STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 12-13
Issued: November 13, 2012

LOCAL 1373, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO, Complainant,	
v.	DECISION AND ORDER
CITY OF PORTLAND, Respondent.	

PROCEDURAL HISTORY

On December 30, 2011, Local 1373, American Federation of State, County, and Municipal Employees ("AFSCME") filed a prohibited practice complaint with the Maine Labor Relations Board ("Board") alleging that the City of Portland ("Portland") engaged in prohibited practices within the meaning of 26 M.R.S.A. § 964(1)(A) and (E) of the Municipal Public Employees Labor Relations Law ("MPELRL"). Specifically, AFSCME alleges that, by refusing to respond in writing to an information request concerning the use of on-call employees, Portland refused to bargain collectively as required by statute. Portland denies that its actions violated the MPELRL. As affirmative defenses, it asserts that AFSCME waived its right to bargain over the issue of on-call employees pursuant to section 40 of the collective bargaining agreement ("Contract"), which allows Portland to use on-call employees on an as-needed basis; that Portland did respond verbally to AFSCME's request at more than one monthly labor management meeting; and that Portland was not required to provide a written explanation in this case.

On March 26, 2012, Neutral Chair Peter T. Dawson convened a prehearing conference in this matter. AFSCME was represented by Erin L. DeRenzis, Esq., and Portland was represented by Ann M. Freeman, Esq. Since there was a high potential for a stipulated record, which would render an evidentiary hearing unnecessary, the April 12, 2012 Prehearing Conference Memorandum and Order required that the parties confer within 14 days of the order and report the results.

At the prehearing conference, the following joint exhibits were agreed to by the parties:

J-1: Portland/AFSCME Local 1373 Agreement, January 1, 2010-June 30, 2012
J-2: Letter from James Breslin dated 7/5/11 re: Information Request
J-3: List of names of on-call or "per diem" staff and Hours worked for months of May and June
J-4: Letter fro James Breslin dated 7/20/12 re: Information Request
J-5: Memorandum from Tom Caiazzo dated 7/29/11 re: Information Request
J-6: Letter from James Breslin dated 11/14/11 re: Information Request
J-7: List of on-call or per diem staff and hours worked for months of September and October
J-8: Labor Management meeting agenda dated December 13, 2011

JURISDICTION

Complainant AFSCME is the bargaining agent, within the meaning of 26 M.R.S.A. § 962(2), for the Portland Local 1373. Local 1373 is a public employee organization within the meaning of 26 M.R.S.A. § 968(5). Portland is the public employer of the employees in the unit within the meaning of 26 M.R.S.A. § 962(7). The jurisdiction of the Board to hear this case and render a decision and order lies in 26 M.R.S.A. § 968(5).

FINDINGS OF FACT

On May 2, 2012, the parties submitted the following stipulations of fact:

1. The Respondent (Portland) is a public employer.

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

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

4. The Union (AFSCME) is the sole and exclusive representative for employees working for the City of Portland and covered under the Collective Bargaining Agreement Between the City of Portland and AFSCME Council 93- City Employee Benefits Association (CEBA) Local 1373. Appendix A of the parties Collective Bargaining Agreement contains a provision allowing for the use of "On-call employees" under certain conditions. These employees are excluded from the bargaining unit.

5. During the month of July 2011 the Union (AFSCME) started to investigate how the Respondent (Portland) was utilizing "On-call employees," and whether or not the Respondent (Portland) was in violation of the negotiated terms and conditions governing the utilization of "On-call employees." On July 5, 2011, the Union (AFSCME) forwarded an information request to the City of Portland Director of Human Resources. (Ex. 2)

6. On July 12, 2011 the Respondent (Portland) fulfilled the request for information. (Ex. 3)

7. On July 20, 2011 the Union (AFSCME) filed an additional request seeking clarification based on the information provided by the Respondent (Portland) on July 12, 2011.

8. The information sought was non-confidential in nature and pertained to the performance of bargaining unit work.

9. In its request, the Union (AFSCME) identified that it was investigating a matter concerning the administration of the Collective Bargaining Agreement, specifically Appendix A. (Ex. 4)

10. On July 29, 2011 the Respondent (Portland) notified the Union (AFSCME) that it was not fulfilling the information request and that it was not obligated under Maine law to answer questions. (Ex. 5)

11. The Union (AFSCME) continued to monitor the use of "On-call employees" performing bargaining unit work, and on November 14, 2011 submitted an additional information request to the respondent. (Ex. 6)

12. On December 13, 2011 the Respondent (Portland) fulfilled the request for information that was submitted on November 14, 2011.

13. On December 13, 2011, the Union (AFSCME), at the monthly Labor Management Meeting, again sought information explaining why "On-call employees" were performing bargaining unit work on a regular basis.

