

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

IN THE MATTER OF	:	
TOWN OF WARREN	:	Case No.: EE-3535
	:	<b>Unit Clarification –</b>
-AND-	:	<b>Exclusion:</b>
	:	Chief of Police
INTERNATIONAL BROTHERHOOD OF	:	
POLICE OFFICERS, LOCAL 470	:	

**DECISION AND ORDER**

**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 Exclusion (hereinafter "Petition") for the position of Chief of Police, currently held by Chief Thomas D. Gordon. The Petition was filed on August 3, 2006 by Warren Town Solicitor, Fausto C. Anguilla, on behalf of the Employer. An informal hearing was scheduled relative to this matter for September 15, 2006, but was rescheduled at the request of the Employer representative, and was held on October 4, 2006.

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 May 31, 2007 provided a copy of the same to the parties. Neither the Union nor the Employer submitted a written response to the investigative report. A formal hearing was held on October 30, 2007. 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 hearings, both parties submitted their briefs on December 28, 2007, and the matter was considered by the Board at its January 31, 2008 meeting.

## PERTINENT HISTORY<sup>1</sup>

The Town of Warren's Police Officers have been organized and represented by a Union since February 1969, pursuant to this Board's certification of representatives in Case No. EE-1836. The certification includes as members of the bargaining unit, "all police officers up to and including chief." On May 17, 1993, the Board issued a second "Certification of Representatives" to the International Brotherhood of Police Officers which recognized the Union as the certified bargaining representative for all regular full-time police officers" as defined in Title 28-9.2-3. At the time of this certification, the Chief of Police was Mr. Robert Pare, who was and remained a member of the bargaining unit until his retirement sometime in 1994.

On or about March 7, 1995, the Employer entered into a private, three-year Employment Agreement with a new Police Chief, Mr. Thomas B. Perrotto. On or about September 22, 1997, the Employer entered into another private, three-year Employment Agreement with Ely G. Barrett, as the next Police Chief. On October 14, 1997, after executing the agreement with Chief Barrett, the Town of Warren enacted an amendment to the Town's Code of Ordinances, identified as Section 15-4 which provided that "the Police Chief shall not be a member of the Union which represents the bargaining unit of the Warren Police Department, but may enter into an employment contract with the Town of Warren, at the discretion of the Town Council. On or about January 18, 2001, the Employer entered into another private Employment Agreement with Police Chief Thomas D. Gordon for the period January 18, 2001 through January 1, 2004.

At no time from March 1995 until January 2003, did the Union question the status of the Police Chiefs having private Employment Agreements, instead of being covered by the collective bargaining agreement. In January 2003, a Union representative did make an inquiry to the Town Manager, Michael Abruzzi, concerning Chief Gordon's status. After an informal hearing conducted on July 22, 2003, the Board, through its Administrator, notified the Union and the Employer that due to the Board's Certification in Case No EE 3535 and

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<sup>1</sup> Some of the facts recited in this case are taken from the companion case of ULP-5687, decided March 14, 2006, which deals with the same parties and the same issue of the Police Chief's certification as a member of the bargaining unit.

R.I.G.L. 28-9.2-3, a Tri-party Agreement would be required to remove the Chief from the certification and that such an Agreement would apply only to the individual holding the Chief's position at the time of the agreement. On July 23, 2003, the Union sent a demand to bargain to the Employer. No bargaining took place and on September 22, 2003, the Union filed a charge of unfair labor practice. This Board issued a Complaint on January 9, 2004. On March 14, 2006, this Board issued its decision in ULP 5687 finding that the Chief was still a member of the bargaining unit and that the Employer committed an unfair labor practice when it refused to bargain over the terms and conditions of the Chief's employment. On August 3, 2006, the Employer filed the within Petition to remove the Chief from the bargaining unit.

### **POSITIONS OF THE PARTIES**

The Employer argues that the position of Police Chief must be removed from the Board's certification and from the bargaining unit for three reasons: (1) The Chief's position is supervisory; (2) The Chief's position is confidential; (3) The Chief's position does not share a community of interest with the other members of the patrol officers' bargaining unit.

