STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 20-PPC-06

FALMOUTH BUS DRIVERS, CUSTODIANS AND MAINTENANCE WORKERS ASSOCIATION Complainant, v. FALMOUTH SCHOOL BOARD, Respondent.	DECISION AND ORDER

I. Statement of the Case

This prohibited practice complaint was filed by the Falmouth Bus Drivers, Custodians and Maintenance Workers Association ("Association") against the Falmouth School Board ("School") challenging the School's refusal to proceed to mediation regarding the School's right to subcontract bargaining unit employee duties and the School's decision to subcontract despite the Association's demand to bargain this issue. The Board finds that the School's decision to subcontract is covered by the contract. Therefore, the School was not obligated to negotiate on the subject during the term of that agreement and acted within its rights when it subcontracted.

II. Procedural History

The Association filed its initial complaint on December 10, 2019 and an amended complaint on January 21, 2020. It alleges that the School refused to collectively bargain by refusing to go to mediation and, in turn, that the School unlawfully interfered with bargaining unit employees' protected activity in violation of 26 M.R.S.A. § 964(1)(A) and (E). The Association also alleges the School's subcontracting of bargaining unit duties was a unilateral change that constitutes a refusal to bargain in violation of 26 M.R.S.A. § 964(1)(E). Lastly, the Association alleges the School's subcontracting amounts to unlawful discrimination in violation of 26 M.R.S.A. § 964(1)(B).[1]

On May 11, 2020, Katharine I. Rand, Neutral Chair, conducted a prehearing conference for the above-captioned matter remotely via videoconference and issued a Prehearing Conference Memorandum and Order the following day. The Board held an evidentiary hearing via videoconference on September 17, 2020. Chair Rand presided, joined by Amie M. Parker, Employee Representative, and Richard L. Hornbeck, Alternate Employer Representative. Rebecca Fernald, accompanied by Wayne O'Brien, C.J. Betit and Nate Williams, represented the Complainant/Association and Tom Trenholm, Esq., accompanied by Dan O'Shea, represented the Respondent/School. The parties were given a full opportunity to examine and cross-examine

witnesses, introduce evidence and to make their arguments. Additionally, both parties filed post-hearing briefs.

III. Stipulations

The parties have agreed to the following stipulations:

1. Complainant (or Association) is the recognized bargaining agent within the meaning of 26 M.R.S.A. § 962(2) of the Municipal Public Employees Labor Relations Law (MPELRL), for a unit consisting of bus drivers, custodians, maintenance workers and groundskeepers employed by Respondent.

2. Respondent is a public employer within the meaning of 26 M.R.S.A. § 962(7)(A)(2).

3. Respondent and Complainant are parties to a current collective bargaining agreement with a duration of September 1, 2018 to August 31, 2021 (CBA).

4. In April 2019, there were five (5) full-time custodial positions at the Falmouth Middle School (Middle School): four (4) night custodians and one (1) day custodian. There was also one (1) part-time (50%) day custodian. Of the four night custodians: one position was held by an employee who had notified Respondent that he intended to retire in June 2019 (that employee did retire after May 2019); one position was vacant because an employee transferred to a groundskeeper position; one position was held by an employee who later transferred to another custodial position at the elementary school in July 2019; and one position was held by an employee who had notified Respondent that he intended to retire in June 2020. The full-time and part-time day custodian positions were held by employees who have remained in their positions at the Middle School.

5. In early April 2019, Respondent was making plans to fill custodial vacancies at the Middle School. Given the current and impending vacancies, Respondent also considered the option of subcontracting the work.

6. A hiring committee has historically interviewed candidates and then recommended candidates to the Director of Maintenance and Transportation, Topper West, for a second interview.

7. In mid-April 2019, a hiring committee interviewed two (2) candidates for a custodian vacancy at the Middle School. The hiring committee consisted of Wayne O'Brien, President of the Falmouth Bus Drivers, Custodians and Maintenance Workers Association, Jeff Woodbury, Maintenance & Transportation Assistant Director, and Phil Dobson, Maintenance & Transportation Assistant. The committee recommended one of those candidates to Topper West, Director of Maintenance, for an interview. Mr. West did not interview that person.

8. On April 26, Dan O'Shea, Director of Finance and Operations, contacted Wayne O'Brien, asking to meet about subcontracting custodial services at the Middle School.

