, and sergeants to the State Police Services bargaining unit and no one sought to have additional classifications added to that unit. Since all of the issues concerning the State Police Services bargaining unit had been resolved, the Board ordered the executive director to conduct a secret ballot bargaining agent election for said unit, without waiting for the resolution of the issues relating to the other state employee units.

32.7 32.83
32.8 71.7

In the Matter of the Appeal of the Unit Determination Report of September 22, 1976, Regarding State Employees [MLRB No. 75-UD-04, et al.], MLRB No. 77-A-02, Decision and Order on Motions to Dismiss (Jan. 17, 1977)

FACTS: The executive director determined seven appropriate state employee bargaining units and various parties appealed. This order disposes of the several motions to dismiss filed by the various parties.

I § 979-G(2) & Rule 1.05: A party that submitted neither a petition for appropriate unit determination, accompanied by a 30 percent showing of interest, nor a petition to intervene, accompanied by a 10 percent showing of interest, in a unit determination proceeding does not have standing to appeal said unit determination to the Board. Permitting such a party to participate in the appellate proceeding without its having provided the requisite showing of interest would subvert the requirements of Rule 1.05 and defeat the purposes of the Act.

32.7 71.7
33.1 71.705

II §§ 979-E(1) & 979-G(2): The statute contemplates that the executive director makes the initial determination of the appropriate bargaining unit and the determination may then be appealed to the Board pursuant to § 979-G. The issues before the Board on appeal are, therefore, limited to those presented before the executive director.

01.21 32.7 71.71
01.22 33.1 71.712
01.24 71.7 71.72

III § 979-G(2): If a unit assignment is made consistent with the position expressed by a party at the unit determination proceeding, that party is not aggrieved by such unit assignment and lacks standing to challenge the same in an appellate proceeding before the Board.

32.7
71.7
71.705

Council No. 74, AFSCME and Maine State Employees Ass'n and Maine State Troopers Ass'n and Local 1435, Retail Clerks Int'l Ass'n and Office of State Employee Relations and Maine Teachers Ass'n and Local 333, United Marine Division and Maine State Nurses Ass'n, MLRB No. 77-A-02, Interim Order ("Interlocutory Decision") (Feb. 2, 1977), aff'd sub nom. Maine Office of Employee Relations v. M.L.R.B. and M.S.E.A., No. CV-77-135 (Me. Super. Ct., Ken. Cty., Apr. 10, 1978 and Oct. 10, 1980)

Appealed from MLRB No. 75-UD-04, et al. (Sept. 22, 1976)

FACTS: The executive director established seven appropriate state employee bargaining units. The M.S.E.A. and the public employer appealed various unit exclusions and assignments. This

interim order disposes of the unclassified employee positions involved in the appeal. The employer appealed and the Superior Court affirmed the unit assignments of the Director of Geology, Director of Civil Emergency Preparedness, and Director of Veterans Services. The unit status of the attorneys in the Department of Attorney General were also before the Court; however, during said appeal, the Act was amended to explicitly exclude such attorneys from the definition of state employee (§ 979-A(6)(H), ch. 642, P.L. 1977) and the relevant portion of the appeal was dismissed by the Court.

I BOARD:
§ 979-A(6)(B): To be excluded under this section, an employee must be appointed to office pursuant to statute or resolution for a specified term by the Governor, a department head or body having appointive power within the executive department. Employees who "serve at the pleasure of" their appointing authority are not appointed for a fixed term and do not fall within this exception.

16.05 33.4
16.06 33.45

II § 979-A(6)(C): To be excluded under this provision, an employee's duties must necessarily involve a confidential relationship with respect to collective bargaining matters between such employee and the Governor, a department head or body or other official exempted from the coverage of the Act. The Board held that an employee who is permanently assigned to collective bargaining functions, employee relations matters, or renders advice on a regularly assigned basis to management personnel regarding either collective bargaining or employee relations matters falls within this exception.

16.2 16.22 33.43
16.21 33.4

III § 979-A(6)(D): To be excluded under this section, an employee must be a department or division head appointed to office pursuant to statute or resolution for an unspecified term by the Governor or by a body having appointive power within the executive department. This section is different from § 979-A(6)(B) in that there is no provision here referring to appointment by a department head. Although not appointed for a specified term, the incumbents in several of the positions at issue were appointed by, and in many cases served "at the pleasure of," their department head. Since they were not appointed by either the Governor or other appointing "body," said classifications were not excluded under this section.

16.05 33.45
33.4

IV § 979-A(6)(E): Employees employed for less than six months are excluded from the coverage of the Act by this section. Entry level positions whose probationary period was not less than six months are not inherently included in this exception.

16.405 33.4
16.45 33.45

V § 979-A(6)(F): Temporary, seasonal, or on-call employees are excluded from the coverage of the Act by this section. Employees whose positions will, by their very nature and function, cease to exist at a fixed time in the future are temporary within the meaning of this exception.

16.47 33.45
33.4 34.39

VI § 979-A(6): Employees of joint employers are not properly included in the same unit with employees of either of their employers. Assistant district attorneys are hired by the local district attorney and funding for their positions is contingent on county support; therefore, assistant district attorneys are jointly employed by the State and one or more of the counties. Such employees cannot be included in any state employee bargaining unit.

11.13 33.38 33.384 33.45
33.3 33.381 33.4 34.14

VII § 979-E(2): In establishing state employee bargaining units, the executive director should avoid "excessive fragmentation" among units. One employee organization sought the creation of a separate unit for vocational trades instructors employed by the State. Such request was properly denied by the executive director because such employees were properly assigned to a broader professional employees unit and establishment of the requested unit would constitute excessive fragmentation. The organization sought to include only a fraction of all of the vocational trades instructors in its proposed unit, thereby further supporting the Board's conclusion concerning unit proliferation through fragmentation.

15.12	33.3	33.323	34.4
15.121	33.32	34.16	

VIII § 979-A(6): Employee classifications that are unoccupied and which the employer does not plan to fill should not be assigned to any bargaining unit. If such positions are reactivated at a future time, their unit status can then be established through unit clarification.

16.49	36.12	36.124
33.3	36.121	

IX § 979-A(6): Although the salaries for certain State employee classifications is set by statute (2 M.R.S.A. § 6), this criteria alone is insufficient to result in the exclusion of such positions from collective bargaining. In addition to wages, numerous terms and conditions of employment can be negotiated on behalf of such employees. Second, since the financial package incorporated into all State employee collective bargaining agreements is subject to legislative approval, the Legislature can make necessary amendments to Title 2 salaries, to reflect any negotiated changes thereof, at the same time and through the same process as is used to appropriate money to fund the collective bargaining agreements.

03.3	07.1	07.14	07.143	16.4
03.4	07.13	07.142	16.0	33.381

X § 979-G(2): Only those parties whose interests are adversely affected by the executive director's decision in a representation proceeding have standing to challenge said decision in an appellate proceeding before the Board.

01.22	71.7
32.7	71.705

XI SUPERIOR COURT:
§ 979-G(2): A reviewing court is bound by the Board's findings of fact in representation matters, in the absence of fraud. The interpretation placed on the Act by the Board, the agency charged with its enforcement, should be accorded "considerable deference" by a reviewing court and the Board's decision in a unit determination should be disturbed only it if is arbitrary or unreasonable.

81.12	81.33	81.493	81.503	81.5090
81.19	81.333	81.50	81.504	
81.3	81.49	81.502	81.505	

XII § 979-A(6): The purpose of the Act is to provide State employees the right to join labor organizations and be represented in collective bargaining. The statutory definition of employees eligible for coverage under the Act includes all State employees, except for those who fall within one of the stated exclusions. It is clear that the three officials at issue--the Director of Geology, the Director of Civil Emergency Preparedness, and the Director of Veterans Services--do not fall within any of the exceptions to the Act.

15.01	21.4	81.521
21.12	21.7	
21.3	33.4	

Council 74, AFSCME an Maine State Employees Ass'n and Maine State Troopers Ass'n and Local 1435, Retail Clerks Int'l Ass'n and Office of State Employee Relations and Maine Teachers Ass'n and Local 333, United Marine Division and Maine State Nurses Ass'n, MLRB No. 77-A-02 (Mar. 17, 1977)

Appealed from MLRB No. 75-UD-04, et al. (Sept. 22, 1976)

FACTS: The executive director established seven appropriate state employee bargaining units. This order disposes of the classified employee positions involved in the appeal.

I § 979-A(6): To be excluded under this provision, an employee's duties must necessarily involve a confidential relationship with respect to collective bargaining matters between such employee and the Governor, a department head, or body or other official exempted from the coverage of the Act. An employee who is permanently assigned to collective bargaining functions, employee relations matters, or who renders advice on a regularly assigned basis to management personnel regarding either collective bargaining or employee relations matters falls within this exception. Employees permanently assigned to personnel and budget matters had access to confidential information, within the meaning of this exception, and were excluded from any bargaining unit.

16.2 16.22 33.43
16.21 33.4

II § 979-E(1): An employee performing supervisory duties should have been included in the separate supervisory employees unit, although said employee was also a professional employee. The performance of the significant management control duties set forth in this section warrants inclusion of employees in a separate supervisory employees unit.

15.01 16.31 34.19
15.31 16.32 34.4
16.3 33.42

III § 979-A(6): Employee classifications that are unoccupied and which the employer does not plan to fill should not be assigned to any bargaining unit. If such positions are later reactivated, their unit status can be established through unit clarification.

16.49 36.12 36.124
33.3 36.121

IV § 979-G(2): Having resolved all of the issues on appeal from the unit determination proceeding, the Board ordered the executive director to proceed to conduct secret ballot bargaining agent elections for the newly-created units.

32.83
71.7

Brunswick Police Communications Operators' Association and Town of Brunswick, MLRB No. 77-A-03 (Jan. 17, 1977)

Appealed from MLRB No. 77-UD-13 (Dec. 9, 1976)

FACTS: The executive director determined an appropriate unit, consisting of the dispatchers and communications supervisor employed by the Brunswick Police Department. The employer appealed on the grounds that said employees shared a community of interest with the employees in the police officers' unit and should have been included therein.

I § 966(2): In fashioning an appropriate bargaining unit, the executive director must consider the employees' right to the fullest freedom in exercising the rights guaranteed by the Act as well as insuring that the employees concerned share a clear and identifiable community of interest.

21.2 33.2
21.3 33.3

II § 966(2): The relevant facts are that the police officers and dispatchers have: (1) a significant disparity in wages, (2) different minimum training requirements, (3) different retirement programs, and (4) different fringe benefits. These differences and the difference

in the nature of the employment of the two groups persuaded the Board to affirm the decision that the two groups did not share the requisite community of interest.

15.4 15.418 15.52 33.3 33.34
15.41 15.44 33.2 33.33 33.343

III § 966(2): The Act guarantees public employees a uniform basis for recognizing their right to join labor organizations of their own choosing and to be represented by such organization in collective bargaining for terms and conditions of employment. The fact that the established police unit had an agreement in effect that expressly excluded the dispatchers therefrom persuaded the Board that assigning the dispatchers to said unit would interfere with their exercise of the rights guaranteed by the Act.

21.2 21.4 33.2
21.3 21.7 33.3

IV § 965(1)(E): Although a unit is created less than 120 days prior to the end of the employer's fiscal year and a timely 120-day notice cannot be given, the employees in such unit are allowed to commence and conclude negotiations on matters not requiring financial appropriation.

07.25 41.32 72.581
09.651 72.52 72.589
41.3 72.58 72.591

Council 74, AFSCME and Maine State Employees Association and University of Maine, MLRB No. 77-A-04 (May 11, 1977)

Appealed from MLRB Nos. 77-UD-10 and -11 (Feb. 24, 1977)

FACTS: The executive director determined an appropriate bargaining unit consisting of the following classifications of University of Maine employees: police officer, police corporal, police sergeant, police detective, security guard I, security guard II, police communications coordinator, security registrar and clerk, and security officer. The employer appealed on the grounds that: (1) sergeants exercise supervisory duties and should have been excluded from the unit and (2) the security guard classifications do not share the requisite community of interest level with the other positions included in the unit.

I §§ 1022(9) & 1024-A(4): The Act defines a supervisory employee as one whose primary work tasks are characterized by performing such management control functions as scheduling, assigning, overseeing and reviewing the work of subordinate employees, or performing duties that are distinct and dissimilar from those performed by the employees supervised, or exercising judgment in adjusting grievances, in applying other established personnel policies and procedures, and in enforcing a collective bargaining agreement, or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards. Since only about 10 percent of the police sergeant's work time is spent on supervisory functions, and 90 percent on performing police officer functions, the sergeant is not a supervisory employee within the meaning of the Act and was properly included in the bargaining unit.

16.3 16.32
16.31 33.42

II § 1024-A(4): Since the security guards' primary function is security work, and not performing maintenance work as argued by the employer, they share a community of interest with the other employees in the unit.

15.41 33.2 33.33 33.34
15.416 33.3 33.333

III § 1028(2): Having resolved all of the issues in this unit determination appeal, the Board ordered the executive director to conduct a secret ballot bargaining agent election for the unit. Any employee organization seeking to appear on the ballot, other than those who had petitioned to participate therein, were ordered to submit their intervention petitions and showings of interest within seven days of the date of the Board's order.

32.6 32.8
32.62 32.83
32.7 71.7

Maine State Employees Ass'n and Office of State Employee Relations and Council 74, AFSCME, MLRB Nos. 77-37 and 77-A-05 (Aug. 9, 1977); appeal docketed but voluntarily dismissed by appellant, Maine State Employees Ass'n v. Maine Labor Relations Board, No. CV-77-528 (Me. Super Ct., Ken. Cty., Nov. 5, 1979)

See abstract under Case No. 77-37.

Teamsters Local 340 and City of Brewer, MLRB No. 77-A-06 (Sept. 19, 1977); appeal docketed but voluntarily dismissed by appellant, City of Brewer v. Maine Labor Relations Board, No. 77-602 (Me. Super. Ct., Pen. Cty., July 24, 1980)

Appealed from MLRB No. 77-UD-16 (June 10, 1977)

I §§ 966 & 967 and Rule 1.05: The Maine Freedom of Access Law (1 M.R.S.A. § 401, et seq.) provides in § 408 that "[e]xcept as otherwise provided by statute" every person has the right to inspect and copy public records. Section 103 defines "public records" to mean " . . . any written, printed, or graphic matter . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except: A. Records that have been designated confidential by statute . . . ." Section 967 of the labor relations act provides that "upon signed petition of at least 30% of a bargaining unit of public employees that they desire to be represented," the executive director "shall conduct a secret ballot election." Since the authorization cards or other forms of showing of interest are an indispensable part of the confidential process of bargaining agent selection, the showing of interest documents must be treated as confidential and exempt from disclosure. Second, Rule 1.05 states that the showings of interest need be filed only with the Board and are "only subject to review by the Board." This rule limits the appropriate use of showings of interest and designates such documents as confidential.

03.3 09.393 32.57
07.52 32.2 35.49
07.521 32.228 37.15

II Rule 1.05: The rule explicitly states that "effective membership cards," that contain the signature of unit employees, their printed name, and the date the document was signed, are sufficient for showing of interest purposes. Although the membership cards submitted here ran to the parent organization and did not include a local designation, they were adequate to satisfy the requirement of the rule.

32.2 32.221
32.22 32.222

Council 74, AFSCME, AFL-CIO v. State of Maine, MLRB Nos. 78-01 & 78-A-01 (Oct. 31, 1977), appeal docketed but dismissed by appellant, No. CV-77-726 (Me. Super. Ct., Ken. Cty., Jan. 9, 1980)

See abstract under Case No. 78-01

Teamsters Local Union No. 48 and City of Ellsworth, MLRB No. 78-A-02 (Jan. 5, 1978)

Election Appeal

FACTS: Prior to a bargaining agent election, the local newspaper published the names and addresses of all of the unit employees and suggested that the employees would be replaced by volunteers, if the union were certified as the bargaining agent. On the grounds that the

published attacks against the union had destroyed the opportunity for a free and fair expression of employee desire and represented the official employer sentiment, the employee organization objected to the bargaining agent election being conducted.

I Rule 3.07: Objections raised under Rule 3.07 must be limited to the Board's conduct of the election. Allegations of direct or indirect employer misconduct, purportedly making a free and fair election impossible, do not fall within the scope of objections that can be raised under this rule and were, therefore, dismissed.

35.4 35.51 35.521
35.43 35.515
35.5 35.52

Lakes Teachers Association and Mount Vernon School Board, MLRB No. 78-A-03 (Dec. 14, 1977)

Appealed from MLRB No. 78-UC-01 (Oct. 17, 1977)

FACTS: This case concerns the various professional employees shared by the several employers who constitute a community school district.

I § 967(2): This section provides that "[w]here there is a valid collective bargaining agreement in effect, no question concerning unit or representation may be raised except during the period not more than 90 nor less than 60 days prior to the expiration date of the agreement." Since a petition for unit clarification raises a question concerning unit configuration, the Board held that a unit clarification petition, filed during the term of an agreement and outside of its "window period," was untimely and had to be dismissed.

NOTE: Section 962(7) has been amended, by adding: "[t]he not more than 90-day nor less than 60-day period prior to the expiration date of an agreement regarding unit determination and representation shall not apply to matters of unit clarification. Ch. 199, P.L. 1979.

01.1 32.81 36.115 36.35
01.22 36.11 36.21
01.28 36.111 36.215

II § 962(6): Section 963 provides that the fundamental purpose of the Act is protection of public employees' right to join and participate in labor organizations. If a community of interest exists among them, the statute does not prohibit including part-time employees or employees who share their working time with more than one employer from a unit.

11.13 16.43 33.384
11.56 21.3 33.46
15.1 33.34 34.34

III § 966: When employees contract and work for more than one employer and the employers divide their time according to their respective needs, a multi-employer unit may be necessary to promote meaningful and effective collective bargaining.

11.13 33.384
11.56 34.14
15.1

University of Maine and Associated Faculties of the University of Maine and Faculty Association of the University of Maine School of Law, MLRB No. 78-A-04 (Jan. 5, 1978)

FACTS: After several days of hearing in a unit determination proceeding to establish the parameters of the faculty unit(s) at the University of Maine, the court reporter recording said proceeding became unavailable. In order to conclude the unit process as soon as possible and to facilitate the certification process, the executive director decided that the proceeding would continue without the services of a court reporter. One of the employee organizations involved and the employer appealed the decision to go forward with the Board.

I § 1028(2): Not every decision or letter of the executive director is subject to appeal under this section. It is necessary for the executive director, pursuant to §§ 1024 and 1025, to schedule hearings, including setting their time and place and, in some cases, providing for the services of a court reporter. It is not the intent of § 1028(2) that every decision concerning scheduling or interlocutory matters be subject to appeal, but rather, only the final ruling or determination of the executive director is appealable to the Board. To provide otherwise would lead to piecemeal consideration of each case by the Board, would result in unnecessary delay and burden to the parties and the Board, and would frustrate the purposes of the Labor Relations Act. The Board dismissed the appeals as untimely.

01.22	32.711	33.1	71.7
01.28	32.712	36.114	71.711
32.7	32.85	36.214	

Baker Bus Service and Teamsters Local Union No. 48, MLRB No 78-A-05 (Oct. 6, 1978), aff'd sub nom. Baker Bus Service v. Keith, No. CV-78-702 (Me. Super. Ct., Ken. Cty., Nov. 19, 1979), aff'd 416 A.2d 727 (Me. 1980)

Appealed from MLRB No. 78-UD-17 (Apr. 28, 1978)

I § 962(7): "[P]ersons or body acting on behalf of" a public employer, that is a person or body who is an agent of a municipality or school district, is a public employer within the meaning of the Act. NLRB v. United Insurance Co., 390 U.S. 254, 256, 258 (1968). To hold otherwise would create a loophole in the Act which the Legislature did not intend. It would be a relatively simple matter, in many cases, for a municipality or school district to subcontract various of its operations to a private entity, while maintaining control over the operation, and, thereby, deprive its employees of the rights and protections provided by the Act. If, however, the private entity is an independent contractor over which the public employer does not exercise control, then we believe, in light of the language contained in § 962(7), that the Legislature did not intend that the entity be considered a "public employer" subject to the provisions of the Act.

AGENCY: In Desfooses v. Notio, 333 A.2d 83, 86 (Me. 1975), the Court held that "agency" is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control.

Independent Contractor: The Court in Murray's Case, 130 Me. 181, 184, 154 A. 352, 353 (1931), quoting other cases with approval stated: "An independent contractor is one who carries on an independent business, and in the line of his business is employed to do a job of work, and in doing it does not act under the direction and control of his employer, but determines for himself in what manner the work shall be done." The right of control over the work to be performed thus is the critical factor distinguishing an agent from an independent contractor, cf. Poulette v. Herbert C. Haynes, Inc., 347 A.2d 596, 599 (Me. 1975). It is not necessary that the employer have the right to control every detail of the work in order for the entity performing the work to be, as a matter of law, the agent of the employer, see, e.g., Frenyea v. Maine Steel Products Co., 132 Me. 271, 275, 170 A. 515, 516-517 (1934). Among the factors to be considered in determining whether an agency relationship exists, so set forth by the Court in Murray's Case, supra, 130 Me. at 186, 154 A. at 354, are: "(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer." The fact of agency is established by proof of such facts or circumstances from which agency can be reasonably and logically inferred, Lunge v. Abbott, 114 Me. 177, 179, 95 A. 942, 943 (1915).

Applying the above criteria, Baker Bus Service was found to be a public employer, for that portion of its work performed for the Augusta School Committee. The public employer retained substantial control over the private company by: (1) supplying all of the equipment required for performance of the contractual services, (2) the equipment can only be used for the contractual services, (3) the public employer is responsible for complying with all federal and state requirements for the equipment and necessary modifications thereto, (4) the public employer had veto power over hiring decisions, (5) the public employer supplied all of the gasoline for operation of the vehicles involved, (6) the public employer paid for the registration and excise taxes on said vehicles, (7) the vehicles were stored on the public employer's premises, (8) the public employer purchased the insurance on the vehicles. The private company's minimal capital involvement established that the contract services were not

carried on as an independent business. Under the contract, very little independent judgment was left to the private company in the performance of the contract services.

