

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

STATE OF RHODE ISLAND

CASE NO. ULP-4584

DECISION
AND
ORDER

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter Board) on an Unfair Labor Practice Complaint (hereinafter Complaint) issued by the Board against the State of Rhode Island (hereinafter Respondent) based upon an Unfair Labor Practice Charge (hereinafter Charge) filed on March 20, 1992, by Rhode Island Brotherhood of Correctional Officers (hereinafter Union). The Charge, in substance, alleged that the Respondent had violated Rhode Island General Laws 28-7-13 (b) and (10) by refusing to bargain collectively with the Union concerning the wages, hours and working conditions of employees designated as Security Specialists.¹

Following the filing of the Charge, the Board notified the Union and the Respondent (through the Director, Department of Administration) that an informal conference would be held on May 7, 1992, for the purpose of obtaining a preliminary statement of the position of the Union and the Respondent.

The informal conference was held on May 7, 1992, with representatives of both the Union and the Respondent with an Agent of the Board. When the informal conference failed to resolve the Charge, the Board issued the instant Complaint on January 4, 1993, wherein it alleged in Paragraph 3 of the Complaint:

¹ The Board would note that the reference to 28-7-13 (b) is clearly a typographical error and should be 28-7-13 (6) for there is no 13 (b). Section 13 (6) relates to the refusal to bargain, which is the subject of this matter. The Board noted this error and corrected it in Paragraph 3 of the Complaint.

"That Respondent has violated Title 28, Chapter 7, Section 13 (6) and (10) of the General Laws of Rhode Island by refusing to bargain collectively with Brotherhood concerning the wages, hours and working conditions of employees designated as Security Specialists."

Copies of the Complaint were mailed by registered mail to representatives of the Union and the Respondent. The Complaint was accompanied by a Notice for a Formal Hearing to be held on February 26, 1993.

No answer to the Complaint was filed.²

The Formal Hearing in this matter was held on February 26, 1993, with representatives of both the Union and the Respondent in attendance. The Union and the Respondent stipulated to all of the facts at that time. (See Transcript Pages 2, 3 and 4). This Stipulation of Facts is summarized by the Union in its Brief at Pages 1 and 2 thereof and is adopted by the Board as an accurate summary of the Stipulation of Facts made on February 26, 1993, whereby the parties agreed that:

1. The Union, on September 9, 1991, formally requested the Board to accrete the classification of Security Specialists to the bargaining unit in Board Case No. EE-2003.

2. By correspondence dated November 12, 1991, the Board acknowledge the request and announced that it would investigate the duties of the classification involved.

3. On December 4, 1991, the Respondent, through its Department of Corrections (hereinafter DOC), in a letter from Joseph Pont, Assistant Director Institutions and Operations of DOC, outlined the duties of Security Specialist as he perceived those duties to be.

4. The Board investigated the Union's request and at the conclusion of its investigation, the Board, by letter dated January 15, 1992, addressed to the Union, "...determined that the position

² Under Section 10 of the General Rules and Regulations of the Board, effective June 1, 1943, "Upon failure of the Respondent to file an answer within the five (5) days specified in Section 24 of said Rules and Regulations, the Board may proceed to hold a hearing at the time and place specified in the notice of hearing and may make its findings of fact and enter its order upon the testimony so taken".

of Security Specialist does not meet the Board's criteria for exclusion based on supervision or confidentiality and should rightfully be included within the bargaining unit defined in Case No. EE-2003 represented by the Rhode Island Brotherhood of Correctional Officers".

5. Notice of the Board's January 15, 1992, Decision was mailed to DOC Director, George C. Vose, Anthony A. Bucci and John J. Turano, Esquire, State Labor Relations Administrator.

6. Subsequent to January 15, 1992, the Union and the State entered into collective bargaining negotiations for a successor Collective Bargaining Agreement.

7. During the course of those negotiations, the Union requested bargaining on the wages, hours and working conditions of employees in the classification of Security Specialists.

