STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 23-PPC-07
Issued: December 18, 2023

MAINE STATE LAW ENFORCEMENT, ASSOCIATION Complainant, v. MAINE OFFICE OF STATE FIRE MARSHAL, Respondent.	DECISION AND ORDER

I. Statement of the Case

The Maine State Law Enforcement Association ("Union" or "MSLEA") filed this prohibited practice complaint against the State of Maine's Office of State Fire Marshal ("Employer"). The allegations at issue are that the Employer made unilateral changes in violation of 26 M.R.S.A. § 979-C(1)(A) and (E); repudiated the contract, by ignoring grievances, in violation of 26 M.R.S.A. § 979-C(1)(A) and (E); discriminated against a bargaining unit employee in retaliation for the employee's protected activity in violation of 26 M.R.S.A. § 979-C(1)(A) and (B); and unlawfully interfered with employee rights through the behavior of one of its supervisors at a staff meeting in violation of 26 M.R.S.A. § 979-C(1)(A).

The Maine Labor Relations Board ("Board" or "MLRB") finds that the Employer did unlawfully interfere with bargaining unit employee rights during the staff meeting and through its unilateral changes in flagrant violation of the parties' collective bargaining agreement. However, the Board finds that the Employer did not violate its statutory duty to bargain in relation to the alleged unilateral changes or repudiate the parties' collective bargaining agreement in its handling of grievances. Likewise, the Board finds there is insufficient evidence of discrimination in the issuance of a counseling memorandum.

II. Procedural History

The Union filed its prohibited practice complaint on September 19, 2022, and an amended complaint on December 14, 2022. The Executive Director issued a sufficiency letter on the original complaint on November 29, 2022, and on the amended complaint on February 16, 2023. A prehearing conference was held on April 5, 2023, and Board Chair Sheila Mayberry, Esq., issued a Prehearing Conference Memorandum and Order that same day. The parties jointly filed a request for a Protective Order in order to protect from disclosure certain documents designated confidential by statute, and the requested order was issued on May 15, 2023. The evidentiary hearing was held on June 27 and June 30, 2023. The Board panel presiding over the hearing was made up of Rebekah Smith, Esq., Alternate Chair; Michael Miles, Employer Representative; and

Roberta de Araujo, Esq., Employee Representative. The Union was represented by William K. McKinley, Esq., and the Employer was represented by Nicholas P. Laskey, Esq. 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 October 10, 2023.

III. Findings of Fact

The following facts are drawn from the record.

A. Unilateral changes

In May of 2022, the Employer, through the agency's Lieutenant, unilaterally halted a prior practice of allowing certain shift swaps regardless of geographic area or time period. A shift swap request had never been previously denied. The new practice allows shift swaps only for staff within the same geographic area and only for a full week at a time. Article 34, section 1, of the parties' collective bargaining agreement provides that there will be no change in work schedules or practices without first notifying the Union and negotiating the impact, if requested. The change to the shift swap practice occurred without the Employer providing prior notice or the opportunity for the Union to bargain regarding the change or its impact.

On July 6, 2022, the Lieutenant announced a change in the agency's travel pay practice. The prior practice for multiple day trainings had been to pay an employee for travel to and from the training and the employee's home, each day of training. The new practice is to pay for travel to, on the first day of training, and travel from, on the last day of training. Article 34, section 7, of the parties' contract provides that: "Present practices with respect to travel time shall be continued." This change to the travel pay practice occurred without the Employer providing prior notice or the opportunity for the Union to bargain regarding the change or its impact.

B. Grievances

Article 30 of the parties' collective bargaining agreement provides the negotiated grievance procedure, including related deadlines for filings and responses. In general, the Employer is obligated to provide a timely response at each step of the grievance process, typically within 10 to15 days. The grievance procedure also provides that if the Employer fails to meet a grievance deadline, it is considered a waiver and it is the Union's responsibility to advance the grievance to the next step, up to and including an invocation of arbitration.

