

_____)	
LOCAL 1476, IAFF,)	
FIREFIGHTERS UNIT,)	
)	
Complainant,)	DECISION
)	AND
v.)	ORDER
)	
CITY OF SOUTH PORTLAND,)	
)	
Respondent.)	
_____)	

The Firefighters Unit of Local 1476 of the International Association of Firefighters (the "Union") filed this prohibited practice complaint with the Maine Labor Relations Board on September 27, 2011, alleging that the City of South Portland (the "City" or "Employer") made a unilateral change in a mandatory subject of bargaining. The complaint alleges that this conduct constituted a failure to negotiate in good faith as required by 26 M.R.S.A. §965(1)(C) of the Municipal Public Employees Labor Relations Law (the "Act"), thereby violating § 964(1)(E) of the Act.

Throughout this proceeding, Robert F. Bourgault represented the Complainant, IAFF Local 1476, and Robert W. Bower, Jr., Esq., represented the Respondent City of South Portland. The case was held in abeyance so that the parties could attempt to resolve the dispute on their own. An evidentiary hearing was held on October 26, 2012, at which time the parties were able to examine and cross-examine witnesses, and introduce documentary evidence. The parties submitted post-hearing briefs, the last of which was filed on February 8, 2013. Board members Susan L. Higgins,

Chair, Richard L. Hornbeck, Esq., and Robert L. Piccone met on March 4, 2013, to deliberate this matter.

JURISDICTION

Local 1476 of the International Association of Firefighters is the bargaining agent within the meaning of 26 M.R.S.A. §962(2), and the City of South Portland is the employer within the meaning of 26 M.R.S.A. §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §968(5).

FINDINGS OF FACTS

1. IAFF Local 1476 is the bargaining agent for a bargaining unit of all uniformed employees below the rank of lieutenant at the South Portland Fire Department. The parties' current collective bargaining agreement runs from July 1, 2011, until June 30, 2014. There are just under 50 firefighters in the Fire Department, as well as 12 officers (captains and lieutenants), three deputy chiefs and one chief. The officers are in a separate bargaining unit.
2. Article 16, section A of the parties' collective bargaining agreement is entitled "Overtime Lists" and describes the overtime hiring requirements for the bargaining unit. It establishes four different overtime rosters including a lists for regular overtime and for forced overtime. The relevant subsections of Article 16(A) are:

2. Any employee called to fill a staffing vacancy shall be called in proper rotation from a Regular Overtime posted roster that reflects the vacancy. Any overtime work that is not for the staffing of fire department equipment shall be taken from a roster called Outside Overtime.

3. Any employee who accepts overtime or refuses six (6) overtime offers shall be rotated to the bottom of the overtime roster. Employees shall supply the Department with their current phone number. An employee may refuse any and all work except that of an emergency nature as defined by the Chief or Deputy. An Emergency (forced) posted roster shall be used when a volunteer is not available to fill a vacancy from the Regular overtime rosters. It shall be the responsibility of the Chief or Deputy to periodically balance the forced lists.

Article 16 includes several other sections called Donation of Service, Training, Call Back, Overtime Rate/Hours of Work, Employees as Members of Call Companies, and All Hands Call Overtime. There is no reference in Article 16 to policies or procedures to implement the Article's provisions.

3. The current year's overtime budget for the Fire Department is \$475,000.
4. Article 16 of the collective bargaining agreement has been in place and has remained unchanged for many years. The collective bargaining agreement does not spell out the actual procedure used for hiring firefighters for overtime such as how firefighters are notified of overtime opportunities and the mechanics of filling spots. These procedures are detailed in the Department's Overtime Hiring Policy.
5. The 2004 version of the Overtime Policy can be summarized as follows: After the staffing needs are identified, the hiring officer would begin the calling process no earlier than 6 p.m. and would start with the first person on the list. If the call was not answered, the officer would leave a message "Fire Department Hiring for Overtime" and wait 5

minutes for a return call. The hiring officer would not move on to the next person on the list until contact had been made or a message left and no response received. An employee who accepted the overtime or refused six (6) overtime offers would be rotated to the bottom of the roster. The hiring officer continued on down the list, calling one person after another using the same procedure until all the vacancies were filled. If the hiring officer reached the bottom of the list and had not filled all the vacancies, the hiring moved to a separate "forced list." In those instances where the person to be contacted was on duty, the hiring officer would either call the fire station by telephone or radio and speak to the employee or have the supervisor ask him if he wanted overtime.

