

BRIEFING FOR LABOR AND HOUSING COMMITTEE

MAINE LABOR RELATIONS BOARD

Neil P. Daly, Executive Director

January 27, 2021

I. Introduction

Senator Rafferty, Representative Sylvester, and members of the Joint Standing Committee on Labor and Housing, my name is Neil Daly and for the last several years, it has been my privilege to serve as the Executive Director of the Maine Labor Relations Board (Board or MLRB), and its affiliated organizations, the State Board of Arbitration and Conciliation (BAC), and the Panel of Mediators.

Thank you for the opportunity to speak with you. Today, I hope to provide the Committee with the following:

- background information on the MLRB including the statutory foundation for public-sector collective bargaining in Maine, as well as the mission and composition of the MLRB, Panel of Mediators, and BAC,
- a more detailed explanation of the collective bargaining process, from start to finish,
- and, finally, a brief explanation of the steps we are taking to improve service to the public and our parties.

II. Background

a. Statutory Framework for Public-Sector Collective Bargaining in Maine

Public-sector employees in Maine have the right to engage in collective bargaining, as provided by four separate laws that govern labor relations in the State. Those laws are:

- The Municipal Public Employees Labor Relations Law (covering municipal and county employees including clerical, schools, fire, police, and public works employees), 26 M.R.S.A. §961, *et seq.*;
- The State Employees Labor Relations Act (covering State employees, including the legislative and executive branches), 26 M.R.S.A. §979, *et seq.*;
- The University Employees Labor Relations Act (covering employees of the University of Maine and Maine Community College systems, as well as Maine Maritime Academy), 26 M.R.S.A. §1021, *et seq.*;
- The Judicial Employees Labor Relations Act (covering the State's judicial branch employees), 26 M.R.S.A. §1281, *et seq.*

In all, approximately 61,000 individuals, employed by nearly 500 public-sector employers, fall within the jurisdiction of these laws.

The State's labor relations laws share a common foundation that establishes the framework for collective bargaining in Maine. The stated purpose of each law is to improve the relationship between public employers and their employees. Employees may choose to engage in collective bargaining by selecting a bargaining agent, i.e. union, to represent a group of the employees, called a bargaining unit, who share common working conditions.

Once a bargaining agent is certified, the employer and bargaining agent must bargain in good faith over wages, hours, and conditions of employment for the bargaining unit. If the parties are unable to reach agreement on their own, they may participate in mediation, fact-finding and interest arbitration to resolve the bargaining impasse. Should one party fail to meet its statutory obligations, the other party may seek enforcement of the law by filing a complaint with the Board for which the Board will conduct a hearing and render a decision and order. The Board's decisions are subject to appeal to the Maine courts.

b. Mission

The Maine Labor Relations Board's primary mission is to enforce the rights and obligations provided in the State's labor relations laws. To do so, the Board and its affiliated organizations perform three central functions: (1) the certification of bargaining units, typically through an election where employees vote on whether to be represented by a union, (2) the resolution of collective bargaining impasses, and (3) the adjudication of complaints that allege violations of the labor relations laws.

In this regard, the Board, Panel of Mediators, and BAC have separate, but related, responsibilities and jurisdiction:

- The Board itself is responsible for resolving disputes over the composition of bargaining units, conducting and certifying elections for bargaining agents, conducting hearings for prohibited practice complaints, and, issuing decisions and orders for those complaints.
- The Panel of Mediator's central purpose is to facilitate resolutions to bargaining impasses involving public-sector employers and their counter-part bargaining agents. Specifically, if an employer and a union are unable to reach agreement in their negotiations, they can request that a mediator from the Panel be assigned to help them achieve a resolution to their bargaining dispute.
- The BAC is available to provide interest arbitration services if mediation and fact-finding are unsuccessful. Most frequently, the BAC provides arbitration services for contract grievances.

c. Composition

Maine Labor Relations Board

The Board is composed of three members and six alternates appointed by the Governor to four-year terms, subject to legislative approval. Out of the three members, one is designated to represent the public (Public Representative), another to represent employees (Employee Representative), and the third to represent employers (Employer Representative). The Public Representative is also designated to serve as the Board’s Chair. Each member has two alternates in the event the member is unavailable for a Board hearing.

The Board is currently composed as follows:

Public Representative/Chairs	(Appointments expired 9/30/19)
Katharine I. Rand, Esq., Scarborough	Board Chair
Jeffrey J. Knuckles, Esq., Phippsburg	Alternate Chair
Michael C. Ryan, Esq., Freeport	Alternate Chair

Employer Representatives	(Appointments expired 9/30/18)
Robert W. Bower, Jr., Esq. Cumberland	Employer Representative
Christine Riendeau, Durham	Alternate Employer Rep.
Richard L. Hornbeck, Esq., Bowdoinham	Alternate Employer Rep.

