

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

STATE OF RHODE ISLAND
DEPARTMENT OF HEALTH

-AND-

RI DEPARTMENT OF HEALTH
PROFESSIONAL STAFF
ASSOCIATION / NEARI/NEA

CASE NO: EE-3575
Unit Clarification: Compliance
Evaluation / Standardization
Officer

DECISION AND ORDER

TRAVEL OF CASE

The above matter came on to be heard on a Request for Clarification (hereinafter Petition) for the position of "Compliance Evaluation/Standardization Officer" held by Ms. Susan Wallace. The petition was filed with the Rhode Island State Labor Relations Board (hereinafter "Board") on February 4, 1999 by the RI Department of Health Professional Staff Association/National Education Association of Rhode Island (hereinafter Petitioner or "PSA / NEARI")

Pursuant to R.I.G.L. 28-7-9 (b) (5), an informal hearing was held on March 10, 1999. Representatives of both the Union and the Employer were present and provided extensive information to the Board's investigative Agent. On April 16, 1999, the Board's Agent interviewed Ms. Wallace for information concerning the scope of her position. On June 2, 1999, the Agent then met with Mr. Ronald Lee, Chief Sanitarian in the Department of Health, also Ms. Wallace's supervisor. On June 9, 1999, the Board's Agent forwarded a copy of her six (6) page written report to all the parties in this case, with instructions that written responses would be accepted by the Board for a period of thirty (30) days.

On July 8, 1999, the Employer filed a written response to the Agent's report, continuing to press its objections to the accretion of this position. On February 24, 2000, the Board reviewed the matter and made a preliminary determination that the position of Compliance Evaluation/Standardization Officer should be accreted to the bargaining unit represented by NEARI in Case No. EE-3575. In accordance with R. G. 28-7-9 (b) (5), the Board then

¹ Although the informal hearing was not held strictly within the 30 day time frame set forth on R.I.G.L. 28-7-9 (b) (5), the delay was at the request of both parties.

conducted a formal hearing on May 30, 2000. Representatives from the Employer and the Union participated and were provided with a full and fair opportunity to examine and cross examine witnesses and to submit appropriate documentary evidence. The parties were then directed to file any post hearing briefs within 15 days after their receipt of the transcript in this matter. The Union submitted its brief on July 5, 2000. The Employer was granted two extensions of time in which to file and did file its brief on August 1, 2000. The matter was then considered by the Board at the next monthly Board meeting held on September 25, 2000.

FACTUAL BACKGROUND

On or about May 6, 1998, PSA/NEARI was certified by the Board to represent: "all professional employees in the Department of Health, in accordance with certification EE-3322."

In 1997, the Department of Health established a program whereby its Food Protection Division would implement "standardization" of inspections for food establishments within the State of Rhode Island. Although not mandatory, this standardization process is encouraged by the Federal Food and Drug Administration. In order to implement the program, the Employer and the Union entered into a consent agreement which outlined the standardization requirements for current and future employees. (Employer's Exhibit # 12) The Consent Agreement outlined the changes to job titles from a "Sanitarian" series to "Environmental Health Inspector" series and the corresponding pay grades. These were:

- 1) Environmental Health Food Inspector, Pay grade 23
- 2) Environmental Health Food Specialist, Pay grade 27
- 3) Sr. Environmental Health Food Specialist, Pay grade 30
- 4) Supervising Environmental Health Food Specialist, Pay grade 33³
- 5) Compliance Evaluation/Standardization Officer, Pay grade 31

Also, pursuant to the consent agreement, existing employees would be given one year to successfully complete and pass the standardization process. Employees who failed to attain that goal within the proscribed time frame would be demoted. (Employer's Exhibit # 12) The position of Compliance Evaluation/Standardization Officer was a newly created position and there was not an equivalent position within the "Sanitarian" series. The Compliance Evaluation/Standardization Officer was posted as a non-union position on September 25, 1998,

² PSA/NEA, the petitioning union in this case, was not a party to the consent agreement submitted in the case, but apparently entered into a similar agreement.

