

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

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IN THE MATTER OF :  
Burrillville School Committee :  
-AND- :  
Burrillville Teachers Association/ :  
NEARI :

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CASE NO: EE- 1652  
**Unit Clarification:**  
**Technology Director**

**DECISION AND ORDER OF DISMISSAL**

**TRAVEL OF CASE**

The above-entitled matter came on to be heard before the Rhode Island State Labor Relations Board (hereinafter "Board") on a Request for Accretion (hereinafter "Petition") for the position of Director of Technology, currently held by Paul Barrette. The Petition was filed by the Burrillville Teachers' Association on December 14, 2006. An informal hearing was held on the matter on January 10, 2007. The Board's Agent conducted a subsequent investigation on the request. Upon completion of the investigation, the Board's agent filed an investigative report with the Board, and on June 27, 2007 provided a copy of the same to the parties. The Union submitted a written response to the investigative report on July 16, 2007. The Employer did not submit a response to the investigative report. The members of the RI State Labor Relations Board reviewed the investigative report and Union's response and made a preliminary determination that the matter should proceed to formal hearing. A formal hearing was held on January 24, 2008. Representatives from the Employer and Union participated and were provided a full and fair opportunity to examine and cross-examine witnesses and to submit appropriate documentary evidence. Upon conclusion of the hearing, both parties submitted their briefs on February 25, 2008.

**DISCUSSION**

The Union argues that the position of Director of Technology, is eligible for accretion into the existing bargaining unit because: (1) Even though the position

does not require teaching duties, the position is considered a “certified teacher” under the definition set forth under R.I.G.L. 28-9.3-2, as a non-administrative professional employee; (2) The position of Director of Technology shares a community of interest with the existing bargaining unit; and (3) The position is neither supervisory nor confidential.

As would be expected, the Employer does not agree with any of the foregoing reasons and argues first that the position of Director of Technology does not fall into the designated class of employees described in the unit’s original certification which states: “All certified teaching personnel engaged in teaching duties, excluding Superintendent, Principals, and Assistant Principals.” The Employer also argues that the recognition clause in the parties’ collective bargaining agreement (“CBA”) does not cover this position, as the clause is specifically limited to “certified teaching personnel” and “certified professional employees.” The Employer argues that the Director of Technology has no certification requirements associated with the position and that by definition the position is, therefore, not eligible for inclusion within the bargaining unit. The Employer also sets forth argument that the position does not share a community of interest with the existing bargaining unit. Finally, the Employer argues that the position of Director of Technology is a “confidential” position and is, therefore, not eligible for collective bargaining.

R.I.G.L. 28-9.3-2 provides - “certified teachers” means certified teaching personnel employed in the public school systems in the state of Rhode Island engaged in teaching duties, including support personnel whose positions require a professional certificate issued by the state department of education and personnel licensed by the department of health; or other non-administrative professional employees. (Underlining added herein.) Based upon the in-depth testimony concerning the duties of the Director of Technology, there can be no question that this position is a “non-administrative professional employee” and is generally eligible for inclusion in collective bargaining, provided, however, that there are no other impediments to inclusion.

The Board's original Certification of this unit in EE-1652 is for the "certified teaching personnel engaged in teaching duties excluding Superintendent, Assistant Superintendent, Principals, and Assistant Principals." The testimony was very clear that Mr. Barrette, the incumbent Director of Technology, does not engage in any teaching duties whatsoever.<sup>1</sup> Thus, it seems clear on its face that the current Certification would not be an appropriate unit for collective bargaining for this position.<sup>2</sup> While the Board could simply dismiss this petition outright for the failure to seek inclusion into an appropriate bargaining unit, it seems likely that the next move would be to amend the certification to either eliminate the reference to "engaged in teaching duties" or to have the certification coincide with the current definition set forth under R.I.G.L. 28-9.3-2. Whether such a move would be successful or not is not before the Board at the present time and we decline to answer that question.