8. The Respondent refused to bargain on these subjects, contending that the classification of Security Specialists was not appropriately placed in the Union's bargaining unit.

9. The instant Charge was filed on March 20, 1992, and the Complaint herein was issued on January 4, 1993.

10. On January 13, 1993, the Respondent requested a Formal Hearing before the Board as to whether the position of Security Specialist had been appropriately included in the bargaining unit.

11. On February 10, 1993, the Board notified the Respondent, through John J. Turano, Esquire, Labor Relations Administrator, that the request for a Formal Hearing was denied on the basis of untimeliness.

POSITION OF RESPONDENT

The Respondent argues that under R.I.G.L. 28-7-9 (b) (6)³ the Board should have conducted a Formal Hearing on the Union's request of September 9, 1991, to include the position of Security Specialist in the unit designated in Board Case No. EE-2003.⁴ From this alleged failure, the Respondent argues that it was not guilty of any Unfair Labor Practice when it refused to negotiate with the Union over the wages, rates of pay, etc. relating to Security Specialists since they were not properly within the bargaining unit. As stated by the Respondent in its Brief at Page 3:

"The issue that is now pending before this Board is did the state and the Department of Corrections engage in an unfair labor practice when it failed to negotiate with the RIBCO over hour (sic), wages and conditions of employment with respect to the position of Security Specialist. The answer to the question must be NO. The reason is simple the inclusion of this class of position into the union was not done in accordance with the operable law. Therefore, the inclusion was fatally flawed consequently illegal, and cannot now be used to sustain a charge of unfair labor practice."

POSITION OF UNION

The Union at Page 3 of its Brief argues that:

"Whether the matter be treated as one of waiver, laches or estoppel, the facts and law demand that the State be precluded from raising representational defense in this proceeding."

DISCUSSION

As noted, the Union and Respondent stipulated to the facts herein. The sole issue to be resolved by the Board is "Was the

³ R.I.G.L. 28-7-9 (b) (6) provides in part that:

"All...petitions for unit classification shall be informally heard by the board.... Within sixty (60) days of such...petition the board shall hold a formal Hearing. A final decision shall be rendered by the board within sixty (60) days after hearing on such...petition is completed and a transcript of the hearing is received by the board".

⁴ The Board concedes that no such Formal Hearing took place prior to its action of including the position of Security Specialist within the bargaining unit certified in Board Case No. EE-2003.

Respondent guilty of an Unfair Labor Practice when it refused to negotiate with the Union concerning the wages, rates of pay, hours and working conditions of Security Specialists?" For the reasons hereinafter set forth, the Board finds that the admitted refusal to bargain with the Union concerning the wages, rates of pay, hours and working conditions of Security Specialists did constitute an Unfair Labor Practice in violation of R.I.G.L. 28-7-13 (6) and (10).

After the Board, on February 13, 1993, denied the Respondent's request for a Formal Hearing relating to the appropriateness of the Board's inclusion of Security Specialists within the bargaining unit in Board Case No. EE-2003, it was incumbent upon the Respondent to appeal such Decision under the Administrative Procedures Act of the State of Rhode Island (hereinafter APA). In the case of Barrington School Committee v. Rhode Island State Labor Relations Board, et al, __ RI __, 608 A2d 1126, decided May 8, 1992, the Rhode Island Supreme Court held that the provisions of the APA were applicable to certification proceedings. As said by the Court at Page 1130 of 608 A2d "...orders and other rulings related to employee representation matters (certification orders) are capable of being perfected for direct and immediate review in the Superior Court...". As viewed by the Board, its denial of the Respondent's request for a Formal Hearing, based upon untimeliness, was a final ruling which could have and should have been appealed to the Superior Court, if the Respondent was dissatisfied with that Decision. No such appeal was ever taken and thus the Board's Decision stands as the law of this proceeding. Therefore, the issue of the Board's failure to conduct a Formal Hearing on the Union's request for inclusion of the position of Security Specialist is foreclosed in this Unfair Labor Practice proceeding.