14. At the December 13, 2011 labor management meeting the Respondent (Portland) reiterated its position as set out in its July 29, 2011 letter; that it would not be providing the Union (AFSCME) with a written explanation in response to the Union's information request and that it was not required to do so under Maine law. (Ex. 8)

15. The parties stipulate that the Union's (AFSCME's) information requests in this matter were reasonably related to the performance of its duties as bargaining agent, and was relevant to the bargaining process and to the Union's administration of the contract; the City's (Portland's) only contention is that it does not have to provide a written explanation. (See Ex. 5)

DISCUSSION

AFSCME alleges that Portland has violated 26 M.R.S.A. §§ 946(1)(A) and (E) by refusing to respond in writing to its

specific and relevant requests for relevant information, which it claims are necessary to investigate the performance of bargaining work by non-bargaining unit members. Portland acknowledges its duty to provide information, but argues it is not required to furnish the requested information in writing, citing *Portland School Committee and Portland Teachers Assoc./MTA*, No. 93-27 at 16 (MLRB, Feb. 17, 1994) ("[T]he right to relevant information is not absolute... ."). Portland states that it has provided relevant information to the Union and has suggested that the Union review other information as a means to obtain the explanation it seeks. Portland also contends that the Freedom of Access Law protects it from disclosing the information about the utilization of a particular on-call worker, arguing:

> By requesting the City provide them with a written explanation, or "why", a certain employee worked the hours she did, the Union is asking the City to put in writing its analysis of potential proposals received for purposes of negotiations which is expressly exempt under section 402(3)(D) of the freedom of access law. The Union, while perhaps not intentionally, is essentially trying to circumvent this prohibition on written materials relating to analysis of a bargaining position... .

Portland Brief at 5. We reject this argument. This case does not implicate the Freedom of Access Law, but rather the scope of an employer's obligation to furnish information sought by the Union in the course of administering an existing collective bargaining agreement.

It is well settled that the duty to bargain includes the duty to provide information relevant to the bargaining process. This duty extends to information requested in order to administer

contracts once they are negotiated.[1] *E.g. MSAD No. 45 v. MSAD No. 45, Teachers Ass'n*, No. 82-10 at 10- 11 (MLRB Sept. 17, 1982); *Portland School Committee v. Portland Teachers Ass'n, et al.*, No. 93-27 at 16 ((MLRB Feb. 17, 1984). The information requested by the Union--an explanation regarding the use of certain on-call workers--is a request for information (not, as Portland contends, a request for an "opinion") and Portland has a duty to respond to it, notwithstanding the absence of any pending grievance.

The next question is whether Portland is required to furnish the information sought by AFSCME in writing rather than verbally. This is an issue of first impression for the MLRB. Because the issue presented is one of first impression for the Board, "we will 'look for guidance to parallel federal law, found in the National Labor Relations Act and decisions thereunder' in reaching our conclusion." *Teamsters Local Union No 48 v. Eastport School Department*, No. 85-18 (Oct. 10, 1985), *quoting Baker Bus Service v. Keith*, 428 A.2d 55 n.3 (Me. 1981). *See also, AFT Local 3711 v. Sanford School Committee*, No. 01-24 at 8 (Jan 31, 2002) (Where previously uninterpreted Maine statute is comparable to federal act, Board will turn to NLRB and federal courts for guidance in interpreting Maine law); *Buzzell et al. and MSEA Local 1989 v. State of Maine*, No 96-14 at 5 (Sept. 22, 1997) (Decision to use "right to control" test to define "employee" consistent with Law Court's suggestion to look for guidance from NLRB and federal law.

In *Cincinnati Steel Castings Co.*, 86 NLRB 592(1949), the Union alleged that the employer refused to bargain in good faith

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[1]In this case, AFSCME alleges it sought information regarding Portland's use of on-call workers in order to administer the Contract; specifically, to ascertain whether Portland is in compliance with the Contract's terms regarding on-call workers. Because AFSCME is not requesting this information in order to negotiate over the use of on-call workers, Portland's waiver argument is misplaced.

when it offered to provide the Union with requested information regarding employees' classifications and wage rates orally rather than in writing. The NLRB held that the employer's response was sufficient, stating:

> As we have frequently held, an employer's refusal, during bargaining negotiations, to furnish necessary information to the representative of his employees shows a lack of good faith in bargaining, and constitutes, in itself, a violation of Section 8(a)(5) of the Act. However, we have not held, nor do we now hold, that the employer is obligated to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining.

Cincinnati Steel Castings Co., 86 NLRB at 593 (footnote omitted).

We agree with the NLRB"S decision in *Cincinnati Steel*. Where a party seeks information relevant to the bargaining process or to administering an existing contract, the duty is to provide the requested information in a form that will be useful to the requestor without undue burden. In some cases, due to the nature or volume of the information sought, a written response may be required. Here, however, AFSCME has not shown that the information it requests--an explanation as to why Portland was using on-call workers to perform certain work--will only be useful if received in written form or will cause undue burden if provided verbally.

The Board finds that Portland did not violate the MPELRL by declining to provide the requested information in writing. It is unclear from the request presented whether Portland has provided the requested information at all (i.e., verbally) and the Board, therefore, does not make any findings in that regard. If, in fact, Portland has not responded to the information request, it is expected to do so post haste, though--in keeping with this

decision--its response need not be in writing.

ORDER

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

> That the prohibited practice complaint, filed on December 30, 2011, in Case No. 12-13, be and hereby is dismissed.

Dated at Augusta this 13th day of November, 2012.

MAINE LABOR RELATIONS BOARD

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 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

/s/_____
Katharine I. Rand
Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Wayne W. Whitney
Employee Representative