

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 18-09

Issued: May 14, 2018

WISCASSET EDUCATIONAL SUPPORT)
PROFESSIONALS ASSOCIATION,)
)
Complainant,)
)
v.) ORDER
)
WISCASSET SCHOOL DEPARTMENT,)
)
Respondent.)

On October 17, 2017, the Wiscasset Educational Support Professionals Association filed a prohibited practice complaint alleging that the Wiscasset School Department violated 26 M.R.S. §964(1)(E) and (A) by making a unilateral change in a mandatory subject of bargaining. Specifically, the complaint alleges a unilateral change in the practice of accruing and using compensatory time off in lieu of overtime pay.

A prehearing conference was held with Chair Katharine Rand on Thursday, January 18, 2018. Representing the Complainant was Rose Mahoney, MEA UniServ Director. Representing the Respondent were Thomas Trenholm, Esq., and Connor Schratz, Esq. After reviewing the proceedings and discussing the matter with the parties, the prehearing officer concluded that the resolution of certain legal issues could result in the complete resolution of the complaint.

The Prehearing Order issued on January 25, 2018, by Chair Rand, directed the parties to brief these legal issues pursuant to MLRB

Rules, Ch. 12 §10(7). Specifically, the parties were ordered to submit written briefs addressing the following legal questions/issues:

1.) Under what circumstances, if any, may an employer provide employees with compensatory time off in lieu of overtime pay, consistent with the Federal Fair Labor Standards Act (FLSA)? If employers may provide compensatory time off in lieu of overtime pay pursuant to an agreement with employees, please address the requirements of such an agreement, including whether the agreement must be written and the necessary parties to such an agreement.

2.) Article 9 of the Collective Bargaining Agreement provides that "[o]vertime shall be paid at a rate of time and one half after the employee has completed forty (40) hours worked within a work week." Irrespective of FLSA requirements, is the employer legally obligated to comply with Article 9 of the collective bargaining agreement after expiration of the contract? Why or why not? Can a practice of granting compensatory time off in lieu of overtime pay co-exist with Article 9's requirement that overtime be paid at a rate of time and one half?

The parties were instructed that in considering these legal issues, the Board will treat all facts alleged as true and will construe the complaint in the light most favorable to the complainant. Buzzell, Wasson, and MSEA v. State of Maine, No. 96-14 at 2 (Sept. 22, 1997). When the allegations in the complaint are more than simply factual allegations but are legal conclusions, however, the Board is not bound to accept those legal conclusions as true. MSAD #46 Educ. Assoc. v. MSAD #46 Board of Directors, No. 02-13, Interim Decision, Nov. 27, 2002 and Wm. D. Neily v. State of Maine and MSEA, Decision on Appeal of Executive Director's Dismissal,

No. 06-13, (May 11, 2006), citing Bowen v. Eastman, 645 A.2d 5, 6 (Me. 1994). The parties' collective bargaining agreement is considered part of the complaint (see MLRB Rules, Ch. 12 §5(3). Exhibits attached to the complaint or to the response are not considered at this stage.

The following statement of facts were included as part of the prohibited practice complaint in accordance with Board Rules Ch. 12 §5(4).

Statement of Facts Supporting Prohibited Practice Complaint

1. Complainant is the bargaining agent, within the meaning of 26 MRSA §962(2) for a unit of Educational Support Professionals (Administrative Assistants, School Secretaries, all Educational Technicians I, Educational Technicians II, Educational Technicians III, Bus Drivers, Head Bus Drivers, Van Drivers, Mechanics, Custodians, Head Custodians, Maintenance, Kitchen Managers and Food Service Workers) employed by the Respondent.
2. Respondent is a public employer within the meaning of 26 MRSA §962(7).
3. Complainant and Respondent are parties to a collective bargaining agreement with a duration of September 1, 2014 to August 31, 2017.
4. As of October 2, 2017, the parties have not reached a successor agreement to the September 1, 2014, to August 31, 2017, collective bargaining agreement and remain engaged in negotiations.
5. The September 1, 2014, to August 31, 2017, collective bargaining agreement is silent on the matter of compensatory time.

6. Under 26 §965 "It is the obligation of the public employer and the bargaining agent to bargain collectively. "Collective bargaining" means, for the purposes of this chapter, their mutual obligation: ... To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration..."