6. In 2005, the Department switched to 24-hour shifts from 14-hour night and 10-hour day shifts. This change impacted the overtime hiring procedure and several grievances were filed. The Union and the Employer agreed to resolve the grievances with an adjustment to the procedure, which was described in a memo from the Chief dated August 25, 2005.
7. The time required under the procedure in effect prior to 2011 varied from around 20 minutes up to an hour and a half, depending on whether firefighters high up on the list answered the call (or responded to the message left) and accepted the overtime. There are some people who never accept overtime, some who occasionally take overtime, and others who take it whenever it is offered.
8. Under the previous policy, if an employee knew he wanted overtime, but would not be available after 6:00 p.m. to take a call, he could tell the officer "if you get to my name, I

do want the OT." At some point, the paging system was used to give employees a "heads up" that there would be available overtime opportunities, but the calls were still made following the order of the rotation list.

9. Some hiring officers were less precise in administering the policy than others, by, for example, starting too early, accepting calls placed too late, or inadvertently skipping someone.
10. The Fire Department's Strategic Planning Committee consisted of Union members from both bargaining units and management, but participation was not consistent over time. Not everyone participating in the committee went to every meeting. Meetings fell off during periods of change in Union leadership and, for example, when the former Human Resources Manager left. Various issues were discussed (and some solved) by this committee. There were ground rules on what the committee could and could not do and overtime was one of the issues on which the discussions would be non-binding. There were concerns from all parties on certain aspects of the overtime hiring process, and the issue was discussed on and off over the course of many meetings.
11. At the strategic planning meeting on February 17, 2011, a number of Union members were in attendance and a document was presented by management as a draft policy on overtime. Michael Williams, a Fire Captain and the second district vice president for the Union, was one of the Union members who voiced his concern that while the document seemed to present a reasonable approach, because it was a working condition, it needed to go back to the Union membership to be voted on and accepted. John Beyer, the President of the

Union, also stated this same objection. Williams testified that he thought that at that point "everybody was on the same page."

12. In an e-mail dated February 23, 2011, Williams wrote to Kevin Guimond, the Fire Chief, on the subject of the proposed overtime hiring policy, stating:

Chief,

I have reviewed the hiring bulletin and believe this changes the conditions on hiring. My understanding is at 1800 hours, the officer or MIC would call only those members that have called in instead of each member on the list when starting at the top. As I mentioned at the Strategic Planning Committee, changes to the policy that would skip members for those calling in would be a change in working conditions and needs to be accepted by each bargaining unit before implementation. Changes to the policy without the approval of the Units could incur grievances or other action based on the prior practice articles of both units.

I'm assuming that this is not your position and a clarification will be forthcoming. I'm more than willing to take back any changes to hiring of officers to the Command Unit for discussion and or approval at our next meeting. BTW, I do have a meeting scheduled for tomorrow evening.

Thanks.

Capt. Mike Williams
President
South Portland Fire Command Officers Association

13. The first overtime policy that was posted was scheduled to come out on April 28, 2011, but was delayed because the Chief saw a problem in it. The policy dated May 2, 2011, reflected the Chief's corrections. Another issue that union members had identified and brought to the Chief's attention was addressed in the version issued on July 20, 2011.

14. The mechanics of the new overtime hiring policy at issue involves the use of a new technological tool called IAMRESPONDING. Under the new policy, the hiring officer uses the IAMRESPONDING system to send a simultaneous text and email message to all of the firefighters. The message specifies the available shifts, the locations, whether firefighter or officer jobs, and the number for the employee to call by the specified deadline.¹ After the deadline passes,² the hiring officer takes a copy of the rotation list and highlights the names of individuals who have called in and left a message stating that they want overtime. The hiring officer starts and the top of the list, calling each highlighted name until all of the available spots are filled. At that point, the hiring officer sends out another message stating that all of the overtime shifts have been filled.
15. If an employee accepted overtime under either the new or old policy, his name would be moved to the bottom of the list. In addition, under both policies, an employee's name would move to the bottom of the list after six refusals.
16. Under the old policy, the increased availability of caller ID on home telephones and on cell phones led to an increase in employees not answering calls from the Department. This led to a reduction in the number of actual refusals logged, and consequently a reduction in the frequency of names being forced to the bottom of the list for six refusals.

¹There was testimony that some hiring officers do not provide the specifics of the shifts available.

²The deadline was changed from 1800 hours to 1700 hours in the version of the policy issued on July 20, 2011.

