

**STATE OF RHODE ISLAND  
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD**

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IN THE MATTER OF	:	
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RHODE ISLAND BOARD OF REGENTS/ DEPARTMENT OF EDUCATION	:	
	:	
-AND-	:	CASE NO. EE- 3729
	:	
RIDE LEGAL COUNCIL/HEARING OFFICER PROFESSIONAL UNION	:	DECISION ON REMAND
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**DECISION ON REMAND**

The matter before the Board is a decision by the Superior Court (McGuirl, J.) to remand a pending appeal by the Rhode Island Board of Education/Department of Education (RIDE) from a supplemental decision rendered by the Board in December 2015. The Board's supplemental decision was in response to a previous remand by the Superior Court (Van Couyghen, J.) of an appeal by RIDE from a decision by the Board directing an election and, ultimately, certifying the RIDE Legal Counsel/Hearing Officer Professional Union. As the Board believes is apparent, the travel and factual background of this case is long and winding. Notwithstanding the Superior Court's comprehensive recitation of both the travel and facts of this matter, for purposes of this Decision and as context in light of the Superior Court's most recent remand, the Board will provide the necessary travel and factual background of this matter.

**TRAVEL/FACTUAL BACKGROUND**

This matter was first decided by the Board on April 30, 2014. In that decision, the Board held that the position of Legal Counsel/Hearing Officer was not excludable from collective bargaining as a confidential position under either prong of the labor nexus test. Additionally, the Board also held that an expansion of the labor nexus test was not warranted based on the facts presented in the case. Subsequent to the Board's Decision and Direction of Election, the Union prevailed at the election and the bargaining unit was certified on May 28, 2014.

On May 30, 2014, RIDE filed an appeal of the Board's Decision and on July 8, 2014 sought a stay of the Board's certification. On September 4, 2014, the Court entered an order for an executed Consent Agreement staying the decision and establishing an expedited briefing schedule. The Consent Agreement provided that RIDE treat the employees in question the same as other non-union, non-classified employees as it pertains to terms and conditions of employment. In late fall 2014, Attorney Anthony Cottone, a new Hearing Officer at RIDE, moved to intervene in the pending appeal and moved for a remand of the matter for further proceedings before this Board. After extensive litigation, on June 12, 2015 Superior Court Judge Brian Van Couyghen, entered an order granting remand, with these directions to the Board:

- (a) Upon remand, the SLRB shall reconsider whether the Legal Counsel/Hearing Officer position at RIDE should have been deemed managerial, and thus, exempt from collective bargaining at the time the Union's petition was filed with the SLRB; and
- (b) Determine, in its discretion: (i) if the parties should be permitted to introduce additional evidence on the issue; and (ii) if so, what additional evidence should be admitted.

In a supplemental decision dated December 2, 2015, the Board addressed each of the above directives issued by the Court. Initially, the Board reviewed the evidentiary record before it to determine whether additional evidence was needed to decide if the Legal Counsel/Hearing Officer position “should have been deemed managerial, and thus, exempt from collective bargaining at the time the Union’s petition was filed...” Finding the evidentiary record, including the examination of witness testimony, to be “sufficiently thorough”, the Board concluded that “the record [was] adequate” to allow the Board to answer the question of whether the Legal Counsel/Hearing Officer position was managerial in nature so as to be excluded from participation in the collective bargaining process. (See Board’s Supplemental Decision at page 2). After reviewing the history of the term managerial employee and looking closely at *Am. Fed’n of State v. Ill. Labor Relations Board*, No. 1-12-3426, 2014 Ill. App. LEXIS 587 (App. Ct. Ill., 1<sup>st</sup> Dist. August 13, 2014), a case relied on by RIDE as determinative of the managerial status of the Legal Counsel/Hearing Officers, the Board applied the facts and evidence before it<sup>1</sup> and found that

