

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

IN THE MATTER OF	:	
	:	
	:	
RHODE ISLAND BOARD OF REGENTS/ DEPARTMENT OF EDUCATION	:	CASE NO: EE- 3729
	:	
-AND-	:	
	:	
RIDE LEGAL COUNSEL/HEARING OFFICER PROFESSIONAL UNION	:	

DECISION AND DIRECTION OF ELECTION

TRAVEL OF CASE

The above-entitled matter came on to be heard before the Rhode Island State Labor Relations Board (hereinafter "Board") as a Petition for Representation filed by the Rhode Island Department of Education (RIDE) Legal Counsel/Hearing Officer Professional Union, seeking to create a bargaining unit comprised of all full-time Legal Counsel/Hearing Officer positions within the Rhode Island Board of Regents/Department of Education, but excluding Chief Legal Counsel and all other full-time positions within the Rhode Island Board of Regents/ Department of Education.

The petition was filed on November 9, 2012. An informal hearing held on December 12, 2012. Formal hearings were conducted on May 9, 2013 and June 20, 2013. Both the Petitioner and the Respondent had full opportunity to present evidence and to examine and cross-examine witnesses. Upon conclusion of the hearing, the parties each filed briefs on or about September 4, 2013. In arriving at the decision herein, the Board considered the testimony and evidence submitted at the formal hearing and reviewed both briefs.

FACTUAL SUMMARY

The proposed bargaining unit consists of three (3) Legal Counsel/Hearing Officer positions at the Rhode Island Department of Education. At the time of the hearing, these positions were occupied by Paul Pontarelli, Esq., Kathleen Murray, Esq., and Forrest Avila, Esq., all long-time employees.¹ Signature cards were submitted with the petition and were verified by the Board's staff. The position of Legal

¹ According to testimony at the hearing, Attorney Avila was scheduled to retire in the summer of 2013.

Counsel/Hearing Officer is in the non-classified service. The job description for the position was submitted as Petitioner's Exhibit #1. Duties and responsibilities of the position include:

- Provide written legal opinions to Commissioner and staff, as consulted.
- Provide legal advise to staff as consulted.
- Provide legal representation to the Department in litigation before boards, commissions, and courts, as necessary.
- Hear and decide appeals on any matter of dispute between parties arising under law relating to schools or education and prepare written decisions for review by and approval of the Commissioner.
- Interpret state laws, rules and regulations relating to education, the functioning of administrative agencies, and other related areas of state and federal law.
- Assist appropriate staff in developing and drafting legislation, rules and regulations relating to education.
- Review and advise with respect to legislation, rules and regulations developed by outside parties and related to education.
- Keep abreast of laws, rules and regulations and court decisions affecting education, and assist and advise the Commissioner and Department staff accordingly.
- Review contract proposals, grants and other materials for conformance with the Department's objectives and adherence to pertinent statutes, rules and regulations.
- Investigate allegations of teacher/applicant noncompliance with certification requirements, represent the Department's interests in informal resolution of certification questions, and represent the Department in revocation proceedings and hearings on denials of teaching certificates.
- Provide information on education law to members of the education community, including parents, teachers, administrators and school committee members.
- Hold public hearings as required.

The Petitioner presented testimony from Ms. Margaret Santiago, the Human Resources Manager for the Rhode Island Department of Elementary and Secondary

Education (RIDE). Ms. Santiago testified that as it pertains to the Department's labor relations matters, she has worked with Attorney George Muskian, Attorney George Rinaldi, Attorney Joseph Whelan, and Attorney Ron Cavallaro. She testified that in her three (3) years as Human Resources Manager, she has not worked with any of the Hearing Officer Attorneys that are involved in the pending petition. She could recall that Attorney Pontarelli was involved in litigation concerning a terminated employee from the Davies School, but verified that Attorney Pontarelli was not involved in the discussions or decisions leading up to the termination.