17. Under the new policy, refusals occur when an employee leaves a message indicating that he wants to work, but turns down the shift when the hiring officer calls. This situation might arise, for example, when the employee wanted a day shift, but all that was available when he was called was a night shift.
18. Two employees testified that the new system resulted in fewer instances of people moving to the bottom of the list due to refusals.
19. The Fire Chief testified that he had adapted the policy three times since the initial publication on April 28, 2011, in response to input from officers and firefighters and that "my door's open today." The Chief thought the policy that was replaced was "very, very inefficient" because it involved making up to 60 phone calls.
20. One employee testified that he did not have good cell phone reception at his house and, consequently, was required to either log in to the city's email system or make a long-distance phone call every day to check on overtime availability. Another employee, who had a cell phone but no home phone, discovered that his cell phone was too old to receive text messages. Because he could not afford a new phone, he had to call in every morning and say that he was available for a job if one opened up. The overtime shifts he had been able to work were all ones where he had been at work the night before.
21. The Union filed a grievance over the City's implementation of the new policy. Although the grievance is not part of the record, the City's response to the grievance dated

July 28, 2011, indicates that the grievance asserted that the Department's new policy violated the terms of Article 16 of the agreement requiring the employees to be "called" in proper rotation. The City Human Resources Director denied the grievance, stating that the new procedure was consistent with the terms of the agreement. The crux of the denial of the grievance is in the following statement by the Human Resources Manager:

. . . I find that the working condition of equalization of overtime opportunities through proper notification and awarding remains unchanged and is consistent with the collective bargaining agreement. Management Rights allows the Chief to establish reasonable rules and methods of operations to facilitate the safe and efficient operations of the Fire Department.

The Union also pointed out in the grievance that one of its members was suffering a financial hardship and was unable update his cell phone to be able to receive text messages. The Employer responded that the hardship example was "not sufficient enough reason to discourage more efficient and less time-consuming overtime hiring procedures."

22. Article 12 ("Management Rights") of the agreement states in full:

A. The listing of the following rights of management in this Article is not intended to be, nor shall be, considered restrictive of, or as a waiver of, any of the rights of the City not listed herein.

1. Except as otherwise provided in this Agreement, the management and the direction of the working forces, including but not limited to, the right to hire, the right to hire part-time and temporary employees, the right to promote, the right to discipline or discharge for just cause, the right to lay off for lack of work or other legitimate reasons, the right to reduce the number of hours of operations, the right to transfer,

the right to assign work to employees, the right to determine job content, the right to classify jobs and the right to establish reasonable rules, are vested exclusively in the City.

2. The City shall have the freedom of action to discharge its responsibility for the successful operation of its mission, including, but not limited to, the determination of the number and location of its platoons, the service to be performed (except as otherwise mentioned in this Agreement) the apparatus, tools, equipment, and materials to be used, the work schedules and methods of operations.

23. Another grievance in August involved an individual who was working when the overtime notice was sent out. The grievant testified that there had not been any need for overtime identified during the day, but that evening, an opening occurred because an employee went home. The officer sent out a text specifying the opening and giving the fire-fighters 20 minutes to respond, the time frame specified in the policy for emergency hiring. The grievant was at work, but his phone was in a different room. Under the old policy, the hiring officer would have radioed him or his supervisor. The Employer denied the grievance because the employee could have called in to the OT mailbox at any time to indicate he was interested in any jobs that opened up.
24. The Fire Chief described various changes in the use of technology for the overtime hiring process over the years. In the mid- to late-1980's, radio calls were used to some extent. When the Department got pagers, they were used to give a "heads up" on available overtime. After the page was sent, the individual could call back and say if you get to me on the list, I will take the overtime. That helped when individuals knew they would not be able to answer the phone when called later. Once cell phones became available, an

employee could provide a cell phone number along with the home phone number. After answering machines became common, a grievance settlement required the hiring officer to leave a message, which replaced the prior practice of moving on to the next name if there was no answer after six rings.

25. Two union officials testified that most of the changes in the overtime hiring policy and procedures used over the years had been agreed to by the union and that some of the changes were the result of grievances.

26.

Article 33 ("Zipper Clause") of the agreement states in full:

A. This contract represents the total understanding of the parties. The parties to this agreement further agree that matters raised during the negotiations of this contract or covered by this contract shall not be the subject of bargaining during the term of this contract, except by the mutual agreement of the parties.

DISCUSSION

The statutory duty to bargain 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." 26 M.R.S.A. § 965(1)(C). It is a well-established principle of labor law that the duty to bargain includes a prohibition against making unilateral changes in a mandatory subject of bargaining, as a unilateral change is essentially a refusal to bargain. See, e.g., Teamsters v. Town of Jay, No. 80-02 at 3 (Dec. 26, 1980) citing NLRB v. Katz, 369 U.S. 736, 743 (1962), and Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806, 809-10 (Me. 1982). An employer's unilateral change "is a circumvention of the duty to negotiate which

frustrates the objectives of [the duty] much as does a flat refusal" to bargain. NLRB v. Katz, 369 U.S. at 743. A change is unilateral if it is taken without prior notice to the union involved in order to afford the union "a reasonable opportunity to demand negotiations" on the contemplated action. City of Bangor v. AFSCME, Council 74, 449 A.2d 1129, 1135 (Me. 1982).