The following were irrelevant in the Board's analysis: (1) the public employer's retained right to control the overall level of services, (2) the level of communications between the company's employees and public employees, (3) the fact that 18 of the 21 employees hired by the private company had performed the same work for the public employer, and (4) the mere fact that the services were performed pursuant to a contract between the public employer and a private company.

01.1 09.111 11.17
09.1 11.11 11.8
09.11 11.12

II SUPERIOR COURT:
§ 962(7): The statutory definition of "public employer" includes a comprehensive generic list of entities which act on behelf of public employers and adds the phrase "or other person or body." This language contemplates that private entities that are agents of public employers fall within the coverage of the labor relations acts.

09.1 11.11 11.17
09.11 11.12 11.8

III § 968(4): The standard of review applied by a reviewing court to the Board's findings of fact in a unit determination case is that such findings are final, if they are supported by any credible evidence. Findings not so supported become errors of law and are reviewable as such under § 972. [Reversed Below]

81.12 81.33 81.50 81.5090
81.3 81.333 81.502

IV § 968(4): The conclusion that one entity is the agent of another is a question of law reviewable by the Court.

81.12 81.33 81.50 81.503
81.3 81.333 81.502

V § 962(7): The critical factor distinguishing an agent from an independent contractor is the principal party's right to control the details of the work to be performed. After citing the eight relevant factors from Murray's Case and the specific criteria relied on by the Board in reaching its decision, the Court concluded that the decision presented a close question. In such a case, the Court decided that it would not overturn the Board.

09.1 09.111 11.12 11.8 81.493 81.521
09.11 11.11 11.17 81.333 81.5090

VI LAW COURT:
§ 968(4): The statute expressly states that, in representation cases, the Board's findings of fact are final in the absence of fraud. On the other hand, the Board's findings of fact in prohibited practice cases are final unless shown to be clearly erroneous, under § 968(5)(F). The difference in language in successive subsections of § 968 indicates that the Legislature meant the Board's findings in unit determination proceedings to be accorded greater finality on review than are its findings in prohibited practice cases; therefore, the Law Court concluded that the Board's findings in representation appeals are final in the absence of fraud and reversed the Superior Court on this point. Rule 80B of the Maine Rules of Civil Procedure does not provide a standard of review; it merely prescribes the procedure by which the Superior Court reviews governmental action.

03.22 81.3 81.333 81.503
81.12 81.33 81.50 81.5089
81.191 81.331 81.502 81.5090

VII § 962(7): This section of the Act contemplates that a private corporation, which acts on behalf of a public employer, is itself a public employer. The phrase "acts on behalf of" is sui generis in public sector labor relations law; however, agents who are "servants," rather than "independent contractors," "act on behalf of" a public employer within the meaning of

the Act. The distinction between an agent-servant and an agent-independent contractor is whether the agent's performance with respect to his physical conduct is subject to another's control or right to control. Both the Board and the Superior Court applied the traditional test for determining the status of the agent private entity herein. By expanding the definition of "public employer" beyond the municipality itself to include entities which are, for all practical purposes, the alter ego of the municipality, the Board must treat such alter ego the same as it would the municipality itself. Reviewing all of the relevant facts, the Law Court concluded that the Board was not erroneous, as a matter of law, in ruling that the private entity was "acting on behalf of" the public employer and, hence, was itself a public employer, within the meaning of § 962(7).

01.1	09.111	11.12	11.8
09.1	09.112	11.17	
09.11	11.11	11.3	

Waterville Police Department and Teamsters Local Union No. 48, MLRB No. 78-A-06 (Oct. 4, 1978)

Appealed from MLRB No. 78-UD-25 (May 26, 1978)

FACTS: The executive director determined an appropriate supervisory officers bargaining unit consisting of the captain of the detective division, sergeants, detectives, narcotics officer, and youth services officer. The employer appealed on the grounds that the captain and youth services officer were confidential employees, within the meaning of § 962(6)(C).

I §§ 966(1) & 962(6)(C): The employer argued that employees who perform significant supervisory duties are inherently confidential within the meaning of the Act. Noting that the Act permits supervisory personnel to form bargaining units, although such employees may be excluded from units that contain their subordinate employees, the Board disagreed. To establish that an employee's duties imply a confidential relationship within the meaning of § 962(6)(C), the employee must be permanently involved in either collective bargaining matters on behalf of the employer or in the formulation, determination, and effectuation of the employer's employee relations policies.

15.01	16.22	33.333	34.19
16.2	16.3	33.35	
16.21	33.33	33.42	

II § 966(1): Neither the captain nor the youth services officer had ever been involved in collective bargaining on behalf of the employer; however, the employer stated that it intended to assign the captain to such functions in the future. In evaluating a claim of confidential status, the Board considers the duties currently being performed by the employee at issue and cannot base its findings on what an employee's duties may be in the future. If an employee's duties should change so as to imply a confidential relationship, the proper procedure is for the employer to file a petition for unit clarification at that time, seeking to exclude the employee from the bargaining unit.

15.01	15.414	16.22	33.333	36.124
15.4	16.2	32.57	33.337	36.125
15.41	16.21	33.33	36.1	36.224

III § 962(6)(C): The evidence established that the captain conducted internal investigations concerning alleged misconduct by police department employees. There was no evidence that such investigations involved collective bargaining or employee relations matters; therefore, the captain was not a confidential employee within the meaning of the Act.

15.01	15.41	16.21
15.4	16.2	16.22

In re: Motion to Stay Fact-Finding Proceedings, Maine State Employees Ass'n and State of Maine, MLRB No. 78-A-07 (Aug. 7, 1978)

FACTS: The bargaining agent initiated fact-finding proceedings in negotiations for an initial collective bargaining agreement and later filed a prohibited practice complaint,

charging that the employer had violated the duty to negotiate in good faith. The employer moved to stay the scheduled fact-finding proceeding, the executive director denied the motion, and the employer appealed the denial to the Board.

I §§ 979-G(2) & 979-D(3): Section 979-G(2) provides a mechanism through which parties aggrieved by decisions of the executive director in representation matters may appeal to the Board. The Legislature has not provided the right to appeal a determination of the executive director made pursuant to § 979-D. Unlike the authority granted to the executive director by §§ 979-E and 979-F, that conferred by § 979-D is ministerial and non-discretionary in nature; e.g., § 979-D(3) provides that, if either party in negotiations requests the assignment of a fact-finding panel, the executive director must appoint such a panel. Section 979-D(3) does not authorize the executive director to exercise discretion in staying fact-finding proceedings. Had the motion for stay been granted, the executive director would have exceeded the authority granted in § 979-D(3). Since it had no jurisdiction to hear this appeal, it was dismissed by the Board.

01.1 01.22 53.25 53.4
01.2 01.28 53.3 71.7
01.21 32.7 53.31

II §§ 979-D & 979-H: In circumstances establishing a clear an unequivocal abuse of the duty to negotiate in good faith, the Board may order that a scheduled fact-finding proceeding be stayed.

53.25 74.12 74.40
53.4 74.37

Town of Fairfield and Teamsters Local Union No. 48, MLRB No. 78-A-08 (Nov. 30, 1978)

Appealed from MLRB No. 78-UD-42 (July 31, 1978)

I § 968(4): After the close of the appeal hearing before the Board, the parties presented their arguments through written briefs.

32.75
71.75

II § 962(6)(C): An employee is confidential within the meaning of the Act if he or she is permanently assigned to collective bargaining functions or employee relations matters, or renders advice on a regularly assigned basis to management personnel regarding either collective bargaining or employee relations matters. A secretary's duties necessarily imply a confidential relationship if such employee handles documents which could jeopardize the public employer's bargaining position. The Board's focus is on employee involvement in collective bargaining or employee relations matters because an employee who is included in a bargaining unit and whose duties involve confidential matters could be faced with a substantial conflict of loyalty between the employer and the bargaining agent. The confidential matters that might give rise to such conflict of loyalty are the public employer's confidential collective bargaining or employee relations ideas, positions, or policies which, if disclosed to the bargaining agent outside of the collective bargaining process, could provide the bargaining agent with unfair leverage or advantage over the public employer. Information disclosed by the employer to third parties or data available to the general public, or that communicated to the bargaining agent, cannot be viewed as confidential. Confidential matters not relating to collective bargaining or employee relations matters could not result in unfair advantage to the bargaining agent; therefore, access to such confidential information does not result in exclusion from the coverage of the Act.

15.01 16.21 33.35
16.2 16.22 33.42

III § 962(6)(C): An employee's confidential status is determined as of the date of the evidentiary proceeding before the hearing examiner and is based on duties actually performed by the employee in question. If the employee's duties are changed at a future time, so as to then necessarily imply a confidential relationship, the correct procedure is for the employer to file a petition for unit clarification, seeking to exclude the employee from the coverage of the Act.

15.01 33.337 36.124 36.224
16.2 33.42 36.125

IV § 962(6)(C): A secretary's typing of one confidential document in over four years of employment does not constitute a permanent involvement in collective bargaining or employee relations matters to warrant exclusion from the coverage of the Act.

15.01 16.2
15.26 33.42

V Concurring opinion of Employer Representative Emery:
§ 962(6)(C): Each public employer needs access to at least one "confidential" clerical staff person in order to be able to function adequately. The majority opinion adds the requirement that an employee must be permanently assigned to collective bargaining or employee relations matters or must perform such as their primary duties in order to be excluded from the definition of public employee. Such requirement constituted an unwarranted extension of the statutory language. Small employers need access to at least one confidential clerical employee and such access would be denied, if the permanent assignment or primary duty test is rigidly applied.

15.01 16.2 16.22 33.42
15.26 16.21 33.383

VI § 962(6)(C): Subsequent legislation, i.e. the State and University Acts, limit the confidential access that gives rise to exclusion from coverage of the Act to confidential access "with respect to matters subject to collective bargaining." The Municipal Act does not; therefore, the legislative intent was to apply a different standard under the Municipal Act and the majority decision erroneously reads all three statutes as if they were identical. Any employee whose duties necessarily imply a confidential relationship with the employer, even if such confidentiality is unrelated to collective bargaining or employee relations matters, should be excluded from the coverage of the Act. Since the employee at issue had no confidential relationship at all with the employer, the result reached by the majority was correct.

03.22 15.26 16.21 33.42
15.01 16.2 16.22

State of Maine and Maine State Employees Ass'n, MLRB No. 78-A-09 (Mar. 2, 1979)

Appealed from MLRB No. 78-UC-06 (Aug. 10, 1978)

FACTS: Due to organizational and operational changes that occurred after the initial unit proceedings, State Police captains and lieutenants now had greater administrative and managerial authority. The captains and lieutenants hired support personnel, authorized transfers, devised work schedules, and could purchase equipment. They evaluated subordinate employees, administered the collective bargaining agreement, and served as its first level grievance officers. Two captains were on the employer bargaining team for negotiations on the subordinate employees' agreement and all of the captains and lieutenants were consulted on language for particular articles of such agreement.

I § 979-G(2): After the appeal proceeding before the Board, the parties presented their respective arguments through briefs.

32.75 71.75

II §§ 979-G(2) & 979-E: The Board's decision in a representation case does not forever bar reconsideration of the issues raised therein. If, due to the evolution of employees' duties, their involvement in collective bargaining or employee relations matters changes, issues relating thereto may be raised and reviewed anew at that time.

01.22 09.4 32.86 36.115 36.224
01.24 09.41 33.1 36.121 36.35
01.28 09.411 36.1 36.215

III §§ 979-A & 979-E(1): The employer requested the Board to fashion an exception from the definition of "State employee" for administrative/managerial employees. Since the Legislature narrowly defined the exemptions from the coverage of the Act and did not grant the Board authority to expand the statutory exemptions, the Board could not do so on the grounds of "policy." Second, the Legislature, in § 979-E(1), clearly indicated that employees who exercise certain administrative or managerial functions are supervisory employees and are entitled to coverage by the Act.

01.28 03.22 16.3
03.2 16.1 33.41

IV § 979-A(6)(C): Although the captains and lieutenants were somewhat involved in collective bargaining, they were not permanently assigned to collective bargaining or employee relations matters nor did they render advice on a regularly assigned basis to management personnel on either collective bargaining or employee relations matters. The captains and lieutenants were consulted from time to time during the negotiations; however, their role was primarily informational and they did not participate in strategy sessions nor did they develop negotiating positions and tactics. The captains' and lieutenants' level of involvement did not rise to the level or degree of formality necessary to qualify for exclusion as confidential employees.

15.417 16.21
16.2 16.22

V § 979-G(2): The employer urged, as an alternative to excluding the captains and lieutenants from the definition of "state employee," placing them in a separate bargaining unit. Since the record was not fully developed and the parties did not have the opportunity to argue the merits of such a proposal, the Board declined to create a separate bargaining unit, even had it been procedurally possible to do so.

01.312
32.572

Teamsters Local Union No. 48 and City of Portland, MLRB No. 78-A-10 (Feb. 20, 1979)

Appealed from MLRB No. 78-UD-39 (Sept. 13, 1978)

FACTS: An employee organization petitioned for the formation of a unit composed of several municipal division heads. At the unit determination proceeding, the union presented no witnesses or other evidence. The hearing examiner ruled that the employees at issue were excluded from the definition of "public employee" by § 962(6)(C) & (D) and the union appealed to the Board.

I § 968(4): A party to a unit determination who does not present evidence at the evidentiary proceeding can, nevertheless, be "aggrieved" by the determination and have standing to appeal to the Board. In a civil case before the courts, the plaintiff's failure to appear at trial results in its losing standing to appeal to the Law Court. Unlike the civil plaintiff, parties to a unit determination proceeding have no burden of proof. Because it does not have a burden of proof, the petitioner's failure to present evidence at the evidentiary proceeding is not fatal to its right to appeal to the Board.

01.22 09.74 32.705 36.11 71.705
09.62 32.7 33.15 36.117

II § 966(1): There is no requirement in the Act for either party to present evidence at the unit determination proceeding. The petitioning employee organization could choose not to offer evidence, hoping that the employer also does not present evidence and that the hearing examiner accepts a presumption that the classifications at issue are appropriate for inclusion, or that the evidence offered by the employer is not sufficient to show that the disputed positions are inappropriate for inclusion.

32.7 33.15 36.117
32.705 36.11 71.705

III §§ 966(1) & 968(4): The hearing before the Board, in an appellate review of a representation decision, is not a hearing de novo. In its review, the Board only examines the evidence offered to the hearing examiner. Under § 966(1) the responsibility for determining the appropriate unit lies with the executive director, subject to review by the Board. In conducting evidentiary proceedings, the hearing examiner has the same powers as the Board has in prohibited practices cases; i.e., the powers to administer oaths and to subpoena witnesses, books, records, and other relevant evidence. Permitting a hearing de novo before the Board would shift responsibility for deciding unit questions to the Board contrary to the intent of the Act, would open the appeal procedure to a continuous and never-ending flow of new allegations, and would interfere with the Board's handling of its prohibited practice complaint docket.

01.21	01.28	32.5	32.7	36.118
01.22	09.62	32.55	32.713	71.7
01.24	09.74	32.562	36.114	71.715

IV § 968(4): The record for Board review of a representation decision consists of: (1) the unit determination report, (2) documentary evidence offered to the hearing examiner, (3) admissible testimony introduced at the appellate proceeding, and briefs of the parties to the appeal.

32.7	36.11	36.118	71.715
32.713	36.114	71.7	

V § 968(4): The standard of review in a representation appeal is whether the hearing examiner's rulings and determinations are unlawful, unreasonable, or lacking in any rational factual basis. At the appellate proceeding, parties may present the same witnesses who testified at the evidentiary proceeding to testify regarding claims of factual error. If no factual error is alleged, the parties may waive the appellate proceeding and submit their legal arguments to the Board through briefs.

32.7	32.73	36.118	71.72
32.713	32.75	71.7	71.73
32.72	36.114	71.715	71.75

VI § 968(4): Upon a showing of good cause, witnesses and documents may be presented for the first time at the appellate proceeding. Such occasions will be rare and lack of preparation or failure to examine all potential witnesses or files prior to the unit determination proceeding will not constitute adequate cause. Generally, a claim that a party was surprised by the evidence presented at the unit proceeding will likewise not constitute good cause. Prior to the unit proceeding, parties should contact each other and maturely and responsibly discuss the issues of unit inclusion and exclusion. A party's failure to contact the other party prior the unit proceeding and its raising surprise at the proceeding before the hearing examiner constitutes grounds for the examiner to deny a motion to continue the proceeding to allow the party to prepare to counter surprise evidence. Usually, a party genuinely surprised by evidence produced at the unit proceeding will request a continuance to permit it to respond to such evidence.

09.62	32.5	32.7	36.11	71.715
09.74	32.562	32.713	36.118	
32.4	32.58	33.15	71.7	

Town of Jay and Teamsters Local Union No. 48, MLRB No. 78-A-11, 1 NPER 20-10015 (May 15, 1979)

Election Appeal

FACTS: A local unaffiliated employee association gave notice, during December, 1977, or January, 1978, of its intent to renegotiate the collective bargaining agreement that would expire on March 13, 1978. The parties met several times, agreement was reached on the successor agreement but the union membership refused to ratify, and the employer implemented many of the new agreement's provisions. Neither party signed the successor agreement prior to the filing of the decertification/certification petition by the insurgent union.

I § 967(2): The Act provides that "[w]here there is a valid collective bargaining agreement in effect, no question concerning . . . representation may be raised except during the period

not more than 90 nor less than 60 days prior to the expiration date of the agreement." The rationale underlying this "contract bar" rule is to foster stability in employer-employee relations by preseving as much time as possible during the term of an agreement free from the disruption caused by organizational activities, while providing a definite guide to employees and outside unions as to the appropriate time to organize for and seek changes in bargaining agent.

21.2 32.141 35.6
32.14 35.330 37.13

II § 968(4): The employer's objection to the election was filed beyond the 15-day and 5-day appeals periods contained in the Act. While such untimely filing constitutes adequate grounds for dismissal of the appeal, the union expressly waived all procedural objections at the outset of the hearing before the Board; therefore, the Board addressed the merits of the objection.

09.62 35.42 71.13
35.4 35.5 71.711

III § 967(2): The expiring collective bargaining agreement provided that it would expire on March 13, 1978, and be automatically renewed from year to year thereafter, unless either party notified the other in writing, 120 days prior to the anniversary date, that it desired to modify the agreement. Although the incumbent bargaining agent gave the notice of intent to modify the agreement well after the November 13, 1978 deadline, the employer waived the untimeliness of the notice. Had the employer done nothing after receiving the notice, the Board would have held that the untimely notice did not forestall automatic renewal of the agreement. Such automatic renewal would mean that the agreement could constitute a bar to the filing of a decertification petition for a total period of up to 3 years, except for the 90-60 day window period prior to expiration of the third year. The employer waived the untimely notice by: negotiating with the union for a successor agreement, presenting its own proposals to change the old agreement, and retroactively implementing the terms that it had proposed and believed had been accepted. In reaching this holding, the Board was aware of NLRB precedent to the effect that a party does not waive the untimeliness of a notice by subsequently entering into negotiations, when there is no evidence that the parties had terminated the old agreement. The Board held that the circumstances warranted the finding that the parties had terminated the old agreement.

09.6 09.7 32.141 37.13 41.35 46.44 73.478
09.613 09.74 35.330 41.32 41.36 72.52
09.65 32.14 35.6 41.34 46.42 72.590

IV § 967(2): The parties' extension of a collective bargaining agreement, pending its modification or negotiation and execution of a new agreement, does not bar the filing of a decertification petition subsequent to the expiration date expressed in the old agreement. According contract bar effect at a time when either party can terminate the agreement does not foster industrial stability but merely interferes with the employees' statutory right to select their bargaining agent without concomitant justification. In the instant case, either party was free to terminate the old agreement after its expiration date; therefore, the Board declined to accord contract bar effect to its extension, pending negotiation of a successor agreement.

32.14 35.330 37.13
32.141 35.6

V § 967(2): Oral agreements or collective bargaining agreements, that are not signed by all parties prior to the filing of the decertification petition, are not accorded contract bar effect. Unless an agreement is signed by all parties, it will not bar a petition, even though the parties to the agreement consider it properly concluded and some or all of its provisions have been implemented. Such a rule has been followed for years by the NLRB, reduces the opportunity for fraud by unscrupulous parties who wish to abrogate the rights of employees to select their bargaining agent, and relieves the Board of the difficult task of determining if and when there has been a meeting of minds on a collective bargaining agreement. In any event, there was no oral or final agreement reached here; the union did not sign the agreement proposed by the employer because it did not agree with its terms.

32.14 35.330 37.13
32.141 35.6 46.41

Council 74, AFSCME, AFL-CIO and City of Brewer, MLRB No. 79-A-01, 1 NPER 20-10031 (Oct. 17, 1979)

Appealed from MLRB No. 79-UC-04 (Feb. 15, 1979)

FACTS: The bargaining agent filed a petition for unit clarification, seeking to include the newly-created dispatcher classification into the patrolmen's bargaining unit. Finding that the patrolmen and the dispatchers did not share a clear and identifiable community of interest and on public policy grounds, the hearing examiner denied the petition. The bargaining agent appealed to the Board.

I § 968(4): Since there were no material issues of fact in dispute, the parties agreed to waive the appellate hearing before the Board and submitted their arguments through briefs.

32.75
71.75

II § 968(4): The standard by which the Board reviews unit reports is whether the hearing examiner's rulings and determinations are unlawful, unreasonable, or lacking in any rational factual basis.