Most of the duties set forth on the Legal Counsel/Hearing Officer job description are common typical task [sic] performed by any attorney for a client-providing legal opinions, providing legal representation, interpreting and keeping abreast of law, and advising others accordingly and preparing advisory opinions for review. While these functions require an attorney to represent a client's interest competently, they do not require the attorney to be "aligned with management" to be successful, competent or

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<sup>1</sup> The Board incorporated its original decision in its supplemental decision. As the Board noted, in its original decision the Board reviewed all the job duties of the Legal Counsel/Hearing Officer position and found “no mention anywhere of a requirement for drafting policies, effectuating policies, developing a budget, or assuring that the department or agency runs effectively. Likewise, there is no direction on the job description or evidence in the record that the Legal Counsel Hearing Officers direct the governmental enterprise of RIDE in a hands-on way or that they possess the authority to broadly affect its mission or fundamental methods.” (Board’s Supplemental Decision at page 5). While the Board found some similarity in the duties of the Legal Counsel/Hearing Officer position with the managerial position described in *Am. Fed’n of State* (i.e., the fact that Legal Counsel/Hearing Officers provided written decisions that were always accepted by a superior), ultimately the Board determined that the role of Legal Counsel/Hearing Officer in “hearing teacher discipline and termination disputes” was “but one (1) small piece of the massive role RIDE holds” and is “not the main avenue by which the Commissioner of Education carries out her statutory duties under Title 16.” (Board’s Supplemental Decision at pages 5 – 6).

appropriate. Indeed, the Board believes that there are likely many attorneys who may not even like their clients or believe in their clients' positions, but that can nevertheless wage impressive representation.

Board's Supplemental Decision at page 6.

The Board concluded that the reliable and competent evidence before it, which was sufficient for it to determine whether the Legal Counsel/Hearing Officer position was managerial, supported "the conclusion that the position is not managerial. As such, the position of Legal Counsel/Hearing Officer is not excluded from collective bargaining on that basis." (Board's Supplemental Decision at page 6).

RIDE once again sought judicial review of the Board's decision and also filed a second motion to remand the matter to the Board. RIDE's second remand request sought the opportunity to submit new evidence regarding changes that had occurred at RIDE since the Board issued its original decision.

Since the filing of the original representation petition in 2012, the complement of Legal Counsel/Hearing Officers has completely turned over, i.e., none of the three original individuals who occupied the Legal Counsel/Hearing Officer position as identified in the Board's 2014 Decision are still employed by RIDE. One individual, who was appointed to the Legal Counsel/Hearing Officer position to fill a vacancy that occurred prior to the holding of the representation election in 2014, has now become RIDE's Chief Legal Counsel. In addition, RIDE submitted an affidavit to the Court from an individual currently in the Legal Counsel/Hearing Officer position that states, in relevant part, that the individual does not wish to be a member of the Union. Further, RIDE has made representations to the Court that the remaining two individuals presently occupying Legal Counsel/Hearing Office positions "do not wish to join a union" or may not "favor joining a union." (Superior Court Decision, PC-2015-5683 at pages 6 – 7; page 8).

Based on the above, the Superior Court (McGuirl, J.) remanded this matter to the Board with the following direction:

Before the Court can render a decision, the Board should clarify whether the current status of Legal Counsel/Hearing Officers, in light of the changed circumstances, would render enforcement of the Board's order "unfair, unnecessary, or otherwise inappropriate." *International Brotherhood of Teamsters, Local 251*, 691 F.3d at 61. On remand, the Board shall consider whether the changed circumstances in this case warrant a decision regarding the Board's previous orders or if the passage of time and related employee turnover no longer justifies this outcome, making a decision inappropriate at this time.

Superior Court Decision, PC-2015-5683 at page 10.

