

STATE OF MAINE

MAINE LABOR RELATIONS BOARD  
Case No. 15-14  
Issued: January 5, 2016

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AFSCME COUNCIL 93, )  
 Complainant, )  
 v. )  
 PENOBSCOT COUNTY )  
 COMMISSIONERS, )  
 Respondent. )

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DECISION AND ORDER

AFSCME Council 93, the bargaining representative for the Corrections Supervisory Unit, filed this Complaint on November 24, 2014, alleging that Respondent Penobscot County Commissioners ("County") violated 26 MRS §964(1)(E) of the Municipal Public Employees Labor Relations Law (the "Act") by failing to bargain in good faith over a change to the County's health insurance plan that affected members of the Supervisory Bargaining Unit. The dispute involves a health insurance plan that is provided to all County employees.

A pre-hearing conference was held on April 2, 2015, with Chair Katharine I. Rand serving as the presiding officer. Throughout this proceeding Anna S. Fletcher, Esq., represented Complainant AFSCME Council 93, and John K. Hamer, Esq., represented the Penobscot County Commissioners. The parties presented their respective positions on the Respondent's Motion to Join as Necessary Parties the agents for the five other bargaining units of County employees. The motion was denied. The Respondent also requested that the proceeding be deferred pending the outcome of the arbitration of a grievance regarding the County's authority to

make the change to the health insurance benefit that is at issue in this prohibited practice complaint. As the Complainant agreed that the outcome of the arbitration would have a bearing on the outcome of this case, the motion to defer was granted.

The final preliminary matter handled at the prehearing conference was the exchange and review of exhibits. All of the Union's exhibits were also offered by the County, so those were admitted as joint exhibits. The rest of the County's exhibits were admitted without objection.<sup>1</sup> The Prehearing Conference Memorandum and Order was issued on April 13, 2015.

The Board of Arbitration and Conciliation ("BAC") issued its arbitration decision on July 28, 2015. In accordance with the terms of the Prehearing Order, the parties were then asked to present a statement of position on the relevance of the arbitration decision to the pending prohibited practice complaint. Upon review of those statements, the BAC decision and the documentary evidence in the record, the Prehearing Officer suggested to the parties that they consider having the case decided on a stipulated record. The parties agreed and submitted their joint stipulations on October 8, 2015. The parties also agreed upon a briefing schedule and all briefs were received by December 18, 2015. The Board met to deliberate this matter on December 30, 2015.

#### STIPULATIONS

1. Penobscot County is a public employer (hereinafter the "County") and AFSCME is the bargaining agent for the Sheriff's Department Supervisory Unit (hereinafter the

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<sup>1</sup>The Union objected to one County exhibit, but it was later withdrawn and replaced with the arbitration decision.

"Union"). The applicable collective bargaining agreement is provided in County Exhibit 1/Union Exhibit J-1 (hereinafter the "CBA").

2. Penobscot County provides health insurance to its employees through a single employee group health insurance plan which covers six bargaining units (including the Union) and non-unionized employees.
3. The other units are: (1) AFSCME Council 93, as certified collective bargaining representative of the Penobscot County General Bargaining Unit; (2) AFSCME Council 93, as certified collective bargaining representative of the Penobscot County Sheriff's Office Corrections Line Unit; (3) AFSCME Council 93, as certified collective bargaining representative of the Penobscot Regional Communications Center ("Dispatch") Unit; (4) Fraternal Order of Police, Lodge 012, as certified collective bargaining representative of the Penobscot County Sheriff's Office Law Enforcement Supervisor Unit; and (5) Fraternal Order of Police, Lodge 012, as certified collective bargaining representative of the Penobscot County Sheriff's Office Law Enforcement Line Unit.
4. Union employees contribute to their health insurance premiums in accordance with a percentage of the total premium as set forth in Article 13 of the CBA (these percentages are the same through all of the collective bargaining agreements); the applicable percentage varies depending upon what plan is chosen (single, employee and child, employee and spouse, or family) and whether the employee was hired before or after January 1, 2009.
5. In the event of an increase in the insurance premium, an employee's contribution increases in accordance with the