32.72
71.72

III § 966(2): An appropriate bargaining unit consists of classifications which share a sufficient community of interest. Among the factors relevant to the community of interest analysis are: (1) similarity in the kind of work performed; (2) common supervision and determination of labor relations policy; (3) similarity in the scale and manner of determining earnings; (4) similarity in employment benefits, hours of work and other terms and conditions of employment; (5) similarities in the qualifications, skills and training of employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desires of the affected employees; (10) extent of union organization; and (11) the public employer's organizational structure. When the positions at issue share a clear and identifiable community of interest, potential conflicts of interest among bargaining unit members are minimized. Employees with widely divergent duties, training, supervision, etc., will often have widely different collective bargaining objectives and expectations, leading to conflicts among unit members. Such conflicts often complicate, delay, and frustrate the bargaining process.

33.2	33.33	33.335	33.342	33.382
33.21	33.333	33.34	33.343	
33.3	33.334	33.341	33.35	

IV § 966(2): The assessment of degree of community of interest present is made on a case-by-case basis and no one factor is necessarily conclusive. Here, the relevant factors were duly considered; therefore, there is no error of law in the hearing examiner's order.

33.2
33.3

V § 966(1): In addition to the 11 community of interest factors, it is proper for the hearing examiner to evaluate public policy considerations in resolving unit disputes. While not conclusive, public interest considerations are relevant in that the failure to consider an important public interest consideration could, in some circumstances, result in an unreasonable ruling, which would be subject to Board modification or reversal. The hearing examiner properly weighed the historical neglect of fire department and ambulance service dispatching, when the dispatching duties had been performed by police department employees, in basing the exclusion of the dispatchers from the patrolmen's unit in part on such public interest consideration.

01.21	15.41	15.44	33.3	33.312
15.4	15.418	33.2	33.31	33.36

VI §§ 966 & 963: The failure to include certain classifications into an existing bargaining unit does not, in and of itself, interfere with the statutory rights of the employees already in the unit. Such unit employees continue to enjoy all bargaining rights and protection of

the Act. Likewise, the ruling has no effect on the non-included employees who may, if they wish, organize themselves into a separate unit and, thereby, secure the rights and benefits of the Act.

21.12 21.7
21.2 33.4

VII Rule 1.13: The rule sets forth situations under which a petition for unit clarification may be denied. The rule does not require such denial, which remains within the sound discretion of the hearing examiner.

36.1
36.35

Council 74, AFSCME, AFL-CIO and City of Bangor, MLRB No. 79-A-02, 1 NPER 20-10032 (Oct. 17, 1979)

Appealed from MLRB No. 79-UC-05 (March 6, 1979)

FACTS: The bargaining agent filed a petition for unit clarification, seeking to include "temporary" and "seasonal" employees into an existing public works department bargaining unit. Although hired as "temporary" or "seasonal" employees within the classifications included in the unit, i.e., only to work on a particular project or to work during a particular season of the year with the understanding that the work would end when the project or season was over, many of the employees' tenure continued and exceeded six months' duration. On the grounds that the employer had employed "temporary" and "seasonal" employees prior to execution of the parties' collective bargaining agreement, the hearing examiner concluded that there had been no substantial change shown and denied the petition.

I § 968(4): The standard of review is whether the hearing examiner's rulings and determinations are unlawful, unreasonable, or lacking in any rational factual basis. Although concluding that the hearing examiner's findings of fact were well supported by the record, the Board made additional findings on the basis of the record at the appellate hearing.

32.713 36.114 71.72
32.73 36.118 71.73
32.74 71.715 71.74

II § 966(3): The unit description contained in the parties' collective bargaining agreement stated that all employees of the department, with specific exceptions, were included in the unit. Prior to execution of the agreement, most of the "temporary" or "seasonal" employees were appropriately hired and used in such categories: once the particular project or season for which an employee was hired was over, the employee was discharged. After the agreement went into effect, the number of "temporary" or "seasonal" employees whose tenure exceeded six months' duration rose dramatically. This increased use of "seasonal" employees on a long-term basis coincided with a decrease in the number of "permanent" employees in the unit. The change in the use and longevity of the "temporary" and "seasonal" employees established the sort of substantial change required to warrant unit clarification and the hearing examiner's conclusion to the contrary was reversed.

15.01 16.47 36.12 36.124
15.6 34.39 36.121 36.222
16.46 34.391 36.122

III §§ 962(6)(G) & 966: While "temporary" or "seasonal" employees may be hired to perform the same work as unit employees without being eligible for collective bargaining rights, employees called temporary or seasonal who in fact work in excess of six months and who were hired on a permanent basis are eligible for collective bargaining rights. Since the unit description was broad enough to encompass the "temporary" or "seasonal" employees whose tenure exceeded six months, the Board affirmed the hearing examiner's denial of the petition but interpreted the unit description as including such employees. In so holding, the Board expressly limited its interpretation to those "temporary" or "seasonal" employees with more than six months' tenure and stated that its holding did not preclude the employer from hiring "temporary" or "seasonal" employees who, if used properly, would remain outside of the bargaining unit.

01.27 16.46 34.391
15.01 16.47 36.222
15.6 34.39

Bangor Water District and Council 74, AFSCME, AFL-CIO, MLRB No. 80-A-02, 2 NPER 20-11013 (Mar. 13, 1980), aff'd sub nom. Bangor Water District v. Maine Labor Relations Board, No. CV-80-191 (Me. Super. Ct., Pen. Cty., Aug. 12, 1980), aff'd 427 A.2d 973 (Me. 1981)

Election Appeal

FACTS: The executive director conducted a bargaining agent election whose results were: 11 for representation, 10 for no representative, and 1 ballot contained the word "no" in the box indicating a choice of no representative. The executive director ruled that the ballot containing the word "no" was void; therefore, the union was certified as the bargaining agent, having gained a majority of the valid votes cast.

I BOARD:
§ 968(4): The parties stipulated to the facts relevant to the appeal, waived oral argument, and submitted their arguments through briefs.

09.380 32.75 35.45 71.715 71.76
09.62 32.76 35.46 71.75

II § 967(2): Had the employer's contention been correct and the ballot at issue been counted, the election would have resulted in a tie and no bargaining agent would have been certified. The Board construes ballots liberally in favor of validity. The Board will count all ballots where the voter's intent is clear, even if the proper designation procedure is not followed, provided that the mode of designation used does not reveal the voter's identity.

32.9 35.343
35.34

III § 967(2): A ballot containing the word "no" in the box indicating the choice "I desire no representative" was correctly deemed void because its intent was not clear; it could have meant no representative or no to no representative.

35.34
35.343

IV § 967(2): The ballot at issue was the only one of the twenty-two cast that had any word written on it. Ballots cast in a manner at variance with the norm always create the possibility that the voter intended to insure that one of the parties to the election finds out how he voted. While the ballot at issue does not patently disclose the identity of the voter, it is possible that such a device could be used by a party to the election to insure that an employee votes in a particular prearranged manner. A device which can so easily be used to destroy the secrecy of elections and encourage fraud, bribery, or corruption cannot be sanctioned by the Board. Therefore, the certification of the election was affirmed.

35.329 35.343
35.34

V SUPERIOR COURT:
§ 968(4): In appeals from the Board's appellate review of representation matters, the Board's findings of fact are final in the absence of fraud. No fraud was alleged; therefore, to prevail, the appellant must establish an error of law.

81.12 81.333 81.502
81.33 81.50

VI § 967(2): The guiding principle in Maine election law is that a ballot must not contain any distinguishing mark. This principle has been adopted by the Legislature in mandating secret ballot elections and implemented by the Board in prohibiting the counting of any ballot which might reveal the voter's identity. Any other rule only invites duress, intimidation, or fraud in secret balloting. Whether a mark is distinguishing is ordinarily a question of

fact, unless the question is so clear that reasonable persons cannot honestly disagree. Since the question of whether the ballot contained a distinguishing mark was a question of fact for the Board, its determination thereon is final.

35.329 35.343
35.34

VII LAW COURT:
§ 968(4): The Board is a proper party in judicial proceedings for review of its decisions.

81.111 81.37
81.112 81.375

VIII § 968(3) & (4): The Board is authorized to make procedural rules and the Court should defer to the Board's interpretation of those rules, provided its interpretation is reasonable. The Board's rules allow it to disqualify ballots that "do not clearly reveal the intent of the voter." The ballot used clearly instructed the voter how to register his vote. The Board is entitled to require compliance with its rules, especially where their purpose is to avoid the possibility of ambiguity in voting. The Board may properly disregard a noncomplying ballot, unless the voter's intent is unmistakably clear. Double negatives are frequently used in common speech to express negative statements; however, the Court could not hold, as a matter of law, that such use expressed the unmistakable intent to opt for no representative. Two interpretations were possible; therefore, the Court could not say that the Board's conclusion was irrational.

01.30 35.343 81.506
06.3 81.493 81.5084
35.34 81.503

IX § 968(4): The Board's findings of fact in representation matters are final in the absence of fraud. No fraud was alleged; therefore, the Court affirmed the Board's order.

81.12 81.333 81.502
81.33 81.50

City of Bangor and Local 1599, International Association of Fire Fighters, MLRB No. 80-A-03, 2 NPER 20-11034 (July 18, 1980)

Appealed from MLRB No. 80-UD-15 (Feb. 1, 1980)

I § 966(3): An employer, seeking to sever one or more classifications from an existing bargaining unit without having been presented with conflicting claims for recognition, may only do so through a petition for unit clarification.

36.1 36.21 36.352
36.2 36.221

II §§ 967(2) & 966(1): An agreement on the appropriate unit or a unit determination decision are prerequisites to a bargaining agent election. Unless the composition of the bargaining unit has been established, it would be impossible to determine which employees would be eligible to vote in the election.

33.05 35.31
33.06

III §§ 966(1) & 967(2): An employer can only request a unit determination and election when it can allege "that one or more public employees or public employee organizations have presented to it a claim to be recognized as the representative of a bargaining unit of public employees." In the case of an employer petition, the question concerning representation is established only by an affirmative claim by a present or potential bargaining agent that it represents a majority of the employees in a unit claimed to be appropriate and an employer rejection of that claim.

31.2 31.4 32.12
31.3 32.1 33.15

IV §§ 966 & 968(4): Consistent with practice before the NLRB, the hearing examiner will treat an improperly filed petition for unit determination as a petition for unit clarification. On appeal, however, the Board is unable to do so, unless the substantial change requirement, which is required for a unit clarification, was properly plead, established, and argued before the hearing examiner.

01.21 36.1
32.18 36.21

V § 966(3): In an attempted severance involving a question concerning representation, the proper procedure is to file a petition for unit determination. The Board has never approved of the use of a unit determination to modify an existing unit, when no competing claims for recognition were involved.

33.325 36.2 36.221
36.1 36.21 36.352

VI § 968(4): On appeal and in the interest of justice, the Board may raise and decide legal issues sua sponte, even if such issues were not raised by the parties below and were missed by the hearing examiner.

32.7 71.74
71.7

Town of Yarmouth and Teamsters Local Union No. 48, MLRB No. 80-A-04 (June 16, 1980)

Appealed from MLRB No. 80-UD-18 (Apr. 4, 1980)

FACTS: An employee organization filed a petition for unit determination, seeking the formation of a unit composed of the highway and sewerage division employees of the employer's public works department. The petition was granted by the hearing examiner.

I § 966(2): The hearing examiner correctly based the conclusion that all of the employees shared a clear and identifiable community of interest on the following: similarities in qualifications, skills, and training; similar working conditions (all are engaged in skilled or semi-skilled physical labor involving machinery or major equipment); similarity in wages; similar benefits; common supervision; identical uniforms; the size of the proposed unit; and the fact that the petitioning employee organization proposed to represent the entire group in a single unit. Community of interest does not require an identity of interest. All that is required is that the classifications at issue share similarities in the relevant criteria. The fact that employees not petitioned for may share some of the same similarities does not undercut the appropriateness of the proposed unit but merely tends to establish that such employees may share a community of interest with the employees in the proposed unit.

15.6 15.8 33.33 33.335 33.343
15.62 15.83 33.333 33.34 34.11
15.65 33.3 33.334 33.341

II § 966(2): The employer's organizational structure is merely one of the relevant community of interest criteria. The mere fact that two existing bargaining units of the employer's employees are established along the employer's divisional lines does not mean that all of the units of the employer's employees must follow such lines. Second, requiring bargaining units to follow the employer's organizational lines would violate the employees' statutory right to full freedom in the exercise of their representational and bargaining rights.

21.12 21.4 33.38 33.393
21.2 33.3 33.382 34.13

III § 966(2): The unit deemed appropriate included a total of 11 employees. Had the employer's proposal been adopted, two units would have been created, one with 9 employees and another with 2. Creation of the two units would have violated the Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units within a single department.

33.323

IV § 966(2): The hearing examiner's responsibility is to determine whether the unit proposed by the petitioner is an appropriate one, not whether the proposed unit is the most appropriate unit. In such determinations, the hearing examiner has broad discretion, particularly in deciding community of interest questions.

01.21 33.2 33.34
01.24 33.21
32.74 33.22

V § 968(4): The Board will overturn a hearing examiner's rulings or determinations if they are unlawful, unreasonable, or lacking in any rational factual basis. Nothing in the record even remotely suggested any of these errors; therefore, the hearing examiner's determination was affirmed.

32.7 32.74 71.73
32.72 71.7 71.74
32.73 71.72

Town of Berwick and Teamsters Local Union No. 48, MLRB No. 80-A-05, 2 NPER 20-11035 (July 24, 1980)

Appealed from MLRB No. 80-UD-25 (Apr. 25, 1980)

FACTS: An employee organization filed a petition for unit determination, seeking creation of a unit composed of the full-time officers, part-time officers, and clerk/dispatcher in the employer's police department. The hearing examiner determined that the full-time and part-time officers should be included in the unit and that the clerk/dispatcher was a confidential employee, excluded from the coverage of the Act.

I § 962(6)(G): The part-time officers were utilized on Friday and Saturday nights--times when additional police coverage was needed--and to fill vacant shifts on an on-call basis. They worked 4 to 6 hours per week and were regularly scheduled for their shifts on the posted monthly schedule. The "temporary, seasonal, or on-call" exception is designed to exclude employees who, because they work irregularly or sporadically, do not share a community of interest with the permanent, full-time employees in the unit. Traditional community of interest considerations control whether an employee is a temporary, seasonal, or on-call employee.

16.43 16.47 33.35 34.391
16.44 16.48 34.34 34.392
16.46 33.34 34.39

II § 966(2): The hearing examiner properly concluded that the full-time and part-time officers share a clear and identifiable community of interest based on the following: while working fewer hours per week, the part-time officers worked year-round on a regularly scheduled basis; the part-time officers were trained, worked closely with, and performed the same duties as the full-time officers; they shared common supervision; had identical working conditions; were both on the employer's regular payroll; and both had some similar employment benefits.

15.4 33.33 33.34 34.34
15.416 33.333 33.341
16.43 33.335 33.343

City of Bath and Local 1828, Council 74, AFSCME, AFL-CIO, MLRB No. 81-A-01, 3 NPER 20-12006 (Dec. 15, 1980), appeal docketed but voluntarily dismissed, City of Bath v. Local 1828, Council 74, AFSCME, AFL-CIO, No. CV-81-03 (Me. Super. Ct., Sag. Cty., Jan. 3, 1983)

Appealed from MLRB No. 81-UC-01 (Aug. 21, 1980)

FACTS: The employer filed a petition for unit clarification, seeking to exclude the dispatchers from the existing police department bargaining unit. With the creation of a new

Communications Department, the dispatchers began to handle fire and ambulance calls, as well as police calls, resulting in a 14 percent increase in the amount of message traffic handled. The hearing examiner denied the petition.

I § 966(3): The hearing examiner correctly held that the dispatchers continued to share a clear and identifiable community of interest with the other police department unit employees because: all the employees perform similar work in that all deal with the world of emergencies and public protection; the employees are in constant professional contact with each other; they share common supervision; they work in the same location; the dispatchers desire to remain in the unit; and the unit has a five-year history of successful negotiations. Dispatchers are often included in police department bargaining units.

15.41 15.44 33.333 33.342
15.414 33.311 33.34 33.394
15.418 33.33 33.341

II § 966(3): The change in the employer's organizational structure, transferring the dispatchers from the police department to a newly-created communications department, resulted in little substantive change in the dispatchers' duties. The change in the employer's organizational structure is only one of the relevant community of interest factors to be considered, when evaluating whether to modify an existing unit, and such change does not, inherently, require unit clarification. In addition to dispatching police calls, the dispatchers now handle fire and ambulance calls, resulting in a 14 percent increase in radio traffic. Such change did not constitute the sort of substantial change required to warrant unit clarification, particularly where the employees affected desired to remain in the bargaining unit.

33.38 33.394 36.122
33.382 36.12 36.124

III § 966(3): The employer's argument, that continuing to include the dispatchers in the police department unit will make negotiating a successor agreement more difficult, is relevant in a unit clarification proceeding, seeking to sever the dispatchers from the unit. The weight of the argument was undercut by two factors: (1) the parties never had particular difficulty negotiating agreements for the existing unit and (2) negotiating two separate agreements, one for the existing unit and one for the proposed dispatchers' unit, would be as difficult as continuing the negotiations that have been successful in the past.

33.31 33.313 36.221
33.311 33.35

IV §§ 966(3) & 963: The creation of a separate five-employee dispatchers' unit through unit clarification would interfere with the employees' free exercise of the § 963 rights and would violate the Board's policy of discouraging the proliferation of small municipal bargaining units.

33.32 36.3 36.34
33.323 36.33

V § 968(4): For the first time on appeal, the employer raised the issue that the bargaining agent is allegedly estopped from urging that the dispatchers continued to share a community of interest with the other employees in the existing unit. First, the issue was not raised before the hearing examiner and, therefore, is not a proper issue on appeal. Second, the estoppel alleged was based on the city manager's letter to the union, stating that, as of a certain date, the employer would no longer treat the dispatchers as members of the bargaining unit. The Board held that the letter did not require an answer from the union, until the beginning of negotiations for a successor agreement. The union did assert the dispatchers' continued unit status during such negotiations.

01.22 09.72 21.91 32.711 71.7
01.28 09.74 32.7 36.114 71.711
09.7 21.9 32.71 36.115 71.712

VI §§ 968(4) & 966(3): The Board will overturn a hearing examiner's rulings and determinations if they are unlawful, unreasonable, or lacking in any rational factual basis. Nothing in the record established such error; therefore, the hearing examiner's report was affirmed. If the

dispatchers' duties continue to evolve over time, their community of interest with the other unit employees may well change and a petition for unit clarification, seeking to sever them from the unit, may be appropriate at that time.

09.4 32.7 36.114 71.73
09.41 32.72 71.7 71.74
09.411 32.73 71.72

Portland Public Library and Portland Teachers Association, MLRB No. 81-A-02, 4 NPER 20-12025 (June 18, 1981), aff'd, No. CV-81-884 (Me. Super. Ct., Cum. Cty., Aug. 22, 1983), appeal to Law Court docketed but voluntarily dismissed, Law Docket No. CUM-83-363 (Dec. 9, 1983)

Appealed from MLRB No. 81-UD-04 (Nov. 25, 1980)

I § 962(7): "A public employer means any officer, board, commission, council, committee or other persons or body acting on behalf of any municipality or town or any subdivision thereof." A person or body "acts on behalf of" another if the former operates as a servant of the latter, subject to the latter's control or right to control.

09.1 11.12
11.11 11.17

II § 962(7): The Portland Public Library is a servant of the City of Portland based on the following: the library has a minimal capital investment in its operation, especially when compared with the city's investment in the buildings, equipment, books, and operating funds used by the library; through the budgetary process, the city council controlled the number of library personnel, their salary schedule, the days and hours of the library's operation, the number of books purchased, and even the Library Director's salary; although controlling its own day-to-day operations, it was unlikely that the library could follow any course independent of or contrary to the city's wishes without jeopardizing its funding and its survival.

09.1 11.12
11.11 11.17

III § 962(7): A high degree of financial support by a municipality is not necessarily dispositve of the public employer question; however, when the degree of financial support results in the municipality having significant control over the operation of a private entity, such degree of support is evidence of the right to control the private entity. Unlike an independent contractor, the library was subject to municipal control over the details of its operation.

09.1 11.12
11.11 11.17

IV § 962(7): The library's reliance on the Auburn Public Library Unit Determination Report (Oct. 18, 1978) is misplaced because: that report predates the Law Court's announcement of the controlling test for determining public employer status in Baker Bus Service v. Keith, 416 A.2d 727 (Me. 1980); the report applied a far more restrictive test than the Baker Bus test; and the test applied has never been approved by the Board or by the Courts. The Auburn Public Library report has no precedential value in this proceeding.

09.4 0.413
09.41

V § 967(2): The employer argued that, as a matter of public policy, a public library should never be deemed to be a "public employer" within the meaning of the Act. This argument was rejected because the Legislature has made it clear that, if an entity acts on behalf of a municipality, its employees are entitled to the rights guaranteed by the Act.

33.36

VI §§ 966 & 968(4): The employer argued that jurisdictional questions in representational matters should be resolved by the Board and not be a hearing examiner. Section 966(1) provides that all questions arising in unit proceedings are to be initially decided by the hearing examiner, subject to review by the Board. There is no provision in the Act for bringing any

question arising in a unit proceeding, jurisdictional or otherwise, to the Board in the first instance.

01.1 01.22 01.32 32.85
01.21 01.28 32.7 71.7

VII SUPERIOR COURT:
§§ 968(4) & 972: Appeals from the Board's decisions in representation matters are controlled by the Act and by Rule 80C of the Maine Rules of Civil Procedure that replaced Rule 80B, effective February 15, 1983.

81.191

VIII § 968(4): The Board's findings of fact were supported by substantial evidence in the record and the Board correctly applied the controlling Baker Bus test; therefore, the Board's decision was not subject to reversal and was affirmed.

