

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE:

MONTANA FEDERATION OF
PUBLIC EMPLOYEES,

Complainant,

vs.

STATE OF MONTANA,
DEPARTMENT OF JUSTICE –
MONTANA HIGHWAY PATROL,

Defendant.

Case No. 1387-2022

**ORDER ON MFPE’S MOTION FOR
SUMMARY JUDGMENT**

This matter is before the Hearing Officer on the Montana Federation of Public Employees’ (MFPE) motion for summary judgment wherein it argues no genuine issue of material fact exists that the Montana Department of Justice – Montana Highway Patrol (MHP) failed to bargain in good faith regarding its physical fitness testing requirements. On May 27, 2022, MHP filed its response brief. MFPE did not file a reply brief within the time specified by the scheduling order, and, therefore, this matter is now ripe for ruling.

I. FACTUAL BACKGROUND

1. MFPE and MHP entered into a collective bargaining agreement (CBA) that expired on June 30, 2021. *Union Ex. 1*.

2. The CBA contained a Memorandum of Understanding (MOU), Addendum D, that set forth the terms for a voluntary physical fitness program known as the Montana Physical Abilities Test (MPAT). *Id.* at 25-26.

3. The MOU took effect on July 1, 2017, and states that it would remain in effect until specifically revoked. *Id.*

4. The MPAT is an assessment designed to evaluate law enforcement officers on the essential physical capacities required to satisfactorily perform their job duties. It tests nine baseline physical abilities required by officers in pursuit of their duties: walking, running, jumping, climbing, vaulting, lifting, carrying, pulling, and pushing. The test consists of an obstacle course, a push-pull machine, and a dummy drag. *Gardener Declaration*, ¶ 7.

5. Pursuant to the terms of the MOU, the MPAT is a voluntary physical fitness program. Troopers could choose to participate in the MPAT once a year. The incentive matrix for voluntary completion was set as follows:

Completion Time	Pay Award	Comp Time Award
4 minutes 30 seconds or less	\$1000	40 Hours
5 minutes 30 seconds or less	\$750	30 Hours
6 minutes 30 seconds or less	\$500	20 Hours
7 minutes 30 seconds or less	\$250	10 Hours
7 minutes 31 seconds or more	\$0	0 Hours

Gardener Dec., ¶ 8; *Union Ex. 1* at 26.

6. Based on discussions during the 2019 negotiations and subsequent Labor Management Committee meetings, MHP had its Employee Wellness Committee review the MPAT and other physical fitness testing options to ensure MHP's method of fitness testing provided accurate information about a trooper's physical fitness and ability to perform required work. In addition, the Employee Wellness Committee was looking at various ways to combat potential long-term effects of the profession, such as the increased risk of back problems, heart attacks, and suicide. It also reviewed information about injuries sustained during physical fitness testing with an eye toward protecting troopers. *Gardener Dec.*, ¶ 10.

7. The Employee Wellness Committee reviewed the rowing test implemented by the Texas Department of Public Safety. The review revealed that the rowing test would provide more accurate information about a Trooper's physical ability to perform required work. The Employee Wellness Committee also reviewed studies which showed physical fitness and exercise correlate with fewer injuries, lowered risk of heart disease, and increased mood. Data also supported the conclusion that the rowing test would cause fewer injuries to troopers than the MPAT. *Gardener Dec.*, ¶ 11.

8. The Texas Department of Public Safety provides law enforcement agencies support in helping to evaluate and implement the rowing test. It has advised MHP on how to obtain data that could be evaluated for setting testing standards. It recommended that MHP obtain real data from MHP troopers on row machines rather than adopting testing standards from somewhere else. *Gardener Dec.*, ¶ 17.

9. To start gathering data, in September 2021, MHP began offering troopers the option of voluntarily participating in a rowing test group. The test group participants would provide two data points from different times of rowing. Participants would receive \$1,000 or 40 hours of compensatory time regardless of how well they performed. This information was communicated to troopers by Colonel Lavin in a September 10, 2021 email. *Gardener Dec.*, ¶ 19.

10. On September 10, 2021, Colonel Steve Lavin sent the following email to troopers:

Good morning everyone,

I am writing to share with you some upcoming changes that we are considering in regard to our physical fitness testing requirements.

I am sure that it comes as no surprise that a career in law enforcement requires a basic aptitude in physical fitness to perform essential job functions. In fact, lives depend on it- yours, your partners', and the public's. The stakes have never been higher, and it is for that reason that we can no longer rely on optional participation in physical fitness testing.

