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	:	CASE NO: ULP-5123
-AND-	:	
STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS	:	

DECISION AND ORDER

TRAVEL OF CASE

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, Department of Corrections (hereinafter Employer) based upon an Unfair Labor Practice Charge (hereinafter Charge) dated and filed on December 7, 1995 by the Rhode Island Brotherhood of Correctional Officers, (hereinafter Union).

The Charge alleged:

> On or about December 4, 1995 the employer violated Title 28, Chapter 7, Sections (6) and (10) of the Rhode Island General Laws by unilaterally changing staffing levels and reducing posts at the Adult Correctional Institutions. Said changes have a direct impact upon the working conditions of bargaining unit members and were made without negotiation with the certified bargaining agent, the Rhode Island Brotherhood of Correctional Officers.

Following the filing of the Charge, an informal conference was held on February 2, 1996 between representatives of the Union and Respondent and an Agent of the Board. When the informal conference failed to resolve the Charge, the Board issued the instant Complaint on October 8, 1997. The Employer filed its Answer to the Complaint on October 20, 1997, denying the allegations contained in paragraphs 3 and 4 of the Complaint.

The formal hearing for this matter commenced on February 28, 1998. Thereafter, the Board granted a few continuances of the formal hearing and a joint request to hold the matter in abeyance during interest arbitration proceedings. On February 1, 1999, the Union notified the Board that it wished to re-commence the matter, and the case was set down and heard at a formal hearing on June 3, 1999. Upon conclusion of the hearing, the Board established a briefing schedule that required the parties to file their briefs within thirty days of their receipt of the transcripts. The briefing schedule was extended from August 1999 to July 10, 2000 at the request of the Employer. Both the Employer and the Union submitted written briefs. In arriving

at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

FACTUAL SUMMARY

The facts leading up to the filing of the unfair labor practice charge are not really in dispute. In 1995, the State of Rhode Island was experiencing a budgetary problem which led the Governor to order the various Departments to cut expenses. (TR. 6/3/99 p. 6) At the point of enactment of the budget, there was a $4.5 million shortfall in the Department of Corrections budget. Of this amount, the Department was going to be responsible for $2 million. (TR. 6/3/99 p. 7, 10) After the budget was adopted (effective date July 1, 1995), various cost cutting measures were considered by the Director of the Department, George Vose, but the "uppermost" consideration was the cutting of "posts" or positions. (TR. 6/3/99 p. 12) Thereafter, the Department hired some consultants to conduct a staffing study, which was done in the fall of 1995. Upon conclusion of the study, the Director made a determination that a number of posts would be cut. On or about December 4, 1995, the Director announced to the Union, and the media, that "post" cuts were going to take place. (TR. 6/3/99 p. 22)

POSITION OF THE PARTIES

The Union's position is that the Employer has a statutory duty to bargain over the effects of the decision to reduce posts, prior to implementing the same, and that the Union has not waived its right to require said bargaining. The Union argues that the Employer's failure to bargain, prior to implementation of the plan, is an unfair labor practice. Furthermore, the Union argues that the matter is not moot, as suggested by the Employer. The Union argues that the Board continues to have jurisdiction to hear the matter, despite the existence of a grievance arising under the same set of facts. Finally, the Union argues that the statutory right and duty of the Director of the Department of Corrections to run a secure prison facility does not supercede his bargaining obligations as set forth in Title 28, Chapter 7 of the Rhode Island General Laws.

The Employer argues that the "broad management rights clause" in the collective bargaining agreement gives the Director full authority to eliminate posts without prior consultation with the Union. In addition, the Employer argues that the Union waived its right to engage in bargaining by agreeing to a "zipper clause" in the parties' collective bargaining agreement. Furthermore, the Employer claims that if the Union were to prevail in its claim, then

the same would be impermissible, under law, because the Director cannot bargain away statutory authority to determine the necessary staffing levels required for the public's, and institution's, safety and welfare. Moreover, the Employer argues that the Board has no authority to hear the case and should "defer" the same because a grievance was filed under the collective bargaining agreement.