There is, however, a significant legal issue remaining which the Board believes is ripe for discussion at this time and that is the issue of exclusion due to the alleged "confidential" nature of this position. In Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992) the Rhode Island Supreme Court considered the question of what employees qualify as "confidential" and held:

"Two categories of employees are recognized as confidential under the test and are therefore excluded from collective bargaining. The first category comprises those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. ... The second category consists of employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations." (Barrington at p. 1136, quoting NLRB v. Hendricks County Rural Electric Membership Corp, 454 U.S. 170 at 189) This two-prong test of confidentiality is commonly referred to as the "labor-nexus" test.

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<sup>1</sup> In fact, he testified that while he did have a valid Rhode Island teaching certification at one point in his career, he has not kept it current.

<sup>2</sup> Having come to this conclusion, there is no need to address the "community of interest" issue at this point in time.

In prior cases reviewing claims of confidentiality, this Board has not veered from the labor-nexus test and we have rejected claims of confidential status based upon an employees' access to medical records or other personal or non labor-related confidential claims. We have, however, previously acknowledged the special nature of the duties of employees engaged as "management information specialists." See Labor Board Case No. EE-2003 State of Rhode Island, Department of Corrections and Rhode Island Brotherhood of Correctional Officers (Unit Clarification - Jr. Electronic Computer Programmer, Sr. Electronic Computer Programmer, and Principal Systems Analyst), Board Decision dated December 18, 1998. Said Labor Board decision was appealed to RI Superior Court in Case No. PC 99-0230 Rhode Island Department of Corrections v. Rhode Island State Labor Relations Board and Rhode Island Brotherhood of Correctional Officers. The Superior Court affirmed the decision of the Labor Board in its Decisions filed October 29, 1999. In that case, the Employer claimed that its management information specialists were "confidential" employees because of their access to computers and other security systems. While we rejected the claim of confidentiality in that case, we did note that if a given employee or employees are allowed unfettered access to every "byte" of information on a computer system, then we would consider expanding the labor-nexus test. It has been (10) years since our decision in that case, and nine (9) years since the RI Superior Court's affirmation of the Board's decision; and the Board is now presented with just that scenario.

In this case however, no expansion of the labor-nexus test is necessary because Mr. Barrette not only has mere "access" to view every "byte" of information on the District's computer systems, he can also manipulate the data (not that he does) and he alone can control the level of access to the system of each and every person accessing the technology. In his position, Mr. Barrette actually controls the access of the information system at the highest level- that is- he can prevent the District's Superintendent (the "CEO") from accessing certain types of data and can prevent manipulation of the data by the superintendent.

In fact, Mr. Barrette testified:

“As director of technology, I have access to all the information in the systems across the district. There’s no other person in the district that has total access to all the systems.” (TR. pg. 45, lines 11-14) “The superintendent doesn’t have access to manipulate the information. He doesn’t have access to go in and assign privilege to staff members, clerks, students, teacher about what they can and cannot do. The superintendent by default cannot go into the student information systems and manipulate that information. He can see the information, but he cannot change it. He, by default, cannot go in and look at information stored on our systems that teachers or students may have stored. The superintendent does not have direct access to teacher and staff email accounts where I do. So, the superintendent cannot go in and look at a staff members’ or teachers’ email accounts. He would have to come to me and request that I produce the information for him. As a matter of fact, and the superintendent is here, he may not like hearing this, but the superintendent can’t install software on his system. Because we have a very large number of systems in our district and there’s a high risk of compromise and infection in our systems, if the superintendent needs something installed or any staff member needs something installed, either myself or the computer technicians do it.” (TR. pg. 45 lines 23-24 and pg. 46, lines 1-23) (Also see TR pgs. 42-45)

The Director of Technology has also been directly involved with investigations into alleged misconduct on the part of bargaining unit members. In one police investigation case, Mr. Barrette was asked to restrict a member’s access to email and to the computer systems, basically to “lock the person out.” Mr. Barrette then physically removed the computer from this individual’s classroom and delivered it to the Rhode Island State Police crime lab. Mr. Barrette was also asked to produce history of that person’s email. In another case, a bargaining unit member was accused by a student of having inappropriate images or material on a computer. Mr. Barrette again locked the member out of the system so nothing could be changed. The computer was then removed so that an audit could be performed. Mr. Barrette sat side-by-side with a bargaining representative and reviewed the computer forensically for a period three hours. (TR., pgs. 52-53) On a third investigative matter, Mr. Barrette produced copies of e-mails that resided on a staff member’s account. (TR. pg. 53) Mr. Barrette has also provided emails on a number of accessions to either the Superintendent or local law enforcement. (TR. pg. 47, lines 3-11.)