The Union argues that the Board simply has no jurisdiction to exclude a Police Chief from a bargaining unit because the legislature has specifically afforded bargaining rights to Police Chiefs, pursuant to R.I.G.L. 29-9.2-3 (2). The Union also argues that the prohibition against supervisory and confidential employees inclusion within bargaining units does not apply to municipal police officers' Unions because these prohibitions do not appear specifically within the Municipal Police Arbitration Act. Finally, the Union argues that there is no rational basis for the Board to establish a single member bargaining unit in Warren [for the Police Chief] because all the members of the Police Department, including the Chief, share a community of interest.

### **DISCUSSION**

The first issue presented is whether or not the Board has jurisdiction to consider the question of removing the position of a Municipal Police Chief from a particular bargaining unit, in light of the statutory definition of police officer under

the Municipal Police Arbitration Act which provides: "Police officer means a full-time police officer from the rank of patrolman up to and including the rank of Chief, including policewomen, of any particular police department in any city or town within the state."

This question cannot be answered by simply referring to the statute alone as suggested by the Union. Since this statute has been the subject of litigation over the years, the Board looks to case-law in making its determination. There are three cases that are specific to the Municipal Police Arbitration Act which the Board also discussed in ULP 5687: (1) Galucci v Brindamour, 477 A.2d 110, (R.I. 1984). (2) FOP v Westerly, 659 A.2d 1104 (R.I.1995). (3) Town of Lincoln v Lincoln Lodge, 660 A.2d 710 (R.I.1995)

In Galucci v Brindamour, 477 A.2d 110, (R.I. 1984), the Court examined the statutory right of collective bargaining afforded by the Rhode Island General Assembly to "all the policemen of the city or town police department" and stated:

"...the statutory right set forth was designed for the benefit of three parties. First, the collective bargaining agent was clearly given the right to bargain on behalf of all policemen after having been chosen by a majority of such policemen to do so. Second, any person who came within the definition of 'policeman' was given the right to be represented by such bargaining agent. Third, the town derived the benefit of the statute as a whole on achieving stability and tranquility in its police department." Id at 619.

In Galucci, a retiring Police Chief who had not been a member of the Union during his tenure as Chief sought the payment of unused sick, vacation and personal time that he would have been permitted to receive, if he had remained a member of the bargaining unit. In Galucci, despite the Board's certification of the Union as the representative of all members of the department from patrolman up to and including chief, each Collective Bargaining Agreement negotiated between the town and the Union specifically exempted the chief from the unit. The Court in Galucci stated that the question before it was whether the parties for whose benefit this statute was enacted have the power to waive those benefits by entering into a contract that specifically excludes the Chief. Id at 618. The Court held waiver was permissible and in the facts presented under Galucci, held that the plaintiff (Galucci), the brotherhood (Union) and the Town both explicitly and implicitly, over a significant period of time have chosen to waive the

inclusion of the Chief of Police in the Collective Bargaining Contract and that they freely and voluntarily chose to forego whatever benefit may have flowed to each of the three as a result of including the Chief in the bargaining unit. Id at 619.

In FOP v Westerly, 659 A.2d 1104 (R.I.1995) the Supreme Court was reviewing whether or not an interest arbitration panel had the authority to exclude the Chief, Captains and Lieutenants from the bargaining unit and held that the interest arbitration panel had all the same authority as the parties [Union and Town] had themselves during negotiations. Id at 1106. The Court noted that the Master Agreement in effect between the parties at the pertinent time specifically excepted the Chief, Captains and Lieutenants. The Court also went on to discuss its reasons for upholding the *arbitration panel's exclusion* of the Chief, Captains and Lieutenants from the collective bargaining unit, as *appropriately excluding managerial and supervisory personnel*.