9. On April 29, Mr. O'Brien and MEA UniServ Director, Rebecca Fernald, met with Mr. O'Shea and Mr. West. Mr. O'Shea referenced the language in Article XVI and noted that Respondent had been subcontracting with a private company (Benchmark) to provide custodial services at

the High School since it opened in the fall of 2001. Mr. O'Shea and Mr. West said that subcontracting at the Middle School would not result in any layoffs or adverse changes to compensation or benefits for current staff. Association representatives informed the administrators that they were opposed to subcontracting and asked for financial information to assess Respondent's plan. Following up on this meeting, on May 7, Mr. O'Shea emailed Ms. Fernald information she had requested about the wage and benefit costs of Middle School custodians, including some overtime costs.

10. On May 15, Mr. O'Brien, Ms. Fernald, and Falmouth Education Association President, Tom Walsh, met with Mr. O'Shea and Superintendent Geoff Bruno, to discuss subcontracting at the Middle School. The Association representatives again voiced their opposition to subcontracting and asked the administration not to subcontract and to hire district employees to fill the vacancies. The Association also informed the administrators that the decision to subcontract was a mandatory subject of bargaining and needed to be negotiated. Mr. O'Shea and Mr. Bruno responded that the language of Article XVI and the history of subcontracting with Benchmark at the High School for nearly two decades showed that the subject had already been negotiated and that the Board already had the contractual right to decide to subcontract provided that it followed the process in that article.

11. On May 21, Mr. O'Shea informed Ms. Fernald that the subcontracting bids were due on May 17, and there was no formal bid opening scheduled and bids were opened after 3 p.m. that day.

12. On May 23, Mr. O'Shea notified Ms. Fernald that Benchmark was the only bid they received for subcontracting custodial work at the Middle School and it was selected by Respondent. Ms. Fernald responded that the decision needed to be negotiated and asked Mr. O'Shea for dates to meet for the negotiations.

13. On May 24, Mr. O'Shea responded to Ms. Fernald's demand for negotiations over the Board's decision to subcontract with Benchmark. Mr. O'Shea disagreed that the decision had not already been negotiated and stated that the language in Article XVI already established the Board's right to decide to subcontract, as well as the Association's right to submit a proposal, which the Association did not do.

14. The Association sent a 10-day notice, dated May 31, to Respondent to bargain the decision to subcontract custodians at the Middle School, and the parties mutually agreed to meet on June 17.

15. On June 17, Mr. O'Shea, Mr. Bruno, Ms. Tracy, and Mr. Trenholm (for the Board) met with Ms. Fernald and Mr. O'Brien (for the Association) pursuant to the Association's 10-day notice. The Association presented arguments against subcontracting custodial services at the Middle School. Ms. Fernald stated that the Association was not trying to take subcontracting away at the High School but that they were trying to stop the expansion of subcontracting in other schools. Ms. Tracy said that the Board will discuss the situation. Ms. Fernald stated that if the Board proceeds with the subcontracting, the Association will file a prohibited practice.

16. On June 27, Ms. Fernald emailed Mr. Trenholm and left him a voicemail to inquire about the Board's response to the Association's position at the June 17 meeting and to ask him if there

should be another meeting between the parties. Mr. Trenholm responded to that email the next day and he and Ms. Fernald agreed to talk on July 1.

17. On July 1, Mr. Trenholm and Ms. Fernald spoke on the phone and Mr. Trenholm informed her that the Board was not planning to take any action to change course regarding contracting with Benchmark at the Middle School following its executive session on June 24 and did not wish to meet again about subcontracting.

18. On July 3, Ms. Fernald emailed Mr. Trenholm requesting financial information and stating that, "[she had] not heard definitively yet if Benchmark employees are working at the Middle School. As you know, we are hoping that the district will reconsider their plan to subcontract, although after speaking with you on Monday, it doesn't appear they have changed their plans."

19. On July 25, Ms. Fernald emailed Mr. Trenholm requesting information and asking if he could confirm that the district was not willing to negotiate and if the Benchmark employees were working in the school.

20. On July 26, Mr. Trenholm responded to Ms. Fernald by email, confirming that Benchmark employees were working in the school, and asking the purpose of further negotiations. Starting July 1, 2019, Benchmark provided custodial services at the Middle School.

