STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 12-10
Issued: November 15, 2012

AFSCME COUNCIL 93, Complainant, v. CITY OF PORTLAND, Respondent.	DECISION AND ORDER

This prohibited practice complaint, filed by Local 1373, Council 93, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME" of "Union") on December 9, 2011, charges that the City of Portland ("City" or "Employer") violated the Municipal Public Employees Labor Relations Law ("Act"), 26 M.R.S.A. §964(1)(E), by unilaterally splitting a vacant full-time permanent bargaining unit position into two part-time bargaining unit positions. Specifically, the Employer made this change without having first given the Union notice of its intent to do so and refused to negotiate with the Union prior to implementing the change. The complaint also charges that the Employer's statements and conduct interfered with, restrained and coerced employees in the exercise of their rights guaranteed in § 963 in violation of § 964(1)(A).

A prehearing conference was held on March 26, 2012, Board Chair Peter T. Dawson presiding. Numerous stipulations and six joint exhibits were presented by the parties and admitted into the record. Since it appeared likely that the record could be stipulated, obviating the need for an evidentiary hearing, the parties were ordered to confer and attempt to reach such agreement. Chair Dawson issued a Prehearing Conference Memorandum and

Order on April 12, 2012. On May 2, 2012, the parties presented a partial stipulated record and agreed to submit affidavits on the narrow issues of fact remaining to complete the record. The Union submitted an affidavit by Cynthia PeBenito, dated May 17, 2012. The City submitted an affidavit by Thomas Caiazzo, dated June 1, 2012, together with a list of food service employees who work at the Barron Center, designated as Exhibit A. The Union submitted a response affidavit by James Breslin, dated June 13, 2012.

Since the admissibility of Exhibit A noted above was unclear, the Executive Director of the Board convened a conference call with the parties on July 20, 2012, to discuss the admission of the exhibit, possible additional stipulations, and a briefing schedule. The parties subsequently agreed to the following:

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> The Exhibit A to Tom Caiazzo's affidavit will be admitted with a modification. Consistent with paragraph 4 of James Breslin's Affidavit dated June 13, 2012 filed by the Union, those Support Team Workers who only work 0.4 FTE are not union members. Therefore, the attached exhibit crosses off the CEBA designation for the employees who work 0.4 FTE. This will be the Exhibit A which becomes part of the record.

Throughout the proceedings, the Union was represented by Erin DeRenzis, Esq., and the City was represented by Ann Freeman, Esq. The parties' briefs and reply briefs were all filed by October 9, 2012. The Board, consisting of Chair Katharine Rand, Employee Representative Wayne Whitney, and Employer Representative Karl Dornish, met on October 19, 2012, to deliberate on this matter.

JURISDICTION

AFSCME, Council 93 is the bargaining agent for certain employees in a bargaining unit at the City of Portland. AFSCME is the bargaining agent within the meaning of 26 M.R.S.A.

§ 962(2), and the City is the public employer within the meaning of 26 M.R.S.A. §962(7). The jurisdiction of the Board to hear this case and to render this decision and order lies in 26 M.R.S.A. §968(5)(A)-(C).

STIPULATED FACTS

1. The Barron Center is a skilled nursing care facility owned and operated by the City of Portland; certain employees at the Barron Center are members of the Union.

2. The Respondent is a public employer.

3. AFSCME, Council 93 is the bargaining agent for certain employees working for the City of Portland.

4. The Respondent and the Union are parties to a Collective Bargaining Agreement covering the period of January 1, 2010 through June 30, 2012. (Jt. Ex. 1).

5. The Union is the sole and exclusive representative for employees working within the Barron Center General Kitchen under the Health and Human Service Department who are covered by the parties' collective bargaining agreement.

6. On or about July 15, 2011, Denise See, a full time Food Service employee at the Barron Center, covered under the parties Collective Bargaining Agreement, resigned from her position.

7. At that time, numerous bargaining unit employees working in the Barron Center General Kitchen were expecting (having a more desirable work schedule) and that the position vacated by Ms. See would be posted in accordance with Article 29 (Filling of Job Vacancies) of the parties' Collective Bargaining Agreement.

