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-	:	CASE NO: ULP-5506
BRISTOL/WARREN REGIONAL SCHOOL DISTRICT	:	

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 Bristol/Warren Regional School District (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated October 26, 2000 and filed on October 31, 2000 by the Bristol Warren Education Association/NEARI (hereinafter "Union").

The Charge alleged:

> The Bristol/Warren School Committee failed and refused to reappoint Michael Twohey to the position of Social Studies Department Head at Mt. Hope High School. Said action by the School Committee was retaliation against Michael Twohey for his protected union activities as President of Bristol/Warren Education Association/NEARI, including leading a strike in Sept. 1999. Such actions constitute interference, harassment, restraint and coercion of union members in the exercise of concerted and protected activities in violation of RIGL 28-7-13 (3), (5), (8), and (10).

Following the filing of the Charge, an informal conference was scheduled for November 20, 2000, but was rescheduled to January 24, 2001. Representatives of the Union and Respondent and an Agent of the Board all attended and had the opportunity to try and resolve the matter. After the informal conference failed to resolve the Charge, the Board reviewed the matter at a meeting held on February 15, 2001 and determined that a Complaint would issue. The parties were advised of the Board's decision by letter dated February 19, 2001. The Complaint was issued on July 13, 2001. The Employer filed its

Answer to the Complaint on July 25, 2001, denying the allegations therein and asserting numerous affirmative defenses. The matter was then set down for formal hearing for November 15, 2001. At the request of the parties, the formal hearing was continued twice and was finally held on November 21, 2002. On November 8, 2002, the Employer filed a Motion to Dismiss, relying on an election-of-remedies argument and the Rhode Island Supreme Court's decision in State of Rhode Island Department of Environmental Management v Rhode Island State Labor Relations Board, 799 A.2d 274 (R.I. 2002) hereinafter referred to as the D.E.M." case. The Union filed an objection to the Motion to Dismiss on November 12, 2002. On November 21, 2002, at the commencement of the formal hearing, the Board determined that it would hear argument only on the issue of the Motion to Dismiss and not on any other substantive matters. The parties were advised that the Board would rule on the Motion to Dismiss first and then reschedule the substantive hearings, if any were necessary, after ruling on the dispositive motion. On March 13, 2003, the Board issued a written decision denying the Employer's Motion to Dismiss and the matter was re-commenced.[1] Formal hearings were conducted on May 8, 2003 and September 16, 2003. After several continuances, the Employer filed its post-hearing brief on February 20, 2004 and the Union filed its post-hearing brief on February 24, 2004.

FACTUAL SUMMARY

The Bristol Warren School Committee and the Bristol Warren Education Association were parties to a collective bargaining agreement for the period September 1, 1996 through August 31, 1999. Negotiations for a successor agreement commenced in November 1998. No settlement was reached by August 31, 1999 and a strike ensued. After being ordered back to work by the Court, the teachers engaged in a "work-to-rule" campaign, which lasted until the contract was finally settled in December 1999. As of April 1999, Helen C. Barboza, was appointed to the position of Assistant Superintendent and in November of 1999 (during the work-to-rule campaign) she was appointed as Acting Superintendent, after the retirement of the prior superintendent. Thus, Ms.

[1] That decision is attached hereto as Exhibit A and made a part hereof.

Barboza was part of the administration at the time of the strike and all during the work-to-rule campaign. The Union President, all during the negotiations, strike, work-to rule, and, thereafter, through the 1999-2000 school year, was Michael Twohey, a high school teacher, who was also serving in his fourth year as "Department Head" of the high school, Social Studies Department.

Ms. Barboza candidly testified that she was strongly opposed to the "work-to-rule" campaign and that she repeatedly requested Mr. Twohey to recommend to the teaching staff that this approach should be abandoned, for the benefit of the students. Mr. Twohey repeatedly declined and "work-to-rule" continued until the contract was settled in December, 1999. As a result of the strike, February vacation week was cancelled for that school year, to make up the lost time. Several teachers apparently contacted Ms. Barboza about previously scheduled vacation plans for that week, to see whether they could take personal time, or what could be done. Ms. Barboza testified that she tried to work out a Memorandum of Agreement with the Union on this issue, but that the Union declined to cooperate. Therefore, Ms. Barboza sent a letter to all the teachers asking them not to take their personal days during the February vacation week; because it would probably cause a hardship in terms of obtaining substitute teachers. Notwithstanding Ms. Barboza's request, Mr. Twohey, as well as several other teachers, did take some personal time off. Mr. Twohey took a day to attend an event with his son at the University of Vermont for early admission students. Mr. Twohey's use of the personal day was apparently within the parameters of the contract and Mr. Twohey, also, apparently utilized the correct procedures for taking the personal day. Nevertheless, on March 3, 2000, Ms. Barboza sent a letter addressed to Mr. Twohey, at his home, wherein she commented upon his decision to "be absent from his classroom" during the week of February 22-25 and characterizes his conduct in taking the day off as "unprofessional behavior." On March 5, 2000, Mr. Twohey takes umbrage with Ms. Barboza's letter and responds with a letter of his own wherein he states:

> "As you know, I went with my son to the University of Vermont for a special day, arranged by the university, for early admitted students. The timing of this event was not under my control.
> ...I strongly object to your insulting tone and the implications of your letter."

He goes on to defend his decision to take a personal day as being done fully within the parameters of the contract, and as a personal family matter that is for the well being of his son:

> "You have questioned my priorities. Every true educator that I know will tell you that students need a strong base at home. My wife and I have strived to provide that for your children. My first priority is to the students I have at home. My presence at the University's meetings of February 25 enabled me to help my son make a decision that will affect the rest of his life. Your letter implies that I do not consider my work with the students of Bristol/Warren important. I believe that my record of past and continued involvement on committees and within programs in the school in which have served, and at the district level, belies your implications. As you know, my involvement has gone, and continues to go, beyond the contractual school day and school year. "

On or about May 8, 2000, Dr. Barboza posted a notice advising all Department Heads that their job descriptions had been changed to reflect both contractual and programmatic changes. She also advised them that all positions have been reposted for the 2000-01 school year and that "preference will be given to teachers currently holding the positions." The memo goes on to instruct: "If you are interesting (sic) in continuing, please forward your letter of intent to my attention." The deadline for submitting letters of intent was May 26, 2000.

In response to the posting, Mr. Twohey did three things on May 23, 2000.

(1) He filed a class-action grievance, #S15-99-00 stating: "The department head job descriptions published by the Superintendent on or about May 8, 2000 calls for a number of actions that violate the agreement and deprive the individuals of professional advantage/advancement and are not sound practices for the district." As a remedy, Mr. Twohey requested: "Rescind all job descriptions as published on May 8, 2000 and revise the sections found questionable with input from administrators and faculty members." [2]

(2) He filed a second-class action grievance, #S16-99-00 stating: "By posting all positions of Department Heads, the Superintendent has discharged the

[2] This grievance ultimately made its way to arbitration. On May 7, 2001, Arbitrator Peter Adomeit determined that the School Committee did not violate the contract by re-writing the job descriptions.

incumbents without reason or due process. The reasons for posting the positions, contractual changes and programmatic changes, are not supported by the contract or by sound educational practices." As remedy for this grievance, Mr. Twohey sought: "A retraction of the posting and the reinstatement of all department heads as of May 7, 2000, with additional remedy provided by Article 20."

(3) He sent a letter of intent for both the Social Studies position, which he held, and for the Business Department posting.

On June 26, 2000, the Bristol Warren School Committee, acting upon the recommendations of Ms. Barbosa, appointed all but two Department Heads for the high school. There was evidence in the record that the School Committee routinely "rubber stamped" the recommendations for appointments and that generally from year to year, the same persons were re-appointed to these positions. On June 26, 2000, Ms. Barboza recommended, and the School Committee appointed, Gregory S. Arruda to the position of Social Studies Department Head. Despite the fact that Mr. Twohey was serving in his fourth year as the Social Studies Department Head and had expressed his interest in returning to the position, Mr. Twohey was not even afforded an interview for this position and was not even officially notified that someone else had been appointed until mid July, 2000.

On July 10, 2000, Ms. Barboza sent Mr. Twohey a letter thanking him for applying for the position of Department Head (with no specification as to which position) and advising that he was not the selected candidate. Sometime between July 10, 2000 and July 18, 2000, Mr. Twohey attended an interview conducted by Cheryl Tutalo, the Principal of Mount Hope High School, and Diane Pontes, the Director of Guidance, for the position of Department Head for the B*usiness Department*. At this interview, Mr. Twohey inquired as to why he had not been granted an interview for the Social Studies Department head position and was told that he did not make it past the "paper screening" which required five years experience. They informed Mr. Twohey that according to the records they reviewed, he only had four years of teaching experience, not five years, as

required under the newly revised job specifications. Mr. Twohey testified that he told Ms. Tutalo and Ms. Pontes, at the interview, that he felt he *did* meet the five year requirement for social studies because he had taught a year of geography (within the social studies disciplines) in Kickemuit (prior to the merger of the Bristol Warren regionalization). Ms. Pontes acknowledges that Mr. Twohey did make this claim at this meeting.

On July 18, 2000, Ms. Barboza sent Mr. Twohey a second letter, this time specifying that he has not received either the Social Studies Department Head position or the Business Department Head position. In response, on July 21, 2000, Mr. Twohey filed another grievance concerning the school district's failure to reappoint him to the Social Studies Department Head position. The grievance did not have a case number assigned because Mr. Twohey asked that it be immediately placed into abeyance because the remedy requested could affect another member of the bargaining unit [Arruda]. He advised Ms. Barboza that the union's grievance committee would then have to determine whether it was going to support his grievance. [3]

Sometime prior to the start of the school year, Mr. Twohey was offered the position Guidance Department Head and accepted the same. In September 2000, Mr. Twohey requested and was granted a leave of absence from his position and took a job teaching in the Town of Smithfield.[4] In October 2000, the within complaint was filed.

DISCUSSION

The issue in this case is whether or not the Employer violated R.I.G.L. 28-7-13 (5), (8) or (10) when it retaliated against Michael Twohey, by failing to reappoint him to a Department Head position after he participated in protected union activities.

The Union argues that the Employers' conduct in this case qualifies as "inherently destructive" and that the Board may draw an inference of improper

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[3] This grievance ultimately made its way to arbitration. On September 23, 2002, Arbitrator David R. Bloodsworth determined that Twohey was in fact the most qualified candidate for the social studies department head position and that the School Committee violated Article 18 of the CBA when it appointed someone else to the position.

[4] Twohey ultimately resigned from the Bristol Warren School District when it would not grant him a second year leave of absence.

motive from the conduct itself. The Union argues that the discrimination and retaliation, which occurred, was capable of discouraging membership in the Union, including discouraging participation in concerted activities. The Union points out that despite the fact that contract negotiations changed the job requirements for both department heads and grade leaders, Dr. Barboza conveniently only vacated and reposted the position of department heads, not grade leaders, without any plausible explanation for this differing treatment of positions. The Union also argues that Dr. Barboza, again, without any plausible explanation, changed the minimum number of years teaching required for obtaining a Department Head position from three (3) to five (5). The Union argues that it was not merely a "coincidence" that the administration chose to raise the minimum number of years of experience required for department heads when the administration's records erroneously reflected Mr. Twohey's teaching experience, showing only four years experience in his official files. Thus, the Union argues that it is entirely plausible to conclude that that the years of experience revision was devised to specifically exclude Twohey from consideration, as retaliation for his participation in concerted activities.

The Employer argues that the changes to the department head job descriptions were required both as a result of contractual changes (deleting the requirement for a principal's certificate) and as a result of permissible programmatic changes, which among other things, changed the minimum number of years teaching experience. The Employer argues that when Twohey became aware that he had not passed the "paper screen" for the Social Studies Department Head position, he did nothing to prove to the administration that he had the five years experience. The Employer argues that it was not provided with any "evidence" of Twohey's fifth year of experience until the following year when Twohey's grievance was being processed through arbitration and thus, the Union has failed to establish a prima facie case of discrimination. The Employer also argues that when it learned that Twohey might be minimally qualified, that it undertook appropriate steps to inquire whether Twohey could be satisfied, but

that Twohey rebuffed the District. [5] The Employer also argues that Twohey was offered and did take a Department Head position in the Guidance Department and so therefore, the Employer could not have discriminated against Twohey. Finally, the Employer also argues that the District's action were not merely a pretext, because Twohey did not satisfy the initial criteria for hiring.

By the time the Board heard and decided this matter, it had already been determined by an arbitrator that Twohey ***should have been re-appointed*** to the position of Social Studies Department Head. The Employer has already argued that the arbitrator also ruled on the issue of discrimination and the Board has already determined that it did not appear to the Board that the arbitrator reached this issue in his decisions. (See appendix A).

In its brief, the Employer cites the criteria set forth in Clock Electric v National Labor Relations Board, 162 F.3d 907, 912 (6th Cir 1998) as those which must be satisfied to establish a prima facie case of discrimination and concludes that the Union and Twohey failed to establish those criteria. The criteria are:

(1) The Employer is covered by the Act

(2) The employee is covered by the act

(3) The employee actually applied for the job and was qualified for the job

(4) Despite qualification, the employee was not hired

(5) Anti-union animus contributed to the decision not to hire the applicant

(6) After rejection, the position remained open and the employer continued to seek applications

The Employer argues that at the time of application, Twohey did not appear to the Employer to be qualified and that the burden essentially shifted to Twohey to prove that he was qualified. In addition, since Twohey "failed" to prove his qualifications, the charge of Unfair Labor Practice must fail. The Union argues that it isn't merely "coincidence" that the minimum teaching requirements for department head positions were changed to a number of years which would disqualify Mr. Twohey, based upon the District's personnel records. While the Board understands why the Union would be suspicious of this change, and

[5] At the time, Twohey was taking an approved one year leave of absence from the School District.

harbors some suspicions of its own, the Board finds that the evidence in the case just doesn't rise to the level to support such an inference that the Employer changed the qualifications merely to thwart Mr. Twohey's eligibility for the position of Department Head.

What is troubling and telling to the Board, however, is the fact that when Mr. Twohey submitted his letter of intent, ***which was all that was requested by the Employer,*** no one ever called him to discuss the letter or to advise him that it did not appear to the administration that he was qualified for the position he was seeking. The Employer, in both oral arguments and in its brief, suggest that it was Twohey's responsibility to prove that he was qualified and that since he did not do so in a timely manner, then it is his fault he was not hired. What this argument fails to grasp is the fact that when the Employer reposted the department head positions, the Employer established the "application" process as well, which was simply a directive to forward a "letter of intent" to Dr. Barboza. The reposting memo also indicated that preference would be given to teachers holding the position. On May 23, 2000, Mr. Twohey sent his letter of intent indicating his belief that he was qualified in both the areas of Social Studies and Business. The evidence established that once she received the letter of intent, Ms. Barboza did not contact Mr. Twohey in any way, shape or form concerning his letter of intent and his qualifications, despite the fact that he was the incumbent in the position. Instead, she submitted a recommendation for another teacher who was appointed on June 26, 2000. In addition, even after other administrators alerted Ms. Barboza in July, 2000 that Mr. Twohey was claiming that he was qualified for the Social Studies Department Head position, Ms. Barboza still took no steps to contact Mr. Twohey concerning his letter of intent or his status as Department Head for the Social Studies Department.

Having established that the first four (4) criteria set forth in Clock Electric have been satisfied, the question turns on whether or not there is evidence in the record of anti-union animus. The Employer argues that there is no such evidence because Dr. Barboza, herself, had been a member of a union for many years and because she and Mr. Twohey had met all that year and cooperatively solved

many issues. The fact that Ms. Barboza was previously a union member does not insulate her from feelings of anti-union animus, especially since she was serving in a management role at this point. She testified quite readily that work-to-rule campaign was particularly distasteful. The evidence also established that when Mr. Twohey took a personal day as permitted under the contract, that she sent him a nasty letter accusing him of unprofessional conduct. The Board believes that this evidence supports an inference that Ms. Barboza was harboring ill will towards Mr. Twohey because he was enforcing his contractual rights. The Board believes that evidence of Ms. Barboza's anti-union animus, as directed at Mr. Twohey, manifested itself during the spring and early summer of 2000.[6] Finally, the fact that Ms. Barboza never even bothered to ask Mr. Twohey about his application for reappointment, and never offered any explanation as to why she didn't call him to discuss the issue, supports the inference that Ms. Barboza was harboring anti-union animus, specifically against Mr. Twohey and this Board so finds. [7] The hiring of another employee satisfied the final criteria of Clock Electric. The fact that Twohey was appointed to another department head position is not persuasive to the Board that the Employer did not discriminate against Twohey because the Employer only offered that position after Twohey had filed an action against the Employer.

FINDINGS OF FACT

1) The Employer and Union were parties to a collective bargaining agreement for the period September 1, 1996 through August 31, 1999. Negotiations for a successor agreement commenced in November 1998. No settlement was reached by August 31, 1999 and a strike ensued.

2) After being ordered back to work by the Court, the teachers engaged in a "work-to-rule" campaign, which lasted until the contract was finally settled in December 1999.

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[6] The Board cannot find that there is sufficient evidence that Ms. Barbosa's anti-union animus reached back to the time of the strike, despite the fact that it was rancorous and contentious.

[7] The Board is especially troubled because Ms. Barboza testified that she and Mr. Twohey continