

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case Nos. 14-27 & 15-08
Issued: March 10, 2016

AFSCME COUNCIL 93, AFL-CIO,)
)
Complainant,)
)
v.)
)
PENOBSCOT COUNTY)
SHERIFF'S OFFICE,)
)
Respondent.)

DECISION AND ORDER

AFSCME COUNCIL 93,)
)
Complainant,)
)
v.)
)
SHERIFF GLENN ROSS and)
PENOBSCOT COUNTY)
COMMISSIONERS,)
)
Respondents.)

AFSCME Council 93 filed a prohibited practice complaint, docketed as case No. 14-27, on April 10, 2014. The Complaint alleged that the Penobscot County Sheriff's treatment of a union official in the Corrections Supervisory Bargaining Unit was discriminatory and interfered with, restrained or coerced unit employees in the exercise of their rights, thereby violating both §964(1)(A) and §964(1)(B) of the Municipal Public Employees Labor Relations Act (the "Act"), 26 MRS §961 et seq. On August 12, 2014, AFSCME filed a related prohibited practice complaint,

case No. 15-08, alleging that the Sheriff's conduct during grievance processing and while investigating issues involving the union official were further violations of 26 MRS §964(1)(A) and §964(1)(B).

Representing Complainant AFSCME Council 93 throughout the proceedings for both complaints was Shawn Sullivan, Esq., and representing Respondent Penobscot County was John Hamer, Esq.

JURISDICTION

The Penobscot County Sheriff and the Penobscot County Commissioners are both public employers within the meaning of 26 MRS §962(7) and AFSCME Council 93 is a bargaining agent within the meaning of 26 MRS §962(2). The jurisdiction of the Board to render a decision and order lies in 26 MRS §968(5).

PROCEDURAL BACKGROUND

With respect to Complaint No. 14-27, the Board's Executive Director provided the Complainant two opportunities to amend the complaint and the County responded to both submissions. The Executive Director issued a sufficiency ruling on August 1, 2014, dismissing certain portions of the Complaint that failed to state a violation of the Act. The Complainant appealed that decision to the Board, which affirmed the Director's decision in parts and reinstated certain parts of the Complaint that had been dismissed. A substantial portion of those parts reinstated were for events occurring beyond the 6 month limitations period and, as such, will be considered not to prove a violation of the Act, but only to the extent that those events may "shed light on the true character of matters occurring within the limitations period." Teamsters v. Waterville, 80-14 at 3 (April 23, 1980).

At the prehearing conference of October 3, 2014, the Board Chair ruled that Complaint No. 15-08 should be combined with Complaint No. 14-27 and heard during the same evidentiary hearing as a matter of efficiency. In addition, the parties agreed that the cases should be stayed pending the completion of an arbitration proceeding that involved several issues raised in the Complaints.

The second prehearing conference was held at the Board's offices on April 2, 2015, after the arbitration decision was issued. The parties established a procedure for presenting arguments to the full Board on whether the Board should defer to the arbitration decision. The parties agreed that the arbitration directly addressed certain issues raised in the two Complaints and that the Board should not hear those matters. The parties disagreed on whether other portions of the Complaint were resolved by the arbitration decision. After discussing various options, the parties agreed that the Respondent would file a Motion to Strike specific paragraphs, with argument supporting its position that the Board should defer to the arbitration decision, to which the Complainant would respond. The Board would receive the written argument and a copy of the arbitration decision in advance of the evidentiary hearing, and would hear oral argument at the start of the hearing. The Board would rule on the matter at that time and then proceed with the evidentiary hearing.

The Board heard the parties' oral argument on the Respondent's Motion to Strike at the start of the hearing on September 24, 2015. The Board conferred, then denied the motion as the arbitration decision was not central to issues presented

in the two prohibited practice cases. The Board ruled that with the exception of the paragraphs that the parties already agreed were addressed by the arbitration decision, the Board would hear evidence on the remaining paragraphs in the two prohibited practice complaints.

FINDINGS OF FACTS

1. AFSCME Council 93 represents the Penobscot County Sheriff's Office Corrections Supervisory Bargaining Unit as well as several other bargaining units of Penobscot County employees. Ms. Sylvia Hebert is the AFSCME Staff Representative assigned to the Corrections Supervisory Unit and had served in that capacity since 2011. A different AFSCME Staff Representative, Mr. Jim Mackie, represents the Corrections Line Unit.
2. Mr. William Gardner had been the Chapter Chair for the Supervisory Unit since the 1990's and handled all grievances and issues arising in the unit. While others had been involved in negotiations, and there appeared to have been others who held union positions such as secretary and even a co-chair at one point, Mr. Gardner was clearly the face and voice of the bargaining unit for several years. For reasons not addressed in this complaint, Mr. Gardner was demoted from his assistant shift supervisor position and his rank of corporal in April, 2014, and, as a result, moved from the Supervisory Unit to the Line Unit.
3. Sheriff Glenn Ross worked for the Penobscot County Sheriff's Department since he was a patrol officer in the 1970s. He was the Penobscot County Sheriff from 2002 until his retirement in December, 2014.