Our goal is to transition to a new testing format and schedule as of January 2022. We would no longer be using the MPAT assessment, except for in the Basic Academy. Instead, we would be conducting mandatory quarterly rowing machine tests. The rowing exercises are more low-impact, less prone to injuries, and a better overall assessment of fitness ability.

We have already purchased over 20 rowing machines and each district should receive one or two for their office. There will also be one or two machines at Headquarters and four or five at the Academy. Troopers are

encouraged to use these machines at their convenience before or after shifts or on days off.

To finish out 2021 physical fitness testing, troopers will have the option of taking the MPAT OR participating in a rowing test group. If troopers elect to participate in the testing group, they will be required to participate in two rowing tests in October and December 2021. Please note- both tests will be required. In exchange for taking both rowing tests, troopers will receive the maximum incentive of \$1,000 or 40 hours of compensatory time.

While the maximum incentive is not conditional on performance time or ability, troopers would be wise to give the test their best effort. I highly encourage as many people as possible participate in the testing group. We will be using the data from these tests to develop our testing requirements in the future. Having a range of athletic abilities will allow us to create a more reasonable and realistic testing standard.

...

Change can be difficult, but I am excited for the journey ahead and the opportunities for self-improvement that this new testing paradigm will provide all of us.

MFPE Exhibit 3, p. 1. This email offered troopers the option to take either the rowing tests or the MPAT, but not both.

11. MHP has not yet implemented the rowing test as its physical fitness test in place of the MPAT. *Gardener Dec.*, ¶ 14.

12. All considerations relating to the potential implementation of the rowing test remain under evaluation. *Gardener Dec.*, ¶ 13.

13. Troopers can still take the MPAT and receive incentive pay under Addendum D to the CBA. *Gardener Dec.*, ¶ 15.

14. MHP implemented the rowing incentive program to start the process of gathering data that could be used to develop testing standards (number of meters,

testing time, and factors to determine time) that could be used in the future if the rowing test was implemented as MHP's fitness test. *Gardener Dec.*, ¶ 16.

15. One trooper was not allowed to take the MPAT.

16. The parties have been engaging in collective bargaining since August 2021. Negotiations continue to present date. The fitness testing to be used by MHP has been a subject of bargaining from the outset, it has been addressed at many of the bargaining sessions, the parties have exchanged multiple written proposals addressing it, and it continues to be discussed to date. *Gardner Dec.*, ¶ 23.

17. During the first bargaining session on August 24, 2021, MHP proposed removing Addendum D to the CBA (*Un. Ex. 1*, pp. 25-26) and moving the physical fitness testing into an agency policy. (*Gardner Dec. Exhibit A*, pp. 27-28). The parties also discussed the possibility of moving from the MPAT to rowing tests. The Union wanted to update Addendum D with rowing information or to create a memorandum of understanding (MOU) to address fitness testing. The parties agreed to schedule another meeting for September 8 to address the potential of a rowing test in more detail. *Gardner Dec.*, ¶ 24.

18. In advance of the September 8 meeting, MHP sent the Union a draft of how it could look to move the physical fitness testing into an agency policy. That draft document set forth MHP's then proposal for the rowing test. (*Gardner Dec. Exhibit B*). The content of that document was still under consideration. MHP had not adopted it as an agency policy. MHP had not implemented the rowing test in place of the MPAT. It was simply a draft proposal and it was submitted to the Union for its consideration. *Gardner Dec.*, ¶ 25.

19. MHP and the Union met for an informational session to address the fitness testing on September 8, 2021. MHP attendees were Major Sager, Captain Braun, Captain Smith, Sgt. Samuelson, and Danielle Gardner. Carl Ward and Joe Dompier attended on behalf of the Union. The parties discussed the physical fitness tests (MPAT and rowing), including the background of the tests and the expected benefits of moving from the MPAT to rowing. *Gardner Dec.*, ¶ 26.

20. Union Representative Dompier sent a letter to Colonel Lavin requesting to bargain over fitness tests on September 14. (*Un. Ex. 4*). Colonel Lavin never responded to Mr. Dompier's September 14 letter.