8. In July 2011, the Union began to inquire on the status of the vacant position.

9. On July 21, 2011, the Union President, Dan McDuffie, was provided with an explanation of the status of the vacant position by Barron Center Administrator, Karen Percival. She explained that the permanent full-time position had been split into two part-time positions. (Jt. Ex. 2 and 2A).

10. On or about July 29, 2011, the Employer posted the two part-time positions on the City of Portland JOBS webpage.

11. Prior to the change to the vacant position in the General Kitchen, the Union was not provided with notice and opportunity to bargain any proposed change to the vacant full-time position.

12. On August 9, 2011, the Union placed this item on its agenda for their monthly Labor Management meeting. (Jt. Ex. 3).

13. On September 13, 2011, the item remained on the Union's agenda at the monthly Labor Management meeting. (Jt. Ex. 4).

14. On September 26, 2011, Employee Labor Manager Tom Caiazzo notified the Union that it was willing to impact bargain the issue. (Jt. Ex. 5).

15. On October 6, 2011, at the parties' monthly Labor Management meeting, the Union discussed the offer of the City to impact bargain. (Jt. Ex. 6).

16. On October 6, 2011, the Union requested "status quo" concerning the full time position in question.

17. The City informed the Union it would not return to "status quo."

18. The City admits that the Union represented the employee who vacated the position at issue in this case.

19. When the City decided to split the position into two part-time positions, the position was vacant.

20. The Union represents the two employees who filled the part-time positions (after the expiration of their probationary period).

21. The City admits that it did not bargain over splitting the position.

FINDINGS OF FACT

1. Article 2 of the Parties' Collective Bargaining Agreement incorporates Appendix A of the Agreement and provides that the recognized bargaining unit includes both full-time and permanent part-time employees in the Support Team Worker classification in the Food Service Department at the Barron Center.

2. Appendix B-4 of the parties Collective Bargaining Agreement notes that the standard work week for full-time employees in the Support Team Worker classification in the Food Service Department at the Barron Center is 37.5 hours per week.

3. Appendix A of the parties Collective Bargaining Agreement provides that part-time employees regularly scheduled to work 18.75 hours per week (.5 full-time equivalent, "FTE") but less than 37.5 hours per week receive certain specified benefits on a pro-rated basis. Part-time employees regularly scheduled to work less than 18.75 hours per week are not entitled to receive such benefits.

4. Although they perform bargaining unit work, employees in the Food Service Department regularly assigned to work on a .4 FTE basis are not benefit-eligible nor do they pay Union dues or a Union service fee. If awarded a position with a greater number

of hours, such employees are awarded seniority from their initial date of hire.

DISCUSSION

The statutory duty to engage in collective bargaining established by § 965(1)(C) of the Act is the mutual obligation of the employer and the bargaining agent "to confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." A corollary to the duty to bargain is the prohibition against the employer's making unilateral changes in a mandatory subject of bargaining, since a unilateral change is essentially a refusal to bargain. *Maine State Employees Association v. Lewiston School Department*, No. 09-05, slip op. at 6 (Jan. 15, 2009), *aff'd on other grounds*, *City of Lewiston School Department v. MSEA and MLRB*, No. AP-09-001 (Me. Super Ct., And. Cty., Oct. 6, 2009). Board *citing Teamsters v. Town of Jay*, No. 80-02, at 3 (Dec. 26, 1980), *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).

Three elements are required to constitute an unlawful unilateral change. The first is that the employer's action must be unilateral, that is, it must have been taken without prior notice to the bargaining agent sufficient to permit the latter to request bargaining over the contemplated change. *City of Bangor v. AFSCME, Council 74*, 449 A.2d 1129, 1135 (Me. 1982). The parties have agreed that, after the full-time Support Team Worker position became vacant as a result of Ms. See's resignation, the City decided to split the position into two part-time positions and only notified the Union after the decision had been made. Faced with this *fait accompli*, the Union demanded bargaining over the decision and the City refused to negotiate. These facts establish that the charged conduct was a unilateral decision by

the City.