There is no dispute as to the fact that the Respondent refused to negotiate with the Union concerning Security Specialists. This was conceded. Such refusal in the light of the facts in this case, constituted a refusal to bargain in violation of R.I.G.L. 28-7-13 (6) and (10).

As to a remedy in this matter, the Union argues that the Board issue a "make-whole remedy", i.e. an order that the Respondent put Security Specialists in the position they would have been in had they been recognized as members of the bargaining unit during negotiations. In addition, the Union requests that the Board include in any order, if the Board finds in its favor, that the Respondent be ordered to reimburse the Union for Union dues that it would have received from the Security Specialists had they been included in the Collective Bargaining Agreement. The Union argues in its Brief (Pages 11-14) that the Board has the authority to issue a "make-whole remedy" and to order the State to pay to it, the Union dues that it would have received had the Security Specialists been included within the Collective Bargaining Agreement.

This Board has been guided by the Decisions of the National Labor Relations Board in construing R.I.G.L. 28-7-1, et seq. This policy has been recognized and approved by the Supreme Court of the State of Rhode Island on numerous occasions. Under applicable National Labor Relations Board precedent, that Board is without power to compel a Respondent to agree to any substantive contractual provisions. What the Union requests in this case would amount to the establishment of substantive contractual provisions. To avoid this result, the Union points out that while under Federal Legislation,⁵ the Rhode Island State Labor Relations Act does not contain the language found in 29 USC § 158 (d) and therefore, the Board is free to grant the remedy requested.

Under R.I.G.L. 28-7-22, dealing in part with the remedial power of the Board, it is provided that upon determination that an Unfair Labor Practice has been committed, the Board is empowered to issue an Order "...requiring such respondent to cease and desist from such unfair labor practice, and to take such further affirmative or other action as will effectuate the policies of this

⁵ Under 29 USC § 158 (d) it is provided that the obligation to bargain "...does not compel either party to agree to a proposal or require the making of a concession".

chapter...". Section 2 of R.I.G.L. 28-7 in part provides that: "...it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining..." (Underlining added). The objective of the Board is to encourage the practice and procedures of collective bargaining and not to impose upon collective bargaining agents or employers terms and conditions of employment or to establish contractual provisions for them. If the Board were to issue an Order as requested by the Union, it would, in fact, be determining contractual provisions. This, the Board is persuaded, is not in the interest of collective bargaining. For the present, the Board is not persuaded that it should change its long established policy of refraining from entering Orders that, in fact, establish contractual provisions.

In this matter, the Board will enter an Order directing the Respondent to negotiate with the Union the terms and conditions of employment of Security Specialists to be applicable under the current Collective Bargaining Agreement existing between the Union and the Respondent.

FINDINGS OF FACT

1. The Union is a labor organization within the meaning of the Rhode Island State Labor Relations Act, which exists and is constituted for the purposes, in whole or in part, of collective bargaining relative to wages, rates of pay, hours, working conditions and other terms and conditions of employment.

2. The Respondent is an employer within the meaning of the Rhode Island State Labor Relations Act.

3. The Union, on September 9, 1991, formally requested the Board to accrete the classification of Security Specialists to the bargaining unit set forth in Board Case No. EE-2003.

4. On November 12, 1991, the Board acknowledged such request and stated its intent to investigate the duties of the position of Security Specialist.

5. On December 4, 1991, the Respondent, through Joseph Pont, Assistant Director Institutions and Operations of DOC, an Agency of

the Respondent, outlined the duties of Security Specialists as perceived by him.

6. On January 15, 1992, after the conclusion of the Board's investigation, the Board, by letter, determined: "...that the position of Security Specialist does not meet the Board's criteria for exclusion based on supervision or confidentiality and should rightfully be included within the bargaining unit defined in Case No. EE-2003 represented by the Rhode Island Brotherhood of Correctional Officers".