Ms. Santiago testified that when it comes to issues surrounding contracts and collective bargaining, she deals with Attorney George Muskian and Attorney David Abbott (also the Deputy Commissioner of RIDE). When she deals with grievances and arbitrations, she works with Attorney Muskian and not any of the three (3) Hearing Officers. (TR. 5/9/2013 pg. 12) Ms. Santiago also stated that none of the three (3) Hearing Officers have access to confidential information pertaining to collective bargaining. Access to such information is limited to the negotiation team. Id. Ms. Santiago verified that the pay-grade for Chief Legal Counsel is higher than the pay-grade for the Hearing Officers.

Upon direct examination by the Employer, Attorney Pontarelli testified that a few years ago, he had a fleeting conversation with Attorney Muskian about an unfair labor practice charge that had been filed against the Central Falls School District. Attorney Muskian had inquired about the statute of limitations for unfair labor practice charges and the necessity of informal hearings. (TR. 5/9/2013 pg. 21) Attorney Pontarelli testified that in his capacity as a hearing officer, he does not handle teacher discipline or termination cases. He explained that while his job description might technically permit him to undertake such work, he does not believe that he could ethically perform that work because he investigates teacher misconduct and prosecutes such cases and that would present a conflict. (TR. 5/9/2013 pg. 25) Attorney Pontarelli does not normally conduct RIDE employee grievance hearings, although he did do a couple of them in the mid 1990s. (TR. 5/9/2013 pg. 33) (Respondent's Exhibits #1 & #2)

In reviewing the bulleted items on job description, Attorney Pontarelli testified that he has provided written legal opinions on a wide variety of topics. (TR. 5/9/2013 pg. 28)

He acknowledged that there was no written limitation on his job description that would prevent him from appearing before this Board or the Human Rights Commission; but that he does not perform labor relations work and that the Chief Legal Counsel does, pursuant to his separate job description. (TR. 5/9/2013 pgs. 31-32) Attorney Pontarelli testified that he was asked to prepare an advisory opinion concerning seniority and job transfers, in connection with an appeal arising within the Portsmouth School Department. (TR. 5/9/2013 pgs. 54-55) Attorney Pontarelli sometimes provides testimony and performs lobbying at the General Assembly; sometimes the topic of legislation is labor relations. (TR. 5/9/2013 pg. 58)

Attorney Pontarelli testified that his office is located in the RIDE offices at 255 Westminster Street in Providence and that the office of Higher Education is also located at the same address. (TR. 5/9/2013 pg. 59) Attorney Pontarelli is aware that the Office of Higher Education and RIDE are merging, pursuant to legislative action and there are other attorneys who work for Higher Ed. (TR. 5/9/2013 pg. 60) Attorney Pontarelli confirmed that he worked on some litigation involving a teacher from the Davies school who had been terminated and who sued, claiming statutory tenure protection. (TR. 5/9/2013 pg. 76) Attorney Pontarelli also entered his appearance for RIDE in litigation involving the East Providence School Committee, but he testified that RIDE did not actively participate in that litigation. (TR. 5/9/2013 pg. 77) Attorney Pontarelli represented the Commissioner in recent litigation concerning the North Providence Teachers' Union. (TR. 5/9/2013 pg. 78)²

Attorney Pontarelli testified that Attorney George Muskian, Chief Legal Counsel, is his immediate supervisor. Attorney Pontarelli also acknowledged that if Attorney Muskian is out of the office, whether ill or on vacation, his work could fall to Attorney Pontarelli. (TR. 5/9/2013 pg. 80)

On examination by Attorney Murray, Attorney Pontarelli testified that since the creation of the Chief Legal Counsel position in approximately 1998, that he has not been involved in any labor relations matters within the department, even when Attorney Muskian was out for sick leave or vacation. (TR. 6/20/2013 pg. 86) Attorney Pontarelli also clarified that the fleeting conversation he had with Attorney Muskian concerning the

² The nature of this litigation was not presented into evidence.