4. For several years, William Gardner had a commission as a law enforcement officer that was issued to him by Sheriff Ross. This enabled him to work part-time as a patrol officer for the Town of Orrington. The commission was not necessary to work as a corrections officer or in a supervisory role at the jail.
5. On July 24, 2013, Sheriff Ross issued a "General Order" limiting overtime in both the Corrections Line Unit and the Corrections Supervisory Unit. The County Jail was experiencing a significant budget shortfall and the Sheriff believed that unless he took immediate action to reduce overtime expenditures, layoffs would have to occur. The General Order identified certain shifts that would have the first vacancy remain open and subject to a "Do Not Fill" ("DNF") order.
6. The Union and the Sheriff had an agreement in principle regarding this general order. Ms. Hebert and Mr. Gardner recognized the significance of the budget shortfall but also took the position that if there were an unscheduled vacancy (an "inside unscheduled extra"), Article 17 of the collective bargaining agreement required the Sheriff to make 3 calls to unit employees on the rotating list to fill that vacancy. During the summer of 2013, Ms. Hebert and Sheriff Ross attempted to draft a Memorandum of Understanding ("MOU") to reflect the Union's willingness to waive its right to file a grievance over this issue for a 2-month period while the Employer would review the financial impact of the DNF order with the Union for that same period. Sheriff Ross and Ms. Hebert exchanged draft MOU's, but did not resolve the matter until 2014.

7. On August 15, 2013, Corporal Gardner learned that he would be needed in court on August 20, 2013, for a few hours. He informed the Lieutenant of his expected absence so the vacancy could be posted. In September, Corporal Gardner received various requests from command staff for details concerning this court appearance, specifically whether it related to County business or if it was a case from Orrington. Corporal Gardner felt that these inquiries were harassing in nature.
8. On September 3, 2013, Ms. Sylvia Hebert wrote to Sheriff Ross expressing her concerns regarding safety issues raised by a recent decision (later rescinded) to operate the jail with a lieutenant serving as the supervisor. She was worried that failing to provide sufficient supervisory staff would jeopardize the safety of the employees. In response, Sheriff Ross wrote that only individuals who were trained and qualified would be assigned as a supervisor, as was permitted by the collective bargaining agreement.
9. Near the end of September, Corporal Gardner requested a vacation day to attend a funeral of a relative. The date of the funeral was changed, which required Gardner to revise his request. Corporal Gardner felt that the number of questions from his supervisor and the level of detail demanded over this request was harassing in nature.
10. On Friday, October 4, and Monday October 7, 2013, Corporal Gardner was ordered from off-duty status to work on two of his scheduled days off. Mr. Gardner sent an email to Ms. Hebert on Monday stating his position that such a "force out" is only supposed to happen in emergencies and that "if it's an emergency this week then it is an emergency every

week." He also stated in that email that he did not want to sign the MOU on the 3-call issue.

11. On October 15, 2013, Corporal Gardner filed a grievance following the first instance where the 3 calls had not been made due to the DNF General Order. The grievance was denied by Sheriff Ross on October 16, 2013, and was then appealed to the next step, the County Commissioners. The grievance hearing was scheduled for January 14, 2014.
12. At some point during the summer or early fall of 2013, complaints about Corporal Gardner were filed by three members of the Corrections Line Unit. The AFSCME Staff Representative for the Corrections Line Unit, Jim Mackie, suggested to the Sheriff that the County Commissioners conduct an investigation of the matter. In late September, the County hired an outside attorney, Ms. Rebekah Smith, to conduct this investigation.
13. On October 16, 2013, Gardner was informed that the County had hired an independent investigator to investigate the three complaints of hostile work environment filed against him.
14. On October 31, 2013, Sheriff Ross held a general staff meeting with the entire Supervisory Unit. The purpose of this meeting was to discuss the staffing needs of the corrections officers and the scope of the DNF general order. The supervisors and assistant supervisors (Sergeants and Corporals) were consulted about which shifts needed full staffing of corrections officers and which might be able to manage without filling an unscheduled vacancy. Toward the end of the meeting the discussion turned to staffing levels of the Supervisory Unit. The