7. The Board did not conduct a Formal Hearing prior to the determination as set forth in Finding of Fact 6 above.

8. The letter referred to in Finding of Fact 6 above was addressed to the Union with copies thereof to the Director of Corrections, to Anthony A. Bucci, to John J. Turano and to Robert Paci, Attorneys within the Department of Administration, Office of Labor Relations of the Respondent.

9. The Respondent did not request the Board to conduct a Formal Hearing relative to its decision to accrete the position of Security Specialists to the bargaining unit in Board Case No. EE-2003, until January 13, 1993.

10. The Respondent did not seek court review of the Board's Decision of January 15, 1992, accreting the position of Security Specialist to the bargaining unit in Board Case No. EE-2003.

11. Subsequent to January 15, 1992, the Union and the Respondent entered into collective bargaining negotiations for a successor Collective Bargaining Agreement.

12. During the course of the negotiations referred to in Finding of Fact 11 above, the Union requested bargaining on the wages, hours and working conditions of employees in the classification of Security Specialist.

13. The Respondent refused to engage in collective bargaining relative to the wages, hours and working conditions of employees in the classification of Security Specialist on the basis that such position had not been appropriately placed in the bargaining unit.

14. On May 8, 1992, the Supreme Court of the State of Rhode Island decided the case of Barrington School Committee v. Rhode Island State Labor Relations Board, et als, reported in 608 A2d 1126 (hereinafter Barrington).

15. Barrington reversed long standing practice and precedent under which only decisions finding or dismissing an Unfair Labor Practice were considered to be final and subject to judicial review.

16. The Supreme Court in Barrington held that under the State Administrative Procedures Act (R.I.G.L. 42-35-1, et seq. and in particular 42-35-15) orders and other rulings related to employee representation matters (i.e. Certification Orders) were directly appealable to the Superior Court.

17. On March 20, 1992, the Charge, in this matter, was filed by the Union.

18. On January 4, 1993, the Board issued the Complaint herein.

19. On January 13, 1993, (nearly a year after the Board's letter accreting the position of Security Specialist to the bargaining unit in Board Case No. EE-2003) the State for the first time requested a Formal Hearing before the Board as to whether or not the Board had acted properly in including (accreting) the position of Security Specialist within the bargaining unit as set forth in Board Case No. EE-2003.

20. On February 10, 1993, the Board denied the request set forth in Finding of Fact 19 on the basis of untimely filing.

21. The Board's decision in its letter of January 15, 1992, in the absence of any appeal became the law of this proceeding.

22. The refusal of the Respondent to negotiate with the Union over the wages, hours and working conditions of employees in the position of Security Specialist was a violation of R.I.G.L. 28-7-13 (6) and (10).

CONCLUSIONS OF LAW

1. The Union has proven by a fair preponderance of the credible evidence that the Respondent's request for a Formal Hearing on the inclusion of the position of Security Specialist in the bargaining unit in Board Case No. EE-2003, was untimely.

2. The Union has proven by a fair preponderance of the credible evidence that the Respondent by its failure to appeal the Board's denial of its request for a Formal Hearing on the inclusion of the position of Security Specialist in the bargaining unit in Board Case No. EE-2003 is now barred by virtue of the Decision in Barrington.

3. The Union has proven by a fair preponderance of the credible evidence that the Respondent's refusal to bargain with it concerning the wages, hours and working conditions of employees in the position of Security Specialist was a violation of R.I.G.L. 28-7-13 (6) and (10).

ORDER

The Respondent is Ordered and Directed to enter into collective bargaining negotiations with the Union concerning the wages, hours and working conditions of employees in the position of

Security Specialist to be applicable under the current Collective Bargaining Agreement between the Union and the Respondent.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Joseph V. Mulvey
Joseph V. Mulvey, Chairman

Frank J. Montanaro
Frank J. Montanaro, Member

Glenn H. Edgecomb
Glenn H. Edgecomb, Member

Daniel L. Beardsley, Jr.
Daniel L. Beardsley, Jr., Member

Entered as Order of the
Rhode Island State Labor Relations Board

Dated: November 26, 1993

By:

Donna M. Leffroy
AGENT OF THE BOARD