Employee Representatives	(Appointments expire 9/30/21)
Amie M. Parker, Lewiston	Employee Representative
Dennis E. Welch, Windham	Alternate Employee Rep.
Carl A. Guignard, Lewiston	Alternate Employee Rep.

Panel of Mediators

The Panel is composed of five to ten individuals appointed by the Governor to three-year terms. 26 M.R.S.A. §965(2)(C). The Panel is currently composed as follows:

	<u>Appointment Expired</u>
David W. Bustin, Hallowell	08/19/14
Maria Fox, Esq. Portland	11/10/14
Denis Jean, Lewiston	12/08/18
Arthur Kyricos, York Harbor	12/08/18
Robert Lyman, Freeport	11/10/14
Philip J. Moss, South Portland	12/08/18
Melissa P. Shattuck, Falmouth	02/02/15
Evan L. Weston, Harpswell	12/08/18
Kenneth T. Winters, Holden	07/18/17

In accordance with 26 M.R.S.A. §965(2)(C), the Board has submitted to Governor Mills several nominees for Panel appointment. Five nominees are current members of the Panel, including:

Maria Fox, Esq. Portland
Denis Jean, Lewiston
Arthur Kyricos, York Harbor
Robert Lyman, Freeport
Melissa Shattuck, Falmouth

Four nominees are not current Panel members and include:

Jane Gilbert, Augusta
James Mackie, South Portland
Erik Peters, Esq. Freeport
Rebekah Smith, Esq. Union

As of the date of this briefing, the Panel nominations remain pending with the Governor's Office Department of Boards and Commissions.

Board of Arbitration and Conciliation

The BAC is also composed of gubernatorial appointees, respectively designated as public chairs, employer representatives, and employee representatives. 26 M.R.S.A. §931. Their terms of appointment are three years. *Id.* The BAC is currently composed as follows:

Public Chairs		<u>Appointment Expired</u>
Shari B. Broder, Esq. Freeport	Board Chair	08/25/14
Sheila Mayberry, Esq., Falmouth	Alternate Chair	12/26/20
John C. Sheldon, Esq., Westbrook	Alternate Chair	12/26/20
Employer Representatives		
Robert W. Bower, Jr., Esq. Cumberland	Employer Rep.	12/26/20
Donald H. Gerrish, Brunswick	Alt. Employer Rep.	02/07/15
Bryan M. Dench, Esq., Portland	Alt. Employer Rep.	12/26/20
Employee Representatives		
Chester G. Hillier, Monmouth	Employee Rep.	12/26/20
James H. Mackie, South Portland	Alt. Employee Rep.	12/26/20
Vacant	Alt. Employee Rep.	

Neutral Staff

The day-to-day operations of the Board, Panel, and BAC are handled by a neutral, non-appointed legal and administrative staff composed of the Executive Director, Board Counsel, and Office Manager. The Board's Executive Director also serves in that same capacity for the Panel of Mediators, in addition to serving as Clerk to the BAC.

On a regular basis, the Board's staff members respond to inquiries from public employers and employees or their representatives, and members of the public. The staff is the primary source of information for persons interested in the operations and procedures of Maine's public sector labor laws. For inquiries that involve matters over which the Board has no jurisdiction, the staff suggests other agencies or organizations that may be of assistance.

The Board's staff maintains a State of Maine website on behalf of the Board, Panel and BAC. See <https://www.maine.gov/mlrb/> . The website provides a variety of Board-related information including links to MLRB-related statutes, administrative rules and forms. One of the site's more important components is a search engine through which the public can research previous Board decisions as well as the Superior and Law Court opinions reviewing those decisions. Access to this case law permits public employers, employees and bargaining agents to know the parameters of required or permitted conduct and to use that information to comply with the law.

III. Collective Bargaining: From Start to Finish

With this background information in mind, it may be helpful to review in further detail the specific process through which collective bargaining operates in Maine's public sector. In general, there are three aspects to collective bargaining here: (1) the certification of a bargaining representative to represent a group of employees, (2) negotiation between the bargaining representative and employer, and (3) the adjudication of complaints for allegations that a party failed to meet its statutory obligations.

a. First Step: Certification of Bargaining Agent

As noted, one of the Board's central functions is the certification of bargaining units. What is generally meant by the term "certification of bargaining units" is a determination that a union is the designated agent, i.e. representative, of a group of employees for the purpose of collective bargaining with the public employer.

The fundamental basis of collective bargaining is the bargaining unit – a grouping of employee classifications which, because they share a clear and identifiable community of interest, are a natural group to negotiate together with their employer over wages, hours, and terms and conditions of employment.