21. At the time this request was received, MHP and the Union were already bargaining over fitness testing. The parties had already addressed fitness testing in the August 24 session, attended an informational meeting on fitness testing on September 8, and were scheduled for the next bargaining session on October 13. MHP had provided the Union with a proposal to move the fitness testing from Addendum B of the CBA to a policy (*Gardner Dec.* Exhibits A and B). MHP did not refuse to bargain the issue with the Union – the parties were already actively bargaining on it. *Gardner Dec.*, ¶ 28.

22. On September 22, 2021, Colonel Lavin sent another email to troopers. In it, Colonel Lavin stated that any trooper who participated in the rowing test would “receive the maximum pay incentive (\$1,000) or the maximum comp time (40 hours) just for participating.” *Un. Ex. 5*.

23. On November 1, 2021, Colonel Lavin emailed troopers to inform them that the October rowing test period had been extended and set forth the incentives for troopers to take the rowing test.

24. In 2022, Colonel Lavin altered the incentives for the troopers participating in the rowing test by providing \$500.00 or 20 hours of comp time to those troopers who participated in both the February and April tests. *Un. Ex. 9*.

25. The parties have continued to bargain over physical fitness testing as evidenced by the exhibits accompanying MHP’s brief.

II. SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment may be granted only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c); *LaTray v. City of Havre*, 2000 MT 119, ¶ 14, 299 Mont. 449, 999 P.2d 1010, 1014. The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact. *LaTray*, ¶ 14. To satisfy this burden, the moving party must “exclude any real doubt as to the existence of any genuine issue of material fact” by making a “clear showing as to what the truth is.” *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993).

In determining whether genuine issues of material fact exist, all evidence must be viewed in the light most favorable to the non-moving party. *LaTray*, ¶ 15.

Therefore, all reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *LaTray*, ¶ 15. If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment. *Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, ¶ 14, 343 Mont. 279, 184 P.3d 1021.

If the moving party meets its burden of demonstrating a complete absence of genuine issues of material fact, the burden then shifts to the non-moving party to set forth specific facts, not merely denials, speculation, or conclusory statements, in order to establish that a genuine issue of material fact does indeed exist. Mont. R. Civ. P. 56(e); *LaTray*, ¶ 14. Finally, if no genuine issues of material fact exist, it must then be determined whether the facts actually entitle the moving party to judgment as a matter of law. Mont. R. Civ. P. 56(c).

III. DISCUSSION

Even when construing the facts in the light most favorable to MHP, as is required for the purposes of summary judgment, there is no genuine issue of material fact that would preclude summary judgment from being granted in MFPE's favor. It is immaterial that MHP has not yet actually adopted the rowing test at issue as its physical test. Rather, the issue is whether MHP unilaterally implemented a policy that altered a program which was a mandatory subject of bargaining without the participation of MFPE. In the MOU, the parties agreed to a specific voluntary program of physical testing. Simply because the program was voluntary does not mean the rowing testing did not alter the MPAT. Since troopers were offered incentives to participate in either the rowing test or the MPAT, the MPAT agreement was thereby unilaterally altered. The incentives for the rowing test were equal to or greater than the incentives for participating in the MPAT. Because MHP did not negotiate with MFPE prior to altering the terms of MPAT MOU when it implemented this incentivized rowing testing program, it violated the Montana Public Employees Collective Bargaining Act (Act).

The Act requires public employers and public employees to negotiate in good faith on wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-305(2). Refusal to bargain collectively in good faith with an exclusive representative constitutes an unfair labor practice. Mont. Code Ann. § 39-31-401(5).

The purpose of the Act is to remove certain sources of labor strife and unrest by encouraging “the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.” Mont. Code Ann. § 39-31-101; *Bonner School District No. 14 v. Bonner Education Association*, 2008 MT 9, ¶ 24, 32, 341 Mont. 97, 176 P.2d 262. Parties to a CBA are obligated “to bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment.” Mont. Code Ann. § 39-31-305(2). The duty to bargain is the heart of the law, whose primary purpose is “to encourage meaningful discussion between employers and employee representatives.” *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1163 (D.C. Cir. 1992). The process of bargaining “does not compel either party to agree to a proposal or require the making of a concession.” Mont. Code Ann. § 39-31-305(2).

Given the similarities between the Act and the National Labor Relations Act (NLRA), the Montana Supreme Court looks to federal court and National Labor Relations Board (NLRB) decisions as guidance for interpreting Montana’s collective bargaining statutes. *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 225, 598 P.2d 1117 (1979); *City of Great Falls v. Young*, (“Young III”), 211 Mont. 13, 17, 686 P.2d 185 (1984).