- employee's respective percentage unless an annual increase exceeds a cap, in which case the employee would pay a portion up to the cap and the County would pay the balance.
6. The cap is the same for the CBA and four of the other collective bargaining agreements, but one collective bargaining unit, the Corrections Line Unit, has a higher cap. These caps are negotiated separately.
  7. In the event of a decrease in the insurance premium, an employee's contribution decreases in accordance with the employee's respective percentage.
  8. The first paragraph of Article 13 of the CBA is the same as Article 13 of the other five collective bargaining agreements in pertinent part, and provides as follows:

ARTICLE 13 - INSURANCE AND RETIREMENT

Health Insurance: The Employer may change health insurance carriers or program without first having to bargain with the Union so long as the coverage of the new health insurance program would be comparable to the existing program. The Employer shall communicate its intention to do so and provide pertinent information to the employees through the Healthcare Advisory Committee.

- See County Exhibit 1/Union Exhibit J-1, p. 22.
9. On or about August 5, 2014 the Union sent a 120 days' notice to bargain to William Collins, County Administrator for a successor contract for the Penobscot County Supervisory Bargaining Unit.
  10. On October 6, 2014, the first negotiations session was held; ground rules were discussed and signed, a copy of which can be found at County Exhibit 2/Union Exhibit J-2.
  11. The Ground Rules allow each party to present new proposals for negotiation at any of the three meetings following the

- meeting at which the ground rules were executed.
12. The Union, through its Staff Representative and chief negotiator Sylvia Hebert, presented a set of initial written proposals; the County did not present a set of initial written proposals but initiated a conceptual discussion of several topics in advance of the next meeting, which in the past has typically been the meeting at which the County first presents new proposals.
  13. At the close of the October 6, 2014 meeting, the parties agreed on a schedule of future meetings to include three meetings scheduled to occur on November 10, 2014, November 18, 2014, and November 20, 2014.
  14. On October 17, 2014, County Administrator William Collins informed the Healthcare Advisory Committee that CIGNA's quote to continue the 2014 plan in 2015 would entail a 9.86% premium increase (hereinafter the "Renewal Plan").
  15. All of the collective bargaining units, including the Union, have representatives on the Healthcare Advisory Committee. This Committee is advisory only and it is not mandatory that members of the Union attend its meetings.
  16. The jail budget, which is controlled by the Department of Corrections rather than the County, has been flat-funded for the past three years.
  17. While some increase was reasonably expected, CIGNA's quote was for a 9.86% increase.
  18. Mr. Collins asked CIGNA for options that would not result in a premium increase and CIGNA suggested an alternate plan (hereinafter the "Current Plan") that was exactly the same as the Renewal Plan except that it included an in-network deductible.

19. The Current Plan would actually result in a 1.79% premium decrease.
20. The deductible would be \$500 for the single plan and \$1,000 for all other plans.
21. Other than the deductibles, the Renewal Plan and the Current Plan are the same; the medical services offered by the Renewal Plan and Current Plan are the same.
22. Later in the day on October 17, 2014, Mr. Collins also notified the Union of the Healthcare Advisory Committee discussion as stated in County Exhibit 3/Union Exhibit J-3.
23. On October 28, 2014, Mr. Collins presented a recommendation to the Penobscot County Commissioners to approve a change in the employee group health plan which made no changes in the coverage of the plan but which added a \$500 deductible for individual participants and a \$1,000 deductible for covered employees plus children, spouses or families.
24. The County Commissioners deemed the Renewal Plan and the Current Plan to be comparable and approved the recommendation.
25. On October 29, 2014, the County notified the Union that the commissioners elected to proceed with the Current Plan to begin on January 1, 2015, and invited all collective bargaining units to participate in joint impact bargaining regarding the new deductibles as stated in County Exhibit 4/Union Exhibit J-4.
26. The Union expressed its objection on November 2, 2014, as stated in County Exhibit 5/Union Exhibit J-5 and the County replied as stated in County Exhibit 8/Union Exhibit J-8.
27. The bargaining committees of the Union and County met for the scheduled first post-ground-rules bargaining session on

November 10, 2014.