09.1 11.17 81.333 81.503
11.11 81.12 81.50 81.508
11.12 81.33 81.502 81.5090

Council 74, AFSCME, AFL-CIO and City of Augusta, MLRB No. 81-A-03, 4 NPER 20-12045 (Sept. 25, 1981), aff'd, Council 74, AFSCME, AFL-CIO v. City of Augusta, No. CV-81-477 (Me. Super. Ct., Ken. Cty., Mar. 30, 1982)

Appealed from MLRB Nos. 81-UD-20 and 81-E-01 (June 2, 1981)

FACTS: In 1970, the Board's predecessor established an appropriate clerical employees bargaining unit and the union was certified as the unit's bargaining agent through a secret ballot election. For over 10 years, the union did virtually nothing for the employees in the unit. In 1980, the union apparently discovered that it represented the unit and sent the employer a notice to begin collective negotiations for the unit. The employer responded by challenging the union's continued status as the bargaining agent and ultimately filed a petition seeking a bargaining agent election. The union moved to dismiss the petition on the grounds that the employer lacked standing to petition for an election for a unit that had an incumbent bargaining agent. The hearing examiner held that, since the unit was no longer viable, it was not necessary to act on the employer's petition.

I § 967(2): Like § 9(c)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1)(B), § 967(2) allows an employer to file an election petition to test a certified bargaining agent's continued majority status. The construction placed on the analogous section of the NLRA is persuasive, when interpreting a provision of the Act. Unless the employer is allowed to file a petition for election to test the bargaining agent's continued majority status, it could be forced to negotiate with a union that does not represent a majority of its employees. Such bargaining would violate § 964(1)(E) and the public policy embodied in the Act.

03.22 32.12 37.16
32.1 32.135 72.588

II §§ 966 & 967: During the 10-year interval between its becoming the bargaining agent and the union's initial demand to negotiate a collective bargaining agreement, several new departments and offices were created that employed clerical workers, some of the classifications in the original unit were changed, new classifications involving clerical work were created, and only 1 of the 13 employees in the unit at the time of its creation remained. In the circumstances, the hearing examiner erred in declaring the unit no longer viable and refusing to act on the employer's petition. Since the unit was plainly no longer appropriate, within the meaning of § 966(1), and since the current composition of the unit was unclear, the hearing examiner should have determined an appropriate unit and then acted on the employer's petition for election. A necessary incident to conducting a secret ballot election is that the bargaining unit of the employees affected be determined. Without such a determination, it would be impossible to identify which employees would be eligible to vote in the election.

32.5 35.31
33.06 35.32

III § 967(2): The standard for determining whether to conduct a bargaining agent election, pursuant to the employer's petition for a unit with an incumbent bargaining agent, is whether the employer can, in addition to showing the union's claim for continuing recognition, demonstrate by objective considerations that it has reasonable grounds for believing that the union has lost its majority status. Here, the union's two demands to negotiate constitute claims for continued recognition. Second, the fact that the union did not attempt to represent the clerical employees for over 10 years, the considerable changes in the unit personnel, and in the unit classifications, together, constitute reasonable grounds for believing that the union has lost its majority status. The employer does not have to be correct in thinking that the union has lost majority status; it must merely have reasonable grounds for its belief. Since the employer demonstrated grounds for its belief that the union no longer has majority status, the Board ordered that a bargaining agent election be conducted pursuant to the employer's petition.

32.1 32.135
32.12 37.16

IV § 968(4): The appeal was granted in part and the matter was remanded to the executive director for determination of an appropriate unit and the scheduling of a bargaining agent election.

32.83
32.89

V SUPERIOR COURT:
§ 968(4): Although the union did not participate in the proceeding before the hearing examiner, the Board apparently deemed the union to have standing to challenge the hearing examiner's report before the Board. The Board has primary jurisdiction to interpret its own rules, including its rules for standing in appeals in representation matters; however, the Court must independently examine questions of standing, even if not raised by the parties. The Court noted that the union took "a considerable legal risk" in refusing to participate in the proceeding before the hearing examiner.

06.3 71.7 81.111 81.506
32.705 71.705 81.493

VI § 962(7): The statute permits the public employer to petition for an election, when a public employee organization has presented the employer with a claim to be recognized as the bargaining agent. The statute does not suggest that the employer may only file such petition once, before the first bargaining agent is certified. The statute does not preclude the employer from filing such a petition where the bargaining agent presented a claim for recognition after 10 years of complete abdication of collective bargaining responsibilities and after significant changes have occurred in the composition of the previously designated bargaining unit. The Court acknowledged the union's concern that this holding might lead to public employers filing election petitions once per year to improperly harass bargaining agents; however, the Court noted that its holding was not so broad as to sanction such a result. The holding was limited to its unique circumstances and the Court reserved judgment on whether a public employer has the right to annual elections on request, when dealing with an active bargaining agent, where a collective bargaining agreement is in effect.

32.1 32.135 37.16
32.12 32.142

VII § 968(4): The Board's findings of fact were supported by the evidence in the record and the Board's decision represented an accurate statement of the relevant law; therefore, the Board's decision was affirmed.

81.50 81.503
81.502 81.526

Council 74, AFSCME, AFL-CIO and City of Lewiston, MLRB No. 81-A-04, 4 NPER 20-12042 (Sept. 17, 1981)

Election Appeal

FACTS: The executive director ruled that an employee, who had stopped working and was on terminal leave on the date of the election, was "on the payroll" on that date and, therefore, was eligible to vote. Counting the ballot at issue, the election results were: 5 for the union and 5 for no representative. Since the union failed to gain a majority of the valid votes cast, the executive director certified that no representative had been selected.

I § 967(2): Board Rule 3.02(A) states: "The employees eligible to vote shall be those who were employed on the last pay date prior to the filing of the petition and who remain on the payroll on the date of the election, and" are public employees, within the meaning of the Act. The Board's voter eligibility rule was based on NLRB case law and should be interpreted consistent with the latter. The unit determination and election sections of the NLRA and the Municipal Act are analogous; therefore, interpretations of the former are persuasive authority in interpreting the latter. The Federal Courts have consistently interpreted the NLRB rule as requiring that an employee work on both the eligibility date and the date of the election to be eligible to vote. Employees not working on election day, due to illness, vacation, leave of absence, layoff, or some other reason, are eligible to vote if they have a reasonable expection of employment within a reasonable time in the future. An employee who terminates his employment effective on a date subsequent to the election, but stops working prior to the election and is being paid on the date of the election for past accumulated time off, is not eligible to vote, even though such employee is still on the payroll. The requirement that an employee be actually working, or have a reasonable expectation of future employment, on the date of the election was adopted because: it is easily understood and applied; there is a considerable body of case law applying this standard in diverse factual circumstances; and allowing persons "on the payroll" but not actually working to vote could give rise to employer-employee collusion in establishing voter eligibility.

03.22 35.31 35.312
06.3 35.311 35.313

II § 962(7): The employee in question: discussed his retirement with management personnel over a month prior to the election, last worked over two weeks before the election, and the only reason he remained on the payroll on the date of the election was to accumulate additional vacation and sick leave, while being paid for accumulated vacation leave. The mere fact that the employee was subject to being called into work did not give rise to a reasonable expectation of future employment on the date of the election. Since the employee was ineligible to vote, his vote was set aside and the election results became 5 to 4 in favor of representation. The Board granted the appeal and ordered the executive director to certify the union as the bargaining agent.

32.9 35.31
32.91 35.311

III § 967(2): The election official committed two technical violations of Rule 3.06(A) by: (1) sealing the challenged ballot envelope, rather than having the voter do so; and (2) setting the sealed envelope aside, rather than having the voter deposit the envelope in the ballot box. While the Board does not condone any violation of the election rules, the standard against which the Board election official's conduct is measured is whether the manner in which the election was conducted raised reasonable doubt as to the fairness and validity of the election. The errors present here did not raise such doubt and did not warrant either setting aside the challenged ballot or ordering a new election.

35.32 35.346
35.34 35.515

Town of Sabattus and Teamsters Local Union No. 48, MLRB No. 82-A-01, 4 NPER 20-12041 (Sept. 17, 1981)

Appealed from MLRB No. 82-UD-02 (July 27, 1981)

I § 968(4): The Board's standard of review in representation appeals is whether the hearing examiner's determination is unlawful, unreasonable, or lacking in any rational factual basis. The appellate hearing before the Board is not a de novo hearing on the merits. Evidence not offered to and arguments not made before the hearing examiner may not be presented or raised for the first time during the appeal.

32.7 32.713 32.74 71.712 71.73
32.71 32.72 71.7 71.715 71.74
32.712 32.73 71.71 71.72

II § 966(1): The hearing examiner's duty is to determine whether the unit proposed by the petitioner is an appropriate one, not whether it is the most appropriate unit.

33.2 33.22
33.21

III § 968(4): Although the employer failed to appear at the initial unit determination proceeding, it was a party aggrieved by the hearing examiner's decision and was, therefore, accorded standing to appeal the unit report.

32.705
71.705

IV § 962(6)(C): Employees are "confidential," within the meaning of the Act, if they are permanently assigned to collective bargaining functions, employee relations matters, or render advice on a regularly assigned basis to management personnel on collective bargaining or employee relations matters. The police sergeant at issue was not a confidential employee under this test.

16.2 16.22
16.21 33.43

V § 966(1): This section permits the hearing examiner to include supervisory personnel in the same unit as their subordinate employees or to place them in a separate supervisory bargaining unit. The single supervisory employee was properly included in the unit together with its subordinates. To hold otherwise would be contrary to the Board's policy of discouraging the proliferation of small bargaining units. Creation of a single-member unit may well impede the employee assigned thereto in securing the free exercise of the rights guaranteed by the Act.

16.3 21.4 33.42
21.12 33.38

State of Maine and Maine State Employees Association, MLRB No. 82-A-02, 6 NPER 20-14027, Interim Order (June 2, 1983), appeal dismissed as untimely, State of Maine v. Maine State Employees Association, No. CV-83-287 (Me. Super. Ct., Ken. Cty., Sept. 9, 1983), aff'd 482 A.2d 461 (Me. 1984)

Appealed from MLRB Nos. 80-UC-15, -16, -17 (Dec. 31, 1981)

FACTS: The employer filed a petition for unit clarification, seeking to exclude several State employee classifications from established bargaining units, on the grounds that said employees were confidential, within the meaning of § 979-A(6)(C).

I § 979-G(2): The determinations concerning some of the positions were appealed on questions of law only, while others were appealed on both questions of law and fact. The parties agreed to bifurcate the handling of the appeal, with argument on the former portion being presented through briefs and oral argument.

32.7 32.76 71.76
32.75 71.75

II § 979-G(2): The Board adopted the same standard of review in representation appeals arising under the State Employees Act as it applies to those arising under the Municipal Act. The Board will overturn a hearing examiner's rulings and determinations if they are unlawful, unreasonable, or lacking in any reasonable factual basis.

32.7 32.74 71.7 71.74
32.72 36.114 71.72
32.73 36.214 71.73

III § 979-G(2): Consistent with the Superior Court decision in Town of Old Orchard Beach v. Old Orchard Beach Police Patrolmen's Ass'n, No. CV-82-613, (Me. Super. Ct., York Cty., Dec. 27, 1982), the Board held that the 15-day period of limitations during which appeals from hearing

examiners' decisions may be brought begin to run on the date when a party receives notice of such decision. [Subsequently, the Law Court reversed the Superior Court and held that the appeals period for appeals from the Board to the Superior Court begins to run on the date of the Board's decision; however, when said decision is mailed to the parties, three days are added to the 15-day appeals period.]

32.711 71.711 81.34
36.115 81.13

IV § 979-E(3): Rule 1.13 permits but does not require dismissal of the unit clarification petition if: (a) the job descriptions are clear and unequivocal, (b) the question raised should be settled by election, or (c) the petition attempts to modify a unit negotiated by the parties and the alleged changes, upon which the petition is based, occurred prior to the negotiations on the collective bargaining agreement presently in force. The essence of the unit clarification procedure is to evaluate whether the circumstances surrounding formation of the unit have changed sufficiently to warrant a change in its composition; if they have, the unit clarification should be granted.

36.1 36.12 36.21 36.352
36.11 36.124 36.35
36.111 36.2 36.351

V § 979-A(6): Collective bargaining coverage for State employees is the rule and exclusion from coverage is the exception under § 979-A(6). Since a finding of confidential employee status results in exclusion from all coverage under the Act, the Legislature intended that such exemptions are to be narrowly interpreted to effectuate the fundamental purpose of the Act.

03.22 16.21 33.4 36.224
15.01 16.4 33.43 36.33
16.2 21.12 33.45

VI § 979-A(6)(C): The Board applied the NLRB v. Hendricks County [454 U.S. 170 (1981)] labor nexus test, within the context of the State Employees Act. Confidential employees are those permanently assigned to collective bargaining or who render advice on a regularly assigned basis to management personnel on labor relations matters, not including contract administration functions. This includes employees who, as part of their job duties, have access to the employer's negotiating positions or strategies, in advance of the same being revealed at the bargaining table, and who, as an integral part of their job, assist and act in a confidential capacity to persons who formulate or determine the employer's bargaining positions or strategies. The purpose of the exemption is to preclude disclosure, outside of the negotiating process, of information which could compromise the employer's bargaining position. Unlike the practice under the NLRA, under § 979-E(1), employees who are engaged in such contract administration duties as exercising judgment in adjusting grievances, applying other established personnel policies and procedures, and enforcing a collective bargaining agreement, or establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards, should be assigned to separate supervisory employee bargaining units, rather than be excluded from the coverage of the Act.

16.2 16.3 33.42
16.21 16.31 33.43
16.22 16.32 34.19

VII § 979-E(3): Rule 1.09 provides that there are no burdens of proof in representation cases; however, in unit clarification matters, the petition must allege and the petitioner must establish, as a threshold question, whether the circumstances surrounding the formation of the unit have changed sufficiently to warrant modification in the composition of the unit.

09.32 36.11 36.21
32.56 36.12
32.57 36.124

VIII § 979-A(6)(C): The purpose of the confidential exclusion requires the Board to examine the duties of the employees alleged to be confidential. An employee who is included in a bargaining unit and whose duties involve confidential information could be faced with a conflict of loyalty between the employer and the bargaining agent. The Legislature minimized

this potential conflict of loyalty through the confidential employee exclusion. The confidential duties that give rise to such a conflict of loyalty involve exposure to the employer's confidential collective bargaining or employee relations ideas, positions, or policies which, if disclosed to the bargaining agent outside of the normal collective bargaining process, could provide the bargaining agent with unfair leverage or advantage over the employer.

16.2 16.22
16.21 33.43

IX § 979-A(6)(C): To be confidential within the meaning of the Act, an employee's involvement in collective bargaining matters must be both significant and necessary. The requirement of significant involvement does not set forth an empirical formula mandating inclusion or exclusion. An important activity, performed rarely, or a relatively minor activity, performed regularly, both could satisfy the requirement of significant involvement.

16.2 16.22
16.21 33.43

X § 979-A(6)(C): The confidential exclusion, by its terms, applies to employees "whose duties necessarily imply a confidential relationship." This proviso requires that the confidential duties be an inherent portion of the employee's duties to give rise to the exclusion. Although the board was able to decide the appeal without ruling thereon, it stated in dicta that the passive diffusion of confidential labor relations and collective bargaining functions throughout the employer's various departments and agencies, without the subjective intent to thereby deprive employees of collective bargaining rights, violates the Act. Section 979-A(5) requires the employer to make an affirmative effort to concentrate its confidential collective bargaining and labor relations functions, to the maximum practicable extent.

16.2 16.22
16.21 33.43

XI § 979-E(3): While the employer's petition was pending before the hearing examiner, the Legislature amended the Act, changing the definition of confidential employees and adding two additional exemptions to the coverage of the Act. The employer argued that the amended statute should be applied to the instant proceeding and also filed a new petition for unit clarification, seeking to exempt many of the clarifications involved in this proceeding and many others, pursuant to the amendments to the Act. The Board held that due process of law requires that a party be afforded notice and a reasonable opportunitiy to participate in a hearing on issues of fact and have an opportunity for argument, written or oral, on issues of law. Since the parties did not prepare, present, nor argue their respective cases before the hearing examiner in light of the new statutory standard, the Board was required to apply the former standard on appeal, as did the hearing examiner below. To avoid repeated proceedings before the Board, the Board remanded those positions that were at issue in both this appeal and under the employer's new petition to the hearing examiner for consideration of their unit status under the new statutory standard. The hearing examiner could receive such new evidence and argument concerning said classifications prior to ruling thereon.

32.5 32.57 32.89 71.7
32.52 32.572 36.114
32.56 32.7 36.214

XII § 979-A(6)(C): If an employee's access to collective bargaining information is limited to learning what transpired between the parties at the table, such information is already known to the bargaining agent and does not give rise to exclusion from the coverage of the Act.

16.2 16.22
16.21 33.43

XIII § 979-A(6)(C): Although not utilizing the employer's confidential collective bargaining information in the formulation or effectuation of collective bargaining or labor relations policies, clerical employees whose jobs require that they have access to such information are excluded from the coverage of the Act. Confidential management personnel need access to at least one "confidential" clerical employee in order to carry out their confidential duties.

15.18 16.21 33.43
16.2 16.22

XIV SUPERIOR COURT:
§ 979-G(2): Since matters remained to be decided by the hearing examiner pursuant to the Board's remand order, the Board's order was not a final, reviewable order and the Court dismissed the employer's appeal as untimely.

81.13 81.332
81.33 81.34

XV LAW COURT:
§ 979-G(2): Generally, interlocutory orders of the courts, administrative agencies, or quasi-judicial bodies are not appealable. The reasons for this final judgment rule are: to curtail interruption, delay, duplication and harassment; minimize interference with the trial process; serve judicial economy; and it saves the appellate court from having to decide issues that may be ultimately moot. Three exceptions have been recognized by the Maine courts: the death knell exception allows review when failure to do so would preclude effective review and result in irreparable injury; the collateral order exception permits review if (a) the determination on appeal is a final determination, separable from the gravamen of the litigation, (b) it presents a major unsettled question of law, and (c) absent immediate review, a party would suffer irreparable injury; and the interests of judicial economy may create an exception to the rule where resolution of the non-final order can effectively dispose of the entire litigation. None of the exceptions were present here; therefore, the appeal was dismissed as untimely.

81.13 81.332 84.16
81.33 81.34 84.17

State of Maine and Maine State Employees Association, MLRB No. 82-A-02, 6 NPER 20-14035 (Aug. 9, 1983)

Appealed from MLRB Nos. 80-UC-15, -16, -17 (Dec. 31, 1981)

FACTS: The employer filed a petition for unit clarification, seeking to exclude several employees from established State employee units, on the grounds that such employees were confidential, within the meaning of § 979-A(6)(C). The Board's first interim order dealt with the classifications appealed on issues of law only and this order concerns the positions appealed on questions of law and fact.

I § 979-G(2): Representation appeals before the Board are appellate proceedings and do not involve hearings de novo. The Board evaluates the hearing examiner's rulings by reviewing only the evidence presented to the hearing examiner. Section 979-E assigns the primary responsibility for resolving unit questions to the executive director. Allowing a full evidentiary hearing before the Board would contravene the statutory scheme and would result in shifting the primary responsibility for resolving representation disputes to the Board. The parties would then use the initial unit hearing only for discovery purposes.

01.21 32.7 36.214
01.22 32.713 71.7
01.24 36.114 71.715

II § 979-G(2): The standard of review for a hearing examiner's findings of fact is that such findings will be upheld unless they are unlawful, unreasonable, or lacking in any rational factual basis. Reviewing the hearing examiner's decision for errors of fact, the Board affirmed the findings below and adopted them as its own findings of fact in connection with all but one of the classifications at issue in the appeal.

32.7 36.114 71.73
32.72 36.214
32.73 71.72

III § 979-A(6)(C): Generally, an employee classification may not involve confidential duties; however, a particular employee in the classification may be performing confidential duties. In such instances, the specific employee is excluded from the coverage of the Act, even though the general classification remains in a bargaining unit.

16.2 16.22 36.224
16.21 33.43

IV § 979-A(6)(C): A clerical employee, who gathers collective bargaining information, takes notes on behalf of the employer during negotiations, and types letters containing confidential collective bargaining information, is confidential, within the meaning of § 979-A(6)(C).

15.26 16.2 16.22 36.224
15.261 16.21 33.43

V § 979-A(6)(C): The passive diffusion of confidential labor relations and collective bargaining functions throughout the employer's various departments and agencies, without the subjective intent to thereby deprive employees of collective bargaining rights, violates the Act. Section 979-A(5) requires the employer to make an affirmative effort to concentrate its confidential collective bargaining and labor relations functions, to the maximum practicable extent. The Board cited several examples where the employer had consolidated its confidential functions in few individual positions.

16.2 16.22
16.21 33.43

VI § 979-A(6)(C): Confidential employees are those permanently assigned to collective bargaining or who render advice on a regularly assigned basis to management personnel on labor relations matters, not including contract administration functions. This includes employees who, as part of their job duties, have access to the employer's negotiating positions or strategies, in advance of the same being revealed at the bargaining table, and who, as an integral part of their job, assist and act in a confidential capacity to persons who formulate or determine the employer's bargaining positions or strategies. An employee who functioned as the agency personnel officer, advising the agency director on interpreting collective bargaining agreements, who was the contact person with the Office of Employee Relations clarifying and applying layoff policies, during a reduction in force, and who advised the departmental grievance officer on layoff grievances, was performing only contract administration duties. The hearing examiner's conclusion of confidential status for said employee was erroneous and the Board ordered the position returned to the bargaining unit.

16.2 16.22 16.31.
16.21 16.3 33.43

M.S.A.D. No. 16 Library Employees Association and M.S.A.D. No. 16 Board of Directors, MLRB No. 82-A-03 (Aug. 12, 1982)

Appealed from MLRB No. 82-UD-27 (March 17, 1982)

FACTS: An employee organization filed a petition for unit determination, seeking the formation of a unit composed of two of the 14 teacher assistants employed in the district. The hearing examiner determined that a unit composed of all 14 teacher aides, assistants, and associates was appropriate for collective bargaining and that the proposed unit was not appropriate therefor.