For Maine public-sector employees, there are generally two steps in the certification of a union to represent a new bargaining unit. First, there is a review of whether the union is seeking to represent an appropriate bargaining unit. Second, once the scope of the bargaining unit is determined, if the employer does not voluntarily recognize the union, an election is conducted to determine whether a majority of voters from the proposed bargaining unit wish to be represented by the union.

i. Unit Determination

In Maine, new bargaining units can be created either by agreement between an employer and a union or through a unit determination hearing process. The hearing process is triggered by the filing of a petition for unit determination, supported by a showing of interest from at least 30% of the employees in the proposed bargaining unit.¹

The purpose of the hearing is to determine whether the proposed bargaining unit is appropriate. A bargaining unit is appropriate if (1) it does not include certain categories of employees excluded by law from membership (such as elected officials, department heads, or employees who have access to the employer's confidential collective bargaining strategies), and (2) the employees in the proposed unit share the required community of interest.² In such hearings, each side presents evidence about the positions at issue and the decision is made by the Board staff, subject to review by the Board.

ii. Voluntary Recognition or Election or Majority Sign-up

Once a unit is established, the next question is whether a majority of employees whose classifications are included in the unit wish to be represented by a union for purposes of collective bargaining. This question may be resolved in one of three ways: (1) the employer may voluntarily recognize a union as the bargaining agent, (2) the Board conducts a secret ballot election, or (3) the Board determines that a majority of the bargaining unit employees authorized, in writing, a labor organization to serve as their bargaining agent.

Elections are triggered by the filing of a petition for election, supported by a showing of interest from at least 30% of the employees in the bargaining unit. The Board conducts all elections by mail and the process takes approximately 5-6 weeks to complete. In Board elections, the majority of employees voting determines the outcome.

The 129th Legislature enacted the Majority Sign-up law which now serves as an alternative to an election. To determine if a majority sign-up petition is viable, the Board reviews the written authorizations submitted for a group of employees to see if a majority of the group designated a labor organization as their bargaining agent. If a majority of the employees have signed such an authorization, the MLRB certifies the labor organization as the employees' bargaining agent without the need for a traditional election.

¹ A showing of interest is a signed statement from an employee expressly indicating the employee's desire to be represented by the proposed union.

² In determining whether a community of interest among employees exists, the Board considers factors such as: (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) similarity 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 employer's organizational structure.

Unit employees may opt to cease being represented, or to change bargaining agents, through a subsequent election. As is the case with initial elections, these elections will be held by the Board upon a showing of interest signed by at least 30% of the unit employees.

b. Second Step: Negotiations and Dispute Resolution Procedures

Once a union is certified as the representative of the bargaining unit, the law requires the employer and bargaining agent to negotiate in good faith over wages, hours, and working conditions. Notably, the law does not require either party to agree to a particular proposal. Therefore, what happens if the parties are unable to reach agreement at the bargaining table?

Unlike private sector employees, those in the public sector do not have the right to engage in strikes or work stoppages to obtain changes in the conditions of their employment. In lieu of such self-help, the Legislature has created dispute resolution mechanisms which are required when parties cannot reach agreement on their own. These mechanisms are mediation, fact-finding, and interest arbitration and because these steps are part of the negotiation process, the law requires the parties participate in them in good faith.

i. Mediation

As previously noted, parties stuck in a bargaining impasse can request a mediator from the Panel of Mediators be assigned to help the parties reach agreement. The mediators have no authority to force parties to make any concession or to agree to anything. Effective mediators resolve disputes by persuading the parties to adjust their positions sufficiently to permit agreement.

ii. Fact-finding

If negotiating parties are unable to reach accord through direct negotiations and mediation, either of them can request fact finding. In that process, the parties present evidence and arguments in support of their respective positions on the unresolved issues to a tri-partite panel. The fact finders then issue non-binding recommendations for resolution of the controversy.

iii. Arbitration

If the parties have not reached agreement through fact-finding, they may proceed to interest arbitration. Interest arbitration is like fact finding, in that the parties present evidence and argument to a tri-partite panel of arbitrators with the notable exception that the arbitrators' award is binding on all issues except for those concerning wages, pensions and insurance. There are few interest arbitrations in Maine in any year and often there are none. If the parties have not settled their dispute after arbitration, the law provides that their new collective bargaining agreement will consist of the agreements reached at the table and the binding portions of the arbitration decision. If the parties have not reached agreement on salaries, pensions, or insurance, the public employer may lawfully implement its "last/best" offer, which must be maintained until the parties' agreement ends and they negotiate a new agreement.

c. Third Step: Prohibited Practice Complaints

If a public employer, public employee or public employee organization believes that one of the State's labor relations laws has been violated, they may file a prohibited practice complaint with the Board. If there are any relevant facts in dispute, a Board panel, consisting of the Public Representative Chair, an Employee Representative, and an Employer Representative, will convene a formal hearing to receive witness testimony, documentary evidence, and argument from the parties. The Board then issues a decision adjudicating the charged violation. Board decisions are subject to appeal to the Maine courts.