The issue of the Employer's responsiveness to grievances involves four separate matters regarding shift swaps, standby pay, travel pay, and overtime pay. For the shift swap grievance, filed on June 15, 2022, the Step 1 grievance was denied in a timely manner, but the Step 2 grievance never received a response. On February 28, 2023, the State's Office of Employee Relations issued a denial of the Union's Step 3 grievance, more than six months after the grievance had been filed. The decision references an upcoming chance for impact bargaining, which did not occur. As of the hearing in the present case, this matter was still pending arbitration.

The Union filed Step 1 of the standby pay grievance on June 29, 2022, and the Employer initially denied the grievance on July 7, 2022. The Union filed a Step 2 grievance on July 7, 2022, to which the Employer did not respond, and then a Step 3 grievance on August 1, 2022, which also received no response. The matter was eventually settled by the parties on November 14, 2022.

On July 7, 2022, a Union representative sent a detailed email to the Lieutenant regarding the unilateral change to the travel pay policy and alleged contract violation. Seven minutes later the Lieutenant replied: "I am good with our current plans. Thanks." The Union took this reply as a Step 1 denial and filed a Step 2 grievance on July 15, 2022. The Employer did not issue a Step 2 response until approximately six months later, on January 17, 2023. In the meantime, the Union had filed a Step 3 grievance on August 1, 2022. After receiving the Employer's response to the Step 2 grievance, the Union again filed a Step 3 grievance, on January 23, 2023, and a meeting was held for that grievance step on February 3, 2023. The grievance was denied and, as of the hearing in the present case, this matter was still pending arbitration.

Regarding the overtime pay grievance, the Union filed at Step 2 on January 24, 2022. A meeting was held on March 15, 2022, and the grievance was denied on April 26, 2022. The Union filed a timely reply and a Step 3 grievance hearing was held on July 20, 2022. No decision was ever issued. The matter was settled on November 14, 2022.

C. Alleged Retaliation

The events leading up to the Employer's alleged discrimination in this case began with a Senior Fire Investigator's potential workplace COVID-19 exposure. Upon learning of the potential exposure, the Sergeant contacted the Senior Fire Investigator and requested that he quarantine and receive testing for the disease. Based on the Senior Fire Investigator's response to this request, the Sergeant issued four counseling memoranda on May 31, 2022. One memorandum raised the issue of the Senior Fire Investigator providing "inaccurate and false information," because of a date discrepancy regarding his COVID-19 test. The Senior Fire Investigator told the Sergeant that he had taken a COVID-19 test on May 24, 2022, but the documentation he provided dated the test at May 25, 2022. The Senior Fire Investigator, with assistance from the Union, subsequently supplied new documentation verifying that the test had indeed been taken on May 24, 2022. On June 8, 2022, based on the new documentation, the Sergeant rescinded the counseling memorandum regarding inaccurate and false information. However, that same day the Sergeant also issued a new counseling memorandum regarding the Senior Fire Investigator taking his COVID-19 test on the wrong day on the basis that the Sergeant claimed to have directed him to take the test on May 25, 2022, in order to comply with COVID-19 testing guidelines at the time.

D. July 12, 2023, Meeting

On July 5, 2022, [1] the Union served on the Employer an unrelated prohibited practice complaint, MLRB case number 23-PPC-01. On July 11, 2022, the Sergeant sent out an email to her four subordinates giving notice of a staff meeting for their section the next day. On July 12, 2022, the Union filed the aforementioned prohibited practice complaint with the Board.

