

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

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

SUPPLEMENTAL DECISION ON REMAND

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 employee under either prong of the labor nexus test. Additionally, we also held that an expansion of the labor nexus test was not warranted by the facts presented in the case. Subsequent to our 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, the Employer 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 Agreement provided that the employer 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. Extensive litigation ensued. 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.

ADDITIONAL EVIDENCE

The Board first addresses the issue of whether or not additional evidence should be admitted in this matter. The prior evidentiary record included two (2) Union Exhibits, including the job description for the Legal Counsel/Hearing Officers and the vacancy notice/description of the

position of Chief Legal Officer. The Employer submitted eleven (11) exhibits, all of which were objected to by the Union, but entered by the Board into evidence over the Union's objections.

The testimony at hearing established that Paul Pontarelli, Kathleen Murray and Forest Avila were all employed as Legal Counsel/Hearing Officers at the Rhode Island Department of Education (RIDE) (TR. 5/9/13. pg. 6) Both Pontarelli and Murray served in this position since 1989. The record is unclear as to Mr. Avila's exact service record, but is understood by the Board that he was also a long-time employee who was nearing retirement at the time of the hearings. In addition to these three (3) attorneys, George Muksian was employed as Chief Legal Counsel and he served as the supervisor for Pontarelli, Murray and Avila. (TR. 5/9/13. pg. 7) The Board conducted two (2) sessions of formal hearings in this matter. The first hearing consisted primarily of the Employer's examination of Attorney Pontarelli. The Employer's questioning was extensive and designed to elucidate "his background and what he does on a day-to day basis." (TR. 5/9/13 pg. 15) In the Board's opinion the examination was sufficiently thorough and the record adequate for an examination on the duties and responsibilities of the position and the question of whether or not the Legal Counsel/Hearing Officers were excludable from collective bargaining at the time of the filing of this petition, as managerial.¹ As such, the Board will not be reopening the record for additional testimony or documentary evidence on this issue. The Board will, however, consider and incorporate by reference all the written arguments of the parties that have been filed in the Superior Court proceedings to date. In addition, we wish to note that the Board takes judicial notice of decision cited by the Employer in its reply brief to the Superior Court, to wit: Am. Fed'n of State v Ill Labor Rels. Bd, No 1-12-3426, 2014 Ill. App. LEXIS 587 (App. Ct. Ill, 1st Dist. August 13, 2014).

MANAGERIAL EMPLOYEES

The Board follows federal law in defining managerial employees. We turn to the US Supreme Court's decision in NLRB v Yeshiva University, 444 U.S. 682 (1980) for guidance in resolving this matter. In Yeshiva, the Court overturned an NLRB certification of a bargaining unit of fulltime faculty members for certain schools located within Yeshiva University, on the basis that the faculty members were managerial employees. In reaching this decision, the Court noted that while there was a central administrative hierarchy that served all the schools within the University, the individual schools were substantially autonomous and that the faculty in each school

¹In the Superior Court proceedings, there was been a suggestion that Attorney Cotton's position, although it shares a job title with Attorneys Pontarelli and Murray, may have evolved into a more expansive position than his predecessor, Mr. Avila's position. Such evolution of a position, months and years after a petition has been filed is not relevant to the conditions that existed at the time the petition was filed. Employer believes that the evolution of this particular position warrants removal from the bargaining unit, then an appropriate petition to remove the petition can be filed.

effectively determined its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. Also, the overwhelming majority of faculty recommendations as to faculty hiring, tenure, sabbaticals, termination, and promotion are implemented. Some of the schools' faculty developed their own policies pertaining to personnel matters. Some of the faculties made final decisions regarding the admission, expulsion, and graduation of individual students. Others decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school. The Court found that the "the extensive control of Yeshiva's faculty" over academic and personnel decisions, as well as its "crucial role . . . in determining other central policies of the institution," and accordingly held that the faculty members are endowed with "managerial status" sufficient to remove them from the Act's coverage.

The Court stated:

"The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which, in any other context, unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id* at 686.

The Court also went on to state that its decision should not be interpreted as applying to all professional occupations:

"We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that 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. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial." *Id* at 690.

Our Rhode Island Supreme Court has adopted the Yeshiva Court's rationale in the cases it has decided. "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).

The Employer has argued at length in its briefings, to the Superior Court that the Illinois Appellate court's decision in Am. Fed'n of State v Ill Labor Rels. Bd, No 1-12-3426, 2014 Ill. App. LEXIS 587 (App. Ct. Ill, 1st Dist. August 13, 2014) is on point with this case. (See brief filed December 15, 2014) There, the Illinois Labor Relations Board determined that Administrative Law Judges who worked for the Illinois Commerce Commission were managerial employees and were barred from collective bargaining because the Commission's policies in utility regulation are directly effectuated through the orders recommended by the administrative law judges and that those orders are almost always adopted by the commissioners. The Illinois Public Labor Relations Act defines a managerial employee as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices. 5 ILCS 315/3(j) The Illinois court noted that the Act did not define "executive and management function" but cited prior case-law and equated these terms with "running an agency or department, such as by establishing policies and procedures, preparing the budget or otherwise assuring that the agency or department runs effectively." Am. Fed'n of State v Ill Labor Rels. Bd, No 1-12-3426, 2014 Ill. App. LEXIS 587 (App. Ct. Ill, 1st Dist. August 13, 2014) at 38.

The Illinois Court stated:

"A managerial employee not only has the authority to make policy but also bears the responsibility of effectuating that policy. Department of Central Management Services, 406 Ill App. 3d at 775. In other words, managerial employees do not merely recommend policies or give advice to those higher up the employment chain, they actually direct the governmental enterprise in a hands-on way. Department of Central Management Services, 406 Ill App. 3d at 775. Managerial employees are those involved in the governmental enterprise or a major unit thereof and who possess the authority to broadly affect its mission or fundamental methods. Salaried Employees of North America (SENA) v Illinois Local Labor Relations Board, 202 Ill. App. 3d 1013, 1020 (1990).

In deciding the question of whether or not the Administrative Law Judges ("ALJs") of the Illinois Commerce Commission were managerial employees, the Court made note of the following facts:

- 1) There are five Commissioners employed by the Illinois Commerce Commission and they each have extensive expertise on utility regulation. They handle and decide cases on a wide variety of utility matters. The Commission's orders on each case effectuate a Commission policy, though not every order announces a policy variety of matters.
- 2) The ALJs spend approximately 90% of their time conducting hearings and issuing recommendations on matters that arise under the Public Utilities Act. When the Commissioners fail to act on a case within a specified period of time, the ALJs order automatically becomes the Commissions' order.
- 3) The ALJs have staff (lawyers and economists) that assist them in preparing cases and orders. The ALJ is not required to accept staff recommendations and is expected to apply her or her own knowledge of the relevant discipline to the issue at hand. Approximately 99% of the ALJs orders were accepted by the Commissioners.
- 4) The ALJs are responsible for conducting hearings in cases involving generic and rulemaking matters, rates, citations and all the matters required under statutes affecting or administered by the Commission, including federal legislation.

5) The procedure by which the ALJs hold hearings and issue recommended orders, which the Commissioners almost always adopt, ***is the primary means, if not the exclusive means*** by which the Commission fulfills its statutory mandate of regulating public utilities. (Emphasis added) As such, the ALJs have a prominent role in the fulfillment of the Commission's duties and are the "**whole game**" with regard to the agency's mission. Because the Commission almost always adopted the ALJ's recommended orders, the ALJs direct the effectuation of the State's policies regarding public utilities.

In its brief, the Employer argues that there is a parallel between the Illinois Commerce Commission (which provides general supervision of all public utilities in the state and sees that the provisions of Illinois constitution and statutes of Illinois affecting public utilities are obeyed and enforced) and the Rhode Island Department of Education (which, through its Commissioner, provides general supervision over public elementary and secondary schools and education and interpret school law and decides any controversies that may be appealed to him or her from decisions of local school committees. (Brief pg. 5) The Employer argues that the Hearing Officers in RIDE who are tasked with hearing and deciding appeals in disputes between parties arising under law relating to schools or education, and who prepare written decisions for review by and for approval of the Commissioner, are comparable to the Illinois ALJs who prepare recommended orders in cases involving rulemaking, rates and citations, especially because the Education Commissioner almost always signs the recommended decisions. The Employer, herein, argues that the Illinois court found, under Yeshiva's teachings, that it is the effectiveness, power, and influence of the recommendations of the ALJs' proposed orders that make them managerial employees and that the RIDE hearing officers are comparable.