When a collective bargaining agreement is in effect, the duty to bargain continues with respect to new issues when those new issues are neither contained in the agreement nor waived in a zipper clause. A zipper clause "zips up" the bargaining obligation for the duration of the agreement for those matters specified. The Board's long-standing position is that any waiver of a statutory right to bargain must be made "by clear and unmistakable language." Maine Teachers Assoc./NEA v. State Board of Education, No. 86-14, at 11-12 (Nov. 18, 1986) (language of waiver did not clearly cover issue of salaries for newly created positions); see also State of Maine v. MSEA, 499 A.2d 1228, 1230 (Me. 1985) (the clear and unmistakable language included waiver of the right to demand bargaining over impact of reorganization).

There are two distinct harms caused by a unilateral change. First, a unilateral change damages the union's ability to negotiate over terms and conditions of employment and deprives the employees their collective voice in bargaining over their working conditions. Easton Teachers Assoc. v. Easton School Committee, No. 79-14 at 5 (March 13, 1979) (unilateral changes undermine the union's authority); Teamsters v. Aroostook County Sheriff's Department, No. 92-28 at 25 (Nov. 5, 1992) (unilateral changes without negotiating undermined the union's position in the mind of employees). Second, a unilateral change may cause a direct harm by adversely affecting the condition of employment of one or more members of the bargaining. See, e.g., Teamsters

Union Local 340 v. Town of Jay, No. 80-08 at 3 (Jan. 9, 1980) (unilateral change in shift schedules dramatically affected work employees' work week). Even unilateral changes that unquestionably improve a term of employment are unlawful because it is still circumventing the bargaining agent. Council 73, AFSCME v. Bangor Water District, No. 81-46, at 3, (July 2, 1981) (granting employees the day after Christmas as a new holiday was an unlawful unilateral change).

The Board has established a three-pronged test for determining whether an unlawful unilateral change has occurred in violation of §964(1)(E). The public employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more mandatory subjects of bargaining. Teamsters Local Union No. 48 v. Eastport School Dept., No. 85-18, slip op. at 4, (Oct. 10, 1985).

The issue presented in this case is whether the change to the overtime policy implemented by the Employer in the spring of 2011 constituted a unilateral change in violation of 26 M.R.S.A §964(1)(E). With respect to the first element in the three-pronged test, there is no dispute that the Employer's action was unilateral. The issue was discussed on several occasions in the strategic committee meetings, but the parties agreed that those discussions were not bargaining. When the Employer first gave the Union a copy of the draft overtime hiring policy, the Union president notified the Fire Chief that the change related to a mandatory subject and needed approval of membership. The Employer asserted that bargaining was not required and proceeded to implement the change unilaterally.

With respect to the second element for determining whether a unilateral change violates 964(1)(E), there is no dispute that

the change in the procedure for overtime hiring was a change from a well-established practice as the new procedure used a different mechanism for notifying employees of overtime opportunities and ascertaining whether the employee wanted to work.

The crux of the case before us is whether the change to the procedure involves a mandatory subject of bargaining. Clearly, overtime pay and assignment of overtime is a component of wages. One of the Board's earliest decisions held that an overtime allocation policy is a mandatory subject of bargaining. See Council 74, AFSCME v. City of South Portland, PELRB Nos. 73-13 and 73-14, at 19-20 (Sept. 28, 1973). However, the change at issue in this case did not directly affect the allocation or availability of overtime--its primary effect was to change the procedures for determining who was interested in working. Thus, the City is correct to state that this case is distinguishable from the Gardiner and South Portland cases cited by the Union. In the Gardiner case, the Board found a violation because the employer unilaterally changed the procedure for determining who would get the overtime in certain emergency situations. The prior procedure had awarded a minimum of two hours to all who called in, while the new procedure awarded overtime to only the first two employees to call in. Local 2303, IAFF v. City of Gardiner, No. 05-03, at 14 (March 22, 2005). In the South Portland case, the Board concluded the employer made an unlawful unilateral change which gave officers (members of a different bargaining unit) more opportunities for overtime work while the firefighters received fewer opportunities. Thomas Blake and South Portland Professional Firefighters Ass'n v. City of South Portland, No. 94-12 at 10-11 (June 2, 1994). The change at issue in the present case did not directly affect the availability of overtime, but altered the procedures used for communicating with the employees about overtime opportunities.