³ This position was previously called "Principal Sanitarian" and was already a member of the NEA's professional/technical unit.

and Ms. Susan Wallace was hired and began work in January, 1999. In February, 1999, the Union filed its request for clarification.

SUMMARY OF TESTIMONY

At the formal hearing the Union presented the testimony of Edward D'Arezzo, Chief of Human Resources at the Department of Health for 15 years. (TR. p. 9) He testified that the grades of titles encompassed by the NEA's bargaining unit went from grade 16 to grade 34. (TR. p. 1) He testified that the majority of job titles within the NEA's unit required a bachelor's degree, as did the position of Compliance Evaluation/Standardization Officer. He also stated that Mr. Ron Lee, the Chief Environmental Health Food Specialist, (formerly "Chief Sanitarian" serves as Ms. Wallace's immediate supervisor. (TR. p. 13)

The Union also presented the testimony of Ms. Susan Wallace, the Compliance Evaluation/Standardization Officer since January 7, 1999. (TR. p. 14) She testified that "standardization" within the Food Protection Unit, is a concept being pushed by federal agencies which would establish specific guidelines for food safety inspectors, to insure consistency and uniformity in inspections. (TR. p. 15-16) The federal Food and Drug Administration has established a standardization process which the Rhode Island Department of Health used as a model and then adapted for its needs. (TR. p. 16-17) Within Rhode Island, the Food Code has been in place since 1994. (TR. p. 7) During 1999 and part of 2000, Ms. Wallace trained new employees and gave refresher training (on the food code regulations) to existing employees. (TR. p. 7-18) Once that process is completed, the "standardization" testing begins. She testified that she does not have the authority to hire, lay off, promote, reward, discipline, suspend or terminate other employees. (TR. p. 18-19) She does not hear grievances that are brought under the collective bargaining agreement. (TR. p. 19)

On cross examination, she testified that although her job description states that her position supervises other employees, she evaluates and trains, but does not supervise. (TR. p. 21) She testified that she developed the criteria for the training program and that she did participate in discussions with Dr. Julian, Dr. Combs, Mr. Lee and Council 94 concerning these criteria. (TR. p. 22) On one occasion, she met with the Union alone, and then documented the discussions. (Employer Exhibit # 2) She testified that she develops inspection forms at the direction of Dr. Julian. (TR. p. 25) She also developed a checklist for conditions that require a

HAACP Plan (Hazard Analysis and Critical Control Point). (Employer's Exhibit # 7) (TR. p. 32) She testified that she created this document because there was some confusion, and she wanted to provide clarification for some of the inspectors. (TR. p. 33) She also testified that one of her responsibilities was to pull together policies and procedures for the Office of Food Protection and that she developed some of these from the Food Code. (TR. p. 37) She also revised existing policies and procedures, together with her supervisor, Mr. Lee. (TR. p. 39)

On further cross examination, Ms. Wallace testified that when she completes training the employees, she will then conduct the standardization testing. (TR. p. 39) Ms. Wallace develops the proposed criteria for the standardization testing. She discusses the same with Council 94's president and also with Mr. Lee or Dr. Julian. (TR. p. 40) She stated that there were one or two meetings with the Union that she went to alone because Dr. Julian was not available, and she then reported back to him (TR. 42) She described establishing the criteria as a team process, which, in addition to Council 94 has also included Mr. D'Arezzo, Dr. Combs, Mr. Lee and Dr. Julian. (TR. p. 42) Once the criteria is in place, she will then begin the testing or standardization of the employees. (TR. p. 42)

