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-5280
-AND-	:	
STATE OF RHODE ISLAND, DEPARTMENT OF HEALTH	:	

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 Health (hereinafter Employer) based upon an Unfair Labor Practice Charge (hereinafter Charge) dated July 21, 1997 and filed on July 22, 1997 by R. I. Council 94, AFSCME, AFL-CIO, Local 2870, (hereinafter Union).

The Charge alleged:

Violation of 28-7-13 Paragraphs 3, 6, and 10

> "The Department of Health has violated the above cited paragraphs by refusing to recognize the sole and exclusive bargaining representatives of AFSCME, Council 94, Local 2870 concerning grievances and all other union matters."

Following the filing of the Charge, an informal conference was held on September 22, 1997, 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 May 25, 1999 alleging:

> "3. That the Employer reduced the full time bargaining unit position of Medical Examiner Agent to a part time position without first negotiating the same with the exclusive bargaining agent in violation of R.I.G.L. 28-7-13 (6).
>
> "4. The Employer discriminated against bargaining unit members when it assured a bargaining unit member who had applied for the position that the job would not receive any more than 20 hours per week and when the bargaining unit member turned down the job, the Employer filled the position with a non-bargaining unit member and then gave the non-bargaining unit member more than twenty hours per week, in violation of R.I.G.L. 28-7-13 (10)."

The Employer filed its Answer to the Complaint on June 7, 1999, denying the allegations contained in paragraphs 3, 4 and 5 of the Complaint. A formal hearing on this matter initially scheduled for September 7, 1999, was rescheduled to September 21, 1999, due to a scheduling

conflict with counsel for the Employer. At the commencement of the hearing, the Board noted that a Motion to Dismiss had been received from the Employer on the previous day. Due to the timing of the filing, the Board determined that the formal hearing should go forward and that the Motion would be dealt with during its Decision. Upon conclusion of the Union's case, the Employer's counsel made an oral Motion to Dismiss, alleging an insufficiency of evidence to sustain the charges. The Board reserved judgement on that Motion until conclusion of the case, as well.

Upon conclusion of the hearing, 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

In May, 1997, the Employer posted a Vacancy Notice for the position of Medical Examiner Agent. When the notice was originally posted, it listed the position as "full-time". (TR. p. 9) The next day, after realizing that the notice listed a full-time position, the original notice was pulled and a second notice was posted indicating that the position being posted was actually part-time, for 20 hours per week. (TR. p. 11) (Union Exhibit #3) One Council 94 member did apply for the position, was offered the same, but then refused the offer. (TR. p. 13) The notice specified that the position was covered by a collective bargaining agreement and that the exclusive bargaining agent was Council 94. The position was ultimately filled from outside the bargaining unit. (TR. p. 14) The Employer did not negotiate with the exclusive bargaining agent regarding the terms and conditions for the part-time position of Medical Examiner Agent. (TR. p. 42)

POSITION OF THE PARTIES

The Union argues that the time frame for hearings set forth in R.I.G.L. 28-7-9 (b) (5) is discretionary, not mandatory, and that the Board's failure to hold a formal hearing within 60 days of the filing of the charge does not divest the Board of jurisdiction to hear the Complaint.

On the merits, the Union argues that the "undisputed facts establish that the Employer reduced the full-time bargaining unit position of Medical Examiner Agent to a part-time position without first negotiating the same with the exclusive bargaining agent". (Union's brief p. 4) The Union also argues that the undisputed facts show that the Employer discriminated against

bargaining unit members. The Union argues that the facts in this case are essentially identical to, and are "on all fours" with, this Board's decision in ULP-4922, State of Rhode Island, Department of Environmental Management.

The Employer sets forth a number of arguments in its brief. It argues that the Board is without jurisdiction to hear this Complaint and must dismiss the same because the Complaint was not issued, nor was a formal hearing held within 60 days of the Union's charge having been filed. The Employer also argues that the Complaint fails to inform the Employer of the factual basis for the Complaint. The Employer also raises an affirmative defense (in the form of an argument) that the Employer does not have a responsibility to negotiate with the Union because of the parties' collective bargaining agreement. The Employer also argues that the facts, as established at the hearing, do not support a charge of discrimination against the Union, and that the Union's reliance of this Board's decision in ULP-4922 is misplaced.