In our original decision, we recited all of the duties set forth on the Legal Counsel/Hearing Officer's job description. We incorporate that portion of our earlier decision here by reference, so as to not be repetitive. In reviewing the list of duties, there is 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.

The only similarity between the Illinois Commerce Commission case cited by the Employer and the within matter is the fact that in each case the written decisions are almost always accepted by the superior employee. The significant differentiating factor, however, is that in the case of the Commerce Commission ALJs, they spend 90% of their time hearing cases and writing decision and are considered the "whole game", because these decisions *are the main avenues by which the utility Commissioners carry out their statutory duties*. In the case of the Legal Counsel/Hearing Officers, their role in hearing teacher discipline and termination disputes and other matters

appealed to the Commissioner's office from decisions issued by local school committees, in no way could be described as being the "whole game" of the agency. RIDE's Title 16 statutory duties and responsibilities are vast and far-reaching and touch on all elements of the educational process. The matters heard and decided by the Hearing Officers are but one (1) small piece of the massive role that RIDE holds. Certainly, the decisions issued by the Hearing Officers concerning individual teacher cases, all of which will arrive with a different set of facts affecting one teacher and one school district, are not the main avenue by which the Commissioner of Education carries out her statutory duties under Title 16.

Most of the duties set forth on the Legal Counsel/Hearing Officer job description are common typical task 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 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.

The Board finds that the totality of the reliable competent evidence in the record, which is sufficient for rendering a decision as to whether the position of Legal Counsel/Hearing Officer is managerial, supports 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.

SUPPLEMENTAL FINDINGS OF FACT

- 1) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with managerial duty of formulating or effectuating policy by the duty to "ensure that the laws and regulations relating to education are consistent the Department's central role as an advocate for children.
- 2) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial duty to advocate for changes in policies, laws, rules and regulations that are inconsistent with the effective and efficient management of public schools.
- 3) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial requirement to provide legal counsel to the Department in matters related to education policy and law and labor relations.
- 4) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial task of ensuring that the Commissioner is supported in his/her legally authorized role to uphold the laws relating to the education of children.

5) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial function of being closely aligned with management by representing the Commissioner in hearings, trials, public forums and meetings.

6) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, has the managerial duty 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.

7) The duties of the Hearing Officer/Legal Counsel are a very small element of the statutory duties set forth on Title 16 and do not come close to the description of “whole game” in the Illinois Commerce case because they do not issue decisions affecting every type of matter that comes within RIDE’s statutory responsibilities.

8) The position of Hearing Officer/Legal Counsel is charged with the responsibility to “review and advise with respect to legislation, rules and regulations developed by outside parties and related to education.” The position of Hearing Officer/Legal Counsel is not charged with the managerial task of creating or writing legislation, rules or regulations, but rather only with assisting appropriate staff in doing so.

9) The position of Legal Counsel/Hearing Officer requires only three (3) years of legal experience whereas the managerial position of Chief Legal Counsel requires considerable experience in a responsible capacity involving public sector law involving education employment, labor and child advocacy.

10) Legal Counsel/Hearing Officer positions function as lower-level staff attorneys performing the day-to-day operations of a typical government staff attorney; while 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.

SUPPLEMENTAL CONCLUSION OF LAW

1) The position of Legal Counsel/Hearing Officer is not managerial and is not excluded from collective bargaining on that basis.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni

WALTER J. LANNI, CHAIRMAN

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**NEW BOARD MEMBER, ALBERTO APONTE CARDONA,
DID NOT PARTICIPATE IN THIS MATTER.**

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

Dated: December 2, 2015

By: Robyn H. Golden
ROBYN H. GOLDEN, ADMINISTRATOR

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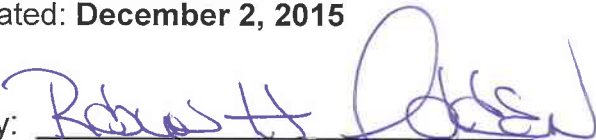
**NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12**

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 December 2, 2015 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 2, 2015**.

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

Dated: **December 2, 2015**

By:


Robyn H. Golden, Administrator

EE- 3729