STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 23-PPC-17
Issued: August 30, 2024

AFSCME COUNCIL 93, LOCAL 1828-12, Complainant,	
v.	DECISION AND ORDER
PENOBSCOT COUNTY, Respondent.	

I. Statement of the Case

AFSCME Council No. 93, Local 1828-12 (Union) filed this prohibited practice complaint against Penobscot County (County) alleging that the County violated the Municipal Public Employees Labor Relations Law (Act) by unilaterally changing its medical accommodations policy and by refusing to later bargain over the impact of the change.

II. Procedural History

The Union filed its prohibited practice complaint on March 21, 2023, and filed an amended complaint on April 18, 2023. The County filed its answers on April 7, 2023, and May 1, 2023, respectively. On May 17, 2023, Sheila Mayberry, Esq., Board Chair, conducted a prehearing conference with the parties and issued a Prehearing Conference Memorandum and Order the next day. The Board postponed the evidentiary hearing at the Union's request, with the assent of the County, and the hearing was eventually held on March 29 and May 1, 2024. The Union was represented by Justin P. Murphy, Esq., and the County was represented by John K. Hamer, Esq. The hearing was presided over by a Board panel made up of Shari Broder, Esq., Alternate Chair, Michael Miles, Employer Representative and James Mackie, Alternate Employee Representative. The parties were given a full opportunity to examine and cross-examine witnesses, introduce evidence and make their arguments. The parties were also permitted to file post-hearing briefs, which were submitted on June 10, 2024.

III. Stipulations

The parties have made the following stipulations.

1. The County is a public employer within the meaning of 26 M.R.S.A § 962(7).

2. AFSCME is the exclusive bargaining agent for the following full-time employees at the Penobscot County Sheriff's Corrections Bargaining Unit: Corrections Officer, Transport Officer, Clerical Intake Specialist II, Public Works Officer, Corrections Utility Custodian, and Cook.

3. John Nuttall is the AFSCME Staff Representative assigned to the Penobscot County Corrections Bargaining Unit.

4. The Parties are in the midst of a collective bargaining agreement that is effective from January 1, 2022 to December 31, 2024.

5. The Medical Information Form listed in 4(B) [Exhibit J-2] was part of the collective bargaining agreements between the parties from June 1997 through December 31, 2018.

6. On or around September 9, 2022,[1] the County circulated the memorandum listed in 4(F) [Exhibit J-8].

7. On September 13, 2022, AFCME demanded to impact bargain with the County regarding the memorandum.

8. The parties met on September 23, 2022, to discuss the memorandum.

IV. Findings of Fact

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

The Medical Information Form that had historically been a part of the parties' collective bargaining agreements was not included in the contract effective January 1, 2019, through December 31, 2021, and has not been included in any subsequent agreements. The County claims it replaced this form and began using a new form, a Request for Accommodation Form, starting in 2019. The only evidence of the form being submitted by bargaining unit employees, however, was from August of 2022.

The County's prior practice with respect to employee medical accommodations required employees to either submit a Medical Information Form completed by their doctor, or to just submit a doctor's note. The Medical Information Form included a field to be completed entitled: "Nature of Illness or Injury." Doctors' notes recommending restrictions on forced overtime for an employee were sufficient to establish an accommodation for that employee.

The County distributed the memorandum outlining the policy for requesting medical accommodations with the new Request For Accommodation Form on September 9, 2022. The practice outlined in the County's memorandum provided that: "[i]f you believe you have a qualifying disability that restricts your ability to perform the essential functions of your position, you will be required to provide completed ADA Request for Accommodation Paperwork." Current employees receiving medical accommodations were given two weeks to submit the required paperwork or else lose their accommodation. The memorandum also stated that a doctor's note that only described an employee's particular limitation, such as not working forced overtime, would not be sufficient and would not replace the required paperwork. The new Request For Accommodation Form replaced the prior form's "Nature of Illness or Injury" field with: "Nature of Qualifying Disability."