Second, the action must be a change from a well-established practice. *Teamsters v. Town of Fort Fairfield*, MLRB No. 86-01, at 9 (Jan. 24, 1986). The parties stipulated that, prior to Ms. See's resignation, the position she occupied was a full-time position.

Third, the action must involve one or more of the mandatory subjects of bargaining. *Bangor Fire Fighters Association v. City of Bangor*, No. 84-15, at 8 (Apr. 4, 1984). The test we use to determine if something is a mandatory subject of bargaining is whether the action at issue "significantly and materially related to 'wages, hours, working conditions and contract grievance arbitration.'" *Portland Firefighters Association v. City of Portland*, No. 83-01, at 4 (June 24, 1983) *aff'd*, 478 A.2d 297 (Me. 1984). The charged conduct directly involved the hours of the bargaining unit positions involved, a mandatory subject of bargaining.

While essentially admitting that it made a unilateral change in a mandatory subject of bargaining, the City avers that "[s]plitting a vacant, full time position does not affect the bargaining unit employees' rights or their jobs in any way whatsoever" because the position was vacant at the time. Brief on behalf of the City at 6-7. In *MTA/NEA v. State Board of Education*, No. 86-14 (Nov. 18, 1986), the employer created two new classifications, assigned them to a bargaining unit represented by the Complainant, unilaterally assigned them salary levels, and refused to negotiate over the salary levels. Addressing one of the defenses to the refusal to bargain charge raised by the employer, the Board stated:

> The State advances by way of defense to the Association's charge of prohibited practices that "no employee represented by the Association is adversely affected" by the assignment of initial salary levels in this case because "the Association may not bargain on behalf of new employees in the first six (6) months of their employment." This argument is unpersuasive. Although the record establishes that appointments for employees to fill the positions in question occurred on [specific dates within the statutory period of limitations], it fails to establish whether the employees so appointed had worked for the employer in any other capacity prior to undertaking employment in the newly-created classifications. Additionally, the State's refusal to negotiate salary levels was categorical and constituted a refusal to negotiate salary to be paid public employees of the employer who might laterally transfer to fill vacancies in such positions. In any event, the State refused to bargain and unilaterally established for these positions a salary schedule that was applicable well beyond the first six months of employment.

No. 86-14, at 9-10. Like the salary schedules at issue in *State Board of Education*, the change of status of the position at issue from full to part time will continue to be experienced by bargaining unit employees when the positions are filled and the incumbents complete their initial six months of employment with the City; therefore, a unilateral change in the length of the standard work week of the Team Support Worker position formerly held by Ms. See violated the statutory duty to bargain.[1]

The final point raised by the City is that the decision regarding how the Barron Center serves the noontime meal to its

[1]Two other cases, *Maine State Employees Association v. Maine Maritime Academy*, MLRB No. 05-04 (Jan. 31, 2006), and *Maine School Administrative District No. 45 v. MSAD No. 45 Teachers Association*, MLRB No. 82-10 (Sept. 17, 1982), are consistent with the principle that unilateral changes in the mandatory subjects of bargaining regarding vacant bargaining unit positions violate the statutory duty to bargain; however, since these cases involve direct dealing between the employer and a present or future bargaining unit employee, we did not choose to rely on them in reaching our conclusion.

residents (the impetus for splitting the position) is within the employer's discretion and is not subject to mandatory bargaining. The City argues that, even if splitting the vacant position affected wages, hours or working conditions, "the contract includes,[2] and the law recognizes exceptions to bargaining when they are within the rights of management," including "managerial decisions which lie at the core of the entrepreneurial control" and "which are fundamental to the basic direction of a corporate enterprise and which impinge only indirectly upon employment security." Brief on behalf of the City at 7-8. The decision of how lunch is served at the Barron Center is not the issue in this case. The question presented is whether the City violated the Act by splitting a vacant full-time bargaining unit position into two part-time bargaining unit positions, without first giving the bargaining agent notice and an opportunity to request negotiations over the decision. As we have previously noted in *Coulombe and South Portland Professional Firefighters v. City of South Portland*, No. 86-11, at 12 (Dec. 29, 1986), there is no statutory management prerogative exception to the duty to bargain over an issue that is "significantly and materially related to 'wages, hours, working conditions and contract grievance arbitration.'"