The Lieutenant opened the staff meeting that day by telling the group that no one would speak at the meeting but him. The purported purpose of the talk was to address the "work environment situation," specifically the bad relationship between the Sergeant and her subordinate investigators. At the hearing, the Lieutenant denied that the Union's grievances were the reason for the meeting but admitted that he took the Union's filing of the prior prohibited practice complaint and the multiple grievances as reflections of the poor working environment. The Lieutenant never specifically referenced the Union at the meeting, but he admitted to previously saying something along the lines of "it isn't the union's responsibility to run the department." In the meeting he told the group that they needed to either work it out or plan to fight, because neither he nor the Sergeant were going anywhere. The Lieutenant used the word "fight" multiple times during the meeting. During the Lieutenant's talk he compared the workplace to a boxing ring and said that if the boxers didn't leave their corners they couldn't come to the center of the ring and figure it out. While using this metaphor the Lieutenant physically acted out a boxing match. At the close of the meeting, the Lieutenant gave the investigators and the Sergeant an assignment to come up with two ways to improve the workplace environment.

IV. Analysis

A. Jurisdiction

At all times relevant, the Union was a bargaining agent within the meaning of 26 M.R.S.A. § 979-A(1) and the Employer a public employer within the meaning of 26 M.R.S.A. § 979-A(5). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 979-H.

B. Unilateral Changes and Related Interference with Protected Activity

Pursuant to the State Employees Labor Relations Act ("Act" or "SELRA"), a unilateral change to employment practices may constitute a failure to collectively bargain in violation of § 979-C(1)(E). To qualify as an unlawful unilateral change, an 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. *Wiscasset Educational Support Professionals Association v. Wiscasset School Department*, No. 18-09, slip op. at 7 (May 14, 2018). An action is unilateral if it is taken without prior notice to the bargaining agent of the employees involved in order to afford a reasonable opportunity to demand negotiations on the contemplated change. *Id.* (citing *City of Bangor v. A.F.S.C.M.E., Council 74 and Maine Labor Relations Board*, 449 A.2d 1129, 1135 (Me. 1982)).

There are exceptions to the unilateral change rule, one of which occurs when the parties waive the right to compel negotiations during the term of the contract. *Teamsters Union Local 340 v. Town of Eliot*, No. 14-04, slip op. at 9 (March 21, 2014). The common form of such a waiver is known as a "zipper clause". The Law Court has found a broadly worded zipper clause to constitute waiver of a union's statutory right to compel negotiations during the term of the collective bargaining agreement, despite an employer's unilateral change. *State of Maine v. Maine State Employees Assn.*, 499 A.2d 1228 (Me. 1985).

It is clear from the record that the Employer's change to the shift swap practice was unilateral, contrary to the parties' collective bargaining agreement and involved a mandatory subject of bargaining. See *Maine State Employees Association v. Bangor Mental Health Institute and State of Maine*, No. 84-01, slip op. at 9 (December 5, 1983) ("[S]hift assignments or hours of work are mandatory subjects of bargaining"). Likewise, the Employer's change to the parties' travel pay practice is in direct contravention of the contract, involves a mandatory subject of bargaining, in the form of wages, and was implemented unilaterally without giving the Union a chance to request bargaining. Despite this, under Law Court precedent involving a nearly identical zipper clause, the evidence indicates the Union waived its statutory right to bargain and the Employer's unilateral changes to the collective bargaining agreement did not violate the Act's prohibition on failing to bargain under § 979-C(1)(E).

However, that is not the end of our examination of this issue. Employers are prohibited from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed in § 979-B." 26 M.R.S. § 979-C(1)(A). The rights guaranteed by § 979-B are the rights to participate, or not participate, in union-related activity. See 26 M.R.S. § 979-B. A bargaining agent unlawfully interferes with the rights of a bargaining unit employee when they have "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Maine Association of Police v. Town of Pittsfield*, No. 20-PPC-07, slip op. at 6 (December 31, 2020). This is an objective standard, and "does not depend upon the employer's motive or success." *Id.*

A claim of unlawful interference, restraint or coercion can be either derivative or independent. A derivative violation is based on conduct that violates another provision of the Act that also has the effect of interfering with, restraining or coercing the employee in the exercise of their rights. See *Maine State Employees Association, SEIU Local 1989 v. Maine Turnpike Authority*, No. 12-08, slip op. at 18 (February 12, 2013); *International Brotherhood of Teamsters Local No. 340 v. Aroostook County*, No. 03-09, slip op. at 19 (February 2, 2004). If the Board finds the alleged violation underlying a derivative claim to be without merit, the Board will dismiss the derivative claim as well. See *Duff v. Town of Houlton*, 97-20, slip op. at 24 (Oct. 19, 1999). An independent violation of unlawful interference, restraint or coercion occurs when the conduct itself directly interferes with the exercise of rights granted under the Act. *Maine Turnpike Authority*, No. 12-08, slip op. at 18.