28. At this meeting Penobscot County responded to initial proposals by Petitioner and advanced a number of its own initial proposals, but the County did not then advance any changes to the wording of Article 13.
29. The parties bargained, caucused, and regrouped for further bargaining in the period from about 10:30 a.m. to about 1:00 p.m.
30. At about 1:00 p.m. the parties returned from caucus, and Ms. Hebert asked whether the County would agree to refrain from making any changes to the health insurance program without first bargaining them with the Union, stating that the change in the health insurance program was a mandatory subject of bargaining.
31. The County, through its chief negotiator Attorney McGuire, indicated that the County intended to proceed with implementation of the announced change in the County health insurance program to go into effect on January 1, 2015, subject however to the outcome of the joint effects or impact bargaining process, citing the language of Article 13 of the Collective Bargaining Agreement.
32. In response, Ms. Hebert announced that if that was the case, the County was engaged in bad faith bargaining, and that as a result the Union would not participate in further bargaining for a new collective agreement; Ms. Hebert canceled the bargaining sessions previously scheduled for November 18 and November 20, and she and the Union negotiating team got up from the bargaining table and left the room.
33. To date, there has been no further contract bargaining.
34. On November 20, 2014, the County sent correspondence to the

- Union asking it to reconsider its position and to agree to engage in joint impact or effects bargaining with the five other units as stated in County Exhibit 9/Union Exhibit J-9.
35. On December 1, 2014, the County again sent correspondence to the Union asking it to reconsider its position and to agree to engage in the joint impact or effects bargaining as stated in County Exhibit 10.
  36. Joint impact bargaining was conducted on December 5, 2014. The Union did not participate, but the Fraternal Order of Police representing two other units did attend.
  37. As a result of the impact bargaining, the County implemented a Health Reimbursement Arrangement ("HRA") that pays 50% of an employee's deductible. The HRA funds are applied to the deductible first, so an employee would only begin paying a deductible after the County paid for the first half, equating to \$250 for the single plan and \$500 for all other plans.
  38. The HRA as described in paragraph 37 applies to the Union even though it did not participate in the joint impact bargaining.
  39. The Current Plan took effect on January 1, 2015.
  40. AFSCME Council 93 filed a grievance on behalf of the Corrections Line Unit alleging Penobscot County violated Article 13 of the Corrections Line Unit CBA when the County implemented the Current Plan. The grievance was denied in AFSCME, COUNCIL 93 and PENOBSCOT COUNTY SHERIFF'S DEPARTMENT, 15-BAC-12, dated July 28, 2015. See County Exhibit 12.
  41. AFSCME Council 93 also filed a grievance on behalf of the Supervisory Unit, but has elected not to proceed with that



arbitration in light of AFSCME, COUNCIL 93 and PENOBSCOT COUNTY SHERIFF'S DEPARTMENT, 15-BAC-12, dated July 28, 2015.

#### EXHIBITS

The following exhibits were admitted into evidence at the Prehearing Conference<sup>2</sup>:

J-1 CBA between Penobscot County and AFSCME Council 93, Penobscot County Sheriff's Office Supervisory Unit

J-2 Ground Rules dated October 6, 2014

J-3 Email from Bill Collins to James Mackie, Sylvia Hebert, and Sylvie Perry dated October 17, 2014

J-4 Letter from Frank McGuire to Sylvia Hebert, Timothy Farwell, Sylvie Perry, Jack Parlon, and James Mackie dated October 29, 2014

J-5 Letter from Sylvia Hebert to Frank McGuire dated November 2, 2014

J-6 Letter from James Mackie to Frank McGuire dated November 10, 2014, for the Corrections Line Unit

J-7 Letter from James Mackie to Frank McGuire dated November 10, 2014, for the Dispatch Unit

J-8 Letter from Frank McGuire to Sylvia Hebert, Sylvie Perry, and James Mackie dated November 20, 2014

J-9 Email string from Frank McGuire to Sylvia Hebert last dated December 1, 2014, and first dated October 29, 2014

County Exh. 10 Email string from Frank McGuire to Sylvie Perry and Sylvia Hebert last dated November 26, 2014, and first dated September 19, 2014

County Exh. 11 Corrections Supervisory Unit Grievance regarding health insurance dated November 13, 2014; Letter from William Collins to Sylvia Hebert dated February 12,

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<sup>2</sup> The parties' stipulations contained an agreement to add the arbitration decision as Exhibit #12.

2015; Letter from Sylvia Hebert to William Collins dated February 18, 2015

County Exh. 12 Arbitration Decision AFSCME, Council 93 and Penobscot County Sheriff's Department, 15-BAC-12, dated July 28, 2015.

