

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
PORTLAND DIVISION

DANIEL B. LOCKE; *et al.*, ON BEHALF OF
THEMSELVES AND THE CLASS THEY SEEK
TO REPRESENT,

Plaintiffs,

v.

EDWARD A. KARASS, STATE CONTROLLER, *et
al.*,

Defendants.

CASE NO. 2:05-cv-00112-GZS

**PLAINTIFFS' OPPOSING STATEMENT
OF MATERIAL FACTS IN
OPPOSITION TO DEFENDANT
MSEA'S MOTION FOR SUMMARY
JUDGMENT**

ORAL ARGUMENT REQUESTED

Pursuant to Rule 56, FED.R.CIV.P., and Civil Rule 56(c), D.ME., Plaintiffs Daniel B. Locke, *et al.*, on behalf of themselves and the class they seek to represent ("the Nonmembers"), file the foregoing Opposing Statement of Material Facts In Opposition to the Motion for Summary Judgment filed by Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC (Clerk's Docket No. 70), as follows:

1. The Maine State Employees Association ("MSEA" or the "Union") is a labor union representing approximately 10,000 employees of the executive branch of Maine state government. *See* Declaration of Robert Alexander ("Alexander Decl.") Ex. 1 (MSEA's Answers to Pls.' First Set of Interrogs.) at No. 1.

Response: Admitted.

2. The State of Maine recognizes MSEA as the exclusive bargaining agent for Plaintiffs and other state employees in the (1) Administrative, (2) Operations, Maintenance and Support, (3) Professional and Technical, and (4) Supervisory Services bargaining units

(hereinafter “the Maine bargaining units”). *See id.*; Declaration of Timothy Belcher (“Belcher Decl.”) at ¶ 2.

Response: Admitted.

3. As the exclusive bargaining agent of the Maine bargaining units, MSEA must fairly represent the interests of all employees in the Maine bargaining units for collective bargaining, and must provide contract administration services for these employees, regardless of whether they are union members. Belcher Decl. at ¶ 3.

Response: This statement contains conclusions of law to which no response is required. To the extent that response is required, Plaintiffs note that the duties imposed by law result from MSEA’s exercise of a monopoly of bargaining authority statutorily granted to it by the State, and for which it lobbied in the State legislature.

4. MSEA provides extensive services to all members of the Maine bargaining units, engages in collective bargaining for the benefit of union members and nonmembers alike, and processes grievances for both members and nonmembers. *Id.* In order to negotiate and administer these collective bargaining agreements, MSEA employs 28 paid employees, as well as 292 stewards who receive direction and training from MSEA. *Id.* MSEA pools costs among all bargaining units it represents, and provides services and resources on an as-needed basis, making all such services available without regard to the particular units to which they are provided. *Id.*

Response: The first sentence contains conclusions of law to which not response is required. To the extent that response is required, Plaintiffs note that the “services” and other activities in which MSEA engages have not been requested by Nonmembers, and/or have been

imposed upon them by virtue of the monopoly of bargaining authority statutorily granted to MSEA by the State. The second sentence should be qualified, since the paid employees and union stewards identified by MSEA engage in activities other than “negotiat[ing] and administer[ing] these collective bargaining agreements.” The third sentence is Admitted.

5. Prior to 2003, employees who were not members of the Union received these services, with the exception of grievance processing, from the Union without charge. The vast majority of the costs of MSEA’s contract negotiation and administration functions were borne by those employees who elected to join the Union. *Id.* at ¶ 4.

Response: Qualified; prior to 2003, employees who were not members of MSEA were subject to MSEA’s monopoly bargaining authority granted by the State. The second sentence is Admitted.

6. MSEA and the State negotiated “union security” provisions to be included in the 2003-2005 collective bargaining agreements (“2003 contracts”) for the Maine bargaining units. *Id.* at ¶ 5 & Ex. 1.

Response: Qualified; the Nonmembers note that the State Defendants assert that “Since 1979, every collective bargaining agreement between the State and the MSEA has included a union security clause, requiring employees in the bargaining units represented by the MSEA who were members of the Union to pay union dues as a condition of their employment with the State.” Clerk’s Docket No. 65, ¶ 4. However, the Nonmembers agree that no “union security” provisions, as that phrase is generally understood, appeared in the State/MSEA monopoly bargaining agreement until the 2003-2005 collective bargaining agreements (“2003 contracts”).