A unilateral change can be the basis for either a derivative or independent unlawful interference, restraint or coercion claim. *Maine State Employees Association v. State of Maine*, No. 89-06, slip op. at 16 (September 5, 1989) ("Unlawful unilateral changes not only violate the statutory duty to negotiate, but also inherently tend to interfere with the employees' exercise of the bargaining rights guaranteed by the Act."), citing *Lane v. Board of Directors of M.S.A.D No. 8*, 447 A.2d 806, 810 (Me. 1982) and *Auburn Firefighters Association v. Valente*, No. 87-19, slip op. at 12 (Sept. 11, 1987); *Maine State Employees Association v. State of Maine*, No. 92-19, slip op. at 35 (Employer Representative Reiche dissenting in part, Jan. 6, 1994), Rev'd, No. CV-94-27 (Me. Super. Ct., Ken. Cty., May 10, 1994), Superior Court Judgment vacated, complaint dismissed sub nom, *Bureau of Employee Relations v. Maine Labor Relations Board*, 655 A.2d 326 (Me. 1995) ("[R]efusal to bargain based on unilateral change within the meaning of Section

979-C(1)(E) is not a necessary prerequisite to a finding of prohibited employer interference, restraint or coercion within the meaning of Section 979-C(1)(A).").

Notably, the Board has found independent violations of unlawful interference, restraint or coercion in the context of unilateral changes, even when a zipper clause has precluded a failure to bargain claim. *AFSCME Council 93 v. Governor McKernan and State of Maine*, No. 91-18, slip op. at 22 (Employee Representative Lambertson dissenting in part, May 31, 1991) affirmed, No. CV-91-208 (Nov. 27, 1991), vacated sub nom *Bureau of Employee Relations v. AFSCME Council 93*, 614 A.2d 74 (Me. 1992)("A waiver of the right to mid-term bargaining, through a zipper clause or otherwise, does not give parties carte blanche to unilaterally change the terms of the agreement they have negotiated. Such unilateral changes, if serious enough, may constitute interference, restraint or coercion separate and apart from any violation in connection with the duty to bargain."); *State of Maine*, No. 92-19, slip op. at 35-36, 41 ("It is indisputable that the right of collective bargaining includes the right to expect compliance with the terms of agreements arrived at through collective bargaining negotiations. Were it otherwise the right to bargain collectively would be meaningless. There can be no surer method of defeating the purposes of the SELRA than to frustrate the expectation of either party that negotiated contracts must be performed. … The expectation of contract compliance is no less than the sine qua non of the right to bargain collectively for wages, hours and terms and conditions of employment."); *Maine State Employee's Association, Local 1989, SEIU v. Bureau of Employee Relations, State of* Maine, No. 98-01, slip op. at 4-5 (October 7, 1997); *Teamsters Union Local 340 v. Aroostook Co. Sheriff's Dept.*, No. 92-28, (M.L.R.B. Nov. 5, 1992).

To be clear, a violation of the contract is not in itself a prohibited practice. *Wood v. Maine Education Assn and Maine Technical College System*, No. 03-06, slip op. at 29 (June 14, 2004). To constitute unlawful interference, restraint or coercion, the contract violation must interfere with the representational and bargaining rights set forth in § 979-B, that is, a violation affecting the right to file a grievance, appeal a performance evaluation or seek union representation, or one that otherwise goes to the heart of the collective bargaining relationship. See *Governor McKernan and State of Maine*, No. 91-18, slip op. at 22; *Bureau of Employee Relations, State of Maine*, No. 98-01, slip op. at 4-5.