The standard this Board has used for assessing whether a particular matter is a "working condition" and therefore a mandatory subject of bargaining is that it must "materially or significantly affect the terms or conditions of employment". IAM District Lodge #4 v. Wiscasset, No. 03-14 at 7 (Feb. 23, 2004) (holding that the established practice of allowing employees to work on their vehicles in the town garage after work hours was a working condition). This standard does not include every single issue related to working conditions that may be of interest to unions or the employer. For example, in Teamsters v. Eastport School Department, the Board held that, absent a change in work rules, the installation and mandatory use of time clocks was not a significant or material change in a mandatory subject of bargaining when the bargaining unit employees were previously required to manually record their hours on weekly time cards. No. 85-18 at 8 (October 10, 1985). The Board distinguished a similar case involving time clocks where the National Labor Relations Board found a violation because the employees had not previously been required to document their hours (other than overtime) and the new policy subjected employees to discipline for failure to use the time clocks. Id. at 6-7, citing Nathan Littauer Hospital Ass'n, 229 NLRB 1122 (1977).

Similarly, in a 1982 case involving University employees, the Board was faced with a complaint that the University's unilateral increase in parking fees from one dollar to five dollars was an illegal change to a working condition. AFUM, UMPA, and Assoc. COLT Staff v. Univ. of Maine, Nos. 82-15, 82-16 & 82-22 (Sept. 27, 1982). The Board held that the parking issue materially and significantly affected working conditions in light of the fact that the vast majority of unit employees drove to work and there was a severe parking shortage, particularly at the

Portland campus of USM. Id. at 9-10. The Board rejected the University's claim that the increase was nominal, noting that over time the amount could be substantial and "were we to hold that the parking fee increase is not a mandatory subject of bargaining, that precedent could lead to substantially higher unilateral increases in the future." Id. at 10. In the same case, the Board held that an increase in locker rental fees at the University's gym was not a mandatory subject because, unlike parking, there was no inherent need for University employees to use the athletic lockers. Id. at 11. The use of the lockers was not a working condition but was merely a convenience to employees and others who wanted to avail themselves of the opportunity of using the athletic facilities. In another University case, the Board held that discontinuing the practice of letting campus police officers assist local police departments in off-campus matters had no tangible effect on working conditions, therefore the employer had no obligation to bargain over the effect of the decision. Teamsters Local Union No. 48 v. University of Maine, No. 79-37 at 3 (Oct. 17, 1979).

THE NATURE OF THE CHANGES TO THE OVERTIME HIRING PROCEDURE

The change at the heart of this case is whether revising the procedure for notifying employees of available overtime and determining who was interested in working the overtime is material and significant enough to trigger the duty to bargain.

The Employer argues that the new policy does not involve any change in working condition because there has been no change to the manner in which overtime is assigned to firefighters nor to the rules for rotation to the bottom of the overtime list. The Employer contends that the only change in the new system is the mechanism for notifying firefighters of available overtime.

Prior to the change, each firefighter was called individually and offered overtime in the order dictated by the rotation list. After the change, all firefighters are simultaneously sent a text or email message notifying them of the overtime available. The firefighters are required to call in and leave a message if they wanted to work overtime. The hiring officer awards overtime to the top person on the rotation list who responded, and the next overtime assignment goes to the next highest person on the list who responded and on down through the rotation list until all spots are filled. The significance of the rotation list remained the same and the rules dictating movement on that list did not change from the old policy to the new one. The primary difference is that under the old system the firefighter had to answer the phone or quickly respond to a telephone message saying he was being called for overtime; under the changed system, the firefighter is required to call the department and leave a message after receiving the text or email notification.³ The Employer emphasizes that the change to the policy does not involve any working conditions of the firefighters because it is simply "the way in which the firefighters are called" that has been changed and that it is merely a "technical or ministerial change." (Br. at 7.)

The Union argues that the change in the procedure does have a material and significant effect on the firefighters' working conditions in two respects demonstrating that the revised policy is not merely a ministerial change. First, under the new policy the burden is on all employees to contact the Department in order to be eligible for the available overtime; failure to do so

³Under both the old and new system, a firefighter could call in and leave a message of his intent to accept an offer of overtime without having received a text or being called by the department.

results in a lost opportunity for overtime. Under the old system, the burden is on the Employer to make successive calls strictly following the rotation list, going through the entire list if necessary. To receive the overtime work, the employee was required to answer the phone and say yes or call back promptly if a message had been left. Under the new system, the firefighters wanting overtime had to call in and leave a message, and the employer need only call enough to fill the available spots. Thus, a new condition of receiving overtime is for the employee to make the call to the Department where that condition had not previously existed. Similarly, the discontinuance of the practice of radio calls to on-duty employees added another burden requiring those employees to check their cell phone messages while at work.