7. These union security provisions provided, *inter alia*, that all nonmember employees hired after the effective date of the agreements in the Maine bargaining units would be obligated to pay a service fee equivalent to their pro rata share of union dues, representing the costs that MSEA incurs in providing collective bargaining and contract administration services on behalf of bargaining unit members. *See id.* at ¶ 5 & Ex. 1 at 80-81.

Response: Qualified; the forced-unionism provisions of the collective bargaining agreements speak for themselves. The Nonmembers specifically deny that MSEA’s “service fee” is “represent[s] the costs that MSEA incurs in providing collective bargaining and contract administration services on behalf of bargaining unit members.”

8. In 2005, MSEA and the State negotiated collective bargaining agreements for 2005-2007 (“2005 contracts”), which extend the service fee obligation to all nonmember employees in the Maine bargaining units, effective July 1, 2005. *See id.* at ¶ 10 & Ex. 2 at 55-56.

Response: Qualified; the forced-unionism provisions of the collective bargaining agreements speak for themselves.

9. The 2005 contracts for the Maine bargaining units cap the service fees for employees who had been exempted from service fees under the previous contract—those who were hired prior to July 2, 2003, and who were neither members of MSEA nor service fee payers since that date (referred to as “grandfathered nonmembers”). Their service fees are capped at fifty percent of the otherwise applicable fee through June 2006. *Id.* at ¶ 10 & Ex. 2 at 56.

Response: Qualified; the forced-unionism provisions of the collective bargaining agreements speak for themselves.

10. The 2003 and 2005 contracts contain indemnification clauses requiring the Union

to indemnify the State against any claim or any other form of liability arising from or incurred as a result of the service fee program. *See id.* Ex. 1 at 86-87 & Ex. 2 at 59-60. Previous contracts had contained an indemnification clause in the union security provisions requiring the State to facilitate collection of dues through payroll deduction. *See* Affidavit of Kenneth Walo (“Walo Aff.”) (d/e 66) at ¶ 3.

Response: Qualified; as to the first sentence, the indemnification sections of the forced-unionism provisions of the current collective bargaining agreements speak for themselves. As to the second sentence, the indemnification sections of the prior collective bargaining agreements speak for themselves, and only apply to the collection of union dues collected from voluntary union members through voluntary dues checkoff authorizations.

11. On October 18, 2005, MSEA and the State signed an agreement clarifying that the aforementioned indemnification clause does not apply to “any intentional deprivation of an individual’s constitutional rights by the State.” *See id.* at ¶ 5.

Response: Qualified; the indemnification agreements of the forced-unionism provisions of the collective bargaining agreements, and any “an agreement clarifying that the aforementioned indemnification clause,” speak for themselves.

12. The Union calculates service fees by ascertaining what percentage of MSEA’s expenditures are chargeable to all members of the bargaining unit, using the accounting figures from the Union’s most recent available fiscal year. *See* Belcher Decl. at ¶ 6. In addition to MSEA’s direct expenses, MSEA deems chargeable the portion of affiliation fees that the Union pays to its parent union, the Service Employees International Union (“SEIU” or the “International Union”), equal to the percentage of SEIU’s expenses that SEIU calculates to be attributable to its

chargeable activities based on the audited financial statements for its most recent fiscal year. *See id.* at ¶¶ 8-9.

Response: The first sentence is Admitted. The second sentence is Denied, as MSEA calculates “the percentage of SEIU’s expenses that SEIU calculates to be attributable to its chargeable activities based on the audited financial statements for its most recent fiscal year” **available.** See Clerk’s Docket No. 47: Plaintiffs’ First Amended and/or Supplemental Complaint (“FASC”), Exhibit A(2).

13. On April 11, 2005, MSEA mailed all employees in the Maine bargaining units a notice (“April Notice”) informing the nonmember employees that service fee obligations would be applicable to all employees in the Maine bargaining units under the 2005 contracts, effective July 1, 2005, and explaining the service fee calculations. *See id.* Ex. 3.

Response: Admitted.

14. On June 10, 2005, MSEA mailed members of the Maine bargaining units another notice (“June Notice”), again explaining the service fee obligations effective July 1, 2005, and providing updated financial information, based on the Union’s 2004 financial statements and SEIU’s 2003 financial statements, which were included with the notice. *Id.* at ¶ 13 & Ex. 4. The fees calculated on the basis of the more recent figures were slightly lower than the fees calculated on the basis of the earlier data. *Id.*

Response: Admitted.

15. On July 13, 2005, MSEA mailed all nonmember employees (as well as members who had joined the Union since the April Notice was issued) a revised notice (“July Notice”), which superseded the April Notice and the June Notice. *See Belcher Decl.* at ¶ 15 & Ex. 5.