For example, in *AFSCME Council 93 v. Governor McKernan and State of Maine*, the Board analyzed a unilaterally implemented plan to delay the paychecks of certain employees in order to address a State budget deficit. No. 91-18. The Board found that, regardless of whether the right to collectively bargain was implicated, the Governor and State had unlawfully interfered with bargaining rights because they had (1) violated a statute that set State employee pay schedules and (2) violated the collective bargaining agreement. *Id.*, slip op. at 23. The Superior Court affirmed the Board decision regarding the unlawful interference, restraint or coercion holding, based on the violation of the pay schedule statute. *Governor McKernan and State of Maine*, No. CV-91-208. In the ensuing appeal, the Law Court held that because the statutory pay schedule is not a protected right under SELRA, a violation of the statute does not come within the rights protected by § 979-B and thus does not constitute unlawful interference, restraint or coercion. *AFSCME Council 93*, 614 A.2d at 77 (Me. 1992). However, neither the Law Court nor the Superior Court ever addressed the Board's proposition that a serious contract violation can be unlawful interference, restraint or coercion. In fact, by mere dint of its analysis of the issue, the

Law Court implicitly endorsed the view of the Board and the Superior Court that an unlawful interference, restraint or coercion claim may be valid, independent of whether the union has waived its right to bargain through a zipper clause. With this in mind, the Board finds Board precedent on this point to be persuasive. Unlike the pay schedule statute violation the Law Court examined in *Governor McKernan and State of Maine*, here we have multiple contract violations that implicate the Union's protected collective bargaining rights under SELRA.

In another example, in *Maine State Employees Association v. State of Maine*, the Board also examined a contract violation in the context of a broadly worded zipper clause. No. 92-19. At issue was the State's failure to follow the collective bargaining agreement's layoff and recall procedures during a government shutdown. The Board found this to be a "widespread repudiation" of the contract, and to be an independent violation of unlawful interference, restraint or coercion, regardless of the zipper clause waiving the union's right to mid-term bargaining. *Id.*, slip op. at 35. While the Superior Court reversed, it did so only on the grounds that the budgetary emergency justified the State's failing to follow the contract. *Bureau of Employee Relations*, 655 A.2d at 327. Neither did the Law Court ruling address the Board's holding regarding contract violations. Instead, it ruled that the issue was moot because the State had already complied with the Board's ordered remedy. As in that case, this case is likewise dealing with serious violations of the parties' collective bargaining agreement, independent of a failure to bargain claim.

For an example where the Board has examined a contract violation and found no independent violation of unlawful interference, restraint or coercion, there is a case involving the State's unilateral change to its heat stress policy. *Bureau of Employee Relations, State of Maine*, No. 98-01. The State had negotiated the policy change with a joint labor-management committee instead of the union. Where the committee had been set up in accordance with the collective bargaining agreement, the Board's Alternate Neutral Chair, in the role of prehearing officer, failed to find the "fundamental disruptions of the collective bargaining relationship" that existed in other Board cases that found an independent violation of unlawful interference, restraint or coercion for contract violations, and thus granted the State's motion to dismiss. *Id.*, slip op. at 5. Unlike that case, this case involves contract violations that do fundamentally disrupt the collective bargaining relationship.

The State argues in its brief, citing *State of Maine v. Maine State Employees Assn.*, that the Board does not have authority to enforce alleged contract violations, and that the Legislature recognized arbitration as the desired method for resolving contract disputes. 499 A.2d at 1230; 1231-1232. While this is true, the Law Court in that same case acknowledged the Board's authority to analyze violations of the parties' contract when a violation of SELRA has been alleged. *Id.* at 1230. The Law Court pointed to arbitration as the appropriate venue for the parties' dispute in that case because it had found no violations under SELRA. [2] The Board recognizes the important role that arbitration plays in Maine's public sector collective bargaining laws, and has a process for parties to request deferral of prohibited practice cases to the parties' grievance process for relevant contract violations. [3] The Board does not wish to become an arbiter for every alleged contract violation, but where, as here, there is an independent claim for unlawful interference, restraint or coercion that is based on serious violations of the contract that

undermine the parties' collective bargaining relationship, it is appropriate for the Board to examine whether the Act prohibits such violations, regardless of the existence of a zipper clause.