In Town of Lincoln v Lincoln Lodge, 660 A.2d 710 (R.I.1995), the Court addressed several certified questions submitted to it by the Superior Court, including the question of whether or not the position of chief of police should be excluded from Lincoln Lodge's bargaining unit on the basis of public policy. The Court held that the General Assembly's inclusion of police chiefs as members of local bargaining units must be evaluated "in light of a particular Chief's powers, responsibilities, policy making authority and the extent of that Chief's actual involvement in negotiations." Id at 716.

In light of the foregoing discussion, the Board finds that it is not precluded from considering the question of whether or not police chiefs may be removed from a certified bargaining unit. We believe that the Court's decision in Lincoln Lodge makes it clear that as a matter of public policy, police chiefs or other police department employees who exercise managerial prerogatives on behalf of their employer, may be excluded from a rank and file bargaining unit.

In undertaking the analysis of whether or not a police chief may be removed from a bargaining unit previously certified by this Board, we are cognizant of our prior ruling in ULP 5096, City of Pawtucket /Police Department. In Pawtucket, the Board had the occasion to determine whether or not the City of

Pawtucket had committed an unfair labor practice in entering into a private Employment Agreement with its Chief of Police, Richard DeLyon. The Union in that matter had argued that notwithstanding the Chief's personal resignation from the Union, the position of Chief was never removed from the Collective Bargaining Agreement and therefore, the City had no right to bargain directly with the Chief. The City of Pawtucket, while acknowledging that it did not bargain with the Union, argued that it did not have to do so because the Union had waived the Chief's bargaining unit status. In finding for the Employer, this Board held that since the Union had issued an ultimatum [of three choices] to Chief DeLyon, which included the option of resigning from the Union, the Union had implicitly agreed to whatever choice Chief DeLyon might make. The Board also specifically held, "in order to reverse the status quo, agreement by all three parties is necessary."

To the extent that the City of Pawtucket decision needs clarification in light of today's decision, the Board reaffirms the holding in City of Pawtucket, with the *qualification* that the ability of the parties to enter into a Tri-party Agreement assumes that the Chief in a particular municipality does not have managerial duties. In the event that a Chief does have managerial duties, then a Tri-party Agreement would seem to this Board to be *ultra vires*, in light of the Court's decision in Lincoln Lodge. We also take this opportunity to clarify that if the three parties are unable to agree on the status of a Police Chief and the bargaining unit, the parties are free to seek assistance from this Board, through the unit clarification process.

Having found that this Board does have the jurisdiction to hear petitions seeking the removal of police chiefs from previously certified bargaining units, we now turn our attention to the specific facts of the within petition. As mentioned previously, Thomas D. Gordon was first appointed to the position of Warren Police Chief in 2001. Chief Gordon was the only witness to testify before the Board in this matter. On direct examination, Chief Gordon described the differences between his position as Police Chief from the duties of the ranks and file members of the bargaining unit as follows:

“I think it is different in that it is more an administrative position. I’m responsible for strategically managing the Department, for managing the Department into the future, for being sure that the rank and file have what they need, for assuring that budgetary needs are looked out for, for assuring that policies and procedures are in place, and for the overall efficiency and effectiveness of the department, it’s my responsibility.” (TR. p. 26)

When questioned as to his level of authority for discipline, the Chief responded: “That is my responsibility, to ensure when it is necessary that discipline is meted out, whether it be positive or negative discipline, it’s part of my job.” (TR. pgs. 26-27)

As to funding issues, the Chief testified that he alone is responsible for searching for grants, obtaining grants and administering the grants. (TR. p. 28) The Chief testified that he is also responsible to issue policies and procedures, and standards of conduct for the Department and sends copies of these regulations to the Town Manager. (TR. p. 31) The Chief testified that historically, the authorization of policies and procedures has been solely within the realm of the chief’s duties. (TR. pgs. 31-32) The Chief also testified that he is regularly called to attend Executive Sessions of the Town Council. (TR. p. 33) He also testified that he is sometimes made privy to confidential communications pertaining to labor relations. (TR. pgs. 34-35) When it comes to hiring, the Chief decides in any given year, whether the Department will do a physical agility test first or a written examination. The Chief will choose what written examination to administer and the cut-off score necessary for passing. (TR. p. 36) The chief establishes the oral board, selects the members of the board, and asks the board to make recommendations to him. He, in turn, will then make a recommendation for hiring to the Town Manager. (TR. p. 37)