Common subjects of prohibited practice complaints include allegations of:

- failures to bargain in good faith,
- discrimination or retaliation against an employee for engaging in protected activity (protected activity includes the right to form or join a union, or, to refrain from doing so),
- conduct that interferes with an employee engaging in protected activity,
- denial of an employee's right to union representation during an investigatory examination (commonly known as Weingarten rights),
- a union violating its duty of fair representation to a bargaining unit employee.

IV. Steps Towards Improving Operations and Resources

a. E-File and Remote Hearings

One primary focus is increasing the efficiency of access to MLRB-related services. To this end, beginning in 2019, the Board commenced the process of revising its procedural rules for the first time since 2001. The major goal of the revision was to implement an electronic filing process (E-File). Previously, parties were limited to filing hard copies of MLRB-related documents either by mail or in person. Apart from a lack of efficiency, the traditional filing process also led to occasional disputes as to when a document was mailed versus received.

E-File was successfully implemented on April 1, 2020. Through E-File, parties are now expected to engage with the Board, and each other, primarily through electronic correspondence. Where all the Board's filing forms are available through the MLRB's website, a party can now file a complaint or request for services in a matter of minutes. In addition to providing parties an easier and more efficient way to file documents with the Board, and to serve those documents on opposing parties, the E-File process will greatly reduce argument over when a document was filed, as date of filing is now based on when it was delivered via email.

While coincidental, the conversion to E-File also significantly increased the Board's ability to continue operating as effectively as possible during COVID-19. Because submissions to the MLRB are now done through email, it was a relatively smooth transition for the MLRB to move to a system based on nearly all electronic correspondence while primarily working remotely during the State of Emergency.

Likewise, during the pandemic, the Board has conducted all of its adjudicative hearings and procedural meetings via a remote, videoconference platform. Thus far, remote hearings have not presented significant problems. In the post-COVID future, the Board anticipates continuing to use videoconference technology for certain pre-hearing conferences, and, perhaps for hearings themselves, depending on the circumstances.

b. Collective Bargaining Resources

Another area of focus is improving access to collective bargaining resources. In pursuit of this goal, the Board recently created a collective bargaining agreement database on the MLRB website. The intended purpose is to assist labor organizations and employers during contract negotiations by providing access to other contracts involving similarly situated parties. Once the database is established, parties in negotiations will be able to compare the relevant contracts from the database to their own bargaining proposals or use them to develop new proposals.

In addition to the contract database, the Board also plans to develop a case law outline which will be aimed at providing front-line union and management representatives with a clear, concise review of each party's rights and obligations under Maine's collective bargaining laws.

c. Proposed Legislation

At this time, the MLRB plans on introducing a bill before the 130th Legislature which would make certain adjustments to the per-diem compensation structure for the board members who participate in MLRB and BAC hearings. The proposed changes are two-fold, neither of which will require an increase to the Board's General Fund appropriation:

1. **MLRB Per Diems:** Currently, the parties to a case before the MLRB are responsible for sharing the costs of the Board members' per diems and related costs for hearings and deliberations. Under the proposed change, the MLRB Executive Director would have the discretion to provide the costs of the per diems directly from the MLRB's budget, assuming the availability of funds. If funds were not available, the parties would retain the responsibility for splitting the per diems. There would be no adjustment to the amount of the per diems. The intended goal of this change is to reduce the financial obligation to both the parties seeking to enforce their rights under the State's labor relations laws, as well as those respondent parties who have to participate in Board proceedings, despite the possibility of having committed no violation of the law.
2. **BAC Per Diems:** Currently, BAC panel members are compensated at \$150 per meeting, with each meeting typically involving either a hearing or a deliberation. Under the proposed change, panel members would receive \$300 for each day of hearing and \$150 for a deliberation. The intended goal of this change is to reduce the difference in typical compensation between private arbitrators and BAC panel members. By doing so, we hope to ensure that we have a full roster of qualified BAC panel members readily available for the timely scheduling of BAC hearings. The parties to each case would remain responsible for sharing the costs of the BAC per diems.

V. Conclusion

This is a dynamic time for the Maine Labor Relations Board, the State Board of Arbitration and Conciliation, and the Panel of Mediators. In addition to the potential of new membership for each board, the MLRB is pursuing innovative steps to provide our parties the best service possible. While challenges exist, the MLRB's goal remains to provide the State's labor-management community the ability to exercise their statutory collective bargaining rights and obligations, which, in turn, facilitates labor-management stability.

Once again, thank you for the opportunity to speak with you and I will try to answer any questions you may have. Additionally, please do not hesitate to contact me outside of this briefing with your questions or concerns.

Contact

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