DISCUSSION

This Board has consistently held that the time limits in R.I.G.L. 28-7-9 (b) (5) are discretionary, not mandatory, and the failure to hold a formal hearing on the case within 60 days of its filing does not create a bar to the Board's jurisdiction. In two cases which have been appealed to the Superior Court, the Court has agreed with the Board's ruling. See State of Rhode Island, Department of Administration v Rhode Island State Labor Relations Board, PC 97-4890, J. Cresto and State of Rhode Island, Department of Environmental Management v Rhode Island State Labor Relations Board, et al, P.C. 99-3151, (J. Gibney). The Board sees no reason, at this point, to change its mind on this issue, and continues to hold that the timeframes set forth in R.I.G.L. 28-7-9- (b) (5) are discretionary; and the Board's failure to conduct a formal hearing within 60 days of the charge being filed does not divest the Board of jurisdiction to hear the Complaint.

The Board also notes that the Employer argues that the timeframes set forth in R.I.G.L. 28-7-9 (b) (5) also determine when a Complaint must be issued by the Board. Once again, this Board has previously determined that it is R.I.G.L. 28-7-21 that governs the issuance of Complaints by the Board, not R.I.G.L. 28-7-9 (b) (5), and that R.I.G.L.28-7-21 has no time constraints set forth therein. This determination has also been upheld by the Rhode Island

Superior Court in State of Rhode Island, Department of Environmental Management v Rhode Island State Labor Relations Board, et al, P.C. 99-3151, (J. Gibney)[1].

The Employer also argues, that the Complaint fails to inform the Employer of the factual nature of the basis for the Complaint. The Employer claims that it does not know which of the Board's policies have been violated, or where these policies are found. Thus, the Employer argues that the Complaint does not supply a sufficient factual basis to know what it has done. This circuitous, silly argument was also raised in ULP-4922. First of all, the reference in the Complaint specifically states that the Board is referring to the policies and provisions set forth in the Rhode Island State Labor Relations Act.[2] How can the same be any more specific? Moreover, the factual allegations are clear, concise and specific. It should also be noted that the Employer was present, and took part fully, at the informal hearing held in September, 1997. Therefore, to suggest that the Employer does not know the factual basis for the Complaint is disingenuous. The Board finds no merit in this argument.

The Employer also argues that it does not have an obligation to bargain because the parties' collective bargaining agreement contains a "zipper clause" and other clauses that relieve it of the duty to bargain. In its brief, the Employer sets forth what it believes are the applicable portions of that agreement. This argument, however, is not evidence. Neither the Union nor the Employer submitted a copy of the collective bargaining agreement into evidence. Therefore, the Board cannot consider the provisions set forth in the Employer's brief as evidence. Were the Board to do so, the Union would be deprived of its ability to respond accordingly, and either rebut the existence of said agreement, or to argue the meaning of those clauses. The Board therefore, finds that there is no evidence in this case supporting the existence of any of these provisions and will not consider the same.

In this case, the testimony established that the position of Medical Examiner Agent had previously been a full-time position. The particular opening being filled, in this case, was for a position that had been vacant for several years, but was still "available" to the Department. The Employer had come to the determination that a part-time position would fill both the

[1] Although this matter is presently pending before the Rhode Island Supreme Court on the State's petition for certiorari which was granted, it is unclear what issue, out of several which have been raised, that the Court is reviewing. Therefore, until the Rhode Island Supreme Court issues a decision contrary to those which have been issued by the Superior Court, this Board will not change its position on this issue.

[2] The Employer is advised to look at subsection 2 of that chapter.

Department's operational needs and would be the most fiscally prudent. The Board does not sit in judgement of, or to second guess this business decision, and the Board essentially accepts the Employer's proffered reasons therefore.

However, it is well settled that work schedules, salaries, and other terms and conditions of employment are mandatory subjects for bargaining. The facts, in this case, also establish to the Board's satisfaction that the Employer decided to create and fill a part-time position without prior negotiations with the exclusive bargaining agent. (See testimony of Diane Rafferty, TR. p 12 and testimony of Edward D'Arrezzo at TR. p. 33-34) A newly created part-time position, where none existed before, has an impact on members of an existing bargaining unit. The other Union members have an interest in how the part-time hours and benefits compare to those afforded to full-time employees, particularly if existing bargaining unit members are interested in applying for the part-time positions.

In this case, the evidence established that the part-time employee who accepted this position worked an average of 24.7 hours per week, in excess of the posted 20 hours. A second part-time employee, hired afterwards, worked an average of 27.3 hours per week, again in excess of the posted 20 hours. (See Employer's Exhibit #2) As in ULP-4922, these facts raise a question in the minds of some Board members as to whether or not a current Union member may have been interested in applying for this position under these actual conditions, because a position that is less than full-time, but more than 20 hours per week may indeed be appealing to some members of the existing bargaining unit.

The Union has argued that the evidence established that the Employer had engaged in discrimination against Union members by telling a Union member, Mr. Bisbano, that the position was limited to 20 hours per week, but then providing more work to the person hired. First of all, Mr. Bisbano did not testify in this proceeding, and the Union's proffer of what Mr. Bisbano was told in his interview is totem pole hearsay and shall not be considered. When a charge of discrimination is alleged, the Board must look to see whether a legitimate business purpose has been set forth for the Employer's actions. In this case, the Board finds the Employer's stated rationale for the creation of a part-time position credible. Although there is some question as to why there was only a need for a part-time position when the Employer had recently terminated a full-time Medical Examiner, there isn't any reason or evidence to suggest that the same was for a

discriminatory motive, particularly when the new part-timer would still be a part of the bargaining unit. Therefore, the Board finds that there is insufficient evidence to make a finding that the Employer engaged in discrimination, and the Complaint as to this count is dismissed.

Finally, the Employer argues that this case is different from ULP-4922 in that the Employer has created other positions within the Department that are within Council 94, without any prior objections from the Union. Without saying so, the Employer appears to imply, by this discussion, that the Union has, therefore, waived its right to complain about these acts in the future. The Employer is mistaken. The failure of the Union, through its various Locals, to pursue its rights as to other positions, for whatever reasons (which are not in the record) has no bearing on this case. In each instance, where an Employer refuses to bargain collectively with an exclusive bargaining agent, when so obligated, a cause of action for unfair labor practice arises. The Union then has a six-month period to make the determination to file a charge with the Labor Board. That time frame has been met in this instance. The fact that a Union chose not to pursue a remedy in other instances does not foreclose its actions in the present matter.

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 May, 1997, the Employer posted a Vacancy Notice for the position of Medical Examiner Agent. When the notice was originally posted, it listed the position as "full-time."
4) The next day, after realizing that the notice listed a full-time position, the original notice was pulled, and a second notice was posted indicating that the position being posted was actually part-time, for 20 hours per week.
5) The notice specified that the position was covered by a collective bargaining agreement, and that the exclusive bargaining agent was Council 94.
6) One Council 94 member did apply for the position, was offered the same, but then refused the offer. The position was ultimately filled from outside the bargaining unit.

7) Prior to this part-time position, the position of Medical Examiner Agent had always been a full-time position.

8) The part-time position did not arise as a result of eliminating an existing full-time employee, and then reducing the position to part-time, but rather was a reduction to part-time from a long vacant, full-time position.

9) The Employer did not negotiate with the exclusive bargaining agent regarding the terms and conditions of employment for the part-time position of Medical Examiner Agent.

CONCLUSIONS OF LAW

1) The Board has subject matter jurisdiction in this case.

2) Wages, hours of employment, time off, and work schedules are all terms and conditions of employment and are mandatory subjects for bargaining.

3) The Employer has an obligation to discuss the terms and conditions of employment for newly created positions.

4) The Union has proven, by a preponderance of the evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (6) by refusing and failing to negotiate the terms and conditions of employment [wages, hours of employment, time off, and work schedules] for the part-time position of Medical Examiner Agent, prior to its creation.

5) The Union has not proven, by a preponderance of the evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (3) or (10).

ORDER

1) The Employer's Motions to Dismiss (oral and written) are hereby denied.

2) The Employer is hereby ordered to cease and desist from creating any new part-time positions in the bargaining unit without first negotiating the terms and conditions of employment of the same with the Union.

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

John R. Capobianco, Member

Elizabeth S. Dolan, Member

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

Dated: July 11, 2001

By: _____
Joan N. Brousseau, Administrator