Central Falls matter, mentioned supra, lasted approximately forty-five (45) seconds to one (1) minute and that it took place next to their legal assistant's printer. (TR. 6/20/2013 pg. 86) The record also reflects the fact that Attorney Pontarelli had the occasion to file a grievance on his own behalf; which was heard and denied by Commissioner Gist. (TR. 6/20/2013 pg. 90) (Respondent's Exhibit #6)

Attorney Pontarelli acknowledged that when he serves as a Hearing Officer, he is serving as the Commissioner's designee, pursuant to the two (2) statutes that give the Commissioner jurisdiction. When asked if he was "representing" the Commissioner in these hearings, Attorney Pontarelli testified as follows:

"That is a very complex issue because in the role of the hearing officer and in adjudicating cases, my approach has been that the hearing officer needs to base the decision on the record created in the hearing and the law applied to that factual record, and therefore I am unable to consult with the Commissioner or any staff of the Commissioner's office or anyone at RIDE in processing a matter for decision. Unfortunately, that's just the approach that I believe I have to take, and sometimes it does rub up against the notion that I, 'represent the Commissioner or that I represent RIDE'. I think the adjudication function isolates the hearing officer and it has an isolated need through my own choice." (TR. 6/20/2013 pgs. 98 - 99)

Attorney Pontarelli explained that the only information he may consider in deciding a case is information that is either produced as evidence at the hearing or by stipulation of the parties' attorneys. He might ask the attorneys for briefs and if they are not adequate for his needs, he will do research on law. He does not confer with others about the decision or accept input from others as to what the decision will be. He stated that sometimes his decision may cause displeasure in the upper reaches of the Department, but that even still, the Commissioner almost always signs the decision. (TR. 6/20/2013 pgs. 100 - 101)

DISCUSSION

The Petitioner argues that the position of Legal Counsel/Hearing Officer is not precluded from participation in collective bargaining and that the positions share a community of interest with each other and therefore, forms an appropriate bargaining unit. The Respondent argues that these positions are by nature, confidential, and therefore, simply ineligible for collective bargaining.

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 which 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)

The definition of “confidential” for collective bargaining purposes, as set forth in Barrington, is purposefully and narrowly constricted to two (2) types of employees, because “a more expansive application of the exclusionary rule would deprive a great number of employees, in an unwarranted fashion, of the statutory right to collectively bargain.” Barrington at 1136, referencing, Note, “*The Labor-Nexus” Limitation on the Exclusion of Confidential Employees—NLRB v. Hendricks County Rural Electric Membership Corp.*, 16 Ga. L. Rev. 745, 754 (1982). Thus, the word “confidential” within the scope of labor relations has a very specific legal meaning, which departs significantly from the routine dictionary definition of confidential (treated with confidence, private, secret).

The proposed bargaining unit of Legal Counsel/Hearing Officers in this case admittedly presents an issue of first impression for this Board. At first blush, the near automatic response to a representation petition for a bargaining unit of attorneys may be one of disbelief that such a thing can even be possible, even in the public sector. After all, the work of attorneys is universally considered to be synonymous with “confidentiality”, as that word is traditionally understood. However, public sector attorneys in many states have been permitted to join labor organizations. In some cases, this development is old news.³ In each case, the efforts are conducted pursuant to the applicable statutory provisions unique to each state and often include the traditional exclusions of confidential, supervisory or management employees. Thus, for Rhode Island to now consider the issue of attorneys in public sector labor Unions, is not tantamount to “Crossing the Rubicon”, but rather is more of a reminder that the Board must simply follow well-worn path of analysis that it follows for all representation petition disputes.

³ New York, Illinois, California, Florida, Arizona and Oregon. Private sector attorneys are also joining the unionization efforts in various states as well.

DOES THE LEGAL COUNSEL/HEARING OFFICER POSITION IN THE PROPOSED BARGAINING UNIT ASSIST AND ACT IN A CONFIDENTIAL CAPACITY TO PERSONS WHO FORMULATE, DETERMINE, AND EFFECTUATE MANAGEMENT POLICIES IN THE FIELD OF LABOR RELATIONS?