- Sheriff sought the supervisors' input on which days and times it was necessary to have both a corporal and a sergeant on shift and when they could operate with either one or the other.
15. During this October 31, 2013, meeting, the Sheriff made a comment which seemed to suggest that Ms. Hebert had agreed that the 3-call was not needed all the time. Ms. Hebert spoke up and said she had not made any such agreement and that until an MOU was finalized, the Union's position was that the contract had to be adhered to which meant that the 3 calls needed to be made.
 16. As the discussion continued, Sheriff Ross singled out William Gardner and made comments directly to him that he was the only one in the room that had a problem with the DNF situation by insisting that the 3 calls be made. The Sheriff polled the other unit members in the room in a manner that highlighted Gardner as the only unit member who thought 3 calls were necessary.
 17. Sergeant Nuttall testified that at the time he was serving as Co-Chair with Gardner, and they both felt that it was important to keep the 3-call rule in order to preserve the overtime for unit members and to maintain proper coverage in the jail. The MOU was key to this objective, because they could assist in addressing the budget overrun without forgoing the right to insist on adhering to what they considered to be an established practice.
 18. The Sheriff's polling of the supervisory employees during this meeting created a very uncomfortable atmosphere for the employees in the room. It was clear to those present who testified that Sheriff Ross was attempting to drive a

- wedge between the unit members and Corporal Gardner.
19. At some point after this meeting, Mr. Gardner spoke with the Sheriff about his concerns about one aspect of the DNF policy. He believed that inconsistent treatment or favoritism would arise by giving the duty officer the discretion to let people go home when the inmate population or the workload was low, even when a particular shift needed to be filled according to the policy. The Sheriff disagreed that favoritism would be an issue, but agreed to change the policy to address Gardner's concern.
 20. On November 18, 2013, Corporal Libby wanted to go home early because it was very slow at the jail. After the duty officer called the Sheriff at home, Libby was told that he would have to work the full shift. When Sergeant Nuttall came in, Corporal Libby spoke to him about his frustration with not being allowed to go home and attributed it to the "Bill Gardner rule." Later that day, Sheriff Ross approached Sergeant Nuttall and stated that he had wanted to let Corporal Libby go home, but he had an agreement with Gardner which would not allow it. Sergeant Nuttall considered it very unusual for the Sheriff to approach him to discuss such a matter.
 21. Sergeant Nuttall testified that it was the general sense among the unit membership that there was a conflict between Bill Gardner and the Sheriff, and that the unit members were being made to work shifts they did not want to work as a result of that conflict.
 22. On January 14, 2014, the County Commissioners held the grievance hearing on the 3-call grievance. During the discussion, Sheriff Ross referred to the October 31, 2013,

meeting and said that the 3-call issue was just a Bill Gardner issue. One of the Commissioners asked why the MOU had not been signed and Sheriff Ross said Bill Gardner refused to sign it because he was angry that he had been forced to work on his scheduled days off.

23. The MOU was eventually signed by Sheriff Ross, Corporal William Gardner, and Ms. Sylvia Hebert on February 6, 2014.
24. Attorney Rebekah Smith sent her investigative report to the County's attorney, Mr. Frank McGuire, on January 29, 2014. Her cover letter referred to the "letter of understanding" (her terms of engagement), which provided that the three complainants and the "alleged discriminatory official" (Mr. Gardner) would receive copies of the report from Mr. McGuire. Her cover letter also cited the condition of her investigation that the report is to remain confidential but, "[t]he parties may, however, agree that the report may be admissible in a subsequent legal action."
25. On February 11, 2014, Mr. McGuire sent Ms. Hebert the copy of the report for Mr. Gardner. The cover letter stated that he was being provided with a copy of the report because he was identified as "the alleged discriminatory official" in the employee complaints of a hostile work environment. The letter further stated:

For that reason, in accordance with Ms. Smith's terms of engagement, the report is herewith provided to you. It will also be provided to the complaining parties. Ms. Smith has requested that the report otherwise be kept confidential, consistent with terms of her engagement.

The letter also indicated that the report was being provided to Sheriff Ross. Mr. McGuire emailed a copy of

- the report to Sylvia Hebert late on February 12, 2014.
26. Mr. McGuire sent the three complainants a copy of the report about a week later. The cover letter informed each complainant that the report is confidential and that it had been provided to the other two complaining parties, as well as Mr. Gardner and Sheriff Ross. He also included a copy of the cover letter Ms. Smith had sent to him with her report which described the confidentiality issue.
 27. On February 13, 2014, at 2:00 p.m., Sheriff Ross called Corporal Gardner to his office in the middle of his shift. The Sheriff explained that he was putting him on paid administrative leave based on the independent investigator's conclusion that there was a hostile work environment on Corporal Gardiner's shift arising from his reliance upon "belittling, humiliating, and negative treatment, often directed at female subordinates but also directed at individuals perceived as weak." The Sheriff informed Gardner that he would be scheduled for an evidentiary hearing in accordance with departmental policies and the collective bargaining agreement. The Sheriff also suspended Corporal Gardner's commission and notified the Orrington Patrol Supervisor that Gardner not be assigned any patrol duties until the Sheriff had reauthorized such assignments. The Sheriff provided Gardner with a letter formalizing the administrative leave and suspension of his commission.
 28. Corporal Gardner's meeting with Sheriff Ross did not last very long, as the Sheriff did not want to get into a discussion of anything beyond the specifics described in his letter. Gardner was told to pack up his personal