DISCUSSION

The threshold issue we must address is the question of the Board's jurisdiction to hear this Complaint. The Employer argues that the "principle of deferment" essentially divests the Board of jurisdiction to proceed in this matter. The Employer cites federal "deferral" cases such as Collyer Insulated Wire, 192 NLRB 837, 1971, and its progeny, for this argument. This Board has previously and consistently held that "there is no question that a given set of facts may well give rise to both an allegation of a violation of a collective bargaining agreement and an allegation of a violation of the Act. Therefore a complaint which alleges the existence of an unfair labor practice is properly heard by the Board unless there exists some legal bar to the board's jurisdiction." (See ULP-4922 State of Rhode Island, Department of Environmental Management)[1] Pursuant to the Rhode Island State Labor Relations Act, R.I.G.L. 28-7-1 et seq., (hereinafter RISLRA or Act), the Board has exclusive subject matter jurisdiction, in the first instance, to determine whether or not an unfair labor practice has been committed by either an employer or a labor organization. R.I.G.L. 28-7-13, 28-7-13.1. Also see, Paton v. Poirier, 286 A.2d 243 (1972). No other agency or body within the State of Rhode Island has concurrent jurisdiction to hear such matters.

Moreover, R.I.G.L. 28-7-20 directs the Board to "prevent unfair practices" and provides that the Board's "power shall not be affected or impaired by any means of adjustment, mediation, or conciliation in labor disputes that have been or may hereafter be established by law".

[1] The Board notes that this ULP-4922 was upheld by the Rhode Island Superior Court, (C.A. 99-3151.) That decision is presently before the Rhode Island Supreme Court, (C.A. No. 00-372) and is being briefed. It is unclear what issue(s) the Court is reviewing in that matter. However, until such time as the Rhode Island Supreme Court directs and mandates the Board to adopt a "deferral policy", the Board shall decline to do so.

Therefore, it is clear that the Board has unrestricted power to hear complaints of unfair labor practices, notwithstanding the co-existence of a grievance arising out of the same set of facts.[2] Were this Board to decline jurisdiction over this case, the Union would be left with no avenue of remedy, since this Board has exclusive jurisdiction in the State of Rhode Island to determine whether an unfair labor practice has occurred. This Board will not decline its jurisdiction to hear an alleged violation of the Labor Relations Act, just because a party may also allege a cause of action in a different forum. To do so would be a clear violation of the Board's statutory responsibility.

The Employer, in this matter, argues at length, in its brief, about several provisions of the parties' collective bargaining agreement and makes certain claims concerning the "plain language" of the contract, the "management rights" clause, and the "general waiver" clause. However, the Union rightfully points out, in its brief, that the collective bargaining agreement between the parties was never placed into evidence before the Board, either jointly or by either of the parties. The Union argues, therefore, that the Board cannot consider such "evidence" when making a determination about this case. The Union is correct. This Board is an administrative agency which is limited to consideration of the facts, testimony, and evidence adduced at the formal hearing. Although the Employer has appended an "Index of Relevant Language of the CBA", to its brief, the same is not evidence and cannot be considered by the Board in its deliberation of this matter. To do so would be admitting evidence outside the scope of the formal hearing and depriving the Union its due process opportunity to object or to refute the existence of said provisions. Therefore, the Employer's arguments, as they relate to the language of the contract, shall not be considered because they are outside the scope of the evidence of the record.