Second, the Union argues that the new policy imposes a financial burden on those employees who do not own cell phones that are capable of receiving text messages or who live in a location with poor or non-existent cell phone reception. Those employees would have to call both to find out if overtime was available and to leave a message that they wanted the work. One employee testified that calling the department was a long-distance toll call. While it appears that there is only one employee whose cell phone has these limitations, the change in procedure might become a consideration for others when replacing their cell phones as well as for new employees.

There is also a change in how "refusals" are tallied, though the collective bargaining agreement specifies six as the number of refusals allowed before an employee is dropped to the bottom of the rotation list. Under the old system, if an employee refused what was offered by the hiring officer on the phone (or via radio at work), that was a refusal. Under the new system, a

refusal would occur if the employee had changed his mind by the time the officer called to fill the OT shift or did not want the shift that was available. The evidence presented on whether the change affected movement on the rotation issue was limited to the conflicting assertions of two individuals, neither of whom referred to any data to support their conclusions. While it is clear that there is a potential change in movement on the list caused by the new policy, it is difficult to determine whether there was an actual change without knowing more about movement patterns under the prior policies.

CONCLUSION

In light of these arguments and the findings of facts, we conclude that the Employer's assertion that the change was "merely" a ministerial change is an over-simplification of the issue before us. The Employer implemented a new procedure in order to take advantage of new technology that would improve its efficiency. The new procedure involved some changes that went beyond the choice of technology used to notify the employees of overtime opportunities. Merely labeling something as "ministerial" skirts the question of whether it "materially or significantly affects the terms or conditions of employment."

We conclude that the changes in the overtime hiring policy did not materially or significantly affect the terms and conditions of employment to an extent that would subject the Employer to the duty to bargain. The "burden" imposed on the employees of having to check a text message and then call or notify the Department if interested in overtime rather than simply answering a phone call is inconsequential. The "burden" is not significantly different from the burden under the prior procedure of being available at the right time frame necessary to

answer the phone or to call back. Similarly, the requirement for on-duty employees to check their text messages while at work similarly does not rise to the level of being a material or significant change in a working condition. The new procedure is consistent with the language in the collective bargaining agreement that employees "shall be called in proper rotation" for overtime--the hiring officer stills calls in the proper rotation, but only calls those who are interested in working overtime. For these reasons, we conclude that the Employer did not have a duty to bargain over the decision to implement the new policy.

Even though we conclude that the Employer did not have an obligation to bargain over implementation of the policy itself, our conclusion is different with respect to bargaining over the impact of implementing the policy. In City of Bangor v. AFSCME, Council 74, the Maine Law Court recognized the distinction between "impact bargaining" and bargaining over the change which resulted in the impact. 449 A.2d at 1134-1135 (1982). In that case, the Court found that while the union had waived the right to negotiate over discharges, this waiver did not include the right to demand bargaining over the impact of discharges. Id. at 1135. Three years later, the Court held that the State's reorganization plans were not only specifically authorized by the management rights clause, the Union had waived the right to bargain over the impact of those changes in clear and unmistakable language in the zipper clause. State of Maine v. MSEA, et al., 499 A.2d 1228, 1232 (1985). More recently, the Board held that an employer was required to bargain over the impact of a change in health insurance coverage even when that decision was made by the insurance carrier and not the employer. Augusta Fire Fighters, Local 1650, IAFF v. City of Augusta, No. 01-09 (August 10, 2001). The Board has also held that an

employer was required to negotiate about the impact of the elimination of a Deputy Chief position even though it was not required to bargain over the decision itself. Granite City Employees Ass'n v. City of Hallowell, No. 05-02 (February 16, 2005).

In the present case, the management rights clause was sufficient to permit the Employer to implement these limited changes to its overtime hiring policy. The zipper clause in the parties collective bargaining agreement, however, only waives mid-term bargaining on matters raised during negotiation or "covered by" the contract. It does not waive the right to demand bargaining over the impact of the Employer's adoption of a new overtime hiring policy to the extent it is not already covered by the contract. There is undisputed evidence that the new policy had a negative impact on one individual whose cell phone was not capable of receiving text messages. There was a further suggestion that the new policy had an effect on the frequency of refusals and consequently the frequency of individuals being moved down to the bottom of the rotation list. We need not conclusively determine that there is an impact because that is a subject that the parties are best equipped to discuss at the bargaining table. As this Board noted in the Augusta Fire Fighters case with respect to health insurance coverage issues,

The City's assumption that the Union can articulate no impact of the coverage changes on the terms and conditions of employment which requires impact bargaining may ultimately prove correct. . . . However, by not meeting with the Union, the City failed to avail itself of the opportunity to learn the specifics of the Union's arguments and proposals regarding impact.