On redirect examination, Ms. Wallace testified that the consent agreement, which was entered into before her date of hire, dictates a demotion, in the event that the employee fails to become standardized. (TR. p. 44) Prior to her hire, the Department's Inspectors used blank forms (51A and 51B) to document food safety violations. (TR. p. 45) Ms. Wallace's responsibilities were to establish a more formalized process, designed to bring more structure to conducting inspections and to reduce inconsistencies and omissions. (TR. p. 45-46) accomplished this in part by creating a "how-to-fill-in form" guideline. (TR. p. 47) She would be using the evaluation forms for Environmental Health Inspector, Environmental Health Specialist and the Sr. Environmental Health Specialist, all Council 94 positions. (TR. p. 49) also testified that Employer Exhibit #8, "Adulterated Food" Policy sets forth the requirements of the Rhode Island Cosmetic Food, Drug and Cosmetic Act, 21-31-10. (TR. p. 52) She testified that Employer Exhibit #9, "Embargo Process" is a "step-by-step" policy for the embargo requirement set forth in state law. (TR. p. 53) Employer Exhibit #10 identifies a pre-existing regulation for bed and breakfast establishments. (TR. p. 54) Employer Exhibit #11, which

outlines “sampling” procedures for contaminated or misbranded foods codifies a well known identifiable requirement of food protection and inspection. (TR. p. 54)

Ms. Wallace explained that the evaluations she will conduct during standardization will be brought to Mr. Lee and Dr. Julian. (TR. p. 55)

The Employer also presented testimony on direct examination from Mr. Edward D’Arezzo. He testified that the Employer also entered into a consent agreement with NEA.⁴ He stated that the purpose of the agreement was to come up with a new hierarchy for the office of Food Protection, which included a trainee position and which raised the educational requirements for inspectors entering into the Food Protection area. (TR. p. 59-60) The agreement also required the members of the old hierarchy to become “standardized”. (TR. p. 60) Employees who failed to become “standardized” would be demoted. (TR. p. 61) Mr. D’Arezzo testified that it was his understanding that the work Ms. Wallace did in connection with developing the criteria for the standardization process/evaluation was done on behalf of the State (Employer). (TR. p. 62)

On cross examination, Mr. D’Arezzo conceded that Ms. Wallace was not empowered with full authority to reach agreement with Council 94 over the standardization evaluation criteria. (TR. p. 63) He also testified that he and others are “Appointing Authorities” within the Department of Health; within the Division of Food Protection, Dr. Julian is the appointing authority. (TR. p. 63)

The Employer also presented Dr. Ernest Julian, the Chief of the Office of Food Protection for 10.5 years. (TR. p. 65) He supervises the entire office which is charged with establishing regulations governing all food safety in the state. The Division does plans for model establishments, conducts licensing activities, and certifications of food safety managers. (TR. p. 65) He testified that Ms. Wallace’s primary function as Compliance Evaluation/Standardization Officer is to train and evaluate staff to make sure that all staff were enforcing food safety regulations in the same way. (TR. p. 66) He testified that her secondary function is to establish policies and procedures for the office and make sure that all the staff is uniformly implementing those policies. (TR. p. 66) He stated that Ms. Wallace had, in fact, established such policies and procedures, and referred to the Employer’s exhibits. (TR. p. 66) Dr. Julian further testified that

⁴ This agreement was not entered into evidence in this case.

Ms. Wallace participates in the hiring process by serving on the hiring panel (TR. p 67) Dr. Julian testified that he considered Ms. Wallace to be an integral part of management's team (Dr. Julian, Mr. Combs, Mr. Lee) when she was developing the standardization process. (TR. p. 67) As for discipline, Dr. Julian testified that although she couldn't do it directly, Ms. Wallace's role would be to gather information on employees' performances. He stated that Ms. Wallace has a great deal of latitude in the evaluation process and that employees would be demoted or retained based upon what she determines. (TR. p. 70)

DISCUSSION

Professional Employees

Professional employees, unless disqualified for other grounds (managerial, supervisory or confidentiality), are eligible to participate in collective bargaining.

Professional employees, who are permitted to engage in collective bargaining are defined as

“any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, manual, or physical processes; or
(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph a, and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).”

The position of Compliance Evaluation/Standardization Officer performs work that is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work. The position involves the consistent exercise of discretion and judgment in its performance and requires advanced knowledge (Bachelor's degree) of a scientific field of study. Therefore, the position of Compliance Evaluation/Standardization Officer is best characterized as a professional position.

In this case, the Employer argues that the professional position of Compliance Evaluation/Standardization Officer is also both supervisory and/or managerial, and therefore is ineligible for collective bargaining.