I § 966: In establishing an appropriate bargaining unit, the hearing examiner is justified in looking at all of the employer's employees and not just those that the petitioner seeks to organize. The hearing examiner held that the proposed two-person unit was not appropriate and that all 14 aides, assistants, and associates share a clear and identifiable community of interest and, therefore, together constitute an appropriate unit. The Board affirmed the holding that the smaller unit is not appropriate, when the positions at issue clearly belong in a larger, comprehensive unit.

01.21 15.133 33.2 33.324
01.24 15.134 33.32
15.1 15.14 33.323

II § 966: If granted, the petition proposing the creation of a small unit, whose component classifications clearly belong in a more comprehensive appropriate unit, would violate the Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units within a single department.

33.32
33.323

III § 966: The hearing examiner correctly applied the established 11-point community of interest test in determining that the comprehensive unit was appropriate. In applying the 11-factor test, not all of the criteria need be present in every case nor "is it a matter of casting the criteria in the air to see how many fall on one side or the other." All that is required is that the various positions at issue share sufficient similarities. All 14 positions: were uncertified personnel who perform educational support or semi-professional duties; all were classified as auxiliary personnel by the State Department of Educational and Cultural Services; all were paid according to the same salary scale; and all enjoyed the same employment benefits.

09.33 33.21 33.332 33.334 33.34
33.2 33.3 33.333 33.335 33.343

IV § 968(4): The standard review applied in representation appeals is that the hearing examiner's rulings and determinations will be affirmed, unless they are unlawful, unreasonable, or are lacking in any rational factual basis. None of these errors was established in the record; therefore, the unit determination report was affirmed.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

Town of Kennebunk and Teamsters Local Union No. 48, MLRB No. 83-A-01, 5 NPER 20-14002 (Oct. 4, 1982)

Appealed from MLRB No. 82-UD-33 (Sept. 1, 1982)

FACTS: An employee organization filed a petition for unit determination, seeking formation of a police supervisors bargaining unit composed of the shift supervisors, the lieutenant and corporals. These were the department's only supervisory employees other than the chief of police.

I §§ 968(4) & 967(2): Subsequent to issuance of the unit determination report, the executive director scheduled a bargaining agent election for the supervisory unit at issue. The employer moved to stay conduct of the election until after resolution of its appeal. The Board denied the motion for stay, but ordered the executive director to sequester the ballots until after resolution of the appeal.

32.85 35.48
32.88

II § 966(1): In evaluating whether an individual is a supervisory employee, the hearing examiner should look at the person's actual duties and not elevate form over substance. Although the police department's standard operating procedure provided that the lieutenant supervised the corporals, in the established chain of command, the lieutenant and the corporals each supervise a separate shift, all perform the same work, and all were directly supervised by and reported to the chief of police. Since they shared a clear and identifiable community of interest, the lieutenant and corporals were properly included in the same unit.

15.4 16.31 33.331 33.34 33.42
15.414 16.32 33.332 33.382 34.19
16.3 33.33 33.333 33.4

III § 966(1): This section facilitates formation of separate units composed entirely of supervisory employees. The fact that some employees in the unit may supervise other members thereof does not render the unit inappropriate, so long as all of the affected classifications share the requisite community of interest. In so holding, the Board expressly rejected any suggestion to the contrary that might be read into Command Officers, South Portland Police Department and City of South Portland, Hearing Examiner Report (Dec. 21, 1972). The Board's hearing examiners often include supervisory classifications in rank-and-file bargaining units when a total of one or two supervisory employees are involved. Such an exercise of the hearing examiner's discretion, like the result in the instant case, is consistent with § 966(1) and with the Board's policy of avoiding the proliferation, through fragmentation, of small bargaining units within the same department.

01.21 16.31 33.4
01.24 16.32 33.42
16.3 33.34 34.19

Town of Kittery and Teamsters Local Union No. 48, MLRB No. 83-A-02, 5 NPER 20-14018 (Feb. 7, 1983)

Appealed from MLRB No. 83-UD-04 (Nov. 5, 1982)

FACTS: The employee organization, that was the bargaining agent for the dispatchers and patrolmen's bargaining unit, filed a petition for unit determination, seeking formation of a separate police supervisors bargaining unit. The employer opposed the petition on the grounds that allowing the same employee organization to serve as the bargaining agent for both supervisory employees and for the employees they supervise would result in conflicts of loyalty for supervisory employees, between the union and the employer.

I § 968(4): The sole issue in this appeal is whether an employee organization may be the bargaining agent for both the rank-and-file and the supervisory employees of the same public employer. This question of statutory construction is one of first impression for the Board. As the agency charged with its enforcement, the Board is empowered to construe the meaning of the Act. The Law Court has directed that, in interpreting portions of the Act, the Board should look for guidance to the parallel sections of the National Labor Relations Act. In this instance, federal law is not helpful because supervisory employees are denied collective bargaining coverage under the NLRA.

03.2
03.22

II § 966(1): Section 963 prohibits interference with the right of public employees to join and participate in labor organizations of their own choosing. Employee freedom of self-organization is one of the two fundamental purposes of the Act. Section 966 permits supervisors to engage in collective bargaining, delegates the authority to fashion bargaining units to the executive director, and allows the assignment of supervisory employees to the same unit that contains the employees that they supervise. Supervisory employees and their subordinate employees may, therefore, be represented by the same bargaining agent in separate units.

01.21	21.12	33.4	34.19
01.24	21.2	33.42	
16.3	21.3	33.47	

III § 966(1): The employer cited federal case law to the effect that the states may prevent supervisors from being in the same unit as their subordinate employees, without violating the First Amendment freedom of association. Prevention of a conflict of loyalties is a legitimate state interest and prohibition on joint membership in the same unit is the least drastic restriction available to effect said state interest. Although prohibiting supervisors and their subordinate employees from being in the same unit would pass federal constitutional muster, it would be inconsistent with Sections 963, 966 and 967 of the Act; therefore, such limitation will not be imposed by the Board. Policy arguments militating against supervisors and the employees they supervise being in the same unit or being represented by the same employee organization run contrary to the plain meaning of the Act and, therefore, should be addressed to the Legislature.

04.1	33.4	33.47
16.3	33.42	34.19

Local 797, International Association of Firefighters and Lewiston-Auburn 911 Committee, MLRB No. 83-A-03, 6 NPER 20-15002 (Dec. 5, 1983)

Appealed from MLRB Nos. 83-UC-06 and 83-E-01 (Nov. 12, 1982)

FACTS: For several years, the dispatching duties of the Auburn Fire Department were performed by firefighters who were members of the Auburn Fire Department bargaining unit. The cities of Lewiston and Auburn decided to consolidate their emergency services dispatching functions under a joint 9-1-1 committee. The committee maintains a dispatch center at the Lewiston Central Fire Station and on duty at any given time are a Lewiston dispatcher, an Auburn dispatcher, and an ambulance service dispatcher. Calls coming into the 9-1-1 center are routed through the appropriate dispatcher who dispatches the appropriate emergency response personnel.

I § 968(4): The standard of review the Board uses to evaluate the hearing examiner's actions is that said rulings and determinations will be reversed if they are unlawful, unreasonable, or lacking in any rational factual basis.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

II § 962(7): The hearing examiner determined the identity of the employer based exclusively on which entity--the 9-1-1 Committee or the City of Auburn--provided the day-to-day supervision for the employees at issue. That factor is insufficient to warrant the hearing examiner's conclusion. The Board reversed the hearing examiner's finding and found that the City of Auburn was the Auburn dispatchers' employer. The Board based its finding on: who hired, trained, and paid the employees, as well as who was responsible for their overall supervision and for the imposition of discipline. The Lewiston dispatchers, whose relationship with the 9-1-1 Committee is identical with that of the Auburn dispatchers, are members of the Lewiston Fire Department bargaining unit, negotiate with the city of Lewiston over the mandatory subjects of bargaining, and are employees of the city of Lewiston.

11.11 11.3 33.381
11.12 11.33
11.23 11.34

Maine State Employees Association and City of Lewiston, Lewiston School Department and Council 74, AFSCME, AFL-CIO, MLRB No. 83-A-04, 5 NPER 20-14016 (Feb. 23, 1983); aff'd sub nom. Council 74, AFSCME v. Maine State Employees Association, 476 A.2d 699 (Me. 1984)

See: MLRB No. 83-14

Saint John Valley Vocational Cooperative Board and Northern Aroostook Vocational Educators/MTA/NEA, MLRB No. 83-A-05, 5 NPER 20-14012 (Feb. 4, 1983)

Appealed from MLRB No 83-UD-13 (Jan. 20, 1983)

FACTS: An employee organization filed a petition for unit determination, seeking formation of a wall-to-wall unit composed of all eligible professional and non-professional employees of a vocational education employer. With the exception of a single position not at issue in this appeal, the employer and the employee organization reached agreement on the composition of the unit during a recess in the unit determination proceeding.

I § 966(2): To be appropriate, all of the classifications in a proposed unit containing both professional and non-professional employees must share the requisite community of interest and a majority of the professional employees must vote in favor of such unit inclusion. The employer and the employee organization agreed that the proposed wall-to-wall unit, with the exception of one position which they agreed to exclude as a confidential employee, was appropriate for purposes of collective bargaining. In response to a question from the hearing examiner concerning the professional employees' unit inclusion vote, the employee organization provided a statement, signed by a majority of the professional employees, stating that a majority of the professional employees had voted to be included in the same unit as the non-professional employees. The Board mentioned, without comment, the hearing examiner's holding that said statement satisfied the vote requirement of § 966(2).

33.336 33.393 34.16 34.4
33.34 33.395 34.21

II § 968(4): The Board's task in representation appeals is to review the hearing examiner's rulings and determinations. The Board's review is limited to the evidence presented in the initial evidentiary proceeding and upon which the decision under appeal was based. The appellate proceeding is not a de novo proceeding and evidence not offered to the hearing examiner is not admissible thereat.

01.21 09.39 32.713 71.715
01.22 32.7 71.7

III §§ 966 & 968(4): These sections charge the executive director with the primary responsibility for deciding unit questions. The Board's role is limited to an appellate review of the executive director's decision; therefore, matters not raised before the executive director cannot be raised on appeal before the Board. The employer's appeal was denied because it did not question the unit status of the position at issue before the hearing examiner.

01.21 01.24 32.712 71.7
01.22 32.7 33.05 71.712

IV § 966(3): The employer alleged that it had voted to change the duties of the position at issue, effective at a future time. Since representation matters are resolved on the basis of duties actually being performed, such future change would have no impact in this proceeding. Once the changed duties are actually being performed, the employer may raise the position's continued unit status through a petition for unit clarification.

33.337 36.125
36.12

Auburn Firefighters Association, Local 797, IAFF and City of Auburn, MLRB No. 83-A-07, 6 NPER 20-15003 (Dec. 5, 1983)

Appealed from MLRB No. 83-UD-15 (Apr. 19, 1983)

FACTS: An employee organization filed a petition for unit determination, seeking formation of a bargaining unit composed of the Auburn dispatchers who worked at the Lewiston-Auburn 9-1-1 communications center.

I § 968(4): The Board's standard of review in representation appeals is that the hearing examiner's rulings and determinations will be reversed if they are unlawful, unreasonable, or are lacking in any rational factual basis.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

II § 968(4): Upon timely appeal of an aggrieved party, the Board may affirm or modify hearing examiner findings and determinations in representation matters. A hearing examiner's finding of fact, that was subsequently reversed by the Board, does not constitute final agency action and does not estop the Board from considering the same factual issue in a different proceeding. The doctrine of collateral estoppel is an equitable doctrine that is not blindly and inflexibly applied. The finding of fact at issue was not the focus of the earlier proceeding, was not fully litigated thereat, and was merely a "make weight" argument in the community of interest context. In the circumstances, the earlier finding would not collaterally estop the Board from considering the same issue, even if the hearing examiner's report had not been appealed and modified.

09.41 09.7 09.73
09.411 09.72

III §§ 966 & 962(7): A finding of different public employers for two groups of employees would, in almost every case, require a separate bargaining unit for each group and foreclose all further inquiry on joining the two groups in the same unit.

11.12 33.4 34.14
33.38 33.45

IV § 962(7): The following adequately supported a finding that the city of Auburn, and not an inter-municipal committee, was the public employer of the employees at issue. The city: hired, set the wages and benefits for, paid and funded the benefits of, kept the personnel records for, and exercised final authority in disciplinary matters for the employees. Working at the inter-municipal communications center were Auburn dispatchers, Lewiston dispatchers, and ambulance dispatchers. The Lewiston dispatchers, who have an identical relationship with the 9-1-1 committee as the Auburn dispatchers have, are employed by the city of Lewiston, are members of the Lewiston Fire Department bargaining unit, and negotiate with the city for their wages, hours, and conditions of employment. The ambulance

dispatchers are employed by a private ambulance company, which sets and pays their wages and employment benefits.

11.11 33.381
11.12

V § 962(7): Although the agreement that created the inter-municipal agency that operates the communications center vested that body with full authority to hire and control the employees, the fact that each participating city hired, paid, and controlled the employees it supplied to the agency militated against finding that the agency was the public employer. In determining the identity of the public employer, the hearing examiner must look at the actual circumstances, and not at future intentions or theoretical capabilities. Future intentions and theoretical capabilities are too speculative in nature to be the basis for unit decisions.

11.11 32.57 33.38
11.12 33.337 33.381

VI § 966(1): The hearing examiner's responsibility under the Act is to determine whether the proposed unit is an appropriate unit, not whether it is the most appropriate one. In this determination, the hearing examiner has broad discretion, particularly in deciding community of interest questions.

01.21 32.5 33.21
01.24 33.2 33.22

City of Saco and Teamsters Local Union No. 48, MLRB No. 83-A-08, 6 NPER 20-14031 (July 18, 1983)

Appealed from MLRB No. 83-UC-12 (May 24, 1983)

FACTS: The bargaining agent filed a petition for unit clarification, seeking unit inclusion for two clerical employees which the employer had treated as temporary employees. The employees at issue were held to be public employees and were placed in the bargaining unit.

I § 962(6)(G): The purpose of the "temporary, seasonal or on-call" exclusion is to exempt employees with sporadic or irregular employment from bargaining units because they do not share a community of interest with the other employees. The usual community of interest test is used to determine whether employees are temporary, seasonal or on-call so as to be excluded from the coverage of the Act.

15.01 16.48 33.4 34.391
16.46 33.2 33.45
16.47 33.34 34.39

II § 962(6)(G): Individuals who are otherwise eligible public employees will not be deemed "temporary" merely because their salaries are paid from grant monies that may not be renewed in the future. The fact that the employer considers certain employees to be temporary, seasonal or on-call is not dispositive in proceedings before the hearing examiner.

15.01 15.35 15.55 15.85 33.4 34.35
15.1212 15.45 15.64 16.47 33.45 34.39

III § 962(6)(G): The parties stipulated that, but for their alleged temporary status, two positions shared a clear and identifiable community of interest with the other positions in the unit at issue. A position that had existed for two years and would continue to exist for at least one additional year was not irregular or sporadic, within the scope of the temporary exclusion in the Act. Second, a position supervised by an independent contractor but employed by the public employer and which will be in existence for at least one year is, likewise, not temporary, within the meaning of the Act.

16.47 33.4 34.39
33.34 33.45

IV § 968(4): Evidence and argument not presented to the hearing examiner is inadmissible and improper on appeal before the Board.

09.39 32.712 71.7 71.715
32.7 32.713 71.712

M.S.A.D. No. 14 and East Grand Teachers Association, MLRB No. 83-A-09, 6 NPER 20-14036 (Aug. 24, 1983)

Appealed from MLRB No. 83-UC-13 (June 1, 1983)

FACTS: The employer filed a petition for unit clarification, seeking to exclude a high school principal from an established professional employees bargaining unit.

I § 968(4): In unit appeals, the Act specifies that the Board shall either affirm or modify the hearing examiner's rulings and determinations. Since appeals are not de novo hearings, no new evidence will be admitted. The purpose of appeals is to review the hearing examiner's decision in light of the evidence on which it was based. Otherwise, the parties would use initial unit proceedings only for discovery and the primary responsibility for resolving unit questions would unlawfully shift from the executive director to the Board. The record on appeal consists of the record before the hearing examiner, documents offered to the hearing examiner, admissible evidence at the appellate hearing, and the parties' briefs. A party's choice to proceed pro se at the unit hearing does not justify allowing the introduction of new evidence at the appeal.

01.21 09.39 32.8 36.214
01.22 32.7 36.114 71.7
01.24 32.713 36.118 71.715

II § 968(4): The standard of review applied in representation appeals is that the hearing examiner's rulings and determinations will be reversed if they are unlawful, unreasonable, or are lacking in any rational factual basis.

32.7 32.73 36.114 71.7 71.73
32.72 32.74 36.214 71.72 71.74

III § 966(3): Unit proceedings are investigatory and non-adversarial in nature and there are no burdens of proof; however, in unit clarification matters, the petitioner must allege and establish, as a threshold question, that the circumstances surrounding formation of the unit at issue have changed sufficiently to warrant a change in the unit's composition.

09.32 36.112 36.21
32.5 36.12 36.212
32.57 36.124 71.512

IV § 966(3): The hearing examiner concluded that the petitioner had failed to establish the requisite "substantial change" and dismissed the petition for unit clarification. The Board held that this conclusion was clearly contrary to the evidence based on the following: at the time of formation of the unit, the principal: was primarily a teacher, did not evaluate the teachers, was not involved in the hiring process, and had no role in determining curriculum. At the time the petition was filed, the principal: was primarily an administrator, regularly evaluated the teachers, made hiring recommendations, was the first step in the teachers' grievance procedure, and had a significant role in determining the high school curriculum. Once the substantial change requirement was established, the Board went on to consider the merits of the petition.

15.113 36.1 36.114 36.121
33.333 36.11 36.12 36.124

V §§ 962(6)(C) & 966(3): To be confidential within the meaning of the Act, an employee must be permanently assigned to collective bargaining or render advice on a regular basis to management personnel on labor relations matters, other than contract administration duties. In addition to being a necessary component of an employee's duties, the involvement with confidential matters must be significant. This latter requirement does not set forth a strict empirical formula mandating inclusion or exclusion of particular employees from the coverage of the Act. That determination must be made on an ad hoc basis. The requirement of significant employee participation is satisfied when the individual's involvement is substantial,

although it is performed rarely, or when the activity is relatively minor, but it is undertaken on a regular basis. The intention to use an employee in a confidential capacity at some future time will not justify an exclusion in the unit clarification context. The exclusion must be based on duties actually performed by the employee at issue. If an employee's duties are actually changed and involve confidential matters, the unit clarification process can be used to exclude the employee from the coverage of the Act.

16.2 33.337 36.12 36.22
16.21 33.4 36.121 36.224
16.22 33.43 36.125

VI § 962(6)(C): An employee must be actually performing confidential duties to be excluded from the coverage of the Act. This requirement is reasonable because the employer may assign such duties as are necessary to unit employees and require, as a condition of employment, that the employees not reveal confidential information to the bargaining agent. So long as such assignments are inherently related to the employees' work duties and the decision to involve them in confidential matters is not made with the subjective intent to, thereby, deprive employees of their statutory rights, such assignments are permitted by the Act.

16.2 33.337 33.4 36.121
16.21 33.38 33.43 36.125
16.22 33.39 36.12 36.224

VII § 966: The hearing examiner's duty in representation matters is to determine whether the unit proposed by the petitioner is an appropriate one, not whether the proposed unit is the most appropriate one. In this determination, the hearing examiner has broad discretion, particularly in deciding community of interest questions.

01.21 33.2 33.22
01.24 33.21

VIII § 966(1): The unit configuration section of the Act permits, but does not require, the assignment of supervisory employees to units separate from those containing their subordinate employees. The last sentence of § 966(1) states: "Nothing in this chapter is intended to require the exclusion of principals, assistant principals, other supervisory employees from school system bargaining units which include teachers and nurses in supervisory positions." This sentence means that, if the hearing examiner determines that a separate supervisory school department unit is appropriate, then principals and assistant principals as well as other supervisory employees may be included therein. Otherwise, the rationale that justifies the creation of the separate supervisory unit would also require creation of separate assistant principal and principals units: the assistant principals supervise teachers and nurses in supervisory positions and the assistant principals are, in turn, supervised by the principals. The last sentence of 966(1) is an expression of legislative intent to discourage the proliferation of small supervisory units within the same department.

15.11 15.113 33.323 33.42
15.111 16.3 33.325 34.19
15.112 33.32 33.4 36.221

IX § 966: The Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units within a single department is encompassed within the "other relevant criteria" mentioned in § 966(1) as relevant in creating appropriate bargaining units. The rationale behind the Board's policy is that small units cost as much money, time, effort, and resources for the employer, the bargaining agent, and the State as do larger units. Further, single-member units may well impede the member employee from securing the free exercise of the rights guaranteed by the Act. Although clearly a supervisory employee, the high school principal was the only supervisory employee eligible to exercise collective bargaining rights; therefore, it was proper for the hearing examiner to order that the principal remain in the bargaining unit with the employer's other professional employees.

16.3 33.323 33.4 36.221
33.32 33.325 33.42

Council 74, AFSCME, AFL-CIO and Maine State Employees Association, Teamsters Local Union No. 48 and State of Maine, MLRB No. 84-A-01, 6 NPER 20-14037, Interlocutory Decision and Order (Aug. 24, 1983); appeal docketed but voluntarily dismissed by appellant, Council 74, AFSCME, AFL-CIO v. M.S.E.A.,

Teamsters Local Union No. 48 and State of Maine, No. CV-83-415 (Me. Super. Ct., Ken. Cty., Sept. 14, 1983)

I FACTS: An employee organization filed a petition for election, seeking to decertify and replace the bargaining agent for a state employee bargaining unit. Another employee organization filed petitions to intervene in the election and to sever a group of positions from the unit. The latter organization submitted a showing of interest in excess of 10% of the employees in the overall unit and a separate showing in excess of 30% of the employees in the unit proposed to be severed. Over 100 employees signed cards on behalf of both of the insurgent organizations. The executive director determined that the showings of interest were adequate, after deducting a number of showing of interest documents that were void on their face.