## DECISION

The matter before the Board is the Superior Court's direction, on remand, to consider whether the complete turnover of the RIDE Legal Counsel/Hearing Officers bargaining unit since the election was conducted and the RIDE Legal Counsel/Hearing Officer Professional Union was certified in May 2014 renders a decision by the Court on RIDE's pending appeal and the Board's request for enforcement of its certification order "unfair, unnecessary or otherwise inappropriate." *Id.* at page 10. The Board has considered the facts in this matter, has carefully reviewed its prior decisions and the evidence submitted by the parties and has reviewed the Superior Court's decision, the case law cited therein, other relevant case law, the State Labor Relations Act (hereinafter Act) and the Board's Rules and Regulations. Having carefully considered all of the above information and for the reasons as more fully discussed below, the Board determines that sufficient evidence and information exists for it to make its decision without the need for an additional hearing or to solicit additional evidence. Further, the Board believes the evidence, case law, statutory law and the Board's Rules and Regulations dictate that it is not "unfair, unnecessary or otherwise inappropriate" due to either passage of time or employee turnover or change of employee sentiment toward the Union for the Board to ask the Court to enforce its certification order and for the Court to rule on that issue and RIDE's appeal.

### **A. The Board's Authority Under the State Labor Relations Act Requires that its Certification Order be Enforced.**

The Board's legal authority emanates from the Act. R.I.G.L. 28-7-9 authorizes the Board to make rules and regulations "to carry out the provisions of this chapter..." R.I.G.L. 28-7-9(a). As established by the Act and supplemented by the Board's Rules and Regulations,

It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining substantively and adversely affect the interest of employees, other employers, and the public in general.

R.I.G.L. 28-7-2(a)

As the Act also makes clear, it is the "public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self organization, and designation of representatives of their own choosing for purposes of collective bargaining,..." See R.I.G.L. 28-7-2(d). Under the Act, the primary functions of the Board consist of addressing unfair labor practice charges and representation petition proceedings.<sup>2</sup> See R.I.G.L. 28-7-9.

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<sup>2</sup> There are three different types of representation proceedings that generally come before the Board. The most common is a request by a union to represent a group of employees through an Investigation of Controversies as to Representation petition and the holding of a secret ballot election where appropriate. The second type of election proceeding is a decertification petition in which generally a group of employees

As pertains to the instant matter, when presented with an Investigation of Controversies as to Representation petition (hereinafter “representation Petition) it is the Board’s responsibility to establish a number of factors including whether the petitioning labor organization has made a sufficient showing of interest (R.I.G.L. 28-7-9(b)(1)). In the instant case, the Union filed a standard representation petition. Under these circumstances, the Board’s initial responsibility is to determine whether a sufficient showing of interest has been met by the petitioning union. This is done through a check of the cards of interest submitted to the Board by the petitioning union. R.I.G.L. 28-7-9(b)(1); Board Rules and Regulations, Rule 1.2(A)(8); Rule 1.14(B). Once the Board’s representative has certified the authenticity of all cards of interest submitted by the petitioning union, it is then incumbent upon the Board to determine the question of representation. Board Rules and Regulations, Rule 1.14(C). This may be accomplished in one of two ways: either the parties agree to a consent election (the employer does not challenge the composition of the proposed bargaining unit – see Board Rules and Regulations, Rule 1.14(C)(1)(a) or (b)); or, if there is a challenge to more than 10% of the positions sought by the petitioning union then the Board will schedule a hearing to determine how to proceed with a contested election. See Board Rules and Regulations, Rule 1.14(D). In the instant case, because RIDE challenged whether the Legal Counsel/Hearing Officer position was appropriate to be included in a bargaining unit, the Board held a hearing. In a contested case, the Board’s authority and responsibility is to determine an appropriate unit. Board Rules and Regulations, Rule 1.14(I). The Board, after holding the hearing in this case, found that the Legal Counsel/Hearing Officer position was not excludable from a bargaining unit and was an appropriate bargaining unit. As a result, the Board directed that an election be held. See Board Decision and Direction of Election, EE-3729 (April 30, 2014); Board Rules and Regulations, Rule 1.14(E). The Union prevailed at the election<sup>3</sup> and the Board certified the Union on May 28, 2014. See Board Rules and Regulations, Rule 1.14(N)1; Board Supplemental Decision, EE-3729 (December 2, 2015).