21. On July 29, Ms. Fernald emailed Mr. Trenholm and stated that: "I think it is important to return to the bargaining table about the subcontracting, even though Benchmark employees have already started working at the Middle School. The issue is not resolved and we need further chances to try to reach a resolution." On August 1, Mr. O'Shea sent Ms. Fernald the financial information she had requested, which was not yet available when she first requested it because the fiscal year's information was still being processed.

22. Ms. Fernald mailed Ms. Tracy a 10-day notice, dated August 2, "to continue negotiations on the decision to subcontract custodians." The parties mutually agreed to meet on August 23.

23. Before that meeting, Ms. Fernald emailed Mr. Trenholm the following proposal on August 8: "The Board shall not subcontract custodial positions at the Middle School and Elementary School. All vacant or new positions shall be filled in accordance with Article X, (B) Vacancies."

24. On August 23, Mr. O'Shea, Mr. Bruno, Ms. Tracy, and Mr. Trenholm (for the Board) met with Mr. O'Brien and Ms. Fernald (for the Association) pursuant to the Association's demand. The Association was provided with copies of a grievance it had filed and a proposal it had made regarding subcontracting. The Board responded to the Association's proposal, emailed by Ms. Fernald on August 8, that it was not obligated to negotiate over the current decision to subcontract. Ms. Fernald said that the Association wanted to take some time to review the materials that she had been provided at the meeting and would get back to the Board about next steps. Ms. Fernald confirmed that she had been provided with all of the information that she had requested to date.

25. On September 16, Ms. Fernald notified Mr. Trenholm by email that the Association would be filing for mediation and Mr. Trenholm received a copy of a mediation request from the Association dated September 18.

26. By letter dated October 4, Mr. Trenholm provided Ms. Fernald with his legal analysis of the negotiability of the Board's decision to contract bargaining unit work. Mr. Trenholm requested that the Association withdraw its mediation request "and refrain from any further efforts to improperly coerce the School Board into re-negotiating this issue, or trying to have the School Board reconsider its decision."

27. On October 18, [the Board's Executive Director] emailed Ms. Fernald informing her that he had talked with Mr. Trenholm who asserted that the Employer's position was that they did not have the obligation to bargain. [The Executive Director] decided not to assign a mediator since he determined that the Employer would not participate in mediation. [The Executive Director] said he would assign a mediator as needed once the dispute over the duty to bargain was resolved.

28. By letter dated October 21, Ms. Fernald responded to Mr. Trenholm's letter dated October 4 and requested "that the School Board comply with the mediation request, as required by law."

29. As of January 15, 2020, there were two full-time and one half-time bargaining unit custodians remaining at the Middle School, with one full-time night custodian scheduled to retire in June 2020.

30. The parties have negotiated multiple successor agreements and maintained their collective bargaining relationship since Respondent first began subcontracting with Benchmark at its high school in 2001.

IV. Findings of Fact

Upon review of the entire record, the Board further finds the following.

Article XVI of the parties' collective bargaining agreement is titled "Sub-contracting" and begins:

> If at any time during the term of this contract the School Board shall contract or subcontract out any services performed by any bargaining unit member hereunder, the School Board agrees that any bargaining unit member whose duties may thereby be reduced or terminated shall be considered for employment by such contractor or sub-contractor provided that such contractor or sub-contractor agrees in such contract or subcontract to permit such consideration.

The article continues, providing for the re-hiring of former bargaining unit employees that had been employed by the contractor or subcontractor upon the completion or termination of the contract or subcontract. The article ends with:

> If the contracting or subcontracting of any bargaining unit duties is being proposed by the School Board, the Falmouth BDCMWGA shall have the

> opportunity to submit a proposal under the same terms and conditions as any other contractor or sub-contractor.

This subcontracting language has been included, unchanged, in successive collective bargaining agreements between the parties since as early as 1984. Mr. O'Shea testified at the hearing that the Association has consistently proposed changes regarding subcontracting during contract negotiations between the parties since at least 2000 and that it did so once in writing, in 2009.

Until the opening of the high school in 2001, the School combined the high school and middle school in one facility, with all custodial services provided by bargaining unit employees represented by the Association. The School subcontracted custodial services at the new high school facility, without prior notice to the Association. On September 19, 2001, the Association filed a grievance claiming that the School had violated the parties' collective bargaining agreement by subcontracting bargaining unit duties without having first notified the Association and given it a chance to submit a competing bid in accordance with the contract language quoted above. The parties subsequently settled the grievance.