7. Compensatory time is a mandatory subject of negotiations.

8. Since 1996, coinciding with the closing of Maine Yankee, the Wiscasset School Department and the Association established a practice of compensating overtime hours worked by means of compensatory time instead of monetary compensation;

9. On November 18, 2016, during a meeting with Lori Cronk, WESPA President, and Rose Mahoney, UniServ Director, Superintendent Heather Wilmot raised a concern regarding an employee's use of compensatory time. The result of the discussions was that the matter would be appropriately addressed in successor negotiations.

10. On March 7, 2017, Superintendent Heather Wilmot instructed bargaining unit member Cindy Collamore that she could no longer receive or use compensatory time going forward and that any and all compensatory time that had been accrued by Ms. Collamore would be paid out.

11. On March 14, 2017, the Wiscasset Educational Support Professionals Association issued a 10-day notice to bargain the issue of compensatory time.

12. On March 28, 2017, the parties met to negotiate the matter of compensatory time, but did not reach agreement on the matter.

13. On May 10, 2017, the parties met for the purpose of negotiations for a successor agreement and the matter of compensatory time pursuant to the March 14, 2017, 10-day notice was rolled into successor negotiations.

14. On or about September 5, 2017, Superintendent Wilmot issued a directive to all bargaining unit member[s] who have earned compensatory time in the past that going forward they would be required to be paid for overtime as it was worked and that compensatory time would not be allowed.

15. By engaging in the behavior as described in this complaint, the respondent has violated the MPELRL at 26 MRSA §964(1)(E) and (A).

DISCUSSION

The essence of the Association's complaint is that the Wiscasset School Department made a unilateral change by the Superintendent's directive of September 5, 2017, stating that going forward, overtime must be paid and compensatory time off would not be allowed.¹ Article 9 of the parties' collective bargaining agreement, which expired shortly before the directive was issued, requires the payment of overtime wages and makes no reference to compensatory time off. The Association alleges that there was an established practice of providing compensatory time off in lieu of overtime pay which the Employer was prohibited from changing unilaterally.

It is well-settled law that the duty to bargain entails a duty to maintain the status quo with respect to mandatory subjects of bargaining while the parties are negotiating a successor agreement. See, e.g., Mtn. Valley Educ. Assn. v. M.S.A.D. #43, 655 A.2d 348, 352 (Me. 1995) and City of Augusta v. MLRB et al., 2013 ME 63, ¶16. It is also well established that the duty to bargain continues during the term of a collective bargaining agreement, "provided the parties

¹ Section 968(5) prohibits the Board from hearing any case based on conduct occurring more than 6 months prior to the filing of the complaint, which in this case is April 17, 2017. Evidence of conduct prior to the 6 month limitation period may be used to shed light on conduct occurring within the 6 months. Teamsters Local 48 v. City of Waterville, No. 80-14, at 2-3 (April 23, 1980).

have not otherwise agreed in a prior written contract." 26 M.R.S.A. Sec. 965(1)(B). Subject to the effect of a "zipper clause,"

... the obligation to bargain continues with respect to new issues which arise during the course of the administration of the collective bargaining agreement when those new issues are neither contained in the terms of the contract nor negotiated away during bargaining for that contract or a successor agreement.

Cape Elizabeth Teachers Assn. v. Cape Elizabeth School Board, No. 75-24, at 4 (Oct. 16, 1975); East Millinocket Teachers Assn. v. East Millinocket School Committee, No. 79-24, at 4-5 (Apr. 9, 1979).

As there is no zipper clause in this case, the question before the Board is whether a practice of compensatory time off in lieu of overtime pay can co-exist with a collective bargaining agreement that expressly requires overtime pay. If not, the question is which alternative must serve as the basis of the status quo to be maintained while the parties are negotiating a successor agreement.

Making a unilateral change in a mandatory subject of bargaining is considered a breach of the duty to bargain. As we have explained on many occasions:

Changes in the mandatory subjects of bargaining implemented unilaterally by the public employer contravene the duty to bargain created by §965(1) of the Act and violate 26 M.R.S.A. §964(1)(E). The rationale behind this principle of labor law is that an employer's unilateral change in a mandatory subject of bargaining "is a circumvention of the duty to negotiate which frustrates the objectives of [the Act] much as does a flat refusal" [to negotiate]. NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 11007, 1111, 8 L.Ed.2d 230 (1962); Lane v. Board of Directors of M.S.A.D. No. 8, 447 A.2d 806, 809-810 (Me. 1982).