Once the Board certifies a union as the representative of the bargaining unit,<sup>4</sup> the Board’s authority, jurisdiction and responsibilities come to an end. It is then up to the parties to begin negotiations in the hopes of reaching a collective bargaining agreement. However, the Board’s role in the process does not extend beyond the certification of the bargaining representative.

In the present case, the Board has been presented with information, through the Superior Court’s remand decision, that there has been a complete turnover of the

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seek to decertify the previously certified union as the exclusive representative of the bargaining unit. Finally, the third type of representation process is a unit clarification petition. Generally, this type of petition, as the name implies, seeks to clarify the members of the bargaining unit either by adding or possibly subtracting positions from the unit.

<sup>3</sup> In directing that an election be held, the Board is completely neutral. The Board’s agent oversees the secret ballot election to make sure that the rules for conducting the election are followed. See Board Rules and Regulations, Rule 1.14(E) – (H).

<sup>4</sup> By rule, the certification of a bargaining representative remains in effect for one year from the date of certification. See Board Rules and Regulations, Rule 1.14(N)2. In the present case and as part of the appellate process, the parties agreed to the issuance of a Consent Order that stayed the implementation of the Board’s April 2014 Decision and the certification of the bargaining representative.

employee complement that occupied the Legal Counsel/Hearing Officer position at the time of the election in 2014. The Board has been directed by the Court to consider whether this change in the employee complement due to the passage of time and/or the possible change in whether the new employee complement supports the Union should render the Board's 2014 certification of the bargaining representative no longer appropriate. To this question, the only possible answer by the Board must be no. Whether employees in a bargaining unit designated as appropriate by the Board through its representation process support or don't support a union or want or don't want to be represented by a union is totally outside the Board's authority, jurisdiction and purview. It is not for the Board to decide whether employees support or reject a union that seeks to represent them for purposes of collective bargaining. The Board's only authority, as described above, is to certify the cards of interest, determine an appropriate bargaining unit and conduct a secret ballot election. See Board Rules and Regulations, Rule 1.14. Beyond that and assuming that no unfair labor practices have been alleged and no notification has been made to the Board that the certified representative no longer represents a majority of the employees in the appropriate unit, the Board has no involvement and has no authority or jurisdiction to insert itself.<sup>5</sup> In the instant case and under the circumstances as presented in the Court's remand decision, the Board believes that the certification it issued in May 2014 pursuant to its legal and regulatory authority must be upheld. The Board does not believe and does not agree with any suggestion that the changed circumstances, i.e., the complete turnover of employees occupying the Legal Counsel/Hearing Officer position, in any way renders the enforcement of the Board's original certification of the Union "unfair, unnecessary, or otherwise inappropriate."

The Board has carefully reviewed the case law cited by the Superior Court in its remand decision and, with all due respect to the Court, finds the cases not on point for the present set of circumstances. While the Board acknowledges that each of the cited cases makes reference to the passage of time and whether the delay creates changed circumstances sufficient to persuade the Court to deny enforcement of all or a part of the NLRB's order, each of these cases notes that delay of time is not, by itself, a sufficient basis to refuse to enforce an NLRB order. In *NLRB v. International Brotherhood of Teamsters, Local 251*, 691 F.3d 49, 61 (1<sup>st</sup> Cir. 2012), the Court of Appeals stated as follows:

We find unpersuasive the union's argument that enforcement of the Board's order is inappropriate because of the passage of time. As the Supreme Court has explained, "[i]nordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in [section] 10(b)." [7] *NLRB v. Katz*, 369 U.S. 736, 748 n. 16, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). That said, if the passage of time leads to changed circumstances rendering enforcement of the Board's order unfair, unnecessary, or otherwise inappropriate, we will decline to enforce an order of the Board. See *NLRB v. LaVerdiere's Enters.*, 933 F.2d 1045, 1054-55 (1<sup>st</sup> Cir.1991); *Emhart Indus. v. NLRB*, 907 F.2d 372, 379 (2<sup>d</sup> Cir.1990)

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<sup>5</sup> In the instant case, neither party has filed an unfair labor practice charge nor has the Board been notified by either party that the certified representative of the bargaining unit no longer represents a majority of the employees in the appropriate bargaining unit. See Board Rules and Regulations, Rule 1.14(N)2. As such, the Board has no authority to abandon the certification it issued in this case in 2014.

(" [W]e must withhold enforcement of orders that will not effectuate any reasonable policy of the act, even where the problems with the order are caused primarily by the lapse of time."). Despite the lengthy delay here, the union has failed to demonstrate that changed circumstances make enforcement unfair, unnecessary, or inappropriate. In order to justify a decision not to enforce an order, courts have previously identified events such as decertification of the union, closure of the relevant plant, or an agreement between the parties resolving the dispute. See *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 22-23 (8th Cir.1991); *Emhart*, 907 F.2d at 379-80. The union has identified no such facts in this case.

In the present case, the only changed circumstance of which the Board has been made aware is the complete turnover of the bargaining unit. Whether this occurred as a result solely of the passage of time or for other reasons is unknown to the Board at this juncture. In either event, this situation, in the Board's view, is simply not sufficient to have the Board abandon enforcement of its certification of the bargaining representative in this case.

In another case cited by the Superior Court, *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045 (1<sup>st</sup> Cir. 1999), the Court of Appeals was asked to enforce a bargaining order instead of allowing the employees the opportunity to have a decertification election. The NLRB had issued the bargaining order in upholding an administrative law judge's finding that unfair labor practices by the employer during a drive by employees to decertify the union had so tainted the environment a free and fair election would not be possible. In denying the NLRB's request, the Court noted the following:

We recognize the other side of the argument--that taking into account the passage of time rewards employer recalcitrance, see *Peoples Gas*, 629 F.2d at 48--and do not mean to suggest that a lengthy delay should result automatically in an election rather than a bargaining order. See *Texas Petrochemicals*, 923 F.2d at 404 ("If delays are occasioned by an obstinate employer, he may not benefit from his own wrongs...") But in circumstances such as these--where there existed a clear showing of substantial employee dissatisfaction unprovoked by the employer before the employer's less-than-egregious misconduct--we think the Board's inordinate delay strongly weighs against a bargaining order, which would impose a relationship on the parties for a substantial period into the future even in the face of strong employee opposition to the union.

*NLRB v. LaVerdiere's Enterprises*, 933 F.2d at 1055.

While the delay has been substantial in the pending case, there has been no suggestion or evidence that it was due to anything the Board did or failed to do. More importantly, if the changed circumstances of the employee complement exist as represented to the Court, then there are methods and means which have long been in place to allow the employee complement to address its situation with the Union. As noted earlier, to date the Board has not been notified of any such action or information.

In the present case, denying enforcement of the Board's certification of the Union will be in direct opposition to the stated policy of the Act. In the present case, a secret ballot election was conducted by the Board and the employees chose the Union as their

representative. There has been no evidence presented to the Board that the certification issued by the Board is invalid or that the Union does not represent a majority of the current bargaining unit.<sup>6</sup> If the current complement of employees in the Legal Counsel/Hearing Officer position want to decertify the Union or otherwise attempt to get out of the Union, there are processes available to them before the Board. However, the Board does not believe it is within the Board's authority or jurisdiction to make that decision for the employees.