IV. Analysis

A. Jurisdiction

The Association is a bargaining agent within the meaning of 26 M.R.S.A. § 962(2) and the School is a public employer within the meaning of 26 M.R.S.A. § 962(7). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 968(5).

B. Refusal to collectively bargain – refusal to participate in dispute resolution process

The Municipal Public Employees Labor Relations Law (the Act) imposes an obligation on both the employer and the employees' bargaining agent to collectively bargain with respect to mandatory subjects of bargaining. 26 M.R.S.A. § 965. The decision to subcontract bargaining unit work is a mandatory subject of bargaining. *Teamsters Local Union No. 48 v. Boothbay/Boothbay Harbor Community School District*, No. 86-02, slip op. at 11-12 (March 18, 1986). The obligation to collectively bargain includes the obligation to "participate in good faith in the mediation, fact-finding and arbitration procedures" required by the Act. 26 M.R.S.A. § 965(1)(E). An employer's refusal to collectively bargain with the bargaining agent as required by § 965 of the Act is a prohibited practice under § 964(1)(E) of the Act.

A party may waive its right to bargain about a particular subject during the term of a collective bargaining agreement by agreeing to specific contractual language. *Gray-New Gloucester Teachers Ass'n v. MSAD 15 Board of Directors*, 85-01, slip op. at 3 (Oct. 11, 1984). In order for such a waiver to be effective, the waiver must be "clear and unmistakable," and "a mere inference, no matter how strong, should be insufficient." *SAD 3 Education Ass'n v. RSU 3*, No. 15-19, slip op. at 12 (February 18, 2016), citing *MSEA v. State of Maine*, No. 84-19, slip op. at 9 (July 23, 1984), quoting *Communications Workers of America v. N.L.R.B.*, 644 F.2d 923, 928 (1st Cir. 1981).

If the parties' contract does not contain a "clear and unmistakable" waiver of midterm negotiations, that does not end the inquiry. The Board has long held that "the obligation to bargain continues with respect to new issues which arise during the course of the administration of the collective bargaining agreement when those new issues are neither contained in the terms of the contract nor negotiated away during bargaining for that contract or a successor contract." *Wiscasset Educational Support Prof'l Ass'n v. Wiscasset School Dept*., No. 18-09, slip op. at 6 (May 14, 2018), quoting *East Millinocket Teachers Assn. v. East Millinocket School Committee*, No. 79-24, slip op. at 4-5 (Apr. 9, 1979), quoting *Cape Elizabeth Teachers Ass'n v. Cape Elizabeth School Board*, No. 75-24, slip op. at 4 (Oct. 16, 1975).

Thus, even without an express waiver of midterm bargaining in the contract, a party is relieved of the obligation to engage in bargaining if the subject is "covered by" the contract. The Board does not require the subject to be specifically mentioned in the collective bargaining agreement in order to be considered covered by the contract—it is enough for the subject to be "inseparably bound up with and thus plainly an aspect of provisions in the contract." *Augusta Fire Fighters, Local 1650, IAFF v. City of Augusta*, No. 01-09, slip op. at 8 (August 10, 2001), aff'd sub nom. *City of Augusta v. Maine Labor Relations Board, et al.*, No. AP-01-63 (Me. Super. Ct., Kennebec Cty., May 3, 2002), quoting *C & S Industries, Inc.*, 158 N.L.R.B. 454, 459 (1966) (internal quotations omitted).

The Association correctly points out that the collective bargaining agreement between the parties contains no waiver of midterm negotiations, such as a zipper clause. Again, however, the absence of such a waiver does not settle the matter. When a subject is covered by the collective bargaining agreement, the issue of waiver is irrelevant. See *Mv Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), quoting *N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) ("A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has *exercised* its bargaining right and the question of waiver is irrelevant.") (emphasis in original).

In order to determine whether the School's decision to subcontract is covered by the contract, thus relieving the School of the obligation to bargain, the Board must examine the relevant language in the parties' collective bargaining agreement. *Granite City Employees Assoc. v. City of Hallowell*, No. 05-02 at 11 (Feb. 16, 2005). Looking to the parties' agreement, Article XVI is devoted solely to the subject of subcontracting. While the language lays out the conditions that must be met in order for the School to subcontract, it does not expressly state that the School has the authority to subcontract.