No. 01-09 at 9-10.

ORDER

On the basis of the foregoing findings of fact and discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 968(5), it is hereby ORDERED:

That the City of South Portland and its representatives and agents:

1. Meet within ten days of receipt of a written demand from the Firefighters Local 1476, IAFF, to negotiate the impact of the revised Overtime Hiring Policy on the terms and conditions of employment of employees in the Firefighters Unit.

Dated at Augusta, Maine, this 24th day of May, 2013.

The parties are advised of their right pursuant to 26 MRSA Section 968(5) (F) to seek a review by the Superior Court of this decision by filing a complaint in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

MAINE LABOR RELATIONS BOARD

Susan L. Higgins
Chair

Richard L. Hornbeck, Esq.
Employer Representative

Employee Representative Robert L. Piccone filed a separate, dissenting opinion.

DISSENTING OPINION

I disagree with the majority opinion that the changes are inconsequential and therefore not subject to the duty to bargain. There is no question in my mind that the changes for individual unit employees and the bargaining unit as a whole are material and substantial. I would therefore require the Employer to reinstate the previous policy and bargain over both the implementation and the impact of a new overtime hiring policy.

The Fire Chief testified that there were 310 days with overtime in the preceding year and that the overtime budget was \$475,000. Using the total of 62 firefighters and officers combined, that amounts to an average of over \$7,600 per person in overtime earnings. A single missed overtime shift of ten hours would be over \$227 in lost earnings for an employee at the very bottom of the lowest pay scale. Thus, any change that affects how \$475,000 of overtime becomes available to employees materially and substantially affects the terms and conditions of employment.

That this issue is significant to both parties is demonstrated by the fact that they have negotiated a lengthy and detailed article on overtime which expressly requires employees to be called in proper rotation. The first sentence of Article 16(A) (2) states, "Any employee called to fill a staffing vacancy shall be called in proper rotation from a Regular Overtime posted roster that reflects the vacancy." I disagree with the Board's conclusion that the new procedure complies with this contractual provision because the language does not allow skipping any employee--it says employees shall be called in proper rotation from the roster. There is no legal or factual basis for

concluding that the Employer was authorized to unilaterally implement a hiring procedure that was inconsistent with the express terms of the negotiated agreement.

The majority opinion commits the same error that the Fire Chief committed in unilaterally implementing the policy at issue here. The Chief, having had significant experience on the other side of the table as a negotiator and President of the Union Local earlier in his career, took it upon himself not only to decide what policy design would achieve his stated goals of efficiency and accuracy, but also how his policy affected working conditions. The fact that he accepted "input" from union members on problems with his policy and made adjustments based on that input does not make his behavior acceptable or any less of a unilateral change. In fact, one of the changes clearly resulted in a material and substantial change to a working condition. A quick comparison of the two latest versions of the policy indicate an obvious difference--the deadline by which an employee must call in was changed from 1800 to 1700 hours. Regardless of the rationale for this change, it clearly illustrates a substantial and material change to the conditions in the revised overtime hiring policy imposed unilaterally by the Fire Chief. The Chief was receptive to input and ideas from everyone, but he insisted on acting unilaterally. This attitude goes directly to the heart of the violation of the Act because, like a straightforward unilateral change, an openness to ideas from individuals while refusing to negotiate with the Union has a tendency to erode the status of the bargaining agent.

The Union is correct to state that the question is not "whether the new policy is 'better' or 'worse' than the former policy." Brief at 3. The reasonableness of the new policy and the improved efficiencies are issues relevant to the negotiation

process, but are beyond the scope of an analysis of whether the employer is obligated to bargain over a subject.⁴ The question before the Board is not the reasonableness of the policy, but whether the change is a material and substantial change to a working condition. In this case, the Chief designed and implemented a new procedure that affected working conditions in a variety of ways, both positive and negative, without negotiating with the bargaining agent of the employees over either the decision to change the policy or the effects of those changes on working conditions.