As far as labor relations issues are concerned, the Chief has the authority to and does adjust grievances. (TR. p. 38) He also participates on the management side at arbitration hearings. (TR. p. 38) Although the Chief has participated in negotiations on behalf of management for the police officers’ contract, he did not do so in for the current contract. (TR. p. 41)

The Chief has the authority, pursuant to the Police Officers' Bill of Rights, to issue a suspension for up to two days. He can also mete out lesser forms of discipline such as letters of reprimand or partial day suspensions. (TR. p. 39) On cross-examination, Chief Gordon testified that he believes he has the authority to issue whatever discipline is necessary within the Department, but that if he wants to terminate an employee, he must receive sanction from the Town Manager to start termination proceedings. (TR. p. 48)

In its Brief to the Board, the Employer does not discuss the issue of whether or not the Police Chief is a managerial employee. However, based upon the evidence adduced at hearing, the Board finds this necessary and appropriate.

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 1104,1107 (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.

In this case, it is overwhelmingly clear that Chief Gordon's description of his duties, responsibilities, and level of authority rise to the level of a managerial employee. He specifically has the authority, in the interest of his employer, to not



only effectuate policies and procedures, but to establish them. The Chief's description of his authority to make policy, issue discipline and adjust employee grievances, makes it clear that such duties are not routine because the actions that he takes clearly implement his employer's policies.

Supervisory Employees:

In the Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board, 694 A.2d 1185, 1189 (R.I. 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))

Under federal labor law, this list of supervisory function 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 1132 (1996). It also includes individuals who possess the authority to recommend any of the foregoing actions.

In this case, the Chief's testimony established that he has the sole authority to issue discipline including up to two days suspension. In addition, the Chief has the authority to adjust grievances and to effectively recommend hiring and firing of employees. Therefore, the position of Police Chief is also supervisory.

Since the position of Warren Police Chief, as presently constituted, is both managerial and supervisory, this position is not eligible for inclusion in collective bargaining. Therefore, the Employer's petition to remove this position from the bargaining unit is hereby granted.

**FINDINGS OF FACT**

- 1) The Town of Warren 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.
- 3) The Town of Warren Police Officers have been organized and represented by a Union since February 1969, pursuant to this Board's certification of representatives in Case No. EE-1836. The certification includes as members of the bargaining unit, "all police officers up to and including chief."
- 4) On May 17, 1993, the Board issued a second "Certification of Representatives" to the International Brotherhood of Police Officers which recognized the Union as the certified bargaining representative for all regular full-time police officers" as defined in Title 28-9.2-3. At the time of this certification, the Chief of Police was Mr. Robert Pare, who was and remained a member of the bargaining unit until his retirement sometime in 1994.
- 5) On or about March 7, 1995, the Employer entered into a private, three-year Employment Agreement with a new Police Chief, Mr. Thomas B. Perrotto.
- 6) On or about September 22, 1997, the Employer entered into another private, three-year Employment Agreement with Ely G. Barrett, as the next Police Chief. On October 14, 1997, after executing the agreement with Chief Barrett, the Town of Warren enacted an amendment to the Town's Code of Ordinances, identified as Section 15-4 which provided that "the Police Chief shall not be a member of the Union which represents the bargaining unit of the Warren Police Department, but may enter into an employment contract with the Town of Warren, at the discretion of the Town Council.
- 7) On or about January 18, 2001, the Employer entered into another private Employment Agreement with Police Chief Thomas D. Gordon for the period January 18, 2001 through January 1, 2004.
- 8) At no time from March 1995 until January 2003, did the Union question the status of the Police Chiefs having private Employment Agreements, instead of being covered by the collective bargaining agreement.

