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 STATE LABOR RELATIONS BOARD	:	CASE NO: ULP-5389
	:	
-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 March 23, 1999 and filed on March 31, 1999 by the Rhode Island Brotherhood of Correctional Officers, (hereinafter Union or RIBCO).

The Charge alleged:

> The employer has violated Title 28, Chapter 7, Section 13 (6) and (10) of the General Laws by creating the position of Janitorial/Maintenance Supervisor (Corrections) in a bargaining unit represented by the RI Brotherhood of Correctional Officers with shift hours other than those negotiated with the Brotherhood, the exclusive bargaining representative. Posting for said position took place by means of a Vacancy Notice which is attached hereto and made a part hereof.

Following the filing of the Charge, an informal conference was held on May 24, 1999 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 January 27, 2000. The Employer failed to file any Answer to the Complaint.

A formal hearing on this matter was held on March 9, 2000. 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

As stated in the Union's brief, "the basic facts are not at issue, although the parties disagree on the interpretation thereof and the legal consequences which flow therefrom." On or

about January 19, 1999, the Employer posted a Vacancy Notice for the new civilian positions of Janitorial/Maintenance Supervisor. (Union Exhibit #2) The notice established this position as one which is represented by the Union. The position was posted with work hours of 1:00 pm - 8:00 pm. One position had a work week of Sunday through Thursday (Friday/Saturday off) and the other work week ran from Tuesday through Saturday (Sunday/Monday off). It is undisputed by the parties that this position was a new position, which had not been covered by the parties then expired collective bargaining agreement.

POSITION OF THE PARTIES

The Employer argues that its actions were defensible for three reasons. First, the Employer argues that its actions were permissible because the Director of the Department has broad statutory power under R.I.G.L. 42-56-10. Second, the issue is one which involves the application and interpretation of a contract provision which is referable to the arbitration process. Finally, it argues that it did in fact engage in negotiations, but reached an impasse, and therefore, it was permissible, under a management rights clause, to move forward without an agreement.

The Union argues that the Employer committed an unfair labor practice twice; first when the Employer failed to reach agreement with the certified bargaining representative prior to changing the existing work hours; and secondly, when the Employer failed to propose changes in such hours during interest arbitration. (See Union's brief p. 6.) As a remedy, the Union seeks an Order from this Board directing the Employer to cease and desist and to order the Employer to forthwith assign the civilian Janitorial/Maintenance Supervisor's classification to one of the civilian work schedules reflected in the 1994-1996 collective bargaining agreement.

DISCUSSION

The first issue that the Board will address is the second "count" of unfair labor practice alleged by the Union it its brief at page 6, where it stated that the Employer failed to propose changes in such hours during interest arbitration. While this allegation presents an interesting question, is not properly before this Board. No motion was ever made by the Union, either orally or in writing, to amend its charge, as required by the Board's Rules and Regulations. Therefore, this additional charge will not be addressed by this Board.

It is axiomatic that, for an Employer to have a bargaining obligation regarding employees, the position must be part of the bargaining unit. There are essentially three ways in

which an Employer's obligation to recognize and bargain with a Union may arise: voluntary recognition by the Employer, certification by the Board, or the rarely utilized, "bargaining order". In this case, the position of Janitorial/Maintenance Supervisor, was a newly created position. The Employer voluntarily recognized the position as one which should be represented by the Union. In fact, when the Employer posted the position, it noted that the position was subject to a collective bargaining agreement and was represented by RIBCO. Moreover, the Employer's own witness, Mr. George Truman testified that "the State and the Brotherhood had discussions on this position, agreed to its accretion.". (TR. p 26) Therefore, the Board finds that RIBCO is the exclusive bargaining agent for the terms and conditions of employment for those employees in the classification of Janitorial/Maintenance Supervisor.

The Employer, in this case, argues that the Complaint should be dismissed for three reasons: (1) That the Director of the Department of Corrections has broad statutory powers to hire, promote, transfer, and assign employees; and that he/she alone can make this decision, notwithstanding the statutory duty to bargain collectively. (2) The issue involves the interpretation of a contract and is referable to the arbitration process. (3) No unfair labor practice occurred.

The Employer's first two arguments are jurisdictional in nature and shall be addressed first. The Employer's "broad statutory authority" argument is one which the Board has seen with regularity in its response to other charges and complaints of unfair labor practices. The argument derives from the Rhode Island Supreme Court's holdings in MHRH v Rhode Island 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). In those cases, the Court was reviewing the validity of arbitration awards made pursuant to collective bargaining agreements. In Vose, the Court held that an arbitrator's award finding that the State could not require involuntary overtime was in violation of public policy and was, therefore, unenforceable. The Court had framed the issue as to whether the Department has the authority to bargain away the Director's statutory powers under R.I.G.L. 42-56-10 and concurred that the Department did not have such power. In MHRH, the issue was whether the submission of a dispute over a 16 hr. consecutive work hour cap was substantively arbitrable. The Court specifically noted that the State is obligated to negotiate about hours and other conditions of employment. Id at 324.

In this case, the issue is not whether a collective bargaining agreement or an arbitration award has effectively and impermissibly usurped the statutory authority of the Department of Corrections. The issue is whether the Director's "broad statutory powers" under 42-56-10 supercede the statutory responsibility to engage in collective bargaining set forth in the Rhode Island Labor Relations Act. The Board believes that the two obligations are co-existent and must be harmonized with each other, and that the Director has an obligation to make sure that his actions comport with the mandates of both statutes. In fact, that very issue is highlighted in the MHRH decision.

In a recent decision by this Board involving the same Employer and same Union, we concurred with the Union's argument that " there has never been, however, 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 Rhode Island General Laws." (See Decision and Order in ULP 5123, Department of Corrections and RIBCO)

Moreover, even in the event of a statutory conflict, the Board believes that the provisions of the Labor Relations Act would control because R.I.G.L. 28-7-44 provides: "Insofar as the provisions of this chapter are inconsistent with the provisions of any other general, special or local law, the provisions of this chapter shall be controlling." The Board notes, however, that it does not believe that there is a statutory conflict in this case. The Employer sets forth no reason, whatsoever, as to why or how the simple obligation to bargain collectively over the hours and days of work for Janitorial/Maintenance Supervisors would impact the Director's power to hire, promote, transfer, assign, and retain employees.

The Employer also raises the arbitration/deferral/jurisdictional argument as again is so commonly raised before this Board. As this Board has previously and consistently held, "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". 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] 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's third argument is a substantive argument that the Employer did not commit an unfair labor practice. In support of this argument, the Employer claims that the parties did meet and confer on the issue of the hours and work days for the Janitorial/Maintenance Supervisors, and that its posting of the position was in accordance with that agreement. In the alternative, the Employer is arguing that the parties must have reached impasse, because the Union now denies the agreement, and that its actions were appropriate. This argument is internally inconsistent. How can there be an agreement and impasse at the same time?

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[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.

[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.

The answer to this complaint is not whether or not the Employer is obligated to bargain with the Union over the terms and conditions of employment for the Janitorial/Maintenance Supervisors - it is. The issue is whether or not the bargaining ever took place. The Union's only witness in this case was Kenneth Rivard, its Grievance Chairman, who testified that during negotiations for a successor contract, the Employer did, at one point, make a proposal to create the Janitorial/Maintenance Supervisor classification with hours of work other than those contained in the 1994-1996 collective bargaining agreement. (TR. p. 10) Mr. Rivard stated that, although there were some discussions on the subject, he believed the Employer had withdrawn its proposal and that nothing was ever adopted. (TR. p. 10-11) He stated that prior to the posting of the position, the Union had not agreed to the hours of work and days of work. (TR. p. 11) He also testified that there was not any bargaining on this subject by the Employer from the time that the Employer withdrew its proposal until the time the position was posted. (TR. p. 11)

The Employer's only witness, Mr. George H. Truman, Jr., the Department's Associate Director of Human Resources, testified that when the Department first proposed the position, the Union did object to the hours of work and days off. (TR. p. 18) He testified further though that he continued to have discussions with the Union's leadership: Mr. Rivard, Mr. Sean Rocchio, Mr. Paul Stimpson and Mr. Anthony Lepore. (TR. p. 18) He stated that there was some agreement from Paul Stimpson and Sean Rocchio, when they were the Union President(s), to permit the Employer to post the work on a 1:00 p.m.- 8:00 p.m. or 3:00 p.m. -11:00 p.m. shift. (TR. p. 18) He stated that, although there was never an agreement in writing, the Department believed that it had an agreement in spirit; and therefore, went ahead and posted the position in January, 1999. (TR. p. 18) Upon cross examination, however, Mr. Truman testified that Mr. Stimpson and Mr. Rocchio understood the Employer's mission and were willing to negotiate to an end that was satisfactory to the Department. (TR. p. 22-23) On further cross examination, Mr. Truman stated that there was a verbal agreement between Rocchio or Stimpson, but that the agreement did not specify the hours agreed to and that the agreement was that the Union understood the Department's mission and would permit the Department to "accomplish our mission with this position." (TR. p. 24) Mr. Truman also testified that the Employer thought it could work out this problem at the end of the interest arbitration process. (TR. p. 24) He also admitted that the Employer did not propose, to the interest arbitration arbitrator, any hours of

work for civilian employees other than the day shift hours. (TR. p. 26) Finally, he stated that he first became aware of the Union's unfair labor practice charge in approximately June of 1999, but that he did not have any discussion with the Brotherhood leadership on this issue because the Department "was onto bigger and better fish by then". (TR. p. 28) [3]

The parties to this case are no strangers to the collective bargaining process. In fact, all of the representatives of both parties are intimately aware of the duties and obligations arising under the State Labor Relations Act. Taking Mr. Truman's testimony at face value, it seems clear that the most that the Employer had achieved from its discussions with the Union was an agreement to work towards an agreement. The testimony is, that while the prior Union leadership was amenable to continuing discussions on the issue of the hours and days of work, it did not ever reach agreement with the Employer on that issue. On that basis, and in light of the general climate of the parties' protracted negotiations, which ultimately led to interest arbitration, the Board has difficulty in understanding how the Employer could believe that it had an agreement, especially when the proposal wasn't even reduced to writing. It seems more likely to the Board that the Employer posted the position in that fashion because it just decided that it wanted to. In fact, Mr. Truman admitted that the Employer figured that it could just work the issue out at the end of the interest arbitration process. (TR. p. 25)

It is clear to the Board that there was not an agreement for the days of work and hours of work for the position of Janitorial/Maintenance Supervisor. It is also clear that the parties were not at impasse at the time of the Employer's unilateral implementation of the days and hours and the posting of the position. The Employer claimed it was in agreement; it cannot now claim that it was at impasse. Therefore, there is no question that the Employer unilaterally implemented terms and conditions of employment without first engaging in good faith bargaining with the exclusive bargaining agent, in violation of R.I.G.L. 28-7-13 (6)

As a remedy, the Union seeks an order requiring the Employer to implement one of the civilian schedules contained in the 1994-1996 collective bargaining agreement. However, since this case was concluded, the interest arbitration has concluded and the Board takes judicial notice that there is a contract in existence. Therefore, the Board will not mandate the use of a civilian schedule from the expired contract. Rather, the Employer is hereby ordered to assign the

[3] The interest arbitration hearings took place from May through October of 1999. (TR. p. 28-29)

position of Janitorial/Maintenance Supervisor to one of the civilian schedules in the present collective bargaining agreement, if the agreement contains such a schedule, until such time as it engages in meaningful, good faith negotiations with the exclusive bargaining agent.

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) Prior to January 19, 1999, the Employer and the Union had discussions on the position of Janitorial/ Maintenance Supervisor and agreed that the position was appropriate for inclusion within the Union's bargaining unit.
4) Prior to January 19, 1999, the Employer and the Union had general discussions concerning the hours and days of work for the position of Janitorial/ Maintenance Supervisor, but did not come to an agreement regarding the same.
5) On or about January 19, 1999, the Employer posted a Vacancy Notice for two positions of Janitorial/Maintenance Supervisor, positions which the State included within the Union.
6) The hours of work for the two civilian positions were from 1:00 p.m. - 8:00 p.m., which is a schedule that had never been previously available within the bargaining unit, and which was not negotiated to conclusion, in good faith, with the exclusive bargaining agent.

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).

ORDER

1) The Employer is ordered to cease and desist from unilaterally establishing hours of work and schedules for positions within the bargaining unit without first collectively bargaining with the exclusive bargaining agent.

2) The Employer is hereby ordered to rescind the civilian work schedule for Janitorial/Maintenance Supervisors and assign said employees to one of the civilian work schedules contained in the parties' collective bargaining agreement, until a different schedule is bargained, in good faith, with the exclusive bargaining agent.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member (Dissents)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissents)

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

Dated: July 3, 2001

By: _____
Joan N. Brousseau, Administrator