In response to the memorandum, the Union sent a letter to the County on September 13, 2022, requesting impact bargaining based on the policy outlined in the memorandum, characterizing it as a "significant change to the past practice of how [the Department] managed requests for accommodations." In an email sent on September 14, 2022, the County agreed to meet with the Union, while making clear its view that impact bargaining was not required.

The Union categorized the following September 23, 2022, meeting with the County as "informational," where a County representative said at the outset of the meeting that there would be no bargaining or discussion of changes to the medical accommodations policy. At the end of the meeting, the County invited the Union to email any proposed changes and said that, if it did so, it would review the proposals and consider next steps. The Union did not subsequently submit any proposals.

The change in policy impacted bargaining unit employees. Although there was some inconsistency in the testimony, at least one employee that had been receiving a medical accommodation did not submit the newly required paperwork and was therefore required to return to regular duty, and at least one employee moved from full-time to part-time status because of the new policy.

V. Analysis

At all times relevant, the Union was a bargaining agent within the meaning of 26 M.R.S.A. § 962(2), and the County was a public employer within the meaning of 26 M.R.S.A. § 962(7). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 968(5).

The issues presented in this case are whether the County violated its collective bargaining obligations, in violation of 26 M.R.S.A. § 964(1)(E), 1) by unilaterally implementing a change to a collective bargaining agreement or past practice regarding medical accommodations and 2) by refusing to engage in impact bargaining regarding the change, if any.

With respect to the Union's unilateral change claim, the County has raised the issue of timeliness. The Act provides that no claim may be based upon any alleged prohibited practice occurring more than six months prior to the filing of the complaint. 26 M.R.S.A. § 968(5)(B). The complaint was filed on March 21, 2022, so the six-month lookback period begins on September 21, 2022. The limitations period is counted from when the complainant knew, or reasonably should have known, of the occurrence of the event which allegedly violated the Act. *Duren v. Maine Education Association*, No. 09-06, slip op. at 9 (June 25, 2009). Here, the County issued the memorandum laying out its policy regarding medical accommodations on September 9, 2022. The memorandum's mention of two weeks within which to submit paperwork is not referencing a later date that the policy would take effect--the policy was in effect at, the latest, with the issuance of the September 9, 2022, memorandum. The record shows the Union knew, or should have known, about the policy change as of the memorandum, which is outside the limitations period and thus cannot be the basis for a prohibited practice complaint. Accordingly, this claim must be dismissed.

Although the alleged unilateral change itself is beyond the limitations period, the Union's claim that the County refused to impact bargain is squarely within it. Public employers and bargaining agents (unions) are required to collectively bargain under the Act. 26 M.R.S.A. § 965. This includes the obligation "to meet within 10 days after receipt of written notice from the other party requesting a meeting for collective bargaining purposes, as long as the parties have not otherwise agreed in a prior written contract." 26 M.R.S.A. § 965(1)(B). The duty to collectively bargain applies to mandatory subjects of bargaining--wages, hours, working conditions and contract grievance arbitration. *Id.* It also applies to the impact of an employer's action on a mandatory subject of bargaining, which is considered a separate subject of bargaining from the employer's right to take the underlying action itself. See *SAD 3 Education Association v. RSU 3 Board of Directors et al.*, 2018 ME 29, ¶¶ 17-18, 180 A.3d 125; see also *City of Bangor v. Maine Labor Relations Board*, 658 A.2d 669, 671 (Me. 1995). Collective bargaining under the Act includes the duty to "confer and negotiate in good faith." 26 M.R.S.A. § 965(1)(C). When examining whether a party has dispatched its duty to bargain in good faith, the Board looks to the totality of

the party's conduct and will decide whether the party's actions indicate a "present intention to find a basis for agreement," or put another way, "a sincere desire to reach an agreement." *Town of Orono v. IAFF Local 3106 Orono Firefighters*, No. 11-11, slip op. at 7-8 (August 11, 2011) (citing *Waterville Teachers Assoc. v. Waterville Board of Education*, No. 82-11 at 4 (Feb. 4, 1982)). A failure to collectively bargain is a violation of 26 M.R.S.A. § 964(1)(E).