Response: Admitted.

16. The July Notice informed nonmembers that the allocation of organizing-related expenditures had been changed from “chargeable” to “nonchargeable,” and provided nonmembers a recalculation of the service fee. *See id.* at ¶¶ 14-16 & Ex. 5.

Response: Admitted.

17. In addition to a seven-page letter explaining the service fee in detail, *id.* Ex. 5 at 1-7, the July Notice contained the following supporting documents: (1) a July 11, 2005 affidavit from MSEA Director of Finance Joan Towle explaining that the calculation assessing 49.13% of member dues as chargeable to nonmembers was based on the Union’s 2004 financial statements, with organizing expenditures treated as nonchargeable, *id.* Ex. 5 at 8-9; (2) MSEA’s Revised Statement of Expenses and Allocation Between Chargeable and Non-Chargeable Expenses, with organizing expenses treated as nonchargeable, *id.* Ex. 5 at 10; (3) a May 17, 2005 Independent Auditor’s Report of the Union’s 2004 financial statements, including the allocation of chargeable and nonchargeable expenses, *id.* Ex. 5 at 12-19; (4) a July 7, 2005 letter from a partner at the firm that performed the independent audit verifying that the revised calculation of the chargeable percentage, with organizing treated as nonchargeable, was based on the previously audited financial information and was consistent with the original audited schedules, *id.* Ex. 5 at 11; (5) an October 29, 2004 Independent Auditor’s Report of SEIU’s 2003 financial statements, allocating chargeable and nonchargeable expenses, and treating organizing expenses as nonchargeable, *id.* Ex. 5 at 20-29; and (6) a copy of the union security provisions in the 2005 contracts, *id.* Ex. 5 at 30-34.

Response: Qualified: the “July 7, 2005 letter from a partner at the firm that performed

the independent audit verifying that the revised calculation of the chargeable percentage, with organizing treated as nonchargeable, was based on the previously audited financial information and was consistent with the original audited schedules” only to the extent that the figures contained in the “Total Expenditures” column. The “partner at the firm that performed the independent audit” performed no additional accountancy services independently verifying MSEA’s new chargeable calculation. See Expert Witness Report of Michael D. Myers, C.P.A., ¶ 8.

18. The July Notice included the entire SEIU auditor’s statement of the allocation of expenses for the 2003 fiscal year, including the auditor’s notes. See *id.* Ex. 5 at 24-29. The notes in that report explain that payments to SEIU’s local affiliates were treated as chargeable if made as reimbursements for operating expenses, and nonchargeable if made as subsidies for organizing. See *id.* Ex. 5 at 27.

Response: The first sentence is Admitted. The second sentence is Qualified, as those notes speak for themselves.

19. Plaintiffs’ expert witness, Mark Myers, declined to provide an opinion that the Independent Auditor’s Report sent with the July Notice was inadequate. See Alexander Decl. Ex. 3 (Deposition of Mark Myers) at 58.

Response: Denied as vague and ambiguous. Mr. Myers was not asked, in the portion of the Deposition cited by Defendant MSEA, “to provide an opinion [as to whether] the Independent Auditor’s Report sent with the July Notice was inadequate,” or by what standard it was to be judged “adequate” or “inadequate.” The Deposition testimony of Mr. Myers speaks for itself.

20. The cover letter explaining the fee, the Towle Affidavit, and the July 7, 2005 letter each noted that the May 17, 2005 Independent Auditor's Report was issued before the Union made the decision to reclassify organizing expenses, and that the revised calculation of the chargeable percentage in the July Notice differs from the chargeable percentage in the Auditor's Report because the percentage was recalculated treating organizing expenses as nonchargeable, using the 2004 audited data. *See* Belcher Decl. Ex. 5 at 5, 8-9, 11.

Response: Qualified; "The cover letter explaining the fee, the Towle Affidavit, and the July 7, 2005 letter" all speak for themselves.

21. The July Notice provided nonmembers an additional opportunity to challenge the reduced fee as set forth in the July Notice. *See id.* Ex. 5 at 2-3.

Response: Admitted.

22. Pursuant to the 2005 contracts, MSEA began collecting service fees from nonmember employees on July 27, 2005, after the first full pay period of July 2005. *See id.* at ¶ 11 & Ex. 2 at 56. Nonmembers may authorize the State to deduct the service fees directly from their pay. *See id.* The Union bills employees who do not authorize automatic deductions for the service fees owed. *Id.*

Response: Qualified; MSEA's various demands state that nonmembers are required to pay agency fees beginning on 27 July 2005, but many have refused to do so. The second and third sentences are Admitted.