32.23 32.232
32.231

II § 968(4): By stipulation of the parties, the record in this proceeding included the record developed in a related prohibited practice complaint case and contained in the Board's file in that matter. The Board also took administrative notice of the record evidence in an unrelated unit appeal involving the same employer.

09.35 09.380 32.571
09.373 32.57

III § 967(1): The NLRB has developed a "dual card" rule that applies in instances where competing unions are attempting to use membership cards as proof of majority support so that the employer is obligated to negotiate with one of them. Under this rule, the first card, signed by employees who signed cards for both unions, is invalid. The rationale for this rule is that an employer should not recognize and bargain with a union, unless the card majority presented to the employer represents the clear and unambiguous selection of a particular collective bargaining representative.

31.24 32.221
32.22

IV § 967(2): For showings of interest in support of petitions for unit determination and/or bargaining agent election, an employee can sign authorization cards for more than one union and, if they are validly executed, all such cards will be counted. A statement on an authorization card, that the signer is revoking all prior authorizations, is not given effect by the Board. The cards' purpose is merely to establish that employee interest is sufficient to justify the expenditure of agency resources. Employees seeking decertification and replacement of the incumbent union may sign cards for several unions, use the pre-election campaign to get information on which to base agent selection, and express their decision at the secret ballot election.

31.45 32.221 37.15
32.2 32.23

V § 967(2): The bargaining agent alleged that supervisory employees solicited showing of interest documents from their subordinate employees on behalf of the supervisory employees' union's effort to become the bargaining agent for the subordinate employees unit and that such solicitation tainted that union's showing of interest. The Board rejected the bargaining agent's contention because the record did not establish that supervisors collected, or deliberately allowed others to collect, a substantial number of cards on behalf of the supervisors' union. Second, supervisors are eligible for collective bargaining coverage under Maine law. Among the supervisors' protected rights is the right to distribute and solicit authorization cards during non-working times. Cards solicited by supervisors are, therefore, valid. This is especially true since many supervisory employees under the Act would be "leadmen" or "working foremen" under the NLRA and would be eligible to participate in organizational activities in the private sector.

16.3 21.2 32.2 37.15
21.12 21.3 32.227

VI § 967(2): If a supervisory employee pressured or coerced subordinate employees into signing union authorization cards, such cards would be invalid. No evidence of supervisory coercion was produced in the record.

32.2 37.15
32.227

VII § 967(2): Authorization card signatures secured under false pretenses may be invalid. The test for determining the validity of the cards is, considering what the employees were told, whether there is evidence to negate the overt action of the employees in signing the cards designating the union as their bargaining agent. The record established that one employee was asked to sign a union "survey card" when the employee was actually presented an authorization card. In the circumstances, the card was invalidated.

32.2 37.15
32.227

VIII § 967(2): The same showing of interest can be used in support of unit determination, intervention, and election petitions filed by a single employee organization in any one representation proceeding.

32.2 37.15
32.225

IX § 967(2): Rule 2.03 provides that the showing of interest filed in support of a decertification election must indicate that the employees no longer wish to be represented by the incumbent bargaining agent in their employment relations. The Board held that cards signed on behalf of an insurgent union, in the decertification/bargaining agent context, stating that the employee wishes to be represented by the insurgent union in their employment relations, satisfies the requirement of the rule.

32.2 37.15
32.22

X § 968(4): After reviewing the executive director's determination that the insurgent unions' showings of interest were adequate, the Board remanded the matter to the executive director to rule on one union's petition for unit determination, seeking to sever a group of classifications from an established unit. That determination would have to be made prior to conducting a decertification/bargaining agent election.

32.8
32.89

Teamsters Local Union No. 48 and State of Maine (Institutional Services Unit) and Council 74, AFSCME, AFL-CIO and Maine State Employees Association, MLRB No. 84-A-02, 6 NPER 20-15010 (Apr. 2, 1984)

Appealed from MLRB No. 83-UD-25 (Jan. 10, 1984)

FACTS: An insurgent employee organization filed a petition for unit determination, seeking severance of a group of State employee classifications from an established bargaining unit. The executive director determined that the positions sought to be severed continued to share a clear and identifiable community of interest with the other classifications in the established unit and denied the petition.

I § 979-G(2): The parties agreed that there were no errors of fact in the hearing examiner's report; therefore, they presented their arguments concerning the alleged errors of law through memoranda of law. The Board adopted the hearing examiner's findings of fact by reference.

32.75
71.75

II § 979-G(2): In an appellate review of a unit report, the Board's function is limited to review of the hearing examiner's decision and does not include conducting a hearing de novo.

01.2 32.7 71.7
01.22 32.713 71.715

III § 979-G(2): Since the relevant portions of the Municipal Employees and the State Employees Acts are essentially identical, the Board adopted the same standard of review for unit appeals arising under the latter statute as it applies to those arising under the former; i.e., the hearing examiner's rulings and determinations will be set aside if they are unlawful, unreasonable, or are lacking in any rational factual basis.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

IV § 979-E: A unit determination petition, accompanied by a claim for recognition or by an adequate showing of interest, is the proper mechanism for attempting to sever a group of classifications from an existing unit. The severance proceeding is a unit determination and the controlling criteria are: (1) the presence or absence of a clear and identifiable community of interest and (2) the Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units.

33.323 33.34
33.325 36.221

V § 979-E(2): The Board adopted by reference and affirmed the use of the eleven-point test outlined in Council 74, AFSCME, AFL-CIO and City of Brewer, MLRB No. 79-A-01, 1 NPER 20-10031 (Oct. 12, 1979), to evaluate whether the requisite community of interest level is present. The Board noted that the hearing examiner had considered all of the relevant evidence and weighed all of the community of interest factors in concluding that the positions sought to be severed continued to share a clear and identifiable community of interest with the other positions in the current unit; therefore, the conclusion was lawful, reasonable, and supported by the evidence. The conclusion was affirmed.

33.3 36.221
33.325

VI § 979-E(2): This section prohibits undue fragmentation of State employee units. No two of the State employee units, as originally constituted, included the same job classification. The severance sought would have resulted in five classifications being included in two units, thereby undermining the rationale for the separation of the State employee units. The inclusion of the same classification in more than one unit could have had significant impact on unit parameters in the future. Severance here would have resulted in excessive fragmentation among the State employee bargaining units.

33.323 33.331
33.33

VII § 979-E(1): Despite the anti-fragmentation provision of the State Employees Act, with the passage of time, the various community of interest factors for the State employee units will change and, at some point, the relationship or affinity among employee classifications that justified their original unit placement may change sufficiently to require changes in the composition of the various units.

33.323
33.34

Teamsters Local Union No. 48 and Town of Wells, MLRB No. 84-A-03, 6 NPER 20-15012 (2-1, Employer Representative Turner, Dissenting) (Apr. 11, 1984), aff'd sub nom. Inhabitants of the Town of Wells v. Teamsters Local Union No. 48, No. CV-84-235 (Me. Super. Ct., York Cty., Feb. 28, 1985)

Appealed from MLRB No. 84-UC-04 (Jan. 26, 1984)

FACTS: The bargaining agent filed a petition for unit clarification, seeking to include the municipal code enforcement officer ("c.e.o.") into the existing police department bargaining unit. The executive director held: that the petitioner failed to establish sufficiently changed circumstances to warrant modification of the existing unit, that the c.e.o. did not share a clear and identifiable community of interest with the police officers and could not be properly included in their unit, and that the c.e.o. was a department head, within the meaning of § 962(6)(D). The bargaining agent appealed the third conclusion.

I BOARD:
§ 968(4): The issue presented on appeal is whether the hearing examiner was correct in concluding that the c.e.o. is a department head, within the meaning of the Act. The standard of review applied in representation appeals is that the hearing examiner's rulings and determinations will be overturned if they are unlawful, unreasonable, or are lacking in any rational factual basis.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

II § 962(6)(D): An individual is a department or division head, within the meaning of the Act, if the employee: (1) is the administrator of the department or division and (2) is appointed to office pursuant to statute, ordinance or resolution for an unspecified term by the executive head or body of the public employer. To be a department or division head, the employee's primary responsibility must be that of managing or directing the affairs of the department, as opposed either to acting as a supervisor or to performing the day-to-day work of the department. One administers a department if their principal duties are those of formulating and administering the department's policies and practices.

16.05 33.4
16.41 33.45

III §§ 968(4) & 962(6)(D): The hearing examiner erred, in determining that the c.e.o. was a department head, because he overlooked the primary nature of the employee's duties. The record established that the c.e.o.'s main duties are enforcing zoning, sub-division, and building construction ordinances and issuing building, plumbing, and health permits. Although the c.e.o. does perform some administrative duties, focusing thereon to the exclusion of the individual's primary duties is unreasonable; therefore, the conclusion concerning the c.e.o.'s department head status is set aside. To exclude individuals who perform some administrative duties, when their primary duties are the performance of the rank-and-file work of the department, would exclude large numbers of employees from the coverage of the Act, contrary to the plain legislative intent embodied therein. The c.e.o.'s administrative duties (preparing an annual budget and writing the c.e.o. portion of the town's annual report) do not require a major expenditure of time and effort and are secondary to the performance of inspection and permit issuing duties; therefore, the latter are the employee's primary responsibilities.

16.05 32.74
16.41 71.74

IV §§ 968(4) & 966(1): Although the c.e.o. is a public employee, within the meaning of the Act, and is eligible to be included in a bargaining unit, he does not share the requisite community of interest level with the police department bargaining unit employees to be properly included in that unit. C.E.O.s are generally included in either a general town employee or a supervisory employee bargaining unit. No such unit exists in the Town of Wells. Although the Board usually avoids creation of single-member units whenever possible, this policy cannot override the employee's statutory right to engage in collective bargaining. The Board ordered that the c.e.o. be included in his own single-member unit; however, if either a general town employee or supervisory employee unit is ever created in the Town of Wells, the Board expects that the c.e.o. would be included therein. Meanwhile, the Board ordered the executive director to conduct a secret ballot election to determine whether the c.e.o. wishes to be represented by an agent for purposes of collective bargaining.

21.4 33.2 33.323 33.4
32.87 33.32 33.34 33.45

V DISSENTING OPINION:
§ 962(6)(D): In view of the realities of municipal administration in small towns, the hearing examiner correctly concluded that the c.e.o. was a department head on the basis of the administrative duties performed by that employee.

16.05 33.4
16.41 33.45

VI SUPERIOR COURT:
§ 968(4): The standard of review that the Board should apply in representation appeals is that the hearing examiner's rulings and determinations will be overturned if they are

unlawful, unreasonable, or are lacking in any rational factual basis. The Board found that the c.e.o.'s primary duties were operational and that his administrative responsibilities were so limited that it was unreasonable to classify him as a department head. The Board applied the correct standard of review in this case.

32.7	32.73	71.7	71.73	81.12
32.72	32.74	71.72	71.74	

VII §§ 968(4) & 962(6)(D): Whether a particular employee is a "department head" requires statutory construction and is, therefore, a question of law. The reviewing Court may overturn the Board on such questions if the Board's interpretation is erroneous. The Board made no error of law in this case. Employees of municipalities and other small governmental units frequently have hybrid responsibilities, including both managerial and operational duties. If any degree of administrative responsibility was sufficient to disqualify an employee from collective bargaining, many otherwise eligible employees would be beyond the scope of the Act. The Board's "primary responsibility" test strikes the proper balance in resolving employee status questions involving those with mixed responsibilities. The Board correctly relied on the facts in applying this test; therefore, its conclusion that the c.e.o. is not a department head is affirmed.

16.05	33.45	81.50	81.505	81.521
16.41	81.33	81.503	81.5090	
33.4	81.333	81.504	81.5091	

Council 74, AFSCME, AFL-CIO and Teamsters Local Union No. 48 and Cumberland County, MLRB No. 84-A-04, 6 NPER 20-15013 (Apr. 25, 1984)

Appealed from MLRB No. 84-UD-11 (March 16, 1984)

FACTS: An insurgent employee organization filed a petition for unit determination, seeking to sever the law enforcement officers from an existing wall-to-wall county sheriff's department bargaining unit. Since the law enforcement officers were found not to share a clear and identifiable community of interest with the other classifications in the comprehensive unit, the petition was granted and, together, the law enforcement officers were determined to constitute a separate appropriate bargaining unit.

I § 968(4): A finding of fact that accurately reflects the relevant state of affairs did not constitute an error of fact and was affirmed.

32.7	32.73	71.72
32.72	71.7	71.73

II § 968(4): The standard of review applied in representation appeals is that the hearing examiner's rulings and determinations will be overturned if they are unlawful, unreasonable, or are lacking in any rational factual basis. The Board's role is not to substitute its judgment for the hearing examiner's, but instead to review the facts to determine whether the hearing examiner's decisions are rationally supported.

01.22	32.72	32.74	71.72	71.74
32.7	32.73	71.7	71.73	

III § 966(2): The community of interest test is the correct standard to be applied in severance cases. The relevant community of interest factors are: (1) similarity in the kind of work performed; (2) common supervision and determination of labor-relations policy; (3) similarity in the scale and manner of determining earnings; (4) similarity in employment benefits, hours of work and other terms and conditions of employment; (5) similarities in the qualifications, skills and training of employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desires of the affected employees; (10) extent of union organization; and (11) the public employer's organizational structure. The following criteria led the hearing examiner to conclude that the law enforcement officers did not share a clear and identifiable community of interest with the balance of the unit employees: the patrol officers and detectives are the only employees whose primary job is enforcement of criminal and motor vehicle laws; these employees are under the common supervision of the Chief Deputy Sheriff; they are the only employees paid an 11% differential for working a non-standard work week; they are issued firearms, batons and

other unique equipment; they are the only employees required to attend the Basic Training Course at the Maine Criminal Justice Academy; they have infrequent professional contact with the other unit employees; and they are the only employees, with the exception of the court officers, whose primary work location is outside the Sheriff's Department office. In addition, the hearing examiner noted that historically law enforcement positions have been placed in separate bargaining units in order to avoid conflicting loyalties during periods of labor unrest. Since the hearing examiner's findings were free from factual error and his analysis was rationally based on the facts, it was affirmed.

15.4	22.4	33.311	33.333	33.342	36.221
15.41	22.41	33.32	33.335	33.343	36.3
15.413	33.3	33.325	33.34	33.382	36.31
15.42	33.31	33.33	33.341	33.4	

IV § 968(4): The Board affirmed the order to sever the law enforcement officers from the existing bargaining unit, dismissed the bargaining agent's appeal, and ordered the executive director to conduct a representation election for the newly created unit that resulted from the severance.

32.8
32.87

V §§ 966 & 967(2): In a severance case, the incumbent bargaining agent continues as the representative for the newly created unit. In the event that the severance was effected by petition of an insurgent employee organization and that organization has petitioned for an election to decertify and replace the incumbent bargaining agent, the choices on the ballot for such election would include: the incumbent bargaining agent, the insurgent employee organization, and "no representative."

32.87	35.32	37.5
32.95	35.34	

M.S.A.D. No. 43 Board of Directors and S.A.D. No. 43 Teachers Association, MLRB No. 84-A-05, 7 NPER 20-15915 (May 30, 1984)

Appealed from MLRB No. 84-UC-05 (Apr. 23, 1984)

FACTS: The public employer filed a petition for unit clarification, seeking to exclude the athletic director from a unit that consisted of full-time certified teachers. The executive director denied the petition and ruled that the athletic director: was not a confidential employee; continued to share a clear and identifiable community of interest with the other positions in the established unit; and, although a supervisory employee, the athletic director would remain in the rank-and-file unit because no supervisory employee unit existed in M.S.A.D. No. 43. The employer appealed the last holding.

I § 968(4): None of the hearing examiner's findings of fact was challenged; therefore, the Board adopted said findings by reference. The standard of review applied in representation appeals is that the hearing examiner's rulings and determinations will be overturned if they are unlawful, unreasonable, or are lacking in any rational factual basis. It is not proper for the Board to substitute its judgment for the hearing examiner's; its role is to review the facts to determine whether the hearing examiner's decisions are rationally supported by the evidence.

01.22	32.72	71.7	71.73
32.7	32.73	71.72	71.74

II § 968(4): The position of athletic director had been included in the unit for over ten years and the stipend and release time for that position had been negotiated during that time. In the spring of 1983, the position became vacant. The vacancy was posted throughout the summer and no unit employee applied therefor. In the fall of 1983, an assistant principal was appointed as acting athletic director for a one-year term. Shortly thereafter, the requirement that the athletic director hold administrative certification was added, the position was given additional supervisory responsibilities, and its title was changed to assistant principal/athletic director. The haering examiner clearly understood all of the above and included the same in his findings of fact. The hearing examiner focused on the athletic

director because that was the position that the employer sought to have removed from the bargaining unit. The hearing examiner's ruling did not, therefore, lack factual basis.

15.114 33.31 71.73
32.73 33.311

III § 966(3): The 1975 unit determination report, excluding assistant principals from the unit at issue, was not controlling because this proceeding concerned a different position--one that had been included in the unit for over ten years--and the position at issue continues to share a clear and identifiable community of interest with the others in the unit. Furthermore, the Board's policy concerning the assignment of supervisory employees to rank-and-file units changed substantially since 1975.

33.31 33.34
33.311 33.42

IV § 966(1): For a number of years, the Board's policy has been to include supervisory positions in rank-and-file units, rather than establish small supervisory units, when there are only one or two supervisory positions. The rationale for this policy of discouraging the proliferation of small bargaining units within the same department is that small units require the same sort of expenditure of time, money and energy by the employer, the bargaining agent and the State as do larger units. Since the athletic director continued to share the requisite community of interest level to be included in the rank-and-file unit and since there was no supervisory employee unit at M.S.A.D No. 43, it was proper that the athletic director remain in the rank-and-file unit. The hearing examiner's ruling was consistent with established Board policy and, therefore, was not erroneous as a matter of law.

15.114 16.32 33.32 33.34 34.19
16.3 32.74 33.323 33.42 71.74

V § 966(1): An employee holding two positions with the same employer may be included in a bargaining unit for purposes of one of the positions, even though the other position is excluded from the unit.

33.46

Penobscot Valley Hospital and Maine Federation of Nurses and Health Care Professionals, AFT, AFL-CIO, MLRB No. 85-A-01, 8 NPER ME-16011 (Feb. 6, 1985)

Appealed from MLRB No. 85-UD-08, et al. (Dec. 7, 1984)

FACTS: An employee organization filed a petition for unit determination, seeking creation of bargaining units of hospital employees. Two units were created--a professional and technical unit, composed of professional and non-professional employees, and a support and clerical unit.

I § 968(4): The standard of review applied in representation appeals is that the hearing examiner's findings of fact and conclusions of law will be sustained unless they are unlawful, unreasonable, or are lacking in any rational factual basis. Reviewing the errors of fact alleged, the Board concluded that, considered separately or together, the hearing examiner did not labor under a basic misunderstanding of the material facts and, even if all the alleged errors of fact were clearly established, they would not constitute reversible error.

32.7 32.73 71.7 71.73
32.72 32.74 71.72 71.74

II § 966: In interpreting relevant provisions of the Act in the unit determination context, reference should be made to the parallel sections of the National Labor Relations Act and decisions thereunder. Since the relevant sections of federal law dealing with health care bargaining units are not analogous to the section of the Act pertinent herein, private sector hospital unit determinations are not persuasive herein.

03.2 11.67 15.2
03.22 15.126 33.2

III § 966(2): While it is appropriate to consider federal precedent in resolving questions of first impression, the controlling standard herein is the community of interest test that has often been addressed by the Board. The Act provides that there must be a clear and identifiable community of interest among the employees concerned for a given bargaining unit to be appropriate. The Board has consistently applied the City of Brewer 11-point test to evaluate whether the requisite community of interest level is present.

03.2 33.2 33.3 33.34
03.22 33.21 33.311

IV §§ 966(2) & 968(4): The hearing examiner focused on three community-of-interest factors in the unit determination analysis: (1) similarity in the kind of work performed, (2) similarity in qualification, skills and training, and (3) similarity in wage scales. Hearing examiners have broad discretion in deciding community-of-interest questions and emphasizing these three factors was not unreasonable in the context of this case. The hearing examiner outlined the facts supporting the community-of-interest analysis and applied the proper legal standard; therefore, the community-of-interest determination was affirmed.

01.21 33.2 33.33 33.334 33.34
01.24 33.3 33.333 33.335 33.343

V § 966(2): Although they share a clear and identifiable community of interest, professional and non-professional employees may not be included in the same bargaining unit, unless a majority of the professional employees vote in favor of such inclusion. In an earlier case, the hearing examiner held that the professional employee vote requirement was satisfied when a vote was held by the employee organization, a majority of the professional employees opted for unit inclusion with non-professional employees and signed a petition as evidence of their vote outcome. Here, the employee organization approached the professional employees individually and asked whether they favored unit inclusion with non-professional employees. Those who favored such unit inclusion signed a petition expressing their desire. Since no vote was actually held, the Board concluded that the petition procedure did not satisfy the professional employee vote requirement. To rectify the lack of a vote, the Board ordered that such a vote be held simultaneously with the bargaining agent election. A majority of all of the professional employees, not just a majority of those present and voting, would have to vote in favor of unit inclusion with non-professional employees for such inclusion to occur. Those eligible to vote in the unit inclusion vote were those who, based on the nature of their work and their educational background, were professional employees, within the meaning of § 962(5).

32.87 33.395 33.45 34.4 34.42 34.44
33.336 33.4 34.16 34.41 34.43

VI § 966(1): The Act does not require that supervisory employees be excluded from bargaining units that contain the employees they supervise but relegates the supervisory employees' unit status to the sound discretion of the hearing examiner. Except in instances where the resulting one- or two-member supervisory unit would contravene the Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units, the Board has approved creation of separate supervisory units. The purpose of creating separate supervisory units is to minimize potential conflicts of interest within units and to lessen conflicts of loyalty for supervisors between duty to their employer and allegiance to fellow unit employees. There were at least eight supervisory employees; therefore, the hearing examiner did not abuse his discretion in failing to include three supervisors in either of the units created.