Mr. Steven Welford, the District's Superintendent, testified that on occasion he had to ask Mr. Barrette for permission to access some of the information residing on the District's information systems. (TR. pg. 76. lines 15-24) Mr. Welford confirmed that Mr. Barrette has regular and unfettered access to information which is used in both the disciplinary process and the collective bargaining process. (TR. pg. 80, lines 8-12) Mr. Welford also indicated that he would be very hesitant to ask a bargaining unit member to provide information on another bargaining unit member. (TR. pg. 81, lines 1-9)

Based upon Mr. Barrette's total unfettered access to the computer systems, his ability to control the access of every other person accessing the District's technology, and based upon his activities in assisting the Superintendent in investigating grievances and alleged crimes, as well as his access to collective bargaining information residing on the computer systems, this Board finds that Mr. Barrette satisfies both prongs of the labor nexus test.<sup>3</sup> Mr. Barrette clearly acts in a confidential capacity to the persons who formulate, determine, and effectuate management policies in the field of labor relations and he regularly has total and unfettered access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. Therefore, the position of Director of Technology found within the Burrillville School Department is not excluded from participating in collective bargaining as a confidential position.

#### **FINDINGS OF FACT**

- 1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
- 2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.

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<sup>3</sup> We continue to reserve then the question of whether simple access to all the information on a management information technology system will be sufficient to expand the labor nexus test.

3) The original certification in EE-1652 recognizes the Union as the bargaining agent for “certified teaching personnel engaged in teaching duties excluding Superintendent, Assistant Superintendent, Principals, and Assistant Principals.”

4) Mr. Paul Barrette holds the position of Director of Technology for the Burrillville School Department. He does not engage in any teaching duties and does not maintain a teacher’s Certification.

5) As Director of Technology, Mr. Barrette has access to every computer “byte” of information residing on the District’s management information systems and computers. Mr. Barrette, alone, determines the level of access to the system for every employee and user of the system, up to and including the Superintendent of Schools.

6) In his capacity as Director of Technology, Mr. Barrette has worked with the Superintendent and local law enforcement to access, gather, and retrieve information contained on individual computers as well as seizing computers for review by the police. On one occasion, Mr. Barrette forensically reviewed a bargaining unit member’s computer files, in the presence of that member’s bargaining representative.

7) In his position as Director of Technology, Mr. Barrette acts in a confidential capacity to the persons who formulate, determine, and effectuate management policies in the field of labor relations (at minimum, the Superintendent of Schools).

8) In his position as Director of Technology, Mr. Barrette regularly has total and unfettered access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.

#### **CONCLUSION OF LAW**

1) The position of Director of Technology held by Paul Barrette is a confidential position and is ineligible for inclusion within any bargaining unit.

#### **ORDER**

1) The petition to accrete the position of Director of Technology to the bargaining unit Certified by Case No. EE-1652 is hereby denied and dismissed.

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

IN THE MATTER OF  
BURRILLVILLE SCHOOL COMMITTEE  
-AND-  
BURRILLVILLE TEACHERS ASSOCIATION/  
NEARI

CASE NO: EE- 1652  
**Unit Clarification:**  
**Technology Director**

**NOTICE OF RIGHT TO APPEAL AGENCY DECISION  
PURSUANT TO R.I.G.L. 42-35-12**

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. EE-1652 dated December 24, 2008, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 24, 2008**.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: DECEMBER 24, 2008

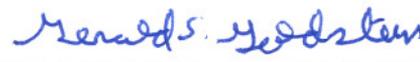
By: Robyn H. Golden  
Robyn H. Golden, Administrator

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ENTERED AS AN ORDER OF THE  
RHODE ISLAND STATE LABOR RELATIONS BOARD

Dated: December 24, 2008  
By:   
ROBYN H. GOLDEN, ADMINISTRATOR