Supervisory Employees

In the Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board, 694 A.2d 185, 189 (R. 1997), the Rhode Island Supreme Court adopted the following federal definition of “supervisor”:

“any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” (29 U.S.C. § 152(11)⁵)

Under federal labor law, this list of supervisory functions has been determined to be disjunctive; that is, a supervisor is an individual with the authority to undertake any one of these functions. Rest Haven Living Center, Inc. 322 NLRB, no. 33, 153 LRRM 132 (1996). It also includes individuals who possess the authority to recommend any of the foregoing actions.

The evidence in this case failed to establish that Ms. Wallace has any authority to hire, transfer, lay off, recall, promote, reward, discharge, assign, or discipline other employees. does not hear or adjust grievances. The questions left to be answered then are, whether she has the authority to responsibly direct employees or to effectively recommend any of the foregoing actions. Ms. Wallace testified that she trains and evaluates the food safety personnel. Board is of the opinion that the words “to responsibly direct employees” mean more than training employees and then evaluating/testing them. Such a phrase clearly contemplates that one with authority would be involved on a daily basis with the workload of his or her subordinates and would be an integral part of making sure that the department’s work was accomplished. There really wasn’t any testimony on Ms. Wallace’s daily interactions with employees; the testimony and the documentary evidence focused essentially on the scope of and nature of Mr. Wallace’s professional and technical duties of implementing the food code in a uniform fashion via training. Therefore, the Board finds that there is insufficient evidence to support a claim that Ms. Wallace responsibly directs other employees.

There was no evidence in the record at all to support a claim that Ms. Wallace can effectively recommend the transfer, lay off, recall, promotion, reward, or assignment of other

⁵ In addition to adopting this definition of supervisor, the Supreme Court also expressly disapproved of the Board’s use of its own definition of supervisor, which had been developed and refined in 1973 and 1979 policy statements. Therefore, the Employer’s arguments (at pages 9-10 of its brief), that the Board should revert to these policies to evaluate the supervisory nature of a position, is hereby rejected.

employees. The issues left then are whether Ms. Wallace can effectively recommend hiring or discipline of other employees. It is undisputed that Ms. Wallace has participated in the hiring process as a member of a panel which tries to come to a group consensus. This Board has previously held and continues to hold that such a practice, while undoubtedly useful to the hiring authority, is insufficient to exclude an employee from collective bargaining. Ms. Wallace is clearly not the “appointing authority” and will not be excluded from the unit on this basis.

The final question, which is closer than all others, is whether Ms. Wallace can effectively recommend discipline or discharge of employees on the basis of her evaluations over which she has wide discretion, according to Dr. Julian. The evidence clearly established that if employees fail to become “standardized” within the specified time, they could be demoted to lower pay grades, possibly even four pay grades below their current salary. The question is whether this demotion amounts to discipline. The Board believes that the consent agreement (Employer’s Exhibit # 12) establishes that this action is merely a “reallocation” back to where the employee was before this new process. Such a reallocation recognizes that not all present employees may be able to meet the demands of an upgrade, but that he or she should not be penalized for attempting the process of upgrading. Further, if the parties intended that an employee’s failure of an evaluation/testing process would result in disciplinary action, the Board believes that the Consent Agreement would have so stated. Therefore, since the ultimate action which results from the evaluation process is not disciplinary, then to effectively recommend (by failing the employee on the exam) the demotion, then Ms. Wallace’s actions have not effectively recommended discipline and therefore such actions are not supervisory.

Managerial Employees

“Managerial” employees are employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employers.” Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly, 659 A.2d 104,1107 1995); State v. Local 2883 AFSCME, 463 A.2d 186, 190 (1983) citing and quoting in part NLRB v. Bell Aerospace Co., 416 U.S. 267, 278 (1974). Managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management. N.L.R.B. v Yeshiva University, 444 U.S. 672 (1980). An employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that control

or implement employer policy. *Id.* “Employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.” *Id.* at 690.