County Exh. 13 Penobscot County Memo dated January 12, 2015, Re: Health, Short, Long Term Disability, Life & AD & D, & Dental Insurance Plan Changes and Health Reimbursement Account

County Exh. 14 Cigna Health and Life Insurance Co.: Open Access Plus, Coverage Period 01/01/2014 - 12/31/2014

County Exh. 15 Summary of Benefits - Cigna Health and Life Insurance Co., For - County of Penobscot, Choice Fund Open Access Plus HRA Plan, 1/1/2014

County Exh. 16 Cigna Health and Life Insurance Co.: Choice Fund Open, Access Plus HRA, Coverage Period 01/01/2015 - 12/31/2015

County Exh. 17 Summary of Benefits - Cigna Health and Life Insurance Co., For - County of Penobscot, Choice Fund Open Access Plus HRA Plan, 1/1/2015

County Exh. 18 Corrections Supervisor Spreadsheet

County Exh. 19 Corrections Supervisor Insurance Spreadsheet

#### DISCUSSION

The Board of Arbitration and Conciliation concluded that the County did not violate Article 13 of the collective bargaining agreement when it changed the insurance plan because the costs to the employees under the new plan, including the HRA funds paying the first 50 percent of the deductible, was comparable to costs that employees would have encountered under the old plan. Exhibit 12 at 8. The Union's position following the issuance of the BAC decision was that the County bargained in bad faith by refusing to

bargain independently with the Corrections Supervisory bargaining unit over the impact of the new insurance plan, and the result of the impact bargaining was the factor that made the new plan comparable. As stated in the Union's brief, "it is the limitation of the opportunity to bargain to joint impact bargaining with which the Union takes issue, and that the Union believes is bad faith bargaining." (Brief at 5.)

We have carefully reviewed the stipulations and the record evidence and find no support for the Union's allegation that the County insisted on or required the Union to participate in joint impact bargaining, nor do we find any evidence that the Union demanded to bargain over the impact individually.

The letter Oct 29, 2014, from the County's attorney to each of the union representatives for the five bargaining units noted that although Article 13 of each collective bargaining agreement authorized the employer to change insurance plans, "the effect of impact of this change is a proper subject of effects or impact bargaining." The wording of the letter does not include any requirement to participate, as the Union suggests, but is presented as an offer or invitation:

We therefore offer to engage in effects or impact bargaining .... Because this change affects employees in all five bargaining units equally, as well as unrepresented employees, we believe bargaining ... is best accomplished jointly with representatives of the five bargaining units. We invite you to participate. Exhibit J-4, p. 2. (emphasis added)

Ms. Hebert, the AFSCME representative for the Supervisory Bargaining Unit, responded on November 2, 2014, stating that the Union considered that the new insurance plan was not comparable to

the then-current plan and therefore the change was not authorized by Article 13. Exhibit J-5, p. 2. In that letter, Ms. Hebert objected to the County's unilateral change to the plan:

. . . [because] the County has not proposed any changes to the health insurance plan at the table, I believe it would be improper to accept an invitation for impact bargaining over a unilateral change to the current health insurance plan.  
Exhibit J-5, p. 2.

As described in Stipulations 27 through 33, Ms. Hebert broke off negotiations for a successor agreement when the County stated that it would proceed with implementation of the change without bargaining over the change, other than the outcome of the joint impact or effects bargaining.

In all of the subsequent emails and letters from the County attorney, the language used continued to be that of an invitation or an offer to joint impact bargaining, not a demand. See Exhibit 8, letter dated Nov. 20, 2014, ("I invited representatives of each of the bargaining units . . . to participate" at p. 1; "I would respectfully encourage you to reconsider [your] position [of refusing to participate] at p. 2; "We will proceed to schedule a first joint effects or impact bargaining with those units who wish to participate." at p. 2); See Exhibit 9, email dated Nov. 26, 2014, p. 2-3 ("We have scheduled a joint effects bargaining session for Friday December 5 at 10:00 am. We will bargain jointly with those of the Penobscot County bargaining units that choose to participate."); and See Exhibit 9, email dated Dec. 1, 2014, p. 2 ("We hope you will reconsider and join us at the effects bargaining table, along with the other five units, to address the effect of this change.")