Although the Board finds the contract language to be strange—perhaps explained by the push-and-pull nature of the negotiating process—it is not ambiguous.[2] See *Eastwick v. Cate St. Capital, Inc.*, 2017 ME 206, ¶ 17, 171 A.3d 1152, 1156, modified (Nov. 30, 2017), quoting *Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 10, 897 A.2d 803 ("The fact that parties have different views of what an agreement means does not render it ambiguous.").

In *Orono Fire Fighters Ass'n v. Town of Orono*, the Board analyzed a similar contract provision in order to determine whether a town was permitted to make changes to the work week:

> If the Town reduces or changes the work week during the life of this contract, the Town agrees not to reduce base wage paid employees. The Town further agrees to give employees a 30-day notice before implementing any schedule changes and to consult with the Union regarding matters of concern.

No. 89-18, slip op. at 16 (Sept. 1, 1989).

The Board found this language to be "apparent on its face" that it permitted the town to make such changes, provided it first met the three conditions.[3] *Id.* The language in the present case is similarly apparent. If the School does not have the authority to subcontract under the collective bargaining agreement, then the subcontracting article does not make any sense.[4] In other words, the School's right to subcontract is "inseparably bound up with and thus plainly an aspect of" the subcontracting provisions of the contract. See *City of Augusta*, No. 01-09, slip op. at 8.

The Association contends that the contract covers only the impact of the decision to subcontract, and that it does not address the School's underlying right to make the decision itself. The U.S. Circuit Court of Appeals for the D.C. Circuit examined a similar argument in *United Mine Workers of America, Dist. 31 v. N.L.R.B.*, 879 F.2d 939 (1989). In that case, the court reviewed a National Labor Relations Board decision that a union and employer had bargained to agreement on the subject of subcontracting in their collective bargaining agreement and that therefore the employer had fulfilled its obligation to collectively bargain. The union argued that the employer had failed to bargain because it had not given the union the opportunity to bargain over the employer's decision to subcontract. The parties' agreement had laid out permissible conditions for subcontracting—that it could not cause or result in layoffs and that the subcontractor must first offer employment to current or laid-off employees—but the union argued these provisions were meant to "coexist" with its statutory rights to bargain over the actual decision and merely served as an additional safeguard. *Id* at 942-943. Like the Association here, it also argued that the duty to bargain could be avoided only through an express waiver in the contract that was "clear and unmistakable." *Id.* The court rejected the union's position, finding that the parties' contract "fully defined the circumstances under which subcontracting was permitted." *Id.* at 942. It further found that the employer's decision to subcontract was based on the subcontracting provisions of the contract and not on the union's waiver of rights, making the "clear and unmistakable" standard inapplicable. *Id.* at 944. The court also rejected, as the Board does here, the argument that the union had reserved its rights to bargain over the employer's decision to subcontract, finding that such a reading would render the subcontracting provisions of the contract meaningless. See *Id.* While this case is not binding precedent, the Board finds its reasoning regarding a similar provision in a roughly parallel body of law on a similar legal question persuasive.

Previous Board decisions may have created confusion on the distinction between when a party has waived midterm bargaining rights and when a party has already exercised its right to bargain by agreeing to language that substantively covers a subject. See e.g, *RSU 3*, No. 15-19, slip op.

at 12 (determining that midterm bargaining was required in the absence of a "clear and unmistakable" waiver, without explicitly applying a "covered by" analysis); *City of Augusta*, No. 01-09 at 6 (Aug. 20, 2001) (applying a "covered by" analysis in the absence of a waiver). Indeed, looking to the federal sector, there has been long-running disagreement between the National Labor Relations Board and some courts, and among courts, about the concepts of waiver and whether a subject has been covered by the contract. See *Mv Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019).

What might appear to be an inconsistency between this decision and the decision in *RSU 3* with respect to that ruling's reliance on "clear and unmistakable" waiver can be reconciled. No. 15-19. In that case, the Board determined there was no "clear and unmistakable" waiver of impact bargaining on a certain subject because the language the employer relied upon was too vague. *Id.* slip op. at 12 (the contract provision at issue read: "With respect to the teachers' in-school work day, the teachers will devote the time necessary to meet their professional responsibilities."). While the Board did not explicitly apply the "covered by" standard, it did so implicitly by rejecting the employer's contention that this vague language covered decisions affecting the length of the school day.