Ms. Wallace clearly has developed and written both “policies” and “procedures” concerning the technical aspects of the Division of Food Protection’s inspections of food establishments within the State of Rhode Island. (See Employer Exhibits 7, 8, 9 & 1) She has also developed checklists and fill-in-the-blank forms for inspectors. (See Employer Exhibits 3, 4, & 5) These policies and forms however do not “express and make operative” the *decisions of her employer*. Rather, these technical policies, procedures and forms are designed to implement the *department’s responsibilities*, as mandated by various Rhode Island laws and as suggested by the federal Food and Drug Administration. Ms. Wallace’s decision-making in creating these policies, procedures, forms and checklists is limited to the routine discharge of the professional duties in the compliance evaluation/standardization projects to which she has been assigned. This is confirmed by Employer’s Exhibit #1, the job description. Under “General Statement of Duties”, it states in pertinent parts: “ .. to participate in the development of *program objectives and procedures*; to evaluate program performance and recommend changes or new activities.”

Therefore, it is clear that her responsibilities for policies and procedures is directed and limited to *programmatically* decision making. Therefore, the Board finds that Ms. Wallace’s duties are not managerial as that term is defined by either federal labor law or Rhode Island labor law and that the position of Compliance Evaluation/Standardization Officer shall not be excluded from collective bargaining as a managerial employee.

The Employer in this case repeatedly referenced the fact that the position was created by agreement as a non-union position, but that the NEA filed this unit clarification anyway. R.I.G.L. 28-7-9 (3) provides that a petition for unit clarification may be filed at *any time* by an appropriate bargaining agent. In the event that the parties had in fact agreed to keep this position non-union and then one party changed course, then a discussion of this issue would prove interesting. However, the Board has reviewed the two (2) page consent agreement carefully. And finds no reference to the union status of any specific position. The only mention of the “Union” (which

on this agreement is Council 94) is on page 2 when it provides: “The process for standardization will be agreed upon by the State and the Union. Therefore, the Board finds no impediment to the filing of this petition or the Board’s jurisdiction to act thereon.

Accretion

“In determining whether accretion of employees to existing bargaining units is proper, the National Labor Relations Board (NLRB) considers many of the same factors that determine community of interest questions for purpose of bargaining unit determination, namely, such factors as integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions and skills, common control over labor relations, collective bargaining history and interchangeability of employees.” Rhode Island Public Telecommunications Authority v Rhode Island State Labor Relations Board, 650 A2d 479, N.L.R.B. v Security-Columbian Banknote, Co., 541 F.2d 135, 140 (3d Cir. 1976).

In this case, the unit’s certification includes all professional employees in the Department of Health. As set forth above, this Board finds that the position of Compliance Evaluation/Standardization Officer qualifies as a professional position. Further, as set forth above, the pay grade for this position falls within the same range as those in the existing bargaining unit. Therefore, since the existing unit contains all professional positions within the Department of Health, the position is appropriate for accretion.

FINDINGS OF FACT

- 1) The Petitioner, R.I. Department of Health Professional Staff Association/National Education Association of Rhode Island (hereinafter Petitioner or “PSA / NEARI”) is a labor organization, which exists and is constituted for the purpose, in whole or in part, of collective bargaining relative to wages, rates of pay, hours, working conditions and all other terms and conditions of employment and of dealing with employers concerning grievances or other mutual aid and protection.
- 2) The State of Rhode Island, Department of Health is an “Employer” within the meaning of the Rhode Island State Labor Relations Act.
- 3) On or about May 6, 1998, PSA / NEARI was certified by the Board to represent: “all professional employees in the Department of Health, in accordance with certification EE-3322.” PSA / NEARI filed the within petition on February 4, 1999.