- belongings and leave.
29. Mr. Gardner went to the office area to collect his belongings. A lieutenant came to his work area a few minutes after Sheriff Ross had put him on leave and told him he should be leaving the building.
 30. At 14:22 (2:22 p.m.) an electronic message (a "pass-on") was issued stating "Effective 02-13-14 at 14:00 hours, Cpl. William Gardner will not be scheduled for duty, until further notice." This message was accessible by all staff at the county jail.
 31. Most, but not all, instances of discharge or discipline of employees occurred either at the start of the shift or by bringing the employee in for a special meeting, rather than sending the person home in the middle of a shift. Similarly, "pass-ons" regarding an individual's employment status or authorization to work were typically issued after the employee had left the premises.
 32. About a week after Mr. Gardner was put on administrative leave, Sheriff Ross contacted Ms. Hebert about the materials he had compiled that might be used in the evidentiary hearing on Gardner's discipline, which had been scheduled about a week or so later. He said the file box was in Capt. Clukey's office and Gardner should go there to get it.
 33. Mr. Gardner picked up the box of materials, which included about 800 pages of documents. He and Ms. Hebert spent two full days trying to organize and make sense of the documents. The file included about 150 to 200 pages of grievances filed by Gardner, other documents and included a confidential settlement agreement from a prohibited

practice complaint that Gardner had filed in 2009. Because of the volume of documents included, Ms. Hebert requested, and was granted, a postponement of the hearing date. It was rescheduled for March 14, 2014.

34. By letter dated February 27, 2014, Sheriff Ross scheduled the evidentiary hearing regarding the impact of "an independent outside human rights investigation regarding complaints of a hostile work environment created by you [Gardner] over a period of time." The letter detailed the various policies alleged to have been violated and scheduled the hearing for Monday, March 14, 2014, in Captain Clukey's office. The letter further stated,

The available evidence (including information from our Human Rights Compliance files) regarding this matter has been provided to you. It is preferable that you come to the evidentiary hearing with a prepared written position regarding the charges, whereas you have been provided all information regarding this situation and no new information will be added to the evidence.

35. At the start of the hearing on March 14, 2014, the Union objected to the use of the documents in the box previously provided to Gardner. The management representative said the documents would not be used. This box of materials was not provided to the attorney-investigator at any stage in her investigation. While the documents themselves all existed prior to Mr. Gardner being placed on administrative leave, there is no evidence that the Sheriff had maintained a centralized file of Gardner-related materials. The box was assembled for the purpose of identifying potential evidence to be used in the upcoming evidentiary hearing.

It was a compilation of materials kept in different locations that had some relation to William Gardner, including files kept that were related to compliance with various human rights laws.

36. On March 20, 2014, Sheriff Ross denied Gardner's request to attend a training session scheduled for April which was required for those holding a deputy commission. Sheriff Ross testified that it did not seem appropriate to have someone on administrative leave to attend this training, and that there would be another training session offered later in the year. The commission was not required to function as a corrections supervisor, but it was required for Gardner's part-time patrol officer position with the Town of Orrington.
37. On April 14, 2014, the decision to discipline was issued resulting in Mr. Gardner's demotion from his position as an assistant supervisor to a corrections officer. Mr. Gardner filed several grievances at this time: one over the demotion itself, one over the length of time taken to complete the investigation, one over his loss of commission, and one related to seniority rights.
38. Sometime in late April, 2014, the AFSCME Staff Representative for the Corrections Line Unit, Jim Mackie, spoke to William Collins, the County Administrator, about two of Gardner's grievances that were headed to Step II of the grievance procedure, that is, a presentation to the County Commissioners. Mr. Mackie indicated that because it was clear that the grievances would go to arbitration, it made sense to skip the Step II process and proceed directly to arbitration. On that basis, Collins made the recommend-

ation and, on April 29, 2014, the Commissioners voted to not hear the Step II grievances and proceed directly to arbitration.