We conclude that the City violated the statutory duty to bargain by splitting a full-time bargaining unit position into two part-time positions, in violation of § 964(1)(E) of the Act. We also hold that the City's unilateral change in the hours of the position at issue constitutes interference, restraint and

[2]Although there is a reference to the collective bargaining agreement in the brief on behalf of the City at 7-8, neither party argued whether or, if so, how the agreement addressed the splitting of a full-time bargaining unit position into two part-time positions. The record fails to disclose whether a grievance was filed in connection with the issue in this case and neither party requested that the Board defer to the grievance arbitration process.

coercion as a derivative violation of § 964(1)(A) the Act. Unilateral changes inherently interfere with the free exercise of the right of employees to engage in collective bargaining. *See, e.g., Coulombe, supra*, at 25, *Lane v. MSAD No. 8*, 447 A.2d at 810.

Having concluded that the City has engaged in a prohibited practice, § 968(5)(C) directs that we order the City "to cease and desist from such prohibited practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." A properly designed remedial order seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice.

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 the City of Portland, and its representatives and agents:

1. Cease and desist from splitting full-time bargaining unit positions into two part-time bargaining unit positions, without first notifying the bargaining agent of the bargaining unit that includes such positions of its intention to do so and, upon request, negotiating over any such decision.

2. Restore the Support Team Worker position in the Food Service Department at the Barron Center, formerly occupied by Denise See, to 37.5 hours per week and fill said position through the process established by the parties' collective bargaining agreement.

3. Should the City contemplate splitting this full-time position into two part-time positions, it must give

the Union notice of its intention and, upon request, negotiate over the decision to divide the position as required by § 965(1) of the Act.

4. Notify the Executive Director, in writing, within 30 days from the date of this order, of the steps that have been taken to comply with this order.

Dated at Augusta, Maine, this 15th day of November, 2012.

MAINE LABOR RELATIONS BOARD

/s/_____
Katharine I. Rand
Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Wayne W. Whitney
Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. Sec. 968(5)(F) to seek review of this decision and order by the Superior Court by filing a complaint in accordance with Rule 80B of the Rules of Civil Procedure within 15 days of the date of this decision.

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 12-10
Issued: January 2, 2013

AFSCME COUNCIL 93, Complainant, v. CITY OF PORTLAND, Respondent.	ORDER CLARIFICATION

On November 15, 2012, the Maine Labor Relations Board ("Board") issued its Decision and Order, resolving the controversy in this matter. On December 13, 2012, Counsel for Respondent, City of Portland ("City"), filed a request for clarification of the Board's intent in paragraph 2 of its Order, which directed the City to:

> Restore the Support Team worker position in the Food Service Department at the Barron Center, formerly occupied by Denise See, to 37.5 hours per week and fill said position through the process established by the parties' collective bargaining agreement.

The City averred that this paragraph was ambiguous and presented two plausible interpretations of the language used by the Board:

> The first is that the City must put the full-time Support Team position back "on the books" but may leave that position vacant because it was vacant at the time the City split it into two positions and because there is nothing in the collective bargaining agreement that requires the City to fill vacant positions. The second is that the City must not only put the full-time position back "on the books" but must hire someone to fill that position.

The Complainant, AFCCME Council 93, was accorded the opportunity to be heard regarding the merits of the City's request for clarification and opted not to be heard. The City's request was forwarded to the Board for their review. The members unanimously

agreed that, pursuant to the authority granted in 26 M.R.S.A. § 968(5)(C), the intent of paragraph 2 was the restoration of the *status quo ante*, relief which the Complainant sought. The 37.5 hour Support Team position, which was vacant just prior to the City's unlawful act, must be reinstated. The future staffing of that position, as well as that of the two part-time positions created by splitting the full-time position, are issues for the parties to resolve in accordance with the terms of their collective bargaining agreement.

Dated at Augusta, Maine, this 2nd day of January 2013.

MAINE LABOR RELATIONS BOARD

Katharine I. Rand
Chair

Karl Dornish, Jr.
Employer Representative

Wayne W. Whitney
Employee Representative