The only statement in the record that might be viewed as more insistent is that portion of the County's November 20, 2014, letter to Ms. Hebert and the two other AFSCME representatives that states:

However, if you do choose to refrain from participating in effects bargaining, that is your decision. We will understand that decision to amount to waiver of the opportunity to engage in effects or impact bargaining as to the cost associated with the change."  
Exhibit 8, p. 2.

This was followed by a statement that the County's "hope and goal is to arrive at agreement" in time to implement them concurrently with the new insurance program on January 1, 2015. In any event, the employer can declare that it "will understand" a particular action to be waiver, but that does not make it so, as waiver is a legal issue to be determined by this Board. The Union could have negated this claim of waiver simply with a demand to bargain impact.

This brings us to the second critical evidentiary matter in this case, which is the absence of any evidence that the Union demanded to bargain over the impact of the change individually, rather than in a joint session as offered by the County. Had the Union made a formal demand to bargain over the impact of the change, as contemplated by §965(1)(B), the County would have been obligated to meet within 10 days to bargain. The Board's case law is clear on this point. See, e.g., Local 1650, IAFF v. City of Augusta, No. 01-09 at 6 (Aug. 20, 2001) ("[A] party is obligated to meet within ten days after receipt of written notice from the other party requesting bargaining.") and Kittery Employees Ass'n v. Eric Strahl, No. 86-23 at 8 (Jan. 27, 1987) (failure to meet within ten days is a per se violation of §964(1)(E)).

The record indicates that the Union believed that one could not bargain over impact without jeopardizing the right to object to the underlying change to the insurance plan. In an email dated December 1, 2014, Ms. Hebert wrote:

[. . .] I believe it would be an injustice to my members to participate in any "impact bargaining" that could be misinterpreted as an recognition/acceptance of this change in health insurance without a proposal from the County to make these changes to the current health insurance plan.

Exhibit 9, p. 2<sup>3</sup>

The "misinterpretation" Ms. Hebert referred to is the possibility that the County would interpret the Union's participation in impact bargaining as an abandonment of the Union's assertion that the City must bargain the change to the plan itself. It is well-established law that the obligation to bargain over the impact of a change on wages, hours and working conditions is a subject that is legally distinct from the duty to bargain over the change itself. See, e.g., City of Bangor v. AFSCME, 449 A.2d 1129, 1135 (Me. 1982) (Waiver of right to bargain over decision to discharge did not include waiver of right to bargain over the impact of that discharge, such as severance pay). The Union could have foreclosed this "misinterpretation" leading to an argument of waiver by preserving its right to contest the legality of the other party's stance while engaging in impact bargaining. See, e.g., Caribou School Dept. v. Caribou School Assoc., 402 A.2d 1279, 1281-82, fn. 4 (June 19, 1979) (Caveat in collective bargaining agreement preserving right to contest validity of duration clause) and SAD #22 Non-Teachers Assoc'n v. SAD #22 Board of Dir., No. 79-32 (July 30, 1979) (Indicating final provision in agreement will

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<sup>3</sup> See also Ms. Hebert's letter of November 2, 2014 ("it would be improper to accept an invitation for impact bargaining over a unilateral change to the current health insurance plan.") Exhibit 5, p.2.

depend on Board's ruling on legality of provision on citizen ratification of agreement). The Union could have preserved its right to contest the County's change while engaging voluntarily in impact bargaining as part of the joint session, or demanding to do so individually, as is their right, or as part of negotiations for a successor agreement, but it did not do so.

The Complainant has failed to demonstrate that the County failed to bargain in good faith. The Complaint is dismissed.

ORDER

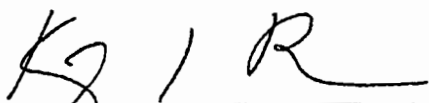
On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 MRS §968(5), it is ORDERED:


That the prohibited practice complaint, filed on November 24, 2014, in Case No. 15-14, be and hereby is dismissed.


Dated at Augusta, Maine, this 5th day of January 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 MRS 968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

  
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Katharine I. Rand  
Chair

  
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Robert W. Bower, Jr.  
Employer Representative

  
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Robert L. Piccone  
Employee Representative