39. A letter dated May 2, 2014, from William Collins to Sylvia Hebert informed her of the unanimous decision of the Commissioners to skip Step II of the grievance procedure and go directly to arbitration on Gardner's grievances. Ms. Hebert called Mr. Collins to inquire how this came about and he said it was Jim Mackie's suggestion. Once Ms. Hebert objected, the County reversed that decision, and the grievance hearing was scheduled.
40. On May 20, 2014, Mr. Gardner received a letter from the Maine Human Rights Commission informing him that a complaint had been filed against him. Included with this letter was the original complaint filed by that individual along with the complainant's documentation, which included a copy of the investigative report completed by Attorney Rebekah Smith.
41. There were two days on which Mr. Gardner's grievances were heard by the County Commissioners, May 27 and June 17, 2014. When Mr. Gardner attempted to present the demotion grievance, he and Ms. Hebert felt that the Commissioners were being very rude to him, interrupting frequently and showing extreme impatience with him. When Mr. Gardner started to describe the issues he would present related to this grievance, he stated a couple of times that it would take a long time. One of the commissioners noted that he was reading his testimony and suggested that it would be better if he submitted the testimony, rather than just read it aloud. The demeanor of several of the commissioners was

such that Ms. Hebert believed that they were not listening to Mr. Gardner or giving him a fair hearing. Ms. Hebert asked for a break in the proceedings and she spoke to Mr. Collins, the County Administrator, in the hall expressing her serious concerns with how Mr. Gardner was being treated. The hearing reconvened and Mr. Gardner was allowed to present his case without further interruption.

42. After the complaint against Mr. Gardner was filed at the Maine Human Rights Commission, there was some disagreement on whether the County would pay for Mr. Gardner's legal defense. Initially, Captain Clukey told Mr. Gardner that the County would be paying for his defense, which was the norm when lawsuits were filed against jail employees. Then Mr. Gardner was informed that the Captain did not have the authority to make that decision. The Commissioners considered the matter and were informed by their risk pool, which provided the County's liability insurance, that the risk pool provided coverage for tortious conduct and negligence, but not for human rights cases. At some point, the Commissioners decided to pay for half the cost of Gardner's legal counsel. Mr. Gardner engaged a private attorney who wrote a letter to the County Commissioners about his representation of Mr. Gardner. By early June, the County Commissioners decided that Mr. Gardner should be provided with counsel appointed by the risk pool. Mr. Gardner testified that his private attorney charged him \$800 for the services provided.
43. On May 5, 2014, Mr. Gardner was at work using one of the ten computer terminals at the jail from which corrections officers can access pass-ons and the data systems. He

noticed certain confidential documents were visible on the computer. He accessed these by clicking on the desktop icon for Adobe Reader, which produced a list of "recently opened" or "recently scanned" files. Mr. Gardner saw a list of documents, many of which were clearly confidential, some having to do with medical records and others documents or correspondence specifically related to Gardner's grievances. He saw that clicking on any individual file listed brought that file up.

44. Sheriff Ross testified that access to these scanned documents was an error caused by some sort of technical problem related to the scanner and the computer system. He indicated that the problem had been fixed. Sergeant Nuttall testified that he had recently seen a similar list with some (but not all) of the documents still accessible.

DISCUSSION

The crux of this case is whether the Sheriff's treatment of William Gardner, the Union Chair of the Supervisory Bargaining Unit, was "interfering with, restraining or coercing employees in the exercise of the rights guaranteed" by the Act, in violation of §964(1)(A) or was discriminatory with respect to his terms and conditions of employment in violation of §964(1)(B). While these two provisions are similar in that they both provide protections to employees, the legal standards are different and must be presented and analyzed separately.

Section 964(1)(A) prohibits an employer from "interfering with, restraining or coercing employees in the exercise of the

rights guaranteed in section 963." Section 963, in turn, protects the right of public employees to:

join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining, or in the free exercise of any other right under this chapter.

Interference, restraint or coercion violations are either derivative or independent violations. A derivative violation occurs when the employer violates the Act in some other fashion and that illegal conduct, in turn, has the effect of restraining employees in the exercise of their 963 rights. An independent violation of 964(1)(A), however, is not incidental to another violation but occurs when the conduct itself directly interferes with the exercise of rights granted under the Act. The allegations in the Complaint before us are of the latter sort.

This Board has found a violation of §964(1)(A) based on conduct that directly interfered with employees' rights on several occasions. For example, the Board found a violation where the employer attempted to interfere with the employee's right to serve on the union's negotiating team. MSEA v. Dept. of Human Services, No. 81-35 (June 26, 1981). Similarly, a police chief's admonition that an employee should not go to the "wrong people" and get "bad advice" was found to be a direct violation of §964(1)(A), independent of any other violation. Ouellette v. City of Caribou, No. 99-17 at 10 (Nov. 22, 1999). It is important to note that an interference, restraint, and coercion violation under §964(1)(A) of the Act does not turn on the employer's motive or level of courtesy or on whether the coercion succeeded or failed. The test is whether the employer's conduct "reasonably tends to interfere with the

free exercise of employee rights under the Act." See MSEA et al. v. State Development Office, 499 A.2d 165, 169 (Me. 1985)