Beyond the question of whether the new policy is good or bad, reasonable or unreasonable, the Employer's assertion that the change was "merely" a ministerial change is a gross oversimplification of the issue before us. The new procedure involved a number of changes that went beyond the choice of technology used to notify the employees of overtime opportunities. The new procedure resulted in various changes that "materially and substantially" affected the terms or conditions of employment. Specifically, these changes include: the new requirement that the employee call in to indicate his interest in working overtime instead of just answering a phone call, the requirement of either having a cell phone capable of receiving text messages or dealing with the added burden of calling in each day to find out what overtime shifts will be offered, the changes in the deadline for indicating interest in working overtime (even if a beneficial change), the discontinuance of radio contact with on-duty employees and the

⁴If this Board were to decide the matter on the basis of the reasonableness of the policy, the Board would essentially be saying that an employer is only obligated to bargain over unreasonable policies.

resulting impact on refusal accruals. Even if none of these factors individually "materially and substantially affected the terms and conditions of employment," the combined effect is significant and sufficient. The inability to meet the new condition of having to call the department is potentially a considerable amount of lost income.

Furthermore, it appears to be a mathematical impossibility to conclude that the new procedure did not have any effect on the frequency of refusals and therefore the frequency of movement to the bottom of the rotation list. Under the old policy, when the hiring officer came to the name of a firefighter who was working, he would call his work station directly or radio to the officer in charge. If we assume that there are ten firefighters on duty on any given day,⁵ that results in ten possible refusals whereas under the new policy there likely will be fewer refusals, possibly even none. This change in the number of refusals slows the upward movement of someone at the bottom of the list, thereby reducing his opportunity for overtime.

Thus, I would find that all three elements necessary for a finding of an unlawful unilateral change are present in this case: the action was unilateral, it was a change from the established practice, and it involved a mandatory subject of bargaining because it materially and significantly affected a term or condition of employment.

The Employer argues that even if the change is substantial enough to be considered a changed working condition, the change

⁵There was no evidence on the number of employees on duty, but there are three permanent stations manned by firefighters and an officer. Ten is a reasonable number for the sake of argument.

made to the overtime hiring policy is consistent with the past practice of the Employer making adjustments to respond to changes in technology. The past changes the Employer cites in support of this argument were the use of radios and paging systems, then telephoning without leaving messages, followed by telephoning with leaving messages. The Employer contends that the latest change is consistent with the prior adjustments made in response to evolving technology, and further asserts that all of the prior changes were made without bargaining. The Union argues that bargaining did occur over earlier changes, either through simple agreement or agreed-upon changes as the outcome of a grievance. These arguments are really beside the point because the issue is not what technology is used to notify employees of available overtime. The core issue is the procedure for calling back and indicating an interest and the subsequent calls by the employer. The Employer can point to no past practice of any changes to the sequence in which the Employer made calls to fill the open positions.

The Employer also argues that the use of the term "called" in Article 16 of the collective bargaining agreement has never been interpreted so strictly as to preclude the use of other technologies. Again, it is not the use of the technology that is at issue, it is the change in the procedure. The first sentence of Article 16(A)(2) states, "Any employee called to fill a staffing vacancy shall be called in proper rotation from a Regular Overtime posted roster that reflects the vacancy" (emphasis added). The Employer argues that when the overtime shifts are being filled, the employees are still being called in the order of the rotation list, it is just that there is no longer any need to call those who are not interested in the work. However, even when there was a practice of paging all employees

giving them a "heads up" of available overtime, the overtime calls were made "in proper rotation." There was no previous practice in which the procedure involved anything other than a sequential contact with the employees in the order of the overtime roster in order to find out if they wanted to work. Again, the new procedure shifts the burden of calling from the employer to the employee, in spite of the clear language of the collective bargaining agreement.

The Employer also claims that it was authorized to make the change by virtue of the management rights clause, citing in particular the provision listing "the right to establish reasonable rules" and the freedom to determine "materials to be used, the work schedules and methods of operation." This argument is without merit as this Board has long held that for a waiver to be effective, it must be "clear and unmistakable." Council No. 74 AFSCME v. City of Bangor, No. 80-41, at 9-10 (Sept. 24, 1980), aff'd, 449 A.2d 1129 (Me. 1982). Given the prefatory words in the management rights provision, Article 12 (A) (1), "except as otherwise provided in this Agreement," and the specific language of the overtime provision in Article 16(A) (2), "Any employee called to fill a staffing vacancy shall be called in proper rotation from a Regular Overtime posted roster," there is no basis for finding a clear and unmistakable waiver with respect to the new policy. To allow an employer to use the improved efficiencies of new technology as an excuse to ignore the duty to bargain would push collective bargaining down a slippery slope in which the question turns to an assessment of the reasonableness of a new technology, rather than its impact on working conditions. This has the effect of putting the Board at the bargaining table without a whit of statutory authority for such a role.

For the forgoing reasons, I would conclude that the Employer violated §964(1) (E) by unilaterally changing the overtime hiring policy. I would therefore require the Employer to reinstate the previous policy and bargain over both the implementation and the impact of a new overtime hiring policy.

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