In the present case, we turn then to the principles of the labor-nexus test first enunciated in NLRB v. Hendricks County Rural Electric Membership Corp, 454 U.S. 170 at 189) as adopted by our state Supreme Court in Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992):

In regard to the first category, the supervisor of the employee whose status is under consideration must have ongoing responsibility for developing labor policy. This qualification is to prevent an employer from temporarily investing a supervisor with influence over labor matters so that his or her personal secretary or assistant might be precluded from belonging to a bargaining unit. In this vein, employees who assist persons who merely serve as consultants or advisors in the field of labor relations do not fall within the scope of the test. Holly Sugar Corp., 193 N.L.R.B. 1024 (1971). The relevant supervisor must also operate at a higher level than merely implementing routine, day-to-day administrative decisions needed to carry out a collective bargaining agreement or other labor policy without having any meaningful input into the contours of such an agreement or policy. See S. Mukamal & J. Grenig, Collective Bargaining: The Exclusion of "Confidential" and "Managerial" Employees, 22 Duq.L.Rev. 1, 20-21 (1983). Some tangible influence by the supervisor on the development of labor policy is required because many employees in an organizational hierarchy have an arguably confidential relationship with a superior who at least "effectuates" labor policy. A more expansive application of the exclusionary rule would deprive a great number of employees, in an unwarranted fashion, of the statutory right to bargain collectively. See Note, The "Labor-Nexus" Limitation on the Exclusion of Confidential Employees--NLRB v. Hendricks County Rural Electric Membership Corp., 16 Ga.L.Rev. 745, 754 (1982) (citing Union Oil Co. v. NLRB, 607 F.2d 852, 853 (9th Cir.1979)).

In this case, the supervisor of the employees whose status is under consideration, Chief Legal Counsel George Muskian, has the responsibility for developing labor policy. For instance, Petitioner's Exhibit #2, the Chief Legal Counsel's job description, provides in the "general statement of duties" section at the top: "To provide legal counsel to the Commissioner of Education and representation of the Department in matters related to educational policy and law and labor relations." The "general statement of duties" section of the job description for Legal Counsel/Hearing Officer (Petitioner's Exhibit #1) provides: "Incumbents are responsible for representing and providing legal advice and other legal services to the Department of Education, providing information related to educational law to members of the education community, conducting hearings, and preparing written decisions resolving appeals."

The Chief Legal Counsel operates at a higher level than the three (3) Hearing Officers and does not merely implement routine, day-to-day administrative decisions needed to carry out a Collective Bargaining Agreement or other labor policy without

having any meaningful input into the contours of such an agreement or policy. As evidence of this authority, the job description for Chief Legal Counsel provides that it reports to the Commissioner and General Counsel and charges the position with the responsibility to: “advocate for changes in policies, laws, rules and regulations that are inconsistent with the efficient and effective management of public schools” and “to ensure that the labor relations function of the Department is carried out in a manner that reflects the core principles of shared responsibility, commitment to worker development and professional responsibility.” (See Petitioner’s Exhibit #2) The only references to the Commissioner in the job description for Legal Counsel/Hearing Officer are: (1) Provide written legal opinions to Commissioner and staff, as consulted; (2) Prepare written decisions for review by and approval of the Commissioner. (3) Keep abreast of laws, rules, regulations and court decisions affecting education and assist and advise Commissioner and Department staff accordingly.

The Chief Legal Counsel is responsible to “oversee work assignments of staff attorneys to ensure that all requirements are met in a timely manner.” (See Petitioner’s Exhibit #2) The job description for Chief Legal Counsel also requires that the incumbent have “a thorough knowledge of the methods, practices and procedures of government law, with an emphasis on education law, labor and employment law.” Contrasting the Chief Legal Counsel’s position to the Hearing Officer’s position, the Hearing Officers’ job description simply requires a “knowledge of applicable Federal, State and Local laws, and rules and regulations.” (See Petitioner’s Exhibit #1) There is no specific emphasis on any specialized area of law; especially employment or labor law, as required by the Chief Legal Counsel.