Section 964(1)(B) of the Act prohibits an employer from "encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment." A violation of §964(1)(B) occurs when the Union proves that: (i) the employee engaged in protected activity; (ii) the decision-makers knew of the employee's participation in protected activity; and (iii) there is a relationship, or causal connection, between the protected activity and the adverse employment actions against the employee. See, e.g., MSEA v. Maine Turnpike Authority, No. 12-08 at 19 (Feb. 12, 2013); Litchfield Educational Support Assoc. v. Litchfield School Committee, No. 97-09, at 22 (July 13, 1998) citing Casey v. Mountain Valley Educ. Assoc. and SAD 43, Nos. 96-26 & 97-03, at 27-28 (Oct. 30, 1997) and Teamsters Union Local #340 v. Rangeley Lakes School Region, No. 91-22, at 18 (Jan. 29, 1992).

There are several instances of conduct that the Complainant alleges violated the Act. We will address each in chronological order. We note that we have considered the evidence of conduct occurring beyond the six month period of limitations to the extent that it sheds light upon conduct occurring within that period.

The first incident alleged to have violated the Act was the conduct of Sheriff Ross during the staff meeting on October 31, 2013. The Union raised two issues in the complaint regarding this meeting, the first of which was the Sheriff's comment that

he and Ms. Hebert had an agreement to a resolution of the 3-call issue. The Union alleges that the Sheriff's statement that he and Ms. Hebert had come to an agreement on the 3-call issue was intended to make Mr. Gardner appear to be the only person not willing to come to an agreement. The County asserts that the Sheriff merely misspoke and it was simply a poor choice of words. Once Ms. Hebert corrected him, as she did immediately, the Sheriff acknowledged that their agreement was to work on a memorandum of understanding regarding the 3-call issue.

The second component of the October 31, 2013, staff meeting that the Union alleges was an interference, restraint or coercion violation was the Sheriff's conduct in polling the employees about their sentiments on the 3-call issue. The three Union witnesses testified that the Sheriff went around the room and asked each employee whether he or she supported Mr. Gardner's view on the 3-call issue. The witnesses indicated that it was quite tense in the room as the Sheriff did this, and it was clearly an attempt to create division between the membership of the unit and its leader, William Gardner. The Sheriff pointed out to the membership that Gardner was the only one who considered the 3-call issue a problem. We note also that by the second week of October, the Sheriff knew that Gardner's irritation with being forced to work on his days off was the reason why there was no progress on finalizing the MOU. We conclude that attempting to poll each of the unit employees on their respective positions on the dispute over the 3-call issue would reasonably tend to interfere with the exercise of their rights under the Act, in violation of §964(1)(A). We would reach the same conclusion regardless of our conclusion on the impact of the Sheriff's statement that he had already come

to an agreement with Ms. Hebert on the matter.

The Union also alleges that the conduct described above also violated §964(1)(B). There is no dispute that Mr. Gardner engaged in protected activity and that the Sheriff (the decision maker) knew of Gardner's activity as the Unit Chair and long-time vocal supporter of the Union. The third element of a discrimination violation is an adverse employment action. As there is no evidence of any adverse employment action taken against Mr. Gardner at this juncture, we conclude that the County's conduct at the October 31, 2013 staff meeting did not violate §964(1)(B).

The second alleged violation raised in the complaint relates to the incident when Corporal Libby was not permitted to go home on a particularly slow night. In what was alleged to be another effort to drive a wedge between Mr. Gardner and the rest of the bargaining unit, both Mr. Gardner and Sergeant Nuttall testified that Corporal Libby told them that he was not allowed to go home because of the "Bill Gardner rule." Sheriff Ross denies that he blamed it on Mr. Gardner, but merely told them that they needed to talk to Gardner about it.

Sheriff Ross's explanation that the denial of Corporal Libby's request to go home occurred due to a policy change made to address Mr. Gardner's concern that the duty officer would show favoritism was not refuted by the Union. With that in mind, we consider it entirely natural for the Sheriff to refer a unit member to the unit chair if they had a concern about an agreement made which affected them. Further, since Sergeant Nuttall was an elected official of the unit, there is nothing

unusual about the Sheriff approaching him to discuss the issue, as the Sheriff knew Corporal Libby was upset with his decision. Referring to the agreement made with Mr. Gardner was simply a statement of fact. As Mr. Gardner was the face, the voice and the primary decision maker of the Union, it would have been odd for Ross to refer to the agreement as 'an agreement with your Union' or some other way not using Gardner's name. We conclude that the Sheriff's conduct in explaining the reason for the denial of Corporal Libby's request was not interference, restraint or coercion with respect to anyone's rights under the Act, and therefore not a violation of §964(1)(A).¹

In the third allegation in the complaint, the Union contends that the manner in which Mr. Gardner was put on administrative leave on February 13, 2014, violated §964(1)(A), (B) and (E). There are two aspects to this portion of the complaint. The first is that Mr. Gardner was summoned to the Sheriff's office in the middle of his shift and required to pack his belongings and vacate the building while all of his co-workers were present. The second issue is that his departure was broadcast on the jail's electronic messaging system before he had left the building. We conclude that neither of these rise to the level of conduct that would reasonably tend to interfere with the exercise of rights under the Act.