The Union has not waived its right to impact bargain in this case by having "otherwise agreed in a prior written contract." See 26 M.R.S.A. § 965(1)(B). The Board has long held that to be effective, a waiver of bargaining must be made by explicit contract language and is normally applicable only to the specific item mentioned.[2] See *SAD 3 Education Association, MEA/NEA v. RSU 3*, No. 15-19, slip op. at 12 (February 18, 2016). The parties have no zipper clause in their collective bargaining agreement that would foreclose midterm negotiations, and neither does the contract contain a specific waiver of impact bargaining with respect to changes in the employer's medical accommodations policy.

Besides by explicit waiver in the parties' collective bargaining agreement, a party may also be foreclosed from bargaining when the subject has otherwise been covered by the contract. *Falmouth Bus Drivers, Custodians and Maintenance Workers Ass'n v. Falmouth School Board*, 20-PPC-06, slip op. at 7-9 (January 26, 2021). The County does not point to any provision in the collective bargaining agreement covering the impact of changes to the medical accommodations policy, and neither does the Board find one in its review of the contract language.

It is clear that the County's change in its handling of employee medical accommodations likely could impact, and indeed has already impacted, mandatory subjects of bargaining, namely working conditions and hours. The County has changed the standard guiding its assessment of medical accommodations from the "illness or injury" standard embodied in Article XX of the parties' collective bargaining agreement to a standard aligned with the "disability" standard of the federal Americans with Disabilities Act (ADA).[3] While this federal legal standard is fairly broad,[4] it is inarguably narrower than the term "injury or illness." As such, it is conceivable that an employee's injury or illness may not be covered by the new ADA-based standard and would thus result in the employee either not qualifying for a medical accommodation or losing a previously granted accommodation. Another source of potential impact to employees was the County's determination that a doctor's note describing only an employee's particular limitation was no longer sufficient justification for an accommodation. The inability to obtain a medical accommodation, or the loss of a previously granted accommodation, would likely result in an employee either working despite the burden of the illness or injury, reducing their work hours or losing employment altogether. The record reflects that the new policy has already in fact impacted at least two employees.

To its credit, the County did agree to meet with the Union after the Union's request to bargain. However, the County made clear in its communications with the Union prior to the meeting that it did not view itself as obligated to impact bargain and, according to testimony elicited by the Union and contemporaneous notes of the meeting in the record, the County stated an outright refusal to bargain regarding the new medical accommodation policy during the meeting. The County points out that the Union did not bring any specific proposals to the meeting and that the County offered to review any proposals the Union sent by email after the meeting. The Board does not find these facts to be particularly mitigating in the full context of the County's response to the Union's request for impact bargaining. Looking at the totality of the County's conduct, at no time did the County evince "a sincere desire to reach an agreement." See *Town of Orono*, No. 11-11, slip op. at 8. As the Board has held, merely agreeing to meet and discuss in response to a union's request to bargain is not sufficient--the employer must in fact bargain. *Saco-Valley Teachers Association v. MSAD #6 Board of Directors*, No. 79-56, slip op. at 3 (August 9, 1979). The County stating

its willingness to read a future email is not equivalent to bargaining in good faith or agreeing to continue bargaining.

VI. Conclusion

The Union's claim that the County's change to its medical accommodations policy was an unlawful unilateral change is beyond the Act's actionable lookback period and must be dismissed. Regarding the issue of impact bargaining, the Board finds that while the County met with the Union and made a gesture to at least consider a future proposal, this was an insufficient response to a valid demand to bargain. Accordingly, the County has refused to collectively bargain in violation of 26 M.R.S.A. § 964(1)(E).