Hearing Officers can be hired with as little as three (3) years experience in educational law or a related field; whereas, the Chief Legal Counsel position requires “considerable experience in a responsible capacity involving public sector law involving education, employment, labor and child advocacy.” (Petitioner’s Exhibit #2)

By our reading of these two (2) job descriptions, as well as the testimony of Margaret Santiago, we conclude that the Legal Counsel/Hearing Officer positions function as lower-level staff attorneys performing the day-to-day operations of a typical government staff attorney and that the Chief Legal Counsel is charged with the

managerial and supervisory responsibilities, as well as sharing a confidential position with the Commissioner and General Counsel. There was simply no evidence in the record to suggest that the Hearing Officers act in a confidential capacity to any other employee of the department as it pertains to the formulation, determination or effectuate management policies in the field of labor relations. As such, we do not find the Legal Counsel/Hearing Officer position to be confidential employees under the first prong of the labor-nexus test.

DOES THE LEGAL COUNSEL/HEARING OFFICER POSITION IN THE PROPOSED BARGAINING UNIT REGULARLY HAVE ACCESS TO CONFIDENTIAL INFORMATION CONCERNING ANTICIPATED CHANGES WHICH MAY RESULT FROM COLLECTIVE BARGAINING NEGOTIATIONS?

According to the Barrington Court's decision:

"In regard to the second category, the employee in question must be 'in a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy.' NLRB v. Lorimar Productions, Inc., 771 F.2d 1294, 1298 (9th Cir.1985) (citing Union Oil Co. v. NLRB, 607 F.2d 852, 853 (9th Cir.1979)). Casual access to labor-related information is not enough to disqualify an employee from belonging to a bargaining unit. For example, the mere typing of or handling of confidential labor relations material does not, without more, imply confidential status. United States Postal Service, 232 N.L.R.B. 556 (1978); Ernst & Ernst National Warehouse, 228 N.L.R.B. 590 (1977). The employee at issue must have regular and considerable access to such confidential information as a result of his or her job duties. The scope of the exclusionary rule does not extend to employees who have such access on an occasional, substitute, or overflow basis. See 22 Duq.L.Rev. at 22-23." Barrington School Committee v Rhode Island State Labor Relations Board. 608 A.2d 1126, 1137 (R.I. 1992)

Despite the Respondent's arguments to the contrary at page eight (8) of its brief, Ms. Santiago testified that as it pertains to the Department's labor relations matters, she has worked with Attorney George Muskian, Attorney George Rinaldi, Attorney Joseph Whelan, and Attorney Ron Cavallaro. She testified that in her three (3) years as Human Resources Manager, she has not worked with any of the Hearing Officer Attorneys that are involved in the pending petition. As set forth above, Ms. Santiago testified that when it comes to issues surrounding contracts and collective bargaining, she deals with Attorney George Muskian and Attorney David Abbott (also the Deputy Commissioner of RIDE). When she deals with grievances and arbitrations, she works with Attorney Muskian and not any of the three (3) Hearing Officers. (TR. 5/9/2013 pg. 12) Ms. Santiago also stated that none of the three (3) Hearing Officers have access to confidential information pertaining to collective bargaining.

Access to such information is limited to the negotiation team. The sum total of testimony, as it relates to the interaction of any of the Hearing Officers herein, pertaining to labor relations, was that of the casual "water cooler" type interaction between Mr. Muskian and Mr. Pontarelli concerning the statute of limitations for filing unfair labor practice charges and the requirement of informal hearings before this Board. The answers to either of those two (2) questions can readily be found in our published rules and regulations and certainly do not constitute confidential information. The encounter described by Mr. Pontarelli lasted approximately forty-five (45) seconds to one (1) minute and did not delve into the particulars of any case or controversy. Indeed even if the conversation had lasted longer or gone into more detail, we do not believe that such a casual, isolated incident would have served as evidence of "regular and considerable access to such confidential information as a result of his or her job duties" but rather is more descriptive of an employee who have such access on an occasional, substitute, or overflow basis. We find, therefore, that based upon Ms. Santiago's un rebutted testimony and the issues just described that the evidence establishes, unequivocally, that the proposed members of the bargaining unit do not qualify as "confidential" under the second prong of the labor-nexus test.