Sheriff Ross met with Gardner and placed him on administrative leave within hours of receiving the investigator's report, and after discussing how to proceed with Ms. Hebert.

¹ The Union's assertion that this conduct also violated §964(1)(B) and §964(1)(E) was not accompanied by any argument and is without merit.

The reasons for placing Gardner on administrative leave were serious findings of misconduct as a supervisor that the Sheriff had an obligation to address promptly. There is no evidence of a similar situation to which this can be compared that would demonstrate that the process used in placing Gardner on paid administrative leave was at all unusual. Similarly, the posting of the "pass-on" indicating that Gardner would not be on the schedule does not rise to the level of a violation of the Act. The meeting with the Sheriff was very brief and it was not unreasonable to expect Mr. Gardner to gather his belongings and leave the premises within 20 minutes. We conclude that the Sheriff's conduct in putting Mr. Gardner on administrative leave and announcing the change on the messaging system was not interference, restraint or coercion with respect to anyone's rights under the Act, and therefore not a violation of §964(1)(A).²

The Union's fourth allegation that denying Mr. Gardner's request to attend a training session while he was on administrative leave constituted a violation of the Act is not supported by the evidence. The Sheriff had never faced a similar situation of a request from someone on administrative leave and his decision to deny the request was reasonable in the circumstances, particularly since there would be another training session offered in the fall. The denial of the request to attend training was not interference, restraint or coercion of Gardner's rights under the Act, and therefore not a violation of §964(1)(A). Similarly, the denial cannot be considered discriminatory in violation of §964(1)(B) because there is no causal connection to Mr. Gardner's union activity; rather, the

² The Union's assertion that this conduct also violated §964(1)(B) and §964(1)(E) was not accompanied by any argument and is without merit.

denial was a result of him being on administrative leave.

The next allegation concerns the box of evidence that was provided to Mr. Gardner in anticipation of the evidentiary hearing on whether he should be disciplined for various violations of the Sheriff's Office Code of Conduct. The Union alleged that keeping a "secret file" on a union official is interference, restraint or coercion in violation of §964(1)(A) and that it also violates §964(1)(B) and (E).

The letter to Gardner scheduling the evidentiary hearing stated "[t]he available evidence (including information from our Human Rights Compliance files) regarding this matter has been provided to you" and indicated that no new information would be added to the evidence. The Union contends that this file had been in existence for some time as a "secret file" used to monitor Gardner's union activities. The Sheriff testified that because the violations were related to the investigator's findings of a hostile work environment created by Gardner over a long period of time, the material gathered for the hearing was quite extensive and covered a long period as well.

The evidence indicated that the material put in this box of evidence was assembled specifically for the evidentiary hearing by Captain Clukey but did not exist as a compiled body of material prior to that time. We regard the failure to limit the evidence to those issues related to the hostile work environment issues as a lapse in judgement, but not a violation of the Act. There is no evidence that this over-inclusive compilation was undertaken for an improper purpose, such as making Gardner's defense preparation more time consuming or to obfuscate the

issues. The Union's concern that the file (including a confidential settlement agreement from a PPC Gardner filed in 2009) was provided to the investigator is not supported by the evidence. The parties stipulated that this file was not introduced as evidence or used at all in the evidentiary hearing held on his discipline. Likewise, the evidence is clear that the material was not provided to the investigator, as the file was created after her investigation was completed and her report clearly identifies the documents used in her investigation. We conclude that the County's conduct with respect to this box of evidence did not violate §964(1)(A), (B) or (E).

The next allegation in the complaint³ concerns the County's release of the investigative report to the three individuals who filed a complaint with the Sheriff regarding Corporal Gardner's conduct. The Union argues that in other instances of internal investigations, the substance of the investigation was always kept confidential and a complainant would only receive information on the issues he or she complained of, not issues raised by other complainants. The Union contends that this action interfered with, restrained or coerced employees in the exercise of their rights under the Act in violation of §964(1)(A), was discriminatory in violation of §964(1)(B), and was a refusal to bargain in violation of §964(1)(E).