Viewed in isolation, the Employer's two contract violations might not rise to a level of significance that implicates unlawful interference, restraint or coercion, but that is not the case before the Board. Viewed together, these flagrant contract violations have the effect of seriously undermining the heart of the parties' collective bargaining relationship. Under these circumstances, the Board finds that the Employer's unilateral changes have the effect of unlawfully interfering with bargaining unit employees' protected rights and are thus a violation of § 979-C(1)(A).

C. Repudiation of Collective Bargaining Agreement through Failure to Timely Process Grievances

When a party's disregard of the collective bargaining agreement constitutes a wholesale repudiation of a major provision or the contract as a whole, this repudiation may be a failure to bargain in violation of § 979-C(1)(E) and unlawful interference, restraint or coercion in violation of § 979-C(1)(A). *Wood*, No. 03-06, slip op. at 29 ("What makes a 'repudiation of the collective bargaining agreement' a prohibited practice is that a wholesale repudiation of a major provision of the contract or the contract as a whole may be tantamount to a repudiation of the bargaining relationship or of the basic principles of collective bargaining."). The Board has recognized that a pattern of refusing to process grievances in conformity with the grievance provisions of a collective bargaining agreement could represent a repudiation of the collective bargaining agreement that is a failure to bargain. *Auburn School Support Personnel, AFT v. Auburn School Committee*, No. 91-12, slip op. at 15 (July 11, 1991).

The Employer's consistent delays in responding to contractual grievances reflect an unproductive approach that seriously undermines the effectiveness and goals of the grievance process. However, although it is apparent that the Employer's handling of grievances violated the deadlines established in the contract, it is notable that the collective bargaining agreement places the onus on the Union to advance any delayed grievance to the next step in the process. Therefore, while it is likely the Employer's delayed or non-existent responses to grievances adversely impacts the effectiveness of the grievance process, the Union still retains the ability to advance grievances in a timely manner. Because the Union holds this final authority, at least under the circumstances presented here--i.e., a few grievances over a confined time period, some of which the parties were able to resolve--the Employer's untimely responses to grievances do not rise to a level of conduct that would represent a repudiation of the contract. Absent a repudiation, the Employer has not committed a prohibited practice under either a failure to bargain or interference theory in relation to the processing of grievances. [4]

D. Retaliatory Counseling Memorandum

Public employers, their representatives and their agents are prohibited from: "Encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment." 26 M.R.S.A. § 979-C(1)(B).

To establish a discrimination violation, the complainant has the burden of proving by a preponderance of the evidence that: (1) the employee engaged in protected activity; (2) the decision-makers knew of the employee's participation in protected activity; and (3) there is a relationship, or causal connection, between the protected activity and an adverse employment action against the employee. *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02 (July 24, 2019); *Holmes v. Town of Old Orchard*, No. 82-14 (Sept. 27, 1982) (Board adopted the three-part test established in *Wright Line and Bernard R. Lamoureux*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for issues that turn on employer motivation.) The Board examines first whether the complainant has put forward a prima facie showing sufficient to support the inference that protected conduct was a "substantial or motivating factor in the employer's decision." *Ritchie v. Town of Hampden*, No. 83-15, slip op. at 4-5 (July 18, 1983); *Casey v. Mountain Valley Educ. Ass'n. and SAD 43*, No. 96-26 & 97-03, slip op. at 27-28. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. See *Maine State Law Enforcement Association and Timothy McLaughlin v. State of Maine, Maine Department of Corrections*, No. 13-15, slip op. at 9-10 (October 31, 2013). Evidence of the timing of the adverse employment action, without more, is insufficient to establish a prima facie case for discrimination. See *Maine Turnpike Authority*, No. 12-08, slip op. at 23-24.