The next argument we shall address is that of the so-called "public policy/arbitrability" issue which was raised by the Employer at pages 8-12 of its brief. The crux of this argument is that the Director of the Department of Corrections has certain statutory obligations to determine appropriate staffing levels to insure institutional security and public safety. The Employer argues that the Rhode Island Supreme Court's decisions in State Department of MHRH v Rhode Island

[2] The Board's jurisdiction when an unfair labor practice arises during the course of "interest arbitration" is limited by the Rhode Island Supreme Court's decision in Lime Rock Fire District v State Labor Relations Board, 673 A.2d 51 (1996) and other statutes specifically dealing with the issue of interest arbitration

Council 94, 692 A2d 318, 322 (R.I. 1997) and Vose v Rhode Island Brotherhood of Correctional Officers, 587 A.2d 913 (R.I. 1991) stand for the proposition that governmental employees cannot bargain away authority that has already been delegated to management or to other governmental agents by State law or other paramount public policy. (Employer's brief p. 10) The Employer argues then, that the Director's responsibilities for controlling departmental spending set forth under R.I.G.L. 42-56-10 (u) cannot be delegated to others or subject to the whim of an arbitrator. Therefore, the Employer argues that, if the Director of Corrections was obligated to bargain over the effects of his decision to eliminate posts, such action would interfere with his statutory authority, which is prohibited by the R.I. Supreme Court (MHRH and Vose, supra) on public policy grounds.

In contrast, the Union argues that there has "never been an instance in which our Supreme Court has suggested that the director's authority under Title 42 frees him or her from the constraints imposed by other statutory provisions such as the State Labor Relations Act, the Fair Employment Practices Act (28-5-1 et seq.), the wage and hour laws (28-14-1 et seq.) or any of the myriad statutes governing the employment relationship... To do so would lead inevitably to the conclusion that in the Department of Corrections, employees could be terminated for union activity or because of their race, religion or gender, or denied overtime compensation for work in excess of forty hours per week. The patent absurdity of the position forecloses any argument that the Director is relieved from his/her obligation to bargain with the Brotherhood under 28-7-1 et seq. by virtue of 42-56-10 of the General Laws." (Union's brief at p. 15-16) The Board agrees with the Union's argument. Moreover, there is not a shred of evidence in the record to suggest that bargaining over the impact (as opposed to the decision itself) of the reduction of posts will in any way impair or impede the Director's ability to control the Department's spending. To require the Director to bargain over the impact of his decision to eliminate posts on the terms and conditions of employment for the members of the complaining Union is not synonymous with a usurpation of the Director's power to control department-wide spending.

The next issue, and the most fundamental one to this case, is whether or not there is a difference between a statutory bargaining requirement in order to make a decision, as opposed to a bargaining requirement as to the effects of the decision. While the issue is not precisely framed or addressed as such by the Employer, the Union clearly claimed that it was challenging

the "direct impact upon the working conditions of bargaining unit members". (See charge filed on December 7, 1995) Moreover, the Union notes that it is not contesting the Director's decision to abolish the posts. It does contend that once such a decision has been made, the Union is entitled to timely notice and the opportunity to bargain over its effects on bargaining members. (Union's brief p. 11)

In support of this argument, that "decisional bargaining" is separate and distinct from "impact bargaining", the Union relies upon a decision of the United States Supreme Court, which held that while an employer's decision to cease part of its operations is not a mandatory subject of bargaining, the effects of that decision must be bargained. See First National Maintenance Corp. V NLRB, 452 U.S. 666 (1981) The Union argues this rationale is present in the instant case and that when posts are abolished, there are unresolved workload questions concerning combining of the duties of the abolished posts with existing posts, the impact in institutional security and employee safety, the placement of officers in new posts, their seniority rights and the impact on the affected officers' shift hours, days off, and building assignments. The Union also argues that, although Rhode Island case law is silent on the issue, the Minnesota Supreme Court has indeed recognized the dual source of bargaining obligations, arising from the state's labor relations act and the collective bargaining agreement. School District 88 v. Service Employees, 143 LLRM 2911, 2915. Also see Universal Security Instruments v NLRB, 649 F.2d 247, 107 LLRM 2518, 2526, (4th Cir. 1981)

The Board agrees that an Employer's decision to undertake an act (while perhaps permissible), and the effects of that act on the terms and conditions of employment, are indeed two separate issues. To hold otherwise would be an acceptance that the statutory or contractual authority for an action is exercisable without regard to other limiting statutes or contractual provisions. We believe that such a standard would violate the policies of the Rhode Island Labor Relations Act set forth in R.I.G.L. 28-7-2. Therefore, this Board recognizes the distinction between "decisional" bargaining and "impact" bargaining and declares the same to be applicable to controversies arising under Sections 13 (6) and 13.1 (1) of the Rhode Island State Labor Relations Act.