In order to constitute a violation of §964(1)(E), three elements must be present. The public employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects of bargaining. Bangor Fire Fighters Association v. City of Bangor, MLRB No. 84-15, at 8 (Apr. 4, 1984). An employer's action is unilateral if it is taken without prior notice to the bargaining agent of the employees involved in order to afford said representatives reasonable opportunity to demand negotiations on the contemplated change. City of Bangor v. A.F.S.C.M.E., Council 74, 449 A.2d 1129, 1135 (Me. 1982).

Auburn Firefighters Assoc. Local 797, IAFF, AFL-CIO v. Paula Valente, No. 87-19, (Sept. 11, 1987) (quoting Coulombe v. City of South Portland, No. 86-11, at 11-12 (Dec. 29, 1986) citing Teamsters Local Union No. 48 v. Eastport School Dept, No. 85-18, at 4 (Oct. 10, 1985)).

In the present case, the complaint alleges that "since 1996, . . . [the parties] established a practice of compensating overtime hours worked by means of compensatory time instead of monetary compensation." ¶8. The Association argues in its brief that a practice was established sufficiently to constitute a practice that could not be changed without first bargaining the change with the Association. Brief at 8. For the purposes of our analysis, we accept the allegation of an established practice as true. The crux of the complaint is that the Employer's directive in September prohibiting compensatory time constituted a unilateral change in violation of the Employer's statutory duty to bargain. To reach this point, the Association argues that Article 9 of the expired agreement requiring the payment of overtime pay does not preclude compensatory time off in lieu of overtime pay. Brief at 8-10.

The overtime provision of the expired collective bargaining agreement states, in full:

ARTICLE
OVERTIME

No employee shall work overtime without prior approval. Overtime shall be paid at a rate of time and one half after the employee has completed forty (40) hours worked within a work week. Paid sick leave, vacation leave, holiday leave, or other approved paid leaves shall not constitute time worked for purposes of computing overtime.

Nothing in this Agreement shall prevent the Committee from employing spares or on-call employees to avoid overtime except that if an assignment would result in overtime for a spare, overtime will be offered to employees before being offered to non-unit members. The Committee shall not curtail an employee's regular hours to avoid overtime.

There are no provisions in the collective bargaining agreement that are inconsistent with this overtime provision or provide any sort of opening for exceptions to the requirement of paying employees time and half for overtime hours. Furthermore, there is no "maintenance of benefits" provision or any other type of provision indicating that established practices must be continued.

The Association alleges in paragraph 5 of the complaint that the parties' collective bargaining agreement is "silent" on the issue of compensatory time off. To the extent that the CBA does not specifically use the term "compensatory time," this is true, but that does not mean the agreement permits the use of compensatory time. We see no ambiguity in the Article 9 language: it requires the payment of overtime wages and provides no exceptions. We cannot imagine any instance in which a practice of granting compensatory time off in lieu of the overtime pay required by Article 9 can occur

without expressly amending the language of Article 9.

Past practice is often considered by this Board and the courts to fill gaps in the terms of collective bargaining agreements or to interpret ambiguities in contract language. For example, in Bangor Fire Fighters' Association, the Board ordered the employer to apply the established practice of sharing increases in insurance costs to a situation where costs had decreased, even though the parties had never contemplated a reduction in insurance premiums. Bangor Fire Fighters' Assoc., Local 772, IAFF v. City of Bangor, No. 93-20 (Aug. 9, 1993) at 14, aff'd City of Bangor v. MLRB et al., [658 A.2d 669](#) (Me. 1995). Similarly, in Lincoln Firefighters' Association, the Board ordered the town to continue retirement contributions at the same rate established by past practice even though the contract was silent on the matter. Lincoln Firefighters' Assn., Local 3038, IAFF v. Town of Lincoln, No. 93-18, at 8 (Apr. 21, 1993) ("Where the contract is silent, past practice will determine what the employer must do (or not do) until an alternative to that practice is negotiated."). See also, Norman P. Whitzell v. Merrymeeting Educators Assoc., CV-80-124 at 4 (Me. Sup. Ct., Sag. Cty., Dec. 28, 1982) (Board may look at extrinsic evidence including past practice to determine the meaning of ambiguous contract language.)

In cases where the contract language is unambiguous, past practice that is in direct conflict with clear terms of the contract cannot amend the contract unless there is unequivocal evidence of a "meeting of the minds." With respect to unambiguous language, we agree with the approach adopted by the Michigan Supreme Court:

The party seeking to supplant the contract language must show the parties had a meeting of the minds with respect

to the new terms or conditions so that there was an agreement to modify the contract.