VII. 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 M.R.S.A. § 968(5), it is ORDERED that Penobscot County:

(1) Shall cease and desist:

(a) from refusing to meet to negotiate within ten days of receipt of a written request to negotiate the impact on a mandatory subject of bargaining of any policy or program change in violation of 26 M.R.S.A. § 964(1)(E); and

(b) from refusing to negotiate in good faith the impact on a mandatory subject of bargaining of any policy or program change in violation of 26 M.R.S.A. § 964(1)(E); and

(2) Shall take the following affirmative actions:

(a) meet within ten days of receipt of a written notice from AFSCME Council 93, Local 1828-12 requesting negotiations concerning the impact on a mandatory subject of bargaining of the medical accommodations policy;

(b) distribute copies of the attached notice to all employees of Penobscot County represented for the purposes of collective bargaining by AFSCME Council 93, Local 1828-12;

(c) post copies of the attached notice for 30 days in all locations where notices of AFSCME Council 93, Local 1828-12-represented Penobscot County employees are ordinarily posted; and

(d) notify the Maine Labor Relations Board of the date of the posting of the notice and of the date of the completion of the 30-day posting period.

Dated this day, August 30, 2024

MAINE LABOR RELATIONS BOARD

/s/
Shari Broder, Esq.
Alternate Board Chair

/s/
Michael Miles
Employer Representative

/s/
James Mackie
Alternate Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. § 968(5) 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 80C of the Maine Rules of Civil Procedure.

[1] The parties erroneously stipulated that the memorandum in question was circulated in September 2023, but, as accurately referenced elsewhere in the decision, the actual date of the memorandum was September 9, 2022. Therefore, the stipulation is corrected to reflect the 2022 date of circulation.

[2] The Board has acknowledged the possibility of a waiver of bargaining rights through "a lengthy period of inaction." See *SAD 3 Education Association, MEA/NEA v. RSU 3*, No. 15-19, slip op. at 13 (February 18, 2016). Delay is not implicated in the present case, as the Union promptly demanded impact bargaining after the County's September 9, 2022, announcement of the changes to the medical accommodations policy.

[3] The County cites reference to "disability" in the collective bargaining agreement's preamble to argue that it has not changed its standards with respect to medical accommodations. However, the verbiage in Article XX discussing medical accommodations references the "illness or injury" standard used in the former Medical Information Form, and not the federal Americans with Disabilities Act definition of disability. While that may have been the parties' intent, the contract language and evidence of prior practice do not support this interpretation.

[4] See 42 U.S.C. § 12102 and accompanying federal regulations.

NOTICE TO EMPLOYEES

ISSUED PURSUANT TO AN ORDER OF THE
MAINE LABOR RELATIONS BOARD

IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE MAINE LABOR RELATIONS BOARD AND ABIDE BY THE FOLLOWING:

WE WILL CEASE AND DESIST from refusing to meet to negotiate within ten days of receipt of a written request to negotiate the impact on a mandatory subject of bargaining of any policy or program change in violation of 26 M.R.S.A. § 964(1)(E).

WE WILL CEASE AND DESIST from refusing to negotiate in good faith the impact on a mandatory subject of bargaining of any policy or program change in violation of 26 M.R.S.A. § 964(1)(E).

WE WILL, meet within ten days of receipt of a written notice from AFSCME Council 93, Local 1828-12 requesting negotiations concerning the impact on a mandatory subject of bargaining of the medical accommodations policy.

WE WILL distribute copies of this notice to all employees of Penobscot County represented for the purposes of collective bargaining by AFSCME Council 93, Local 1828-12.

WE WILL post copies of this notice for 30 days in all locations where notices of AFSCME Council 93, Local 1828-12-represented Penobscot County employees are ordinarily posted.

WE WILL notify the Maine Labor Relations Board of the date of the posting of this notice and of the date of the completion of the 30-day posting period.

_____ _____

Date Representative of Penobscot County

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

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

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