### FINDINGS OF FACT

1. In November 2012 a petition for the investigation of controversies for representation was filed with the Board by the RIDE Legal Counsel/Hearing Officer Professional Union.
2. RIDE objected to the petition and the Board conducted a hearing on whether the Legal Counsel/Hearing Officer position should be included or excluded from an appropriate bargaining unit. The Board concluded that the position was not excludable from the bargaining unit and issued its Decision and Direction of Election on April 30, 2014.
3. An election was held and the Union prevailed. The Board certified the Union on May 28, 2014.
4. RIDE appealed the Board's decision and certification of the Union. During the litigation the parties agreed to enter into a Consent Order staying implementation of the certification of the Union.
5. Thereafter, the Superior Court remanded the case to the Board for reconsideration and a determination as to whether the Legal Counsel/Hearing Officer position was managerial in nature and, therefore, exempt from collective bargaining.
6. On December 2, 2015, the Board issued a Supplemental Decision and Order finding that there was no need to reopen the record as sufficient evidence existed for the Board to decide the issue of whether the Legal Counsel/Hearing Officer position was managerial and, further determining that the Legal Counsel/Hearing Officer position was, in fact, not managerial in nature and was appropriately included in the bargaining unit.

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<sup>6</sup> The Board does not accept RIDE's somewhat bias view of the sentiments of the current employees who occupy the Legal Counsel/Hearing Officer position as a legitimate basis for abandoning its request for enforcement of its certification of the Union. While this representation by RIDE may be accurate, the only appropriate way to make that determination and the only way that such a determination is consistent with the policy and purpose of the Act is to let the employees make the decision for themselves. As mentioned previously, if the employees don't want to be represented by the Union there are methods by which they can decertify the Union. However, this must be a choice made by the employees free of any coercive atmosphere. It is certainly not within this Board's authority or jurisdiction to make or enhance that choice for the employees.



7. RIDE appealed the Board's supplemental decision and also filed a second Motion to Remand the case seeking the opportunity to introduce new evidence regarding changes at RIDE subsequent to the close of the hearing at the Board.

8. Since the filing of the original petition in November 2012 there has been a complete turnover of the employee complement in the Legal Counsel/Hearing Officer position.

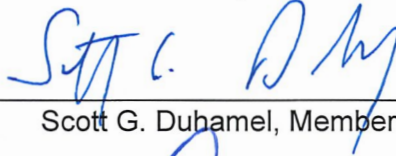
#### **CONCLUSION OF LAW**

1. The changed circumstances presented in the Remand Decision, i.e., the complete turnover of the employee complement occupying the Legal Counsel/Hearing Officer position, and the passage of time does not alter the Board's conviction and determination that the certification of the Union issued on May 28, 2014 should be enforced by the Superior Court.

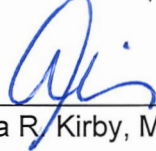
RHODE ISLAND STATE LABOR RELATIONS BOARD



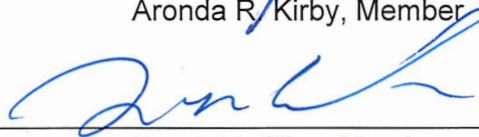
Walter J. Lanni, Chairman



Scott G. Duhamel, Member




Aronda R. Kirby, Member



Derek M. Silva, Member



Harry F. Winthrop, Member



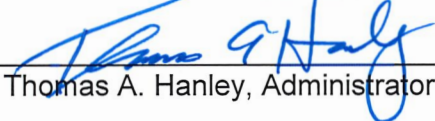
Stan Israel, Member

**\*\*BOARD MEMBER KENNETH B. CHIAVARINI WAS ABSENT FOR VOTE ON REMAND DECISION\*\***

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

Dated: December 14, 2021

By:



Thomas A. Hanley, Administrator

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 :

CASE NO: EE-3729

DECISION ON REMAND

**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 (Remand) dated December 14, 2021 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 15, 2021**.

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

Dated: **December 15, 2021**

By:

  
Thomas A. Hanley, Administrator

EE- 3729R