The Employer also argues that, notwithstanding the fact that it does not have an obligation to bargain over the impact of the decision to cut posts, it did so anyway on both an

informal and a formal basis. The Employer argues that the evidence established that the Union was fully informed, directly and indirectly, with respect to the State's options for reducing budgetary expenditures from the spring of 1995 to the date of implementation. (Employer's brief p. 28) The Employer also argues that " the union was never shut out of the process for evaluating what posts should be eliminated...The process itself was completely open. There were no secrets." (Employer's brief p. 28)

In contrast the Union argues that "the most that may be gleaned from the record is that Brotherhood officials had reason to suspect that post reductions were a possibility. The evidence is undisputed, however, that they were intentionally kept in the dark as to the extent or location of these reductions until the decision had been made and implemented." (Union's brief p. 17) The Union notes that while such a "close to the vest" strategy is not uncommon, the same has been uniformly found to violate the statutory obligation to bargain in good faith. Citing: Los Angeles Soap, 300 NLRB 289, 136 LRRM 1032 (1990), Metropolitan Electronics, 279 NLRB 957, 122 LRRM 1107 (1986), Willimantic Tug & Barge Co., 300 NLRB 32, 135 LRRM 1137 (1990) and others.

Upon cross examination, Mr. Kenneth Rivard testified that, when Director Vose notified the Union of the post cuts on or about December 4, 1995, this was the first inkling he (Rivard) had that there would be post cuts. (TR. 2/24/98 p. 32) He also testified that although he did know that the State had hired a consultant to survey all the posts and facilities of the ACI, he did not know the reason why the survey was being conducted. (TR. 2/24/98 p. 32 & 36, 37, 38) However, Employer's Exhibit # 1, a memo from Director Vose to Mr. Rivard dated July 20, 1995, regarding "Potential Post Cuts" clearly establishes that the Union was on notice that the Department was contemplating such an action. The memo states, in part: "The Wardens have been instructed not to cut posts formally until a study is completed and discussed with R.I.B.C.O." Mr. Rivard's testimony on his knowledge of the purpose of this study is, therefore, less than completely credible. The Board believes that the Union was fully aware that the study was being undertaken, with the potential that it would recommend cutting of posts.

However, the Board also believes that the evidence clearly established that the unilateral implementation of the post cuts, without prior negotiations, was indeed a surprise to the Union. Moreover, the Board believes that the evidence clearly established that the Union did not know

that posts cuts were definitely going to occur and certainly not prior to notification to the Union. Employer's Exhibit #1 clearly stated that the posts would not be cut until the survey was completed and the results discussed with R.I.B.C.O. Moreover, Mr. Rivard testified that he was surprised by the Director's December 4th announcement because of the assurances for discussions given in the July 20th memo. He also stated that he was surprised at the decision, because prior post reductions had resulted in a "bare bones" staffing level; and that since then, the inmate population had increased. The Board finds this testimony to be credible. (TR. 2/24/98 p. 41)

However, the most credible testimony on who knew what, and when came from Director Vose. He candidly admitted that the Union was "not involved directly in the post evaluation process" (TR. 6/3/99 p. 18); consultants hired by the State were not "given the freedom to share with the Union the specific items that were being considered" (TR. 6/3/99 p. 20); and that the Governor's November 1995 decision to implement post cuts was kept quiet until the December 4th announcement because of the fear of labor unrest. (TR. 6/3/99 p. 22-23). Director Vose states that, although a meeting did take place with state officials and RIBCO officials, the same took place on December 8, 1995. The substance of the meeting, which lasted for 1.5 hours, was the Union's suggestions for alternative budget reductions and the *restoration* of the cut posts. Director Vose testified: "The Union argued that all posts should be restored. We told them we could not do that". (TR. 6/3/99 p. 27)[3]