To the extent that Board precedent has been confusing on these issues, the Board takes this opportunity to clarify the law: If a subject is covered by the parties' collective bargaining agreement, there is no obligation to negotiate the subject during the agreement's term.[5] If the subject at issue is not covered by the parties' collective bargaining agreement, however, the parties are required to negotiate the subject, unless the party demanding bargaining has clearly and unmistakably waived its right to do so.[6]

Finally, the Board rejects the Association's contention that the School waived its right to object to further negotiations by agreeing to meet and consider the union's proposed changes to the subcontracting article in their collective bargaining agreement. Far from waiving its position, the School repeatedly asserted during the parties' multiple meetings and communications and when declining mediation that subcontracting was permitted by the contract and that it did not believe it was obligated to negotiate on the subject. See stipulations 10, 13 and 24. To find a waiver in these circumstances would discourage parties from meeting, conferring and attempting to reach middle ground unless plainly required to do so as a matter of law, which is antithetical to healthy management labor relations. Under the circumstances, the School cannot be said to have waived its right to object to ongoing negotiations and impasse resolution on the subject.

C. Unlawful interference, restraint or coercion

The Association has also made a derivative claim that the School's alleged refusal to bargain by refusing to mediate constitutes unlawful interference, restraint or coercion in violation of 26 M.R.S.A. § 964(1)(A). A violation of this provision does not depend upon the employer's motive or success, but is instead 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." *Maine Association of Police v. Town of Pittsfield*, 20-PPC-07, slip op. at 6 (December 31, 2020), quoting *Duff v. Town of Houlton*, No. 97-20, slip op. at 21 (Oct. 19, 1999).

A claim of unlawful interference can be either independent or derivative. An independent violation occurs "when the conduct itself directly interferes with the exercise of rights granted under the Act," whereas a derivative violation is based on conduct that violates another provision of the Act. *MSEA v. Maine Turnpike Authority*, No. 12-08, slip op. at 18 (February 12, 2013). If the Board finds the alleged violation underlying a derivative claim to be without merit, the Board will dismiss the derivative claim as well. *Duff v. Town of Houlton*, No. 97-20, slip op. at 24 (Oct. 19, 1999). Because the School's refusal to proceed to mediation on the issue of subcontracting is not a refusal to collectively bargain in violation of the Act, there can be no derivative violation. Accordingly, the unlawful interference claim must be dismissed.

D. Refusal to collectively bargain – unilateral change

A public employer's unilateral change to a mandatory subject of bargaining violates the duty to collectively bargain created by § 965 of the Act and is a prohibited practice under 26 M.R.S.A. § 964(1)(E). *Wiscasset School Dept.*, No. 18-09, slip op. at 6. In order to constitute a unilateral change in violation of § 964(1)(E), three elements must be present. The public 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. *Id.* at 7; *Bangor Fire Fighters Association v. City of Bangor*, No. 84-15, slip op. at 8 (Apr. 4, 1984).

As we have already determined that the School was permitted to subcontract under the collective bargaining agreement, there has been no unlawful unilateral change to a mandatory subject of bargaining and thus no prohibited practice.

E. Discrimination

Public employers, their representatives and their agents may not encourage or discourage union membership by engaging in discrimination in regard to hire or tenure of employment or any term or condition of employment. 26 M.R.S.A. § 964(1)(B). A complainant alleging unlawful discrimination has the burden of proving by a preponderance of the evidence that (1) the employee engaged in protected activity, (2) the decision-makers knew of the employee's participation in protected activity and (3) there is a relationship, or causal connection, between the protected activity and one or more adverse employment actions against the employee. *Town of Pittsfield*, No. 20-PPC-07, slip op. at 7; *Holmes v. Town of Old Orchard*, No. 82-14 (Sept. 27, 1982) (adopting the three-part test established in *Wright Line and Bernard R. Lamoureux*, 251 NLRB 1083 (1980), aff'd by 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)). In order to determine whether there is a sufficient causal connection under the test, the Board examines whether the complainant has provided evidence to support an inference that the protected activity was a "substantial or motivating factor in the employer's decision." *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02, slip op. at 19 (July 24, 2019), quoting *Casey v. Mountain Valley Educ. Ass'n. and SAD 43*, No. 96-26 & 97-03, slip op. at 27-28 (October 30, 1997).