This situation cannot be compared to an internal investigation because the investigation of Corporal Gardner was an investigation conducted by an outside attorney. The protocols of such an investigation were not determined by internal policies of the Sheriff's Department, but, rather, were

³ This is actually the first allegation in PPC No. 15-08.

set by the arrangement between the attorney conducting the investigation and the County Commissioners. This attorney chose to use the procedures established by the American Arbitration Association specifically for fact-finding investigations into charges of sexual harassment. Both she and the County's attorney complied with that framework in issuing and distributing the report. The County cannot be held responsible for the use of the investigative report by any of the three complainants. We conclude that the County's distribution of the investigator's report did not violate §964(1)(A).⁴

The Union next alleges that the conduct of the County with respect to scheduling Gardner's grievance meeting with the Commissioners and their behavior toward them at that meeting constituted interference, restraint and coercion in violation of §964(1)(A) and was discriminatory in violation of §964(1)(B). The County Administrator and the County Commissioners decided to skip the step two grievance meeting with the Commissioners at the suggestion of Jim Mackie, the AFSCME Staff Representative who represented the interests of the Line Unit. It is not clear whether Mackie led the County Administrator to believe that he had already spoken to Ms. Hebert about this, or if the Administrator just assumed that Mackie had her approval. In either case, we do not think the initial decision to skip the grievance meeting with the Commissioners constituted a violation of the Act, but was simply an error in judgment.

With respect to the Commissioners' behavior during the grievance hearing, the Union alleges that one of the

⁴ The Union's assertion that this conduct also violated §964(1)(B) and §964(1)(E) was not accompanied by any argument and is without merit.

Commissioners was rude and disrespectful to Mr. Gardner, interrupting him and asking him not to read from his prepared statement. While we would prefer all encounters between a union and management to be polite and respectful, we cannot hold that rude and disrespectful behavior (even if a disinterested party would see it as that) constitutes a violation of the Act. Rude and disrespectful behavior is a matter of perception, and is not in itself a violation of the Act. This charge is dismissed.

The Union also alleges that the Sheriff's department violated the Act by leaving confidential documents related to Mr. Gardner accessible on the computers used by jail staff. According to the Sheriff's testimony, this occurred because of a technical error in the setup of the Department's centrally located scanner. He testified that it was corrected as soon as they found out about it. Whether or not it was successfully fixed, we fail to see how a technical snafu without more can constitute a violation of §964(1)(A), (B) or (E).

The final issue raised in the complaint is the County's initial refusal to supply Mr. Gardner with an attorney to defend him against the complaint filed at the Maine Human Rights Commission. The County presented credible testimony that the initial failure of the county to provide an attorney was because of a concern for liability, not because of Mr. Gardner's union activity. The County had never faced this situation before where employees filed a complaint at the Human Rights Commission against a County supervisor and its concern about liability was not unreasonable. We dismiss this portion of the complaint as there is no basis for concluding that the County violated the Act by failing to provide an attorney when first asked.

ORDER

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 MRS §968(5), it is ORDERED:

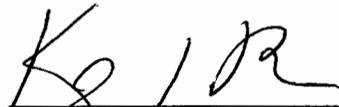
That the Penobscot County Sheriff's Department cease and desist from interfering, restraining or coercing employees of the Corrections Supervisory Bargaining Unit in the exercise of their rights under the Act by attempting to create divisions within the Unit through polling employees on mandatory subjects of bargaining.

That the Penobscot County Sheriff's Department post the attached notice for 10 days at all locations where notices to Corrections Supervisory employees are customarily posted.

Dated at Augusta, Maine, this 10th day of March, 2016.

MAINE LABOR RELATIONS BOARD

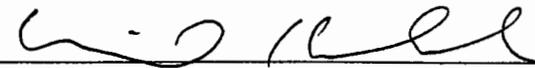
The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 MRSA § 968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.



Katharine I. Rand, Esq.
Chair



Amie M. Parker
Employee Representative



Richard Hornbeck, Esq.
Employer Representative

NOTICE TO ALL EMPLOYEES

PURSUANT TO
a Decision and Order of the
MAINE LABOR RELATIONS BOARD

AS A RESULT OF THE FILING OF A PROHIBITED PRACTICES CASE AGAINST THE COUNTY AND THE SHERIFF, IT HAS BEEN DETERMINED THAT WE VIOLATED THE LAW ON OCTOBER 31, 2013. IN ACCORDANCE WITH OUR INTENTION TO COMPLY WITH THE BOARD'S ORDER, YOU ARE NOTIFIED OF THE FOLLOWING:

- We will cease and desist from interfering, restraining and coercing members of the Penobscot County Corrections Supervisory Bargaining Unit by attempting to create divisions within the Unit through polling employees on mandatory subjects of bargaining.
- We will post this notice for 10 days.
- We will notify the Board of the date of posting and of compliance with its order.

Dated: _____

Penobscot County
Sheriff's Department

Any questions concerning this notice or compliance with its provisions may be directed to:

MAINE LABOR RELATIONS BOARD
STATE HOUSE STATION 90
AUGUSTA, MAINE 04333
(207) 287-2015

**THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.**