See Port Huron Educ. Ass'n/MEA/NEA v. Port Huron Area School District, 452 Mich. 309, 312 (1996)(Tacit acceptance of a practice in conflict with unambiguous language or continuation of a mistake not enough to show amendment by mutual agreement). See also In Re New Hampshire Dept. of Safety, 921 A.2d 924 (N.H. 2007)(Practice for utilizing leave time existed openly for many years, was widely acknowledged and accepted by the parties, and the repeated confirmations during negotiations of several contracts that the practice would continue to be adhered to was sufficient to amend language of contract); and Local 387 NP-4 Unit Council 4 AFSCME v. State of Connecticut Department of Corrections, 56 Conn. L. Rptr. 548, 5 (Sup. Ct. Conn., New Britain J.D., July 16, 2013)(Past practice of allowing full days off for funerals did not modify unambiguous terms of the agreement in the absence of meeting of the minds). In the present case, past practice is not relevant because there is no ambiguity or gaps to fill--the language of article 9 is clear and unequivocal. The Association alleges that the practice actually predates the collective bargaining agreement. As there was no allegation in the complaint that there was a meeting of the minds, after the contract was negotiated, to change the contract, the unambiguous terms of Article 9 must be maintained as the status quo.

We further conclude that in the circumstances of this case, the Employer's action with respect to compensatory time was not a unilateral change because the parties did bargain over the matter. As previously noted, an employer's action is unilateral if it is taken without prior notice to the union in order to afford the union a reasonable opportunity to demand negotiations on the change.

City of Bangor v. AFSCME, Council 74, 449 A.2d 1129, 1135 (Me. 1982). See also Teamsters v. Town of Eliot, No. 14-04 at 17 (Because employer did not provide notice of plan to reduce an employee's hours of employment, there was no opportunity to demand bargaining about the reduction so change was unilateral.)

An examination of the factual allegations in the complaint demonstrates this. Paragraph 10 alleges that on March 7, 2017, the Superintendent instructed a particular bargaining unit member that she could no longer receive or use compensatory time going forward and that any compensatory time she had accrued would be paid out. Given that the next paragraph of the complaint states that on March 14, 2017, the Association issued a 10-day notice to bargain the issue of compensatory time², we conclude that the Association had actual notice of the change. Furthermore, paragraph 12 states, "On March 28, 2017, the parties met to negotiate the matter of compensatory time, but did not reach agreement on the matter," and paragraph 13 states that on May 10, 2017, the parties met to negotiate a successor agreement and the issue of compensatory time was "rolled into" successor negotiations. Finally, paragraph 4 states that as of October 2, 2017, the parties had not reached a successor agreement to the one that expired on August 31, 2017, and remain engaged in negotiations. The September 5, 2017, directive of the Superintendent reaffirmed the Employer's position that the terms of the expired agreement requiring the payment of overtime pay for overtime hours worked must be applied and compensatory time would not be allowed.

When an employer is alleged to have made a unilateral change

² 26 M.R.S. §965(1)(B) requires a party to meet within 10 days of a written request to bargain.

in a mandatory subject of bargaining during negotiations for an initial or a successor agreement, the employer is generally prohibited from implementing a change until overall impasse is reached. See Mountain Valley Educ. Assoc. v. MSAD #43, 655 A.2d 348, 352 (Me 1995). In the situation presented in this case, however, the issue predates successor negotiations and is essentially the Union's demand to bargain a change in the terms of the existing agreement (the expired agreement, subsequent to August 31, 2017). That written agreement clearly and unambiguously required overtime pay. The Employer gave the Association the opportunity to bargain and did, in fact, bargain over the matter. It cannot be said that the Employer's directive was a unilateral change simply because the Association did not succeed in getting the Employer to agree to new language in the collective bargaining agreement addressing compensatory time.

The parties are free to bargain new terms in the successor agreement to provide compensatory time off in lieu of overtime, but, as with all matters, neither party may be compelled to make an agreement or concession. 26 M.R.S. §965(1)(C). Here, as evidenced by Article 9, the parties included overtime requirements in their most recent agreement. We need not decide, and therefore will not decide, whether the alleged practice of granting compensatory time in lieu of overtime pay was lawful under the Fair Labor Standards Act.

For the foregoing reasons, we hold the complaint does not allege a violation of the Act. The Employer did not violate 26 MRS §964(1)(E) or (A) by insisting on adherence to Article 9 of the

parties' expired collective bargaining agreement. The complaint is dismissed.

Dated in Augusta, Maine, this 14th day of May 2018

MAINE LABOR RELATIONS BOARD

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Amie B. Parker
Employee Representative

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