- 4) In accordance with R. G.L. 28-7-9 (b) (5), the Board conducted both an informal hearing and investigation and a formal hearing.
- 5) In 1997, the Department of Health established a program whereby its Food Protection Division would implement "standardization" of inspections for food establishments within the State of Rhode Island. Although not mandatory, this standardization process is encouraged by the Federal Food and Drug Administration.
- 6) In order to implement the program, the Employer the Union entered into a consent agreement which outlined the standardization requirements for current and future employees. The Consent Agreement outlined the changes to job titles from a "Sanitarian" series to "Environmental Health Inspector" series and the corresponding pay grades.
- 7) The consent agreement did not identify any of the positions as union or non union.
- 8) The Compliance Evaluation/Standardization Officer was posted as a non union position on September 25, 1998, and Ms. Susan Wallace was hired and began work in January, 1999.
- 9) Ms Wallace's duties include training, standardizing and evaluating inspectional staff within the Division of Food Protection in the Department of Health. Ms. Wallace is also responsible for developing programmatic policies and procedures, forms and checklists.
- 10) Ms. Wallace has participated on a panel for interviewing a new employee. She is not the Appointing Authority within the Division of Food Protection.
- 1) Although Ms. Wallace develops the proposed criteria for the standardization testing and has discussed the same with Council 94's president, she does not have the authority to make decisions or to bind the Employer. She reports the status of the proposals back to Mr. Lee or Dr. Julian.
- 12) The possible demotions contemplated by the Consent Agreement (Employer's Exhibit #12) constitute "reallocation" of positions, not disciplinary actions.
- 13) Ms. Wallace does not have the authority, in the interest of her employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.
- 4) Ms. Wallace's decision-making in creating policies, procedures, forms and checklists is limited to the routine discharge of the professional duties in the compliance evaluation and

standardization projects to which she has been assigned. These documents do not express and make operative the *decisions of her employer*. Rather, these technical policies, procedures and forms are designed to implement the *department's responsibilities*, as mandated by various Rhode Island laws and as suggested by the federal Food and Drug Administration.


CONCLUSIONS OF LAW

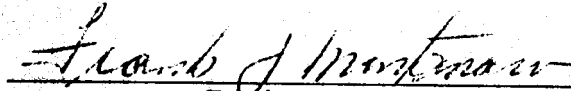
- 1 The position of Compliance Evaluation/Standardization Officer held by Susan Wallace is a professional position.
- 2) The position of Compliance Evaluation/Standardization Officer held by Susan Wallace is neither supervisory nor managerial, and is therefore eligible for collective bargaining.
- 3 The position of Compliance Evaluation/Standardization Officer shares a community of interest with the professional unit certified in Case No. EE-3575.

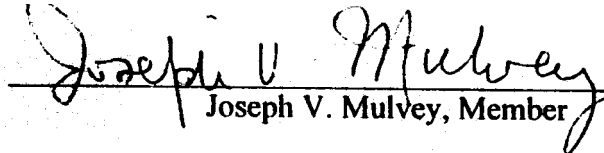
ORDER

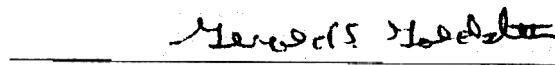
The position of Compliance Evaluation/Standardization Officer held by Susan Wallace shall be and is hereby accreted to the certification in Case No. EE-3575.

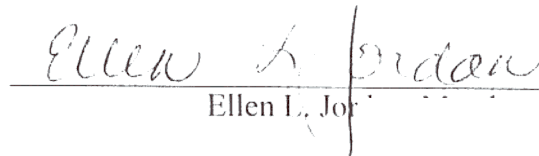
RHODE ISLAND STATE LABOR RELATIONS BOARD

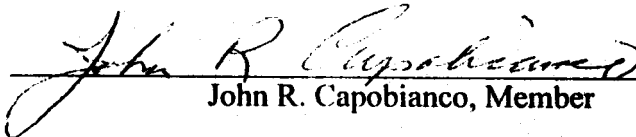

Walter J. Lanni, Chairman


Frank J. Montanaro, Member


Joseph V. Mulvey, Member


Gerald S. Goldstein, Member

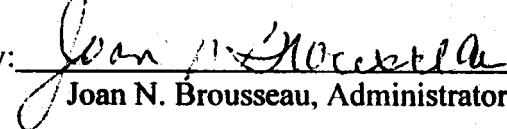

Ellen L. Jordan, Member


John R. Capobianco, Member


Elizabeth S. Dolan, Member

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: December 7, 2000

By: 
Joan N. Brousseau, Administrator