Here, the Union's complaint alleges the Employer violated § 979-C(1)(A) and (B) by retaliating against a Senior Fire Investigator's protected activity by issuing a June 8, 2022, counseling memorandum after the Employer previously rescinded a related counseling memorandum. [5] The evidence indicates that prior to the issuance of the June 8 memorandum, the Senior Fire Investigator engaged in protected activity by obtaining the Union's assistance in challenging certain of the previously issued memoranda. Likewise, the Employer was aware of this assistance. As a result, the first two elements of a discrimination claim are satisfied.

The remaining issue is whether the June 8 memorandum addressing the Senior Fire Investigator's failure to timely take a COVID-19 test was motivated by the Investigator's protected activity. The evidence indicates the Senior Fire Investigator failed to take the COVID-19 test on the day that he was directed to, and that this information only came to light after the issuance of the preceding memoranda. [6] Therefore, the Board fails to find sufficient evidence that the newly issued counseling memorandum was causally related to this protected activity. There is also no compelling evidence that there was any anti-union animus motivating this second memorandum. Under these circumstances, the Board finds that the June 8, 2022, counseling memorandum was not discrimination prohibited under the Act. Where the interference claim here is derivative and based on the alleged discrimination the Board has found to be without merit, the interference claim is also dismissed. See *Falmouth Bus Drivers, Custodians and Maintenance Workers Association v. Falmouth School Board*, No. 20-PPC-06, slip op. at 10 (January 26, 2021) citing *Duff*, No. 97-20, slip op. at 24.

E. Unlawful Interference

The words and body language used in the Lieutenant's talk at the July 12, 2022, meeting were belligerent. It is clear the Lieutenant saw the Union's filing of the prior prohibited practice complaint and the various grievances as a fight. There was arguably warrant for some kind of

intercession to remedy the workplace environment, specifically the relationship between the Sergeant and her subordinates. Whatever his subjective intent may have been, the Lieutenant's approach at the meeting could reasonably be said to have sent a chilling message regarding the employees' union activity, and would thus tend to interfere with the free exercise of employee rights under the Act.

For example, in *William Single and Sanford Police Association v. Town of Sanford*, a police captain walked into a staff meeting being led by a sergeant and attended by four other employees. No. 85-04 (October 18, 1984). The captain proceeded to grab a nightstick and glare at the union's spokesman in the group while slapping the stick into his hands. This occurred in the context of four grievances scheduled to be heard later that day, three of which involved conduct by the captain. The Board found this to be unlawful interference, restraint or coercion, reasoning that it was plain that the captain's behavior was meant to send a message to the union spokesman and other employees that he was not pleased about the grievance proceedings, and that it could reasonably be seen as an attempt to harass or intimidate the employees because of their exercising their protected right to file and process grievances. *Id.*, slip op. at 4-5.

The tenor of the Lieutenant's conduct at the staff meeting at issue in this case was hostile, being a captive-audience speech, involving the words and actions of fighting, and the comment that neither the Lieutenant nor Sergeant were going anywhere. This, coming as it did in the context of multiple pending grievances involving the Lieutenant, in addition to the recent prohibited practice complaint, could have reasonably been seen by the employees as an attempt to harass and intimidate them because of their protected activity. As such, the Board finds the Employer has violated § 979-C(1)(A).

V. Conclusion and Remedy

As explained above, the Employer has not failed to bargain or repudiated the contract in violation of § 979-C(1)(E). However, the Board finds that the Employer interfered with employees' protected activity through its two unilateral changes to working conditions addressed in the parties' collective bargaining agreement and through its behavior at the July 12, 2022, staff meeting. Having held that the Employer violated § 979-C(1)(A) in these three instances, we will fashion a remedy that will effectuate the policies of the Act. Under the circumstances, we order the Employer to cease and desist from interfering with, restraining or coercing employees in the exercise of protected collective bargaining rights in violation of 26 M.R.S.A. § 979-C(1)(A), and that it cease and desist from otherwise interfering with, restraining or coercing employees in the exercise of protected union activity in violation of 26 M.R.S.A. § 979-C(1)(A). We also order the Employer to revert to its prior practices regarding shift swaps and travel pay unless and until a change has been negotiated with the Union to the extent required by law. In order to effectuate the policies of the Act, we also order the Employer to email all its employees a copy of this Decision and Order.