16.3 33.323 33.42 34.19
33.32 33.35 34.17

VII § 962(6)(C): To be confidential within the meaning of the Act, an employee must have a significant involvement in collective bargaining or labor relations matters, other than contract administration duties, on behalf of the employer. Confidential employees need access to at least one confidential clerical employee in order to carry out their confidential duties. A secretary who, as part of her normal duties, had access to information which, if revealed to the bargaining agent outside of the normal course of negotiations, could give the union unfair advantage and jeopardize the employer's positions, is a confidential employee, within the meaning of the Act.

16.2 16.22 33.43
16.21 33.4

Augusta Uniformed Firefighters Association, Local 1650, IAFF, AFL-CIO and City of Augusta, MLRB No. 85-A-02, 8 NPER ME-16012 (Feb. 21, 1985), appeal docketed but dismissed by stipulation of parties, Augusta Uniformed Firefighters Association, Local 1650, IAFF, AFL-CIO v. City of Augusta, No. CV-85-150 (Me. Super. Ct., Ken Cty., July 19, 1985)

Appealed from MLRB No. 85-UC-02 (Dec. 12, 1984)

FACTS: The bargaining agent filed a petition for unit clarification, seeking inclusion of the platoon chiefs (watch commanders) in the bargaining unit with the regular firefighters.

I § 966(3): Board Rule 1.13(c) provides that petitions for unit clarification may be denied if they attempt to modify the composition of bargaining units as negotiated by the parties and the alleged changes, that would warrant such modification, occurred prior to the negotiations on the collective bargaining agreement in force at the time of the filing of the petition.

36.11 36.115 36.21 36.215 36.35
36.111 36.2 36.211 36.217 36.351

II § 966(3): A new position was created prior to the negotiations that resulted in the collective bargaining agreement in effect. Although aware of said position, the bargaining agent never sought to have it included in the unit during the negotiations. The recognition clause of the parties' collective bargaining agreement was amended during the most recent negotiations to reflect the merger of the former police and fire departments into a new department of public safety. In the circumstances, the provisions of Rule 1.13(c) preclude the unit clarification sought and the hearing examiner's decision, granting said petition, was overturned.

32.81 36.115 36.21 36.217 36.351
36.11 36.2 36.215 36.35

Council 74, AFSCME, AFL-CIO and Maine State Employees Association and City of Lewiston and Lewiston School Committee, MLRB No. 85-A-03, 8 NPER ME-16015, Interim Order (June 6, 1985)

Appealed from Interim Report of MLRB No. 85-UD-20 (Apr. 17, 1985)

FACTS: An insurgent employee organization filed a petition for unit determination, seeking to sever the school department employees from an existing unit of employees of the City of Lewiston, including Lewiston school department employees among others. On the grounds that ruling on the petition would require determining the identity of the employer(s) of the employees at issue and that the employer identity issue was then pending in an unrelated matter before the Superior Court, the City of Lewiston moved to stay the proceedings before the Board. The executive director denied the motion for stay.

I §§ 966 & 968(4): The Board has the authority to stay unit determination proceedings in appropriate circumstances. The City was unable to inform the Board of the exact nature of the stipulated issue before the Law Court; therefore, it was uncertain whether the public employer issue would be ultimately decided by the Court.

32.561 32.7 32.88
32.58 32.85 71.7

II § 966: Determination of the identity of the public employer is a matter within the special expertise of the Board and within the scope of its primary jurisdiction. The identity of the public employer is one of several factors relevant in, but is not dispositive in, severance cases.[1]

01.21 11.23 33.325 33.384
11.12 11.5 33.38 36.221

III §§ 966 & 968(4): The sole function of the unit determination petition is to develop a full factual record. Unit determination proceedings are investigatory and non-adversarial in nature. Since separate interests exist between the City and the School Committee, the Board provided that both entities be permitted to appear and fully participate with separate repre-

sentation in the proceedings before the hearing examiner. With this caveat, the order denying the motion for stay was affirmed.

32.5	32.572	32.85	36.117
32.51	32.58	32.88	

1. NOTE: The relationship between municipalities and municipal school committees and resolution of the public employer issue was addressed by the Law Court in City of Lewiston v. Lewiston Educational Directors, 503 A.2d 210 (Me. 1985).

Council 74, AFSCME, AFL-CIO and Maine State Employees Association and City of Lewiston and Lewiston School Committee, MLRB No. 85-A-03, 8 NPER ME-17001 (August 7, 1985)

Appealed from MLRB No. 85-UD-20 (July 12, 1985)

FACTS: An insurgent employee organization filed a petition for unit determination, seeking to sever school department employees from a unit that contains both municipal and school department employees. On the grounds that ruling on the petition would necessarily involve determining the identity of the school department employees and since said issue was then pending before the Superior Court in an unrelated matter, the City moved to stay the Board proceeding pending resolution of the issue by the Court. The insurgent employee organization opposed the motion for stay, the motion was denied, and the denial was affirmed by the Board. Upon the reconvening of the unit determination proceeding, the insurgent employee organization moved for a continuance on the grounds that the case involved a complicated legal issue and the organization's representative felt he needed to retain legal counsel. The complex legal issue had been inherent in the case from its inception over six months earlier and was the basis for the petition. At this point, all of the other parties renewed the motion for stay, pending the expected Law Court decision on the identity of the public employer. The motions for continuance and for stay were denied by the hearing examiner, the insurgent employee organization failed to introduce any evidence in support of its petition, and the petition for unit determination was dismissed.

I § 968(4): None of the hearing examiner's findings of fact was in dispute; therefore, the Board incorporated the same into its order by reference. The standard of review applied in representation appeals is that the hearing examiner's findings of fact and conclusions of law will be sustained unless they are unlawful, unreasonable, or are lacking in any rational factual basis. After review of the entire record and consideration of the parties' arguments on appeal, the Board held that the hearing examiner's denials of the motions and dismissal of the petition were neither unlawful nor unreasonable and affirmed the unit determination report.

32.5	32.7	32.73	32.88	71.715	71.74
32.56	32.713	32.74	33.15	71.72	
32.58	32.72	32.81	71.7	71.73	

Town of Lebanon and Teamsters Local Union No. 48, MLRB No. 86-A-01, 8 NPER ME-17005 (Dec. 5, 1985), aff'd, Inhabitants of the Town of Lebanon v. Maine Labor Relations Board, No. CV-85-656 (Me. Super. Ct., Frk. Cty., Feb. 3, 1987)

Appealed from MLRB No. 86-UD-02 (Oct. 17, 1985)

FACTS: An employee organization filed a petition for unit determination, seeking creation of a unit of full-time patrolmen. The employer sought the inclusion of the part-time reserve officers in the proposed unit. The executive director held that the reserve officers were on-call employees excluded from the coverage of the Act and that the reserve officers and full-time officers did not share the requisite community of interest level to be included in the same unit, in any event.

I BOARD:
§ 968(4): The standard of review applied to representation appeals is that the hearing examiner's findings of fact and conclusions of law will be affirmed unless they are unlawful, unreasonable, or lacking in any rational factual basis. The Board's role is not to substitute its judgment for the hearing examiner's, but rather to review the facts to determine

whether the hearing examiner's decisions are reasonable and are rationally supported by the evidence. After the record on appeal was closed, the employee organization presented oral argument and the employer supplemented its brief to the hearing examiner with an additional memorandum of law.

32.7	32.73	32.75	71.7	71.73	71.75
32.72	32.74	32.76	71.72	71.74	71.76

II § 962(6)(G): The "temporary, seasonal, or on-call" exemption from the coverage of the Act is a codification of case law decided under the National Labor Relations Act. Because of the intermittent, sporadic, or irregular nature of their work schedules, persons in the excluded categories inherently cannot share a sufficient community of interest to be included in a bargaining unit with the full-time employees with whom they work. On the other hand, both the Board and the NLRB have held that regularly-scheduled part-time employees do not work intermittently or sporadically and may, in some circumstances, share the requisite community of interest level to be included in a unit with the full-time employees.

03.2	16.43	16.48	34.34
03.22	16.46	33.4	34.39
04.2	16.47	33.45	34.391

III § 962(6)(G): For several years and until well after the petition for unit determination was filed, the reserve officers did not work on a regularly-scheduled basis and were called in immediately before the shift for which an opening existed. At the time of the evidentiary proceeding before the hearing examiner, the police department was short-handed; therefore, the reserve officers were regularly scheduled for work. However, once the department returned to full strength, the reserves would again only work on an on-call basis or to fill in for ill or vacationing full-time employees. In Town of Berwick, MLRB No. 80-A-05, 2 NPER 20-11035 (July 24, 1980), the part-time employees worked year-round every Friday and Saturday night. The Berwick employees were public employees. It was reasonable to distinguish Town of Berwick on its facts from the case at bar; therefore, the hearing examiner's conclusion was lawful, reasonable, and is supported by the evidence in the record.

16.43	33.4	34.34
16.48	33.45	

IV § 966(2): The unit determination report noted the facts and criteria that militated both in favor of and against the conclusion that the full-time and reserve officers shared a clear and identifiable community of interest. The criteria leading to the conclusion that the two groups do not share the requisite community of interest level were: the full-time officers are paid 30% more than the reserves; full-time employees accumulate vacation leave, part-time employees do not; the part-time employees have no fringe benefits; full-time patrolmen have first choice on their hours of work and work many more hours than do the part-time employees; full-time employees work on a regularly-scheduled basis and part-time employees normally work on a call-in basis; the training requirement for the full-time employees is far more extensive; and there is little professional contact or interchange between the full- and part-time employees. The hearing examiner applied the correct community of interest test, and the criteria relied on in reaching the ultimate community of interest holding were based on the evidence in the record; therefore, the hearing examiner's conclusion was affirmed.

16.43	33.3	33.33	33.34
33.2	33.31	33.335	33.343

V SUPERIOR COURT:
§ 968(4): In a unit determination proceeding, the Board's findings of fact are final in the absence of fraud. Since there was no indication of fraud, the Board's findings were affirmed. The Court held that the Board's conclusion drawn from the relevant facts was not erroneous. The Board correctly distinguished Town of Berwick on its facts and correctly concluded that the reserve officers were on-call employees, within the meaning of the Act. Second, the Court reviewed the facts underlying the Board's community of interest analysis and affirmed the Board's conclusion thereon. The appeal was denied and the Board's decision was affirmed.

16.43	33.45	81.191	81.50	81.508	81.526
16.48	34.34	81.33	81.502	81.5090	
33.4	81.12	81.333	81.503	81.521	

State of Maine and Maine State Employees Association, MLRB No. 86-A-02, Executive Director Action (Sept. 8, 1986)

Appealed from MLRB No. 83-UC-36 (Apr. 11, 1986)

I § 979-G(2): Both parties had appealed portions of a unit clarification report and later decided to withdraw their respective appeals. The executive director granted the joint motion to withdraw the appeal on behalf of the Board.

01.21	32.7	36.214
01.22	36.114	71.7

Council 93, AFSCME, AFL-CIO and M.S.A.D. No. 1, MLRB No. 86-A-03, 9 NPER ME-18014 (Mar. 10, 1987)

Election Appeal

See: MLRB Nos. 86-22 & -25

International Brotherhood of Electrical Workers, AFL-CIO and Fox Islands Electric Cooperative, Inc., MLRB No. 87-A-01, 9 NPER ME-18012 (Feb. 27, 1987)

Appealed from MLRB No. 86-UD-10 (Aug. 15, 1986)

FACTS: An employee organization filed a representation petition with the NLRB. The employer argued before the NLRB and that Board held that the employer was "a subdivision of the State of Maine," within the meaning of the NLRA, and dismissed the petition for lack of jurisdiction. The employee organization then filed a petition for unit determination with the executive director. The petition was dismissed on the grounds that the employer was not a public employer within the meaning of the Act; therefore, the Board had no jurisdiction to entertain the petition.

I §§ 966 & 962(7): A holding by the NLRB that an entity is a subdivision of the State of Maine, within the meaning of the National Labor Relations Act, does not establish that the same entity is a public employer, within the meaning of any of the Maine labor relations acts. The Maine statutes do not provide that the Board's jurisdiction extends to any matter beyond the jurisdiction of the NLRB; therefore, neither res judicata nor collateral estoppel effect should be accorded to the NLRB's decision on jurisdiction.

01.1	01.28	09.41	09.7	11.11
01.13	01.32	09.413	09.71	11.12
01.131	09.4	09.43	09.73	

II §§ 966 & 962(7): An entity is a public employer within the meaning of the Act if it is a person or body acting on behalf of any municipality or town or any subdivision thereof. The critical element for determining whether an organization is acting on behalf of a municipality is whether the former acted as a servant, subject to the municipality's control or right to control. No principal-servant relationship existed here because: the co-op had no contract with any municipality to provide service; the municipalities, whose geographic area coincides with the co-op's service area, did not join the co-op until approximately six months after its creation; the municipalities exercise no greater control over the co-op than any of its other members (each member votes on the same one meter-one vote basis and each municipality had only a few meters); the municipalities can neither appoint nor remove members of the co-op board of trustees; and there was no evidence of significant contributions of land or equipment from the municipalities to the co-op. Since the co-op was neither a municipality nor a body acting on behalf of a public employer, the co-op is not a covered public employer and the Board has no jurisdiction to fashion any unit of its employees.

01.1	09.11	09.113	11.17	32.81
01.28	09.111	11.11	21.12	33.1
09.1	09.112	11.12	32.14	33.38

Phippsburg School Department and AFSCME, Council 93, MLRB No. 87-A-02, 9 NPER ME-18006 (Nov. 25, 1986)

Election Appeal

FACTS: An employee organization filed a petition for bargaining agent election and an election was conducted for a unit of school department bus drivers, cooks, custodians and food service workers.

I § 967(2): The Board requires the highest standards of conduct of both Board agents and participants during an election in order to insure that the employees may exercise a free and untrammeled choice in representation elections. Evidence of violation of the electioneering ban contained in the Board's notice of election and evidence of the coercion of voters through either compromise of the secrecy of balloting or overwhelming physical presence in the polling area is pertinent to the determination of whether the sought-after laboratory conditions for the election were maintained.

35.3	35.329	35.51	35.522	35.5232	73.1
35.32	35.34	35.515	35.523	35.56	73.115
35.326	35.346	35.52	35.5231	35.561	

II §§ 968(4) & 967(2): In the interest of stable labor relations the Board is reluctant to find that conduct has occurred which requires that an election's results be overturned and a certification be revoked where the evidence establishing the existence of the alleged conduct is based solely on uncorroborated hearsay. The complainant produced no witnesses having personal knowledge that any electioneering took place in the polling area during actual voting. Second, upon examination of the union publication that was allegedly "subtly persuasive," the Board found no threat or coercive statement and no mischaracterization of the Board's processes which rise to the level of per se violation of the Act. The complainant's charge was dismissed as unsupported by record evidence.

01.29	09.37	35.49	35.5217	35.55	71.7
09.3	09.376	35.51	35.522	35.552	73.117
09.33	32.57	35.521	35.523	35.8	74.38
09.34	35.47	35.5214	35.528	35.81	

Portland Superintending School Committee and Portland Administrative Employee Association, MLRB No. 87-A-03 (May 29, 1987)

Appealed from MLRB No. 86-UD-14 (Oct. 27, 1986)

FACTS: An employee organization filed a petition for unit determination, seeking creation of a residual employees unit in the Portland School Department. The executive director held that two of the positions at issue were not public employees and could not be included in any unit, and several of the classifications shared the requisite community of interest level with those in existing bargaining units and were assigned thereto. The balance of the classifications did not share the requisite community of interest level to be included in any existing unit; however, since they all shared a clear and identifiable community of interest, together they constituted a separate appropriate unit. The employer appealed, contending that all of the positions at issue should have been assigned to the various existing units.

I § 968(4): Since there was a full transcript of the evidentiary proceeding before the hearing examiner and there was no error of fact alleged, the parties presented their arguments on the appeal through briefs and, upon the request of the employer, the Board heard oral argument. Argument, concerning the assignment of two of the positions at issue in the appeal to existing units, was raised for the first time at the appeal. Since said argument was never presented to the hearing examiner, it was not entertained by the Board.

01.22	32.71	32.713	32.76	71.71	71.75
32.7	32.712	32.75	71.7	71.712	71.76

II § 966: The employer's major contention on appeal was that the statutory rights of the ten employees assigned to the new unit could be secured through their being assigned to the various existing units. The employer already expended significant amounts of time, energy,

and money negotiating and administering collective bargaining agreements for the existing units; therefore, creation of the new unit violated the Board's policy of discouraging the proliferation, through fragmentation, of small bargaining units within the same department. The Board's policy is based in part on the rationale that it preserve employer, bargaining agent, and State resources. While application of the non-proliferation policy would result in the saving of resources, such savings cannot take precedence over the statutory right of employees to be included in a unit with others with whom they share a clear and identifiable community of interest.

21.12 33.32 33.34
21.2 33.323 34.17

III § 966(2): Hearing examiners have broad discretion in deciding community of interest questions. There was no dispute that the positions in the unit found appropriate share a clear and identifiable community of interest. The hearing examiner's duty is to establish an appropriate unit, not the most appropriate unit. The hearing examiner applied the correct legal standard in his community of interest analysis; therefore, it was not erroneous as a matter of law.

01.21 33.2 33.22 71.74
32.74 33.21 33.34

IV § 968(4): The standard of review applied in representation appeals is that the hearing examiner's rulings and determinations will be overturned if they are unlawful, unreasonable, or lacking in any rational factual basis. It is not proper for the Board to substitute its judgment for the hearing examiner's; the Board's role is to review the facts to determine whether the hearing examiner's decisions are logical and are rationally supported by the evidence. Although the Board might not have made the same decision as the hearing examiner, had it made the decision in the first instance, the hearing examiner's report was reasonable and was supported by the evidence; therefore, it was affirmed and the appeal denied.

01.22 32.7 32.73 71.7 71.72 71.74
01.28 32.72 32.74 71.715 71.73

V § 966(2): Ten-person bargaining units are far from small in comparison with other units created under the Municipal Act. There is no "minimium percentage of total employees" rule applicable to unit configurations.

33.32
33.323

Teamsters Local Union No. 48 and AFSCME, Council 93 and Portland Water District, MLRB No. 87-A-04, 9 NPER ME-18009 (Jan. 7, 1987), appeal docketed but dismissed for non-prosecution, Teamsters Local Union No. 48 v. Maine Labor Relations Board, No. CV-87-80 (Me. Super. Ct., Cum. Cty., Aug. 4, 1987)

Election Appeal

FACTS: An insurgent employee organization filed petitions for decertification/certification election, seeking to replace the bargaining agent for two units of Portland Water District employees. The elections for the two units were conducted concurrently. Of the 114 operations and construction employees eligible, 96 voted and the incumbent prevailed by 7 votes. Of the 25 clerical and technical employees eligible, 21 voted and the insurgent organization prevailed by 2 votes. The incumbent organization filed an objection to conduct of election, seeking a new election on the grounds that two clerical and technical unit employees were disenfranchised in reliance on an altered Board election notice. The notice had been altered to indicate that the polls would be open one-half hour longer than was actually the case. The two employees appeared at the polling area ten minutes after the polls were closed but within the polling time noted on the altered notice and claimed they did so in reliance on the altered notice. The insurgent employee organization filed a response, alleging that the two units existed in close proximity of interest and, if the Board held that the laboratory conditions for one election had been tainted, any new Board election should include both units. The employer's response included affidavits from the two clerical and technical unit employees, attesting to the altered notice, and claimed that no other employees raised objection about not being able to vote due to the altered notice.

I §§ 967(2) & 968(4) & (5): The Board's goal in the conduct of representation elections is to assure that employees are afforded the opportunity to exercise a free and untrammeled choice.

If a group of employees, whose number might be outcome-determinative, are disenfranchised by reasonable reliance upon altered notices of Board elections, such circumstances would require that the election be rerun. Such allegations fall within the ambit of the Board's jurisdiction to consider objections to the conduct of an election. The Board's prohibited practices complaint procedure is available to redress any interference with the election process.

35.3 35.325 35.5 35.515 35.529 35.81
35.32 35.4 35.51 35.52 35.8 74.38

II §§ 967(2) & 968(4): The only evidence in the record, that the two employees attempted to vote after the polls closed in reliance on an altered Board notice, was hearsay evidence. Affidavits from the two employees were filed with the employer's response but were never offered into evidence and there was no indication that the direct testimony of the two employees was unavailable. Second, there was confusion among employees of the operations and construction unit as to the polling period and the employer took corrective action to notify the employees in that unit of the correct times. No such action was taken with respect to the clerical and technical unit employees. Third, the Board provided separate notices of election for each unit, only one was altered, and there was no evidence that the altered notice was that for the clerical and technical unit. Fourth, although important to the issue of reasonableness of the reliance thereon, no party attempted to retain, or even inspect, the altered notice. There was no evidence at all that any employee of the operations and construction unit was disenfranchised in reliance on the altered notice. In the circumstances the objections to election were dismissed.

09.36 09.371 09.383 35.3 35.325 35.49 35.8
09.37 09.376 32.57 35.32 35.4 35.529

III § 967(2): The Board noted that, although discovered early on the day of the election, the fact that a notice had been altered was not reported to the Board election agent or to the Board. Notice of the problem would have permitted the Board to take corrective measures to assure, with certainty, that all eligible voters were informed of the correct polling period.