Director Vose's testimony established, without a doubt, that the State did indeed unilaterally reduce the posts without prior discussions with the Union. While both parties knew that post reductions were under consideration, the Union had been assured that the same would not take place until such time as the study was completed and discussed with the Union. Moreover, the only discussions that actually took place, took place after the fact, and were centered on the correction of the action, to wit: restoration of the cut posts.

This Board has consistently held, and continues to do so in this case, that discussions which take place after the unilateral implementation of a change to the terms and conditions of employment, do not constitute good faith bargaining as required by law. Such bargaining, if these types of discussion can be labeled as such, is merely remedial, and in no way changes the prior facts of a unilateral implementation.

[3] Indeed, this meeting took place after the Union had filed its Unfair Labor Practice charge.

Finally, the Board also wants to make specific reference to the fact that the Employer had assured the Union, in writing (Employer's Exhibit #1), that no post cuts would take place until the issue had been discussed with the Union. This memo was written by Director Vose to the Union in July of 1995, in response to the Union's expression of concern of the issue. Thereafter, although there were undoubtedly rumors throughout the Department, the Department took deliberate steps to conceal its intentions and did not have discussions prior to the post cuts, as it promised to do. The Board is particularly concerned by this Employer's attempt to placate the Union with reassurances, while simultaneously having no intention to follow through. Such tactics have no place in good faith labor relations. Moreover, we believe that such tactics interfere with the employees in the exercise of their rights guaranteed to them by 28-7-12, in violation of R.I.G.L. 28-7-13 (10).

FINDINGS OF FACT

1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection, and as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) In 1995, the State of Rhode Island was experiencing a budgetary problem, which led the Governor to order the various Departments to cut expenses. At the point of enactment of the budget, there was a $4.5 million shortfall in the Department of Corrections budget. Of this amount, the Department was going to be responsible for $2 million.
4) After the budget was adopted (effective date July 1, 1995), various cost cutting measures were considered by the Director of the Department, George Vose, but the "uppermost" consideration was the cutting of "posts" or positions.
5) The Employer assured the Union, via a memo dated July 20, 1995, that no post cuts would take place until the completion of a study and discussion of the same with the Union.
6) Thereafter, the Department hired some consultants to conduct a staffing study, which was done in the fall of 1995. Upon conclusion of the study, the Director and the Governor of the State of Rhode Island made a determination that a number of posts would be cut.

7) The Employer did not involve the Union in the post reduction process, did not permit its consultants to discuss issues with the Union, and did not share its decision to cut posts with the Union until the plan was being implemented.

8) On or about December 4, 1995, the Director announced, to the Union and the media, that "post" cuts were going to take place; and the plan was implemented without prior discussions with the Union.

9) The meeting held on December 8, 1995 took place after the Union filed an Unfair Labor Practice and dealt with the Union's request to *restore* the cut posts.

CONCLUSIONS OF LAW

1) The Board has jurisdiction to hear this matter pursuant to R.I.G.L. 28-7-13 and 28-7-20.

2) The duty set forth under R.I.G.L. 28-7-13 cannot be, and is not, impaired by other statutes, pursuant to R.I.G.L. 28-7-44.

3) The Union has proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (6).

4) The Union has proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (10).

ORDER

1) The Employer is hereby ordered to cease and desist from refusing to bargain with the Union prior to implementing post cuts in the future.

2) The Employer is hereby ordered and directed to post this Decision and Order on all bulletin boards within the Department that it regularly utilizes for employment related messages, for a period of thirty (30) days.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (Dissent)

Ellen L. Jordan, Member (Dissent)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissent)

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

Dated: July 3, 2001

By: _____
Joan N. Brousseau, Administrator