23. Certain nonmembers have submitted challenges to the fee through the process specified in the service fee notices, and an arbitration to resolve the challenges was scheduled for October 28, 2005. The arbitration hearing began in early-December 2005, and the arbitrator is

expected to render a decision this spring. *See id.* at ¶ 18.

Response: Qualified; no “arbitration” — as that word is normally understood — is provided to nonmembers who challenge MSEA’s fee calculation. “Arbitration” is a product of mutual consent, and MSEA’s impartial decisionmaker process is imposed solely by and at the discretion of MSEA. Cases are legion where the courts have affirmed this most elementary principle. *See AT & T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) [reaffirming the principle that “arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration”, **quoting** *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1963)];¹ *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304 (9TH CIR. 1994) (same) (arbitration agreement requires “knowing agreement to arbitrate ... disputes”); **see also** Elkhouri & Elkhouri, *How Arbitration Works*, 3d ed., p. 26 (“Fundamentally, arbitration has been and still is a product of private **contract**...”) (emphasis added). Here, there is no contract between the Nonmembers and MSEA. There can be no “arbitration.” All of MSEA’s references to “arbitration,” an “arbitration hearing,” and an “arbitrator” misuse these words.

24. Because the service fees were challenged, all sums collected from nonmembers pursuant to the July Notice have been placed in an interest-bearing escrow account pending the arbitrator’s decision on the propriety of the Union’s fee calculations. *See id.* at ¶ 19 & Ex. 2 at 58.

¹ *Cf. Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1985) (“No obligation to arbitrate a labor dispute arises solely by operation of law”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 200-01 (1991) (“We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon the parties beyond the scope of their agreement.... [T]he statutory policy [is] that arbitration is not compulsory”).

Response: Qualified; MSEA does not provide an “escrow account,” but rather, segregates those funds collected from nonmembers. Furthermore, MSEA makes the same mistaken reference to an “arbitrator” made in ¶ 23, *supra*.

25. If the arbitrator determines that any of the amounts paid into escrow should be returned to the nonmembers, those monies will be released to the nonmembers with interest. *See id.* at ¶ 19. The fees that the arbitrator determines were collected properly from nonmembers will only then be released to the Union. *Id.*

Response: Qualified; MSEA makes throughout the same mistaken reference to an “arbitrator” made in ¶ 23, *supra*.

26. On June 16, 2005, Plaintiffs filed the instant action. *See* d/e 1.

Response: Admitted.

27. On June 24, 2005, Plaintiffs filed a motion seeking to enjoin the collection of the service fees. *See* Pls.’ Mot. for Prelim. Inj. (d/e 6). The district court held a hearing on that motion on July 26, 2005. *See* d/e 33. The court denied the preliminary injunction orally the same day (d/e 34) and issued an order to the same effect on August 2, 2005. *See* Order on Mot. for Prelim. Inj. (d/e 39).

Response: Admitted.

28. All the named Plaintiffs are grandfathered nonmembers and pay only half of the service fees. Their payments amount to only 24.57% of member dues (*i.e.*, half of the 49.13% figure calculated in the Towle Affidavit). Each of the named Plaintiffs pays a fee of only \$2.24 per week for the contract negotiation and administration services provided by the Union. *See* Belcher Decl. at ¶ 17 & Ex. 5 at 2.

Response: Qualified; on advice of counsel, very few of the named Plaintiffs “pay” anything to MSEA at this time. MSEA has, however, made demands of all grandfathered nonmembers — some of whom have paid pursuant to those demands and those made by Defendant Walo — as set forth in FASC, ¶ 25.

29. To date, the Union has not requested any disciplinary action against any nonmember for non-payment of service fees. *See id.* at ¶ 21.

Response: Admitted.

DATED: 21 February 2006

Respectfully submitted,

/s/ W. James Young

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H:\WP\Maine\Locke\MSEA's SJ\Disputations of Fact.wpd
Tuesday, 21 February 2006, 19:04:40 pm, E.D.T.

CERTIFICATE OF SERVICE

I hereby certify that on 21 February 2006, I electronically filed the foregoing **Plaintiffs' Opposing Statement of Material Facts in Opposition to Defendant MSEA's Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: Philip J. Moss; William H. Laubenstein, III; Jeffrey Neil Young; Robert Alexander; and Jeremiah A. Collins.

/s/ W. James Young

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