01.21 35.32
35.3 35.529

City of Biddeford and Local 2011-04, Council 93, AFSCME, AFL-CIO and Teamsters Local Union No. 48, MLRB No. 87-A-05, 9 NPER ME-18013 (Feb. 27, 1987)

Appealed from MLRB No. 87-UC-01 (Nov. 14, 1986)

FACTS: The bargaining agent for a municipal clerical/secretarial bargaining unit filed a petition for unit clarification, seeking unit inclusion of a newly-created public works department clerical position. The bargaining agent for the public works department non-supervisory unit opposed the petition on the grounds that the employee should be assigned to the unit that it represents. The employer appealed the unit placement on two grounds: (1) when the incumbent employee accepted the position at issue, she accepted a $2/hour pay cut and assigning the position to the clerical unit would, at most, result in a twenty-eight cents per hour pay cut and (2) the secretary should be assigned to the same unit as the other public works department employees to avoid the "administrative headache" of public works management having to deal with two separate collective bargaining agreements.

I § 968(4): In representation appeals, the appellant has the burden of proving material error in the issues raised. The employer's salary issue would properly be resolved either through the contractual grievance procedure or through collective bargaining. That issue is not properly part of a unit clarification proceeding. Second, the job site, frequency of professional contact or interchange, and the classification's location within the employer's organizational structure--all of which militate toward assigning the position to the public works unit--were all considered in the hearing examiner's community of interest analysis. Those factors were outweighed by the factors that established that the position at issue shared a clear and identifiable community of interest with the employees in the clerical unit. The hearing examiner's findings of fact were accurate and his decision was rationally supported by those facts; therefore, the appeal was denied.

09.32 32.74 33.382 36.3 71.74
32.7 33.342 34.15 71.7
32.72 33.38 36.214 71.72

Quintal v. State of Maine, Department of Transportation, MLRB No. 87-A-06, 9 NPER ME-18011 (Jan. 27, 1987)

This is not an appeal of a representation matter.

See: MLRB No. 87-09

Lee Academy Board of Trustees and Lee Academy Education Association/MTA/NEA, MLRB No. 87-A-07, 10 NPER ME-18016 (2-1, Employee Representative Vafiades dissenting) (Aug. 17, 1987), aff'd sub nom, Lee Academy Education Association/MTA/NEA v. Lee Academy Board of Trustees, No. CV-87-338 (Me. Super. Ct., Ken. Cty., July 19, 1988), aff'd, Lee Academy Education Association v. Lee Academy, 556 A.2d 218 (Me. 1989)

Appealed from MLRB No. 87-UD-05, Jurisdictional Decision (Apr. 14, 1987)

FACTS: An employee organization filed a petition for unit determination, seeking creation of a unit of employees of a private secondary school. The employer opposed the petition on the grounds that it was not a public employer, within the meaning of the Municipal Act. With consent of the parties, the hearing examiner bifurcated the proceeding and ruled first on the jurisdictional issue of employer status.

I BOARD:
§ 968(4): For purposes of appeal, the parties entered into a stipulation of additional relevant facts that were considered by the Board. Exceptions that were not objected to concerning findings of fact were granted and the record was modified accordingly. Other exceptions to findings of fact were resolved by stipulation of the parties and exceptions not supported by the evidence were dismissed. The portions of the hearing examiner's findings of fact not objected to were adopted by the Board.

09.380	32.71	32.713	71.71	71.715
32.7	32.712	71.7	71.712	

II § 962(7): Although performing the educational functions normally performed by a public high school, such function did not, in and of itself, make the employer a public employer within the meaning of the Act. An entity that is not inherently a public employer may be a covered employer, if it is an "officer, board, commission, council, committee or other persons or body acting on behalf of any municipality or town or any subdivision thereof, or of any school, water, sewer or other district, or of the Maine Turnpike Authority, or of any county or of any subdisivions thereof." An entity "acts on behalf of" a public employer, if it is subject to the public employer's control or right to control.

09.1	09.111	09.113	11.12	11.5
09.11	09.112	11.11	11.17	

III § 962(7): The hearing examiner found that Lee Academy acted on behalf of public employers because: (1) two members of the SAD 30 Board of Directors were ex officio voting members of the Academy Board of Trustees and the Chairman of the SAD Board was an ex officio member of the Academy's Board of Directors; (2) under the Academy's bylaws, "sending units" with at least five students at the Academy should each have at least one representative on the Academy's Board of Trustees; and (3) the Academy received the overwhelming majority of its operating revenues from public sources and would be unable to continue operations at current levels without such funds. The Board reversed the hearing examiner's conclusion based on the following: (1) there was no evidence of voting history to establish that the Academy governing boards were subservient to the will of any public employer; and (2) no public official participated in directing the Academy's operation. At most, the record established a potential for control, not actual control or legal right to control, as required by the controlling legal standard; therefore, the employee organization failed to establish that the Academy was a public employer within the meaning of the Act.

09.1	09.111	09.113	11.17	11.8
09.11	09.112	11.12	11.6	

IV § 962(7): The existence of a contract, under which a private entity performs service for a public employer, is not dispositive of the existence of the agent-servant, rather than the

agent-independent contractor, relationship. The agreement itself did not establish the public employer's right to control the private entity's operations.

11.17 11.8
11.6

V DISSENTING OPINION:
§ 962(7): The Academy was the public employer's alter ego based on the following: (1) a private school, receiving public tuition funds, must meet several State requirements; (2) the State permits SADs who do not provide secondary education to contract with a private school to do so and such contract may establish a joint committee; (3) the SAD 30 contract with Lee Academy requires all secondary students from the SAD to attend the Academy; (4) the SAD and Academy boards are required to meet jointly, at least once per year, to review and make changes in the SAD 30 contract with the Academy and, in fact, such joint meetings occur twice per year; (5) other "sending units" with at least 5 students at the Academy are represented on the latter's board of trustees; and (6) 72% of the Academy's operating budget comes from public tuition payments and 85% comes from public funds.

09.1 09.111 11.11 11.17 11.6
09.11 09.113 11.12 11.5 11.8

VI § 962(7): The State Department of Education has pervasive regulations for private schools that receive public tuition funds. Such regulations are based on the high degree of public trust vested in institutions established for educating children. Sound public policy requires that institutions required to meet strict State guidelines for educating students should not evade the jurisdiction of the labor relations Act. The public's interest in stable labor relations in schools is no less a concern, merely because the school is a "private" entity. Teacher strikes threaten the fundamental learning process. Collective bargaining fosters a sound educational environment where the energy of teachers and administrators is rightfully focused on their educational responsibilities.

11.0 11.17
11.12 11.5

VII SUPERIOR COURT:
§ 968(4): The reviewing Court must treat the Board's findings of fact as final in the absence of fraud in representation matters. The appellant employee organization challenged the Board's findings of fact because the Board took additional evidence beyond that presented to the hearing examiner. While providing that representation appeal hearings are not hearings de novo and that the evidence considered by the Board is normally limited to that offered at the original unit proceeding, the Board's rules do not preclude the Board from considering new evidence in its review proceeding.

32.7 71.7 81.3 81.333 81.502
32.713 71.715 81.33 81.50 81.5090

VIII § 968(4): If the Board's decision in a representation matter is based on an erroneous ruling or finding of law, the court can overrule it. Here, the Board applied the correct legal standard, as set forth in Baker Bus Service, Inc. v. Keith, 416 A.2d 727, 730 (Me. 1980), in determining public employer status. The Board based its conclusion, concerning the lack of control or legal right to control, on the lack of evidence of control and on the testimony of the chairman of the Academy's Board of Directors. The Court could not say, as a matter of law, that the Board's conclusion was erroneous; therefore, it was affirmed and the appeal was denied.

11.12 81.3 81.333 81.503 81.521
11.17 81.33 81.50 81.5090

IX LAW COURT:
§ 962(7): An entity is subject to bargaining unit determination under the Municipal Act only if it is a public employer. As relevant in this case, a public employer is "any officer, board, commission, council, committee or other persons or body acting on behalf of any municipality" or school district. An ostensibly private employer is "public" for collective bargaining purposes if it is an agent-servant of a public entity, rather than an agent-independent contractor, and, hence, is subject to the public entity's control or right to control. The Act mandates a high level of judicial deference to the Board's decision whether control or right to control is present.

01.1	09.111	11.17	81.333	81.502	81.508
09.1	11.11	81.3	81.493	81.503	81.5090
09.11	11.12	81.33	81.50	81.504	

X §§ 968(4) & 962(7): The Board's decisions in representation appeals are subject to limited judicial review. In such cases, the Board's findings of fact are final in the absence of fraud. The Board's task was to determine whether MSAD 30, either alone or together with other quasi-municipal entities, has control or the right to control the Academy. Whether concerning the Board's jurisdiction or otherwise, its findings were well within the Board's expertise and its decision was fully reviewable for errors of law. The structure of § 968 strongly indicates the Legislature intended for the Board's findings of fact in unit determination proceedings to be accorded greater finality on review than its findings in prohibited practices cases. This standard of review applies to the Board's final decision and not to the initial decision by the Board hearing examiner.

01.1	09.111	11.17	81.3	81.493	81.503
09.1	11.11	32.72	81.33	81.50	81.508
09.11	11.12	71.72	81.333	81.502	81.5090

XI § 962(7): The appeal was based in part on the policy argument that the benefits of the Municipal Act should be disseminated as widely as possible and the Academy's students should have the same protection against strikes as do students at public high schools. The Legislature is unlikely to have subjected the employee relations of every business that contracts with a school district to regulation under the Municipal Act. The proper test is that outlined in Baker Bus and applied by the Board. It requires that the public employer exercise, or have the legal right to exercise, control over the private contractor and that, in practical reality, the latter's employees are public employees. Only then is there a clear policy reason for legislative action to regulate the labor relations of the employee group.

09.1	09.111	11.12	11.6
09.11	11.11	11.17	11.8

XII § 962(7): There was no error in the Board's application of the Baker Bus test. The facts supporting the Board's conclusion are: (1) more than half of the Academy's students do not come from SAD 30; (2) 20% are boarding students; (3) the Academy owns its own physical plant and has a $1.14 million endowment; (4) 70% of its budget comes from sources other than SAD 30; over 24 of the Academy trustees do not come from SAD 30 and there was no suggestion that they are mere figureheads for the 2 who do; and the Academy retains control over the students it accepts from SAD 30. The Academy retains independent educational judgment and that is what SAD 30 contracted for. Many private contractors rely on government contracts for their economic life; however, such reliance embodies no legal right to control. The "private" entity's investment in and control over the enterprise in Baker Bus was markedly different than that here. On the record, the relationship between Lee Academy and the public school district is a classic instance of an independent contractor doing business with public entities.

09.1	09.111	11.12	11.5	11.8
09.11	11.11	11.17	11.6	

Merrymeeting Employees Ass'n/MTA/NEA and Local 2010, Council 74, AFSCME/AFL-CIO and M.S.A.D. #75, MLRB No. 88-EA-01, 11 NPER ME-20000 (Sept. 19, 1988)

Election Appeal

FACTS: The incumbent bargaining agent had negotiated a series of successor bargaining agreements for the unit in question. The latest agreement was due to expire on June 30, 1988, the union gave a timely 120-day notice and began negotiations for a successor agreement. During the 90-60-day "window period" provided in § 967(2), an insurgent union filed a petition for decertification/bargaining agent election and the election was held prior to expiration of the bargaining agreement.

I § 967(2): The "insulated period," the time between the last day of the "window period" and the expiration of a collective bargaining agreement, is "insulated" only in the sense that it is intended to free the incumbent bargaining agent from the disruption or harassment which

could result if decertification petitions could be filed in the last days or hours of an expiring agreement.

32.13 32.141
32.14 37.13

II § 967(2): The NLRB adopted a "window period"--the interval not greater than 90 nor less than 60 days prior to the expiration of a collective bargaining agreement--to provide a uniform time for the filing of representation petitions. Such definite filing period balances the interests of unit employees to change their bargaining agent if they wish and that of maintaining stability in the bargaining process. Prior to adoption of the window period, insurgent employee organizations or decertification petitioners could file at any time prior to an agreement's automatic renewal date; therefore, there was a good deal of uncertainty in the last days of an agreement and employees could use another union as a threat to coerce their bargaining agent into unreasonable demands. With the window period, all potential petitioners must file at least 61 days prior to the expiration of an agreement or run the risk that a new agreement will be executed in the 60-day insulated period and will prevent any filing for the new agreement's reasonable term.

32.13 32.141 41.36
32.14 37.13

III § 967(2): The NLRB precedent does not preclude conducting a bargaining agent election during the insulated period, if the representation petition was properly filed during the window period. The purpose of the rule is not to insulate the incumbent bargaining agent from an election if a new agreement is reached in the last 60 days of an existing agreement, but is to provide a time certain for filing representation petitions to ensure that an election will be conducted. The NLRB window period precedent is codified in § 967(2).

32.13 32.141 35.327 37.13 41.36
32.14 35.32 35.330 37.5

IV § 967(2): There is no valid reason for not conducting an election during the "insulated period." Uncertainties over representation should be resolved as soon as possible, consistent with the requirement of fair notice to the participants.

35.32 35.330
35.327 37.5

V § 967(2): The incumbent bargaining agent alleged that conducting a representation election during the term of a collective bargaining agreement is an unconstitutional impairment of contract. The Act contains a process for changing bargaining agents and there is no suggestion that such change affects the underlying agreement. The incumbent union is, by definition, merely the unit employees' agent and the employees themselves, as a group, are the real party in interest in the agreement. Should the employees opt for no representation, the collective bargaining relationship ends with the expiration of the agreement and the ousted union has the obligation to administer the agreement until its termination. Finally, collective bargaining and the resulting agreements are progenies of statute and are not constitutionally based; therefore, the Legislature can impose rational limitations on both bargaining and the resulting agreements without running afoul of the Constitution. Collective bargaining is not necessarily a common law right.

03.1 04.1 21.14 35.32 37.5 46.42
03.11 21.11 22.1 35.327 37.8 46.44
03.12 21.12 22.3 35.330 46.4 46.6

Interpretive Rulings

MSAD #33 Board of Directors 76-IR-02
MSAD #54 Education Assn. and MSAD #54 Board of Directors 76-IR-01

Peru Teachers Assn. and Peru School Comm. 78-IR-01

Teamsters Local Union No. 48 (weapons policy) 79-IR-01

M.S.A.D. No. 54 Education Association and M.S.A.D. No. 54 Board of Directors, MLRB No. 76-IR-01 (Feb. 11, 1976)

I § 965(1)(A) & (B): Parties must meet at reasonable times for purposes of collective bargaining; however, if parties are unable to agree on what are reasonable meeting times or are unable to agree on a meeting schedule, either party can force the other to meet within 10 days of the latter's receipt of a written notice from the former, requesting a meeting for collective bargaining purposes. The 10-day notice can be used to commence negotiations and to convene a meeting at any time during negotiations, provided the parties have not otherwise agreed in a prior written contract. During the course of on-going negotiations, 10 days between bargaining sessions is a reasonable standard and, absent the parties' agreement to negotiate with equally reasonable frequency, the 10-day notice provision can be used to enable one party to require the other to negotiate without procrastination.

41.3 41.31 41.32 41.34 41.35 72.52 72.531 72.537 73.41 73.432 73.439

II § 965(1)(B): The final caveat in this provision, concerning the parties' written agreement about the obligation to meet, refers to written negotiating ground rules or provisions of the expiring collective bargaining agreement that address the bargaining schedule for the new agreement. If either of these written agreements exist, the 10-day requirement is no longer operative.

41.3 41.31 41.32 41.34 41.35 72.52 72.531 72.537 73.41 73.432 73.439

III § 965(1)(A) & (B): The statutory obligation to negotiate in good faith continues even though an impasse exists and one of the parties has invoked the impasse resolution procedures of mediation, fact-finding, or arbitration. The parties must, therefore, continue to meet at reasonable times or within 10 days of receipt of a written request from the other party for a meeting for collective bargaining purposes, unless the parties have agreed otherwise in writing.

41.3 51.4 52.15 72.52 72.521 73.41 73.411

IV § 965(1)(B): The statutory reference to 10 days, in the 10-day notice context, means calendar days.

41.32 72.52 73.41

V § 968(3): The Board's interpretative ruling is advisory only, since the statute restricts binding determinations to actual cases presented to the Board for decision.

01.11 01.28 01.312

Board of Directors of M.S.A.D. No. 33, MLRB No. 76-IR-02 (Dec. 9, 1976)

FACTS: A public employer submitted a unilateral request for an answer to the following question: Does the refusal of public employees to accept voluntary extracurricular duties constitute an unlawful work stoppage, slowdown, or strike.

I § 964(2)(C)(1), (2) & (3): The statutory prohibition against work stoppages, slowdowns and strikes is directed against concerted efforts of or by employees. If an employee refuses to accept a voluntary extracurricular duty, the element of concerted activity is absent and the § 964(2)(C) charge fails. If the element of concerted activity is present, whether the Act has been violated will turn on the following: (1) whether the extracurricular duty is set forth in a contract provision, (2) whether the duty was otherwise negotiated, (3) whether a past practice exists of accepting the duty or (4) whether the duty has been or may be performed by workers outside the bargaining unit. These factors would be examined in context, including whether there was provocation of an extreme nature by the public employer or its agents.

61.1 61.5 61.56 62.231 62.79
61.2 61.51 62.1 62.42 62.791
61.3 61.54 62.23 62.78

II § 968(3): The Board's interpretative ruling is advisory only, since binding determinations by the Board are restricted by statute to actual cases presented to it.

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Peru Teachers Association and Peru School Committee, MLRB No. 78-IR-01 (July 10, 1978)

I § 968(3): The parties filed a joint request for an interpretative ruling as to whether performance of certain non-professional duties by teachers is a mandatory subject of bargaining. The Board requested that the parties submit memoranda of law that were considered by the Board. The parties had agreed to all provisions of the successor collective bargaining agreement (and the same were implemented), except for the provision that was the subject of the inquiry.

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II § 965(1)(C): Bargaining topics for teachers are either matters of educational policy, about which the employer is required to meet and consult but not negotiate, or working conditions that are mandatory subjects of bargaining. In resolving whether a matter is a mandatory subject or within the educational policy exception, the Board is guided by Justice Wernick's analysis in City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387 (Me. 1973). Under Biddeford, teacher working conditions are prima facie eligible for collective bargaining and such eligibility can only be overridden if the quantitative number and/or qualitative importance of functions generally cognizable as managerial and policy making present are found to be significantly substantial.

01.26 42.2 42.42 43.42
41.6 42.22 43.4 43.61

III § 965(1)(C): Applying the Biddeford test, teacher supervision of students in school buildings and playgrounds, during recess and lunch periods, is a matter of educational policy. The managerial interest involved--over and above the supervision, organization, direction and distribution of personnel--is the interest of public employers in avoiding civil liability for injury to students as well as avoiding damage to school buildings and property while students are present at school.

42.2 42.42 43.42 43.619
42.22 43.4 43.61

IV § 965(1)(C): Menial or administrative tasks, such as collecting lunch money or distributing milk or lunch to students, do not involve any managerial functions significant enough to override the prima facie eligibility of such duties for collective bargaining; therefore, performance of such duties is a mandatory subject of bargaining. Bargaining over these duties only encroaches on the managerial functions of organization, supervision, direction and distribution of personnel--encroachment inherent in collective bargaining.

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43.4 43.61

V § 965(1)(C): The fact that a matter of educational policy may have been negotiated in the past and even incorporated in a prior collective bargaining agreement does not transform such educational policy matter into a mandatory subject of bargaining. Agreement reached on a matter of educational policy does not constitute waiver of the right to object to mandatory bargaining thereon at a subsequent time, on the grounds that the topic is an educational policy matter.

09.6 09.7 42.2 43.61 73.47
09.65 09.74 42.22 72.58 73.477
09.66 21.9 42.46 72.589

VI § 968(3): The Board's interpretative ruling is advisory only, since binding determinations by the Board are restricted by statute to actual cases presented to it.

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In the matter of the request of Teamsters Local Union No. 48, MLRB No. 79-IR-01, 2 NPER 20-11032 (Oct. 15, 1979)

FACTS: An interest arbitrator refused to decide whether the weapons policy for university police officers was a mandatory subject of bargaining and recommended that the parties seek the Board's opinion on the question. The bargaining agent submitted a unilateral request for an intrepretative ruling on the issue and the employer objected to the Board's issuing an opinion.

I § 1028(1): The University Employees Act incorporates the rule making and interpretative ruling authority granted in § 968(3) of the Municipal Employees Act. Section 968(3) provides that the Board shall issue interpretative rulings upon request; therefore, the Board rejected the University's contention that the Board could not issue this interpretative ruling.

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II § 1026(1)(C): Safety rules and safe work practices are mandatory subjects of bargaining.

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43.482

III § 1026(1)(C): While there is no governmental policy or managerial prerogatives exception limiting the mandatory subjects of bargaining, there is substantial federal precedent, issued pursuant to the parallel section of the NLRA (29 U.S.C. § 158(2)), for acknowledging a very limited exception from mandatory bargaining for the area of "paramount and fundamental concern" to the employer. This exception is extremely limited and involves only those "managerial decisions which lie at the core of the entreprenurial control" and "which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." The Board adopted, as an extremely limited exemption from the scope of mandatory bargaining, employer action which, while it may affect working conditions, is nonetheless of fundamental and paramount concern to both the public employer's primary function and the public interest, unless such interests are outweighed in the balance by the importance of the working condition affected. Such exception is far narrower than a "governmental policy" exception or the "educational policy" exception, which is itself intended to be narrowly drawn.

42.4	42.47	43.9	72.58	72.591
42.42	42.48	43.92	72.589	72.665

IV § 1026(1)(C): While applying to few subjects, the "fundamental and paramount concern" exception from the statutory duty to bargain applies to the university police department weapons policy. Such policy goes to the fundamental decision concerning the primary function of the university police department and is of paramount concern to the public interest. If a serious safety question existed, such safety interest would supersede the employer's and public interests. No serious safety question was raised here. The morale concerns of the employees are less significant than potential safety concerns and are subservient to the employer and public interests.

42.4	42.48	43.481	43.9	72.589
42.42	43.476	43.482	43.92	72.591
42.47	43.48	43.64	72.58	