- 9) In January 2003, a Union representative did make an inquiry to the Town Manager, Michael Abruzzi, concerning Chief Gordon's status. After an informal hearing conducted on July 22, 2003, the Board, through its Administrator, notified the Union and the Employer that due to the Board's certification in Case No EE 3535 and R.I.G.L. 28-9.2-3, a Tri-party Agreement would be required to remove the Chief from the certification and that such an Agreement would apply only to the individual holding the Chief's position at the time of the Agreement.
- 10) On July 23, 2003, the Union sent a demand to bargain to the Employer. No bargaining took place and on September 22, 2003, the Union filed a charge of unfair labor practice. This Board issued a complaint on January 9, 2004.
- 11) On March 14, 2006, this Board issued its decision in ULP 5687 finding that the Chief was still a member of the bargaining unit and that the Employer committed an unfair labor practice when it refused to bargain over the terms and conditions of the Chief's employment.
- 12) Chief Gordon has the authority to issue discipline, including suspensions, for up to two days.
- 13) Chief Gordon is responsible for and has the authority to issue policies and procedures, standards of conduct and general orders for the police department. After issuing these, the Chief sends copies of these regulations to the Town Manager.
- 14) The Chief also is regularly called to attend Executive sessions of the Town Council and he is sometimes made privy to confidential communications pertaining to labor relations.
- 15) When hiring new officers is necessary, the Chief will choose what written examination to administer and the cut-off score necessary for passing. The Chief establishes the oral board, selects the members of the board, and asks the board to make recommendations to him. The Chief will then make a recommendation for hiring to the Town Manager.
- 16) As far as labor relations issues are concerned, the Chief has the authority to and does adjust grievances. He also participates on the management side at

arbitration hearings. Although the Chief has participated in negotiations on behalf of management for the police officers' contract, he did not do so in for the current contract

- 17) The Chief has the authority, pursuant to the Police Officers' Bill of Rights, to issue a suspension for up to two days. He can also mete out lesser forms of discipline such as letters of reprimand or partial day suspensions. For employee terminations, the Chief must receive sanction from the Town Manager.

#### **CONCLUSIONS OF LAW**

- 1) The General Assembly's inclusion of Police Chiefs as members of local bargaining units must be evaluated in light of a particular Chief's powers, responsibilities, policy making authority, and the extent of that Chief's actual involvement in negotiations. Therefore, this Board has jurisdiction to determine whether the position of Police Chief may be removed from an existing certification of a bargaining unit.
- 2) The position of Chief of Police held by Chief Thomas Gordon is both managerial and supervisory and is therefore, ineligible for inclusion within the rank and file bargaining unit.

#### **ORDER**

- 1) The position of Chief of Police in the Town of Warren is hereby removed from the bargaining unit certified by Case No. EE-3535. This order shall not preclude a later petition for accretion back into the bargaining unit, if the position of Police Chief ever loses its managerial and supervisory functions.

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

IN THE MATTER OF

RHODE ISLAND STATE LABOR  
RELATIONS BOARD

-AND-

TOWN OF WARREN

CASE NO: EE-3535

**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 EE-3535 dated May 2, 2008, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **May 2, 2008**.

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

Dated: May 2, 2008

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

EE-3535

RHODE ISLAND STATE LABOR RELATIONS BOARD

*Walter J. Lanni*

Walter J. Lanni, Chairman

*Frank J. Montanaro*

Frank Montanaro, Member (Dissent)

*Joseph V. Mulvey*

Joseph V. Mulvey, Member (Dissent)

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Gerald S. Goldstein, Member

*Ellen L. Jordan*

Ellen L. Jordan, Member

*John R. Capobianco*

John R. Capobianco, Member (Dissent)

*Elizabeth S. Dolan*

Elizabeth S. Dolan, Member

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

Dated: May 2, 2008

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

EE-3535