Decisions involving the NLRA hold that an employer may not enact a unilateral change to a mandatory subject of bargaining without giving the union an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 735, 747 (1962). Employers must specifically notify and bargain with the bargaining representative before instituting the change. *Safeway Stores*, 270 NLRB 193, 195 (1984). Furthermore, the duty to bargain “extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967). An employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), efd. 136 F.3d 727 (11th Cir. 1998).

It is well settled under federal law that an employer violates Section 8(a)(5), which is similar to Mont. Code Ann. § 39-31-401, when it unilaterally changes union members’ wages, hours, or other terms and conditions of employment after expiration of the collective bargaining agreement. *Katz*, 369 U.S. at 742-743. Further, an employer can’t enact a unilateral change to a mandatory subject of bargaining without giving the union an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 735, 747 (1962). “[I]ncentive programs designed to increase or supplement the actual

earnings of employees are within the contemplation of the term ‘wages’ as used in the Act.” *Bunker Hill Co.*, 208 NLRB 27, 32 (1973). Finally, an employer must negotiate a mandatory subject of bargaining when a union requests to do so. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11 (2017). In this case, the MPAT incentive program was a mandatory subject of bargaining and MHP had a duty to maintain the status quo.

MFPE argues that summary judgment is proper because MHP has “implemented the rowing test and various monetary incentives without negotiating the terms with the Union” and has “unilaterally imposed a change to the mandatory subject of bargaining.” MHP counters that summary judgment is improper because it has not implemented the rowing test, but, rather, has initiated a “pilot program” whereby it sought volunteers to provide data to develop testing standards that could be used to determine if the rowing test should be used as an alternative to the MPAT to assess the physical fitness and wellbeing of troopers. It argues that since troopers are not required to take the rowing test, and troopers are still able to participate in the MPAT and receive the financial incentives laid out therein, a factual issue exists which precludes summary judgment. However, the factual issue raised by MHP is not material.

It is immaterial as to whether MHP had actually implemented the final rowing test as a replacement for the MPAT. What is material are the financial incentives attached to the troopers’ participation in the rowing test in a comparable manner as the existing, and bargained-for, MPAT. There is no factual dispute that MHP offered financial incentives to those troopers who voluntarily participated in the rowing test. There is no dispute troopers could not earn both incentives. There is no dispute that the testing altered the terms of the MOU by creating a different incentive than those laid out in the MOU. Those financial incentives were, arguably, more generous than the incentives offered to troopers who participated in the MPAT because the troopers received the incentives for merely taking the rowing test and not how they performed on the test. Since participation in the rowing test involved financial incentives designed to increase or supplement the troopers’ earnings, and, thus, constituted wages, it was a mandatory subject of bargaining. Simply because the MPAT provided for voluntary participation does not mean that MHP could make any changes it wanted to make by adding more voluntary programs. Rather, because troopers had to choose between the two tests, MHP altered the terms of the MOU.

The undisputed facts establish that no agreement had been reached prior to MHP implementing the rowing test and its accompanying incentives. Consequently,

MHP unilaterally amended the terms of the MOU without bargaining. Again, it is immaterial that the rowing test has not yet been adopted and is still being bargained because the changes to the incentive program were made without bargaining. While the documents produced by the parties show that the parties may have discussed and commenced negotiations on the future of the physical testing program for troopers, no agreement was reached or ratified concerning the incentives that troopers were to receive. Rather, MHP unilaterally implemented the financial incentives for the troopers who were participating in the rowing test without the input of MFPE. Absent a ratification of the incentives for the rowing testing program by the parties prior to the implementation of those incentives by MHP, such an action constitutes an unfair labor practice.

IV. CONCLUSION

Since the undisputed facts establish that MHP failed to bargain with MFPE on a mandatory subject of bargaining prior to implementing the incentives for the rowing testing program, there is no genuine issue of material fact that MHP committed an unfair labor practice, and MFPE's motion for summary judgment is granted accordingly.

DATED this 20th day of June, 2022.

BOARD OF PERSONNEL APPEALS



By:

JEFFREY M. DOUD
Hearing Officer

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by email as follows:

Nate McConnell
nate@natemcconnelllaw.com

Michelle Dietrich
MDietrich@mt.gov

DATED this 20th day of June, 2022.