DOES THIS CASE PRESENT THE APPROPRIATE FACTUAL CIRCUMSTANCES THAT WOULD WARRANT AN EXPANSION OF THE LABOR-NEXUS TEST IN DETERMINING CONFIDENTIALITY OF EMPLOYEES?

In Barrington, the Court stated that it was "declining at this time to embrace the labor-nexus test as necessarily controlling in all future instances. It may be that a broader definition of those employees considered to be 'confidential' would be desirable in other circumstances." *Id.* In making this statement, the court included the following footnote in its decision:

"In NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981) the United States Supreme Court concluded that the NLRB's usage of the labor-nexus test has a reasonable basis in law. In a separate opinion, part concurrence and part dissent, Justice Powell, joined by three other members of the Court, advanced an alternative formulation of the "confidential employee" doctrine that bears examining. Justice Powell stressed that the division between management and labor is "fundamental to the industrial philosophy of the labor laws of this country." *Id.* at 193, 102 S.Ct. at 230, 70 L.Ed.2d at 340. In order to maintain the adversary system of labor relations, he asserted that "employees who by their duties, knowledge, or sympathy [are] aligned with management should not be treated as members of labor." *Id.* In Justice Powell's view, the labor-nexus test is but a means to effectuating this end. He is persuaded that certain other

confidential assistants "who are privy to the most sensitive details of management decision making, [and] who work closely with managers on a personal and daily basis" should be precluded from collective bargaining even if they do not handle labor relations materials as part of their duties. *Id.* at 194-95, 102 S.Ct. at 231, 70 L.Ed.2d at 341. This is because "the essence of their working relationship requires undivided loyalty." *Id.* at 200, 102 S.Ct. at 233, 70 L.Ed.2d at 344. We are unwilling to decide at the present time the extent to which Justice Powell's doctrine is compatible with the objectives of the Rhode Island Labor Relations Act. For purposes of the instant case it is clear that even under Justice Powell's approach employees who fulfill the requirements of the labor-nexus test may not belong to a bargaining unit.

In the present case, the Respondents have argued that when the Board of Regents and RIDE merger are completed, there will be other attorneys who will necessarily have to be included in the bargaining unit being proposed by this case. These attorneys were identified as Anne-Marie Coleman, Esquire and Ronald Cavallaro, Esquire. The Board took judicial notice of the fact that both of these attorneys have appeared before this Board from time-to-time, presenting management's interests. The Respondent, however, simply argued this issue and presented no documentation that these two (2) attorneys from the Board of Regents hold similar job descriptions. Although the Board believes that both of these attorneys function at much higher levels than the Hearing Officers herein, we can make no factual finding on this issue, as no evidence was introduced into the record on the issue.

The Respondent also argues that the Hearing Officers assist and act in a confidential capacity to Mr. Muskian and independently have access to confidential information related to labor relations within RIDE, related to grievances and other labor relations issues. The Respondent argues that the Hearing Officers personally have heard and decided labor grievances from RIDE employees in the past and that nothing has changed in their job descriptions. (Respondent's brief pgs. 8-9) The Respondent argues that such activity precludes the Hearing Officers from engaging in collective bargaining on their own behalves. In addition, the Respondent argues that in hearing labor relations grievances from disciplined teachers, the Legal Counsel/Hearing Officers serve as advisors to the Commissioner in her capacity to hear the grievances and write the decisions for the Commissioner deciding those grievances. (Respondent's brief pg. 10)