Although the Union has requested attorney's fees be awarded, the Board does not find the Employer's violations to be egregious enough under these circumstances to justify this remedy.

VI. Order

On the basis of the foregoing findings of fact and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 979-H, it is ORDERED:

1. That the Maine Office of State Fire Marshal, and its representatives and agents, cease and desist in any like or related manner from interfering with, restraining or coercing employees in the exercise of protected collective bargaining rights in violation of 26 M.R.S.A. § 979-C(1)(A).

2. That the Maine Office of State Fire Marshal, and its representatives and agents, cease and desist in any like or related manner from interfering with, restraining or coercing employees in the exercise of protected union activity in violation of 26 M.R.S.A. § 979-C(1)(A).

3. That the Maine Office of State Fire Marshal shall revert to its prior practice regarding shift swaps unless and until a change has been negotiated with the Maine State Law Enforcement Association to the extent required by law.

4. That the Maine Office of State Fire Marshal shall revert to its prior practice regarding travel pay unless and until a change has been negotiated with the Maine State Law Enforcement Association to the extent required by law.

5. That the Maine Office of State Fire Marshal shall email all its employees a copy of this Decision and Order.

6. That the Maine Office of State Fire Marshal shall notify the Board by affidavit or other proof of the date of the email required in paragraph 5 and of final compliance with this order within thirty (30) days.

Dated this day, December 18, 2023.

MAINE LABOR RELATIONS BOARD

/s/ Rebekah Smith
Rebekah Smith, Esq.
Alternate Board Chair

/s/ Michael Miles
Michael Miles
Employer Representative

/s/ Roberta L. de Araujo
Roberta L. de Araujo, Esq.
Employee Representative

The parties are advised of their right pursuant to 26 MR.S.A. § 979-H(7) 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.

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[1] This is taking administrative notice of the date of service of the prior complaint. Complainant's June 30, 2022, date is inaccurate based on Board documentation.

[2] That case also involved a claimed violation of unlawful interference, restraint and coercion under 26 M.R.S.A. § 979-C(A)(1). However, because the Law Court never discusses this claim separately from the failure to bargain claim, a fair reading of the decision is that the Court examined this claim as a derivative claim, wholly dependent on an underlying failure to bargain claim.

[3] Board Rules, Ch.12, §§ 9(1), 10(6). It is worth noting that the Employer did not opt to argue for deferral in this case, despite the ongoing grievance process underway for the same contract violations.

[4] The unlawful interference, restraint or coercion claim here is derivative of the failure to bargain claim and so both claims fail. See *Falmouth Bus Drivers, Custodians and Maintenance Workers Association v. Falmouth School Board*, No. 20-PPC-06, slip op. at 10 (January 26, 2021) citing *Duff*, No. 97-20, slip op. at 24.

[5] In addition to the complaint form itself, the Union agreed to the description of this allegation at the prehearing conference. Through its post-hearing brief, the Union first alleges that the language used in the Lieutenant's response to a subsequent grievance concerning the memorandum was retaliatory. The Union had ample opportunity under Board Rules, Ch.12, § 20, to amend the complaint to conform to the evidence at the hearing, but did not so avail itself. As such, the charge in the Union's brief that language in the Lieutenant's grievance response was retaliatory has not been properly pled and will not be addressed.

[6] There was conflicting testimony as to whether the Sergeant had actually directed the Senior Fire Investigator to take a COVID-19 test on a specific day. The Board finds that he was so directed.