Although the Board has not previously examined a discrimination claim in the context of an employer's decision to subcontract, the Association cites National Labor Relations Board and federal court decisions finding subcontracting to constitute discrimination under the roughly

parallel provision in federal law. *Joy Recovery Tech Corp*, 320 NLRB 356,365 (1995), aff'd 134 F.3d 1307 (1998); *Pollution Control Industries of Indiana*, 316 NLRB 455 (1995); *Special Mine Services*, 308 NLRB 711,720 (1992), aff'd in relevant part, denied in part, 11 F.3d 88 (7th Cir. 1993); *Lear Siegler, Inc.*, 295 NLRB 857 (1989). Each of the cases the Association relies upon, however, involved clear adverse employment actions—current employee terminations or layoffs—evidence of which is absent from the current claim. No violation of § 964(1)(B) occurs absent an adverse employment action. See e.g., *AFSCME, AFL-CIO v. Penobscot County Sheriff's Office*, Nos. 14-27 & 15-08, slip op. at 21 (March 10, 2016). The School's subcontracting may, as the Association fears, come to erode the bargaining unit over time, but the School has not discharged or taken any disciplinary action against bargaining unit employees in the course of subcontracting. Rather, the School has subcontracted bargaining unit employee duties only through means of attrition. Because the Association has not established that the School's subcontracting pursuant to the parties' collective bargaining agreement was or caused an adverse employment action, the discrimination claim has no merit.

V. Conclusion

The Board finds that the School's right to subcontract is covered by the parties' collective bargaining agreement and that, accordingly, the School did not fail to collectively bargain in violation of the Act when it refused to proceed to mediation on the subject of subcontracting or when it unilaterally implemented its decision to subcontract. The Association has also failed to establish that the School's subcontracting was an adverse employment action motivated by the protected activity of bargaining unit employees. As such, the compliant is dismissed.

ORDER

On the basis of the foregoing stipulations, findings of fact and discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. § 968(5), it is ORDERED that the complaint in Case No. 20-PPC-06 be, and hereby is, DISMISSED.

Dated this 26th day of January, 2021

MAINE LABOR RELATIONS BOARD

/s/ Katharine I. Rand

Katharine I. Rand

Chair

/s/ Richard L. Hornbeck

Richard L. Hornbeck

Alternate Employer Representative

/s/ Amie M. Parker

Amie M. Parker

Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. § 968(5)(F) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.

[1] The Association alleges in its post-hearing brief that the School's alleged discrimination, in violation of § 964(1)(B), also constitutes unlawful interference in violation § 964(1)(A). As this claim was not included in the Association's initial complaint, nor any subsequent amendment, it is untimely and, regardless, without merit.

[2] The School points to the Association's grievance from 2001 to demonstrate that the parties' have long understood the contract to permit the School the discretion to subcontract. In the 2001 grievance, the Association had challenged the School's failure to provide prior notice of its decision to subcontract at the new high school facility, but did not protest the School's actual decision to subcontract. Because the Board finds the contract to be unambiguous, such extrinsic evidence of past practice is irrelevant. See *Wiscasset School Dept.*, No. 18-09, slip op. at 6. ("In the present case, past practice is not relevant because there is no ambiguity or gaps to fill…").

[3] Although the language at issue in that case was analyzed in the context of the waiver exception to the unilateral change rule, the root issue is identical—whether the employer was permitted to make the decision under the contract.

[4] The Board applies principles of contract law in order to interpret ambiguous language in a collective bargaining agreement necessary for determining whether the language covers an area in dispute. *RSU 3*, No. 15-19, slip op. at 16; *State of Maine v. Maine State Employees Ass'n.*, 499 A.2d 1228, 1230 (Me. 1985). Although the language at issue in this case is not ambiguous, it is worth noting that Maine contract law supports the Board's interpretation of this provision. See *Dow v. Billing*, 2020 ME 10, ¶ 14, 224 A.3d 244, 249 (A contract should be interpreted so as "to avoid rendering any part meaningless.").

[5] The parties are still, of course, obligated to negotiate on mandatory subjects of bargaining in the context of negotiations for a successor contract.

[6] As noted above, the parties are still obligated to negotiate on mandatory subjects of bargaining in the context of negotiations for a successor contract.