The record established that Attorney Pontarelli heard and decided RIDE employee grievances, one each in both 1995 and 1996 and that Attorney Avila conducted a hearing in 1995. (See Respondents Exhibits #1, #2, #3, and #4) In addition, the Hearing Officers are designated by the Commissioner to hear appeals from decisions pertaining to teacher discipline, teacher certification, and teacher terminations; and to make the actual determinations as to the cases and to issue written decisions, which the Commissioner signs. The Commissioner does not hear and decide the cases and then ask the Hearing Officer to write the decision or discuss how to write the decision so that it may be sustained under a legal challenge (as this Board's own counsel does). What seems to be lost on the Respondent on these matters is that the Hearing Officers are acting as the "neutrals" in these matters. The Hearing Officers are not "prosecuting" the grievances on behalf of management of RIDE.⁴ Rather, they are acting in a quasi-judicial capacity, hearing evidence and applying the law to the facts and rendering a written decision. A neutral Hearing Officer, by nature and function cannot be "aligned with management", or engage in direct communications with management concerning the subject matter of hearing, as that would render a hearing process as fundamentally unfair. See Arnold v. Lebel, 941 A.2d 813, (R.I. 2007) and Champlin's Realty Associates v. Tikoian 989 A.2d 427 (R.I. 2010)⁵

The record is devoid of any evidence that would establish that the Legal Counsel/Hearing Officers are privy to the "most sensitive details of management decision making", or that they work closely with managers on a personal and daily basis. In fact, Ms. Santiago testified as to the opposite. Mr. Pontarelli also testified that he is not privy to management issues or labor relations issues. Thus, this Board finds, therefore, that the present case does not present sufficient facts to warrant an expansion of the reasons for examining the confidential nature of employees' duties beyond the labor-nexus test.

FINDINGS OF FACT

1. The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.

⁴ Attorney Pontarelli testified that he does not hear teacher terminations in his capacity as Hearing Officer, because he does legal work for the certification office and could not act as both a "prosecutor" and as a Hearing Officer in these cases.

⁵ Attorney Pontarelli, in fact, explained that ethically, he is prohibited from soliciting or accepting advice from anyone else concerning matters which he is hearing.

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 proposed bargaining unit consists of three (3) Legal Counsel/Hearing Officer positions at the Rhode Island Department of Education. At the time of the hearing, these positions were occupied by Paul Pontarelli, Esq., Kathleen Murray, Esq. and Forrest Avila, Esq., all long-time employees.
4. The position of Legal Counsel/Hearing Officer is in the non-classified service. The job description requires a "knowledge of applicable federal, state and local law and rules and regulations." There is no specific emphasis on any specialized area of law- especially employment or labor law.
5. Duties and responsibilities of the position include:
 - Provide written legal opinions to Commissioner and staff, as consulted.
 - Provide legal advice to staff as consulted.
 - Provide legal representation to the Department in litigation before boards, commissions, and courts, as necessary.
 - Hear and decide appeals on any matter of dispute between parties arising under law relating to schools or education and prepare written decisions for review by and approval of the Commissioner.
 - Interpret state laws, rules and regulations relating to education, the functioning of administrative agencies, and other related areas of state and federal law.
 - Assist appropriate staff in developing and drafting legislation, rules and regulations relating to education.
 - Review and advise with respect to legislation, rules and regulations developed by outside parties and related to education.
 - Keep abreast of laws, rules and regulations, and court decisions affecting education, and assist and advise the Commissioner and Department staff accordingly.

- Review contract proposals, grants and other materials for conformance with the Department's objectives and adherence to pertinent statutes, rules and regulations.
- Investigate allegations of teacher/applicant noncompliance with certification requirements, represent the Department's interests in informal resolution of certification questions, and represent the Department in revocation proceedings and hearing on denials of teaching certificates.
- Provide information on education law to members of the education community, including parents, teachers, administrators and school committee members.
- Hold public hearings as required.

6) The job description for the position of Chief Legal Counsel includes the responsibility to provide legal counsel to the Commissioner of Education and representation of the Department in matters related to educational policy and law and labor relations.

7) The job description for Chief Legal Counsel also requires that the incumbent have "a thorough knowledge of the methods, practices and procedures of government law, with an emphasis on education law, labor and employment law.

8) Ms. Margaret Santiago, Human Resources Manager, RIDE, testified that as it pertains to the Department's labor relations matters, she has worked with Attorney George Muskian, Attorney George Rinaldi, Attorney Joseph Whelan, and Attorney Ron Cavallaro. She testified that in her three (3) years as Human Resources Manager, she has not worked with any of the Hearing Officer Attorneys that are involved in the pending petition.

9) Regarding issues surrounding contracts and collective bargaining, Ms. Santiago deals with Attorney George Muskian and Attorney David Abbott (also the Deputy Commissioner of RIDE). When she deals with grievances and arbitrations, she works with Attorney Muskian and not any of the three (3) Hearing Officers.

10) Ms. Santiago confirmed that none of the three (3) Hearing Officers have access to confidential information pertaining to collective bargaining. Access to such information is limited to the Employer's negotiation team.

11) Attorney Pontarelli does not normally conduct grievance hearings, although he did do a couple of them in the mid 1990s.

12) Attorney Pontarelli sometimes provides testimony and performs lobbying at the General Assembly; sometimes the topic of legislation is labor relations. There is no evidence in the record that this information is confidential, as it is clearly public.

13) Attorney Pontarelli occasionally participates in litigation on behalf of RIDE.

14) Since the creation of the Chief Legal Counsel position in approximately 1998, Attorney Pontarelli has not been involved in any labor relations matters within the department, even when the Chief Legal Counsel was out for sick leave or vacation.

15) No evidence was entered into the record concerning the job descriptions of Attorney Anne Marie Coleman, Esquire or Ronald Cavallaro, Esquire, other than they are both employed by the Board of Regents and have previously appeared on behalf of management before this Board.

CONCLUSIONS OF LAW

- 1) The position of Legal Counsel/Hearing Officer is not a confidential position for purposes of exclusion from collective bargaining, under neither the first or second prong of the labor-nexus test.
- 2) An expansion of the labor-nexus test or deviation, therefrom, is not warranted by the facts presented in this matter.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the Rhode Island State Labor Relations Board by the Rhode Island Labor Relations Act, it is hereby:

DIRECTED that an election by secret ballot shall be conducted within thirty (30) days hereafter, under the supervision of the Board or its Agents, at a time, place and during hours to be fixed by the Board, among the Legal Counsel/Hearing Officers employed by the Rhode Island Board of Regents/ Department of Education who were employed on November 9, 2012, to determine whether they wish to be represented, for the purposes of collective bargaining, as provided for in the Act, by RIDE Legal Counsel/Hearing Officer Professional Union, or by no labor organization.

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

IN THE MATTER OF

RHODE ISLAND BOARD OF REGENTS/
DEPARTMENT OF EDUCATION

-AND-

RIDE LEGAL COUNSEL/HEARING OFFICER
PROFESSIONAL UNION

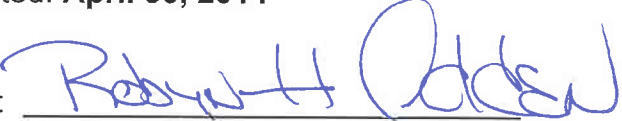
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CASE NO: EE-3729
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**NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12**

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. EE-3729 dated April 30, 2014 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **April 30, 2014**.

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

Dated: **April 30, 2014**

By: 
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni

Walter J. Lanni, Chairman

Frank J. Montanaro

Frank Montanaro, Member

Gerald S. Goldstein

Gerald S. Goldstein, Member (Dissent)

Marcia B. Reback

Marcia B. Reback, Member

Scott G. Duhamel

Scott G. Duhamel, Member

Board Member, Bruce A. Wolpert, recused himself from participation in this matter.

Board Member Elizabeth S. Dolan dissented in this matter; Ms. Dolan was absent for the voting to sign the Decision and Order as written.

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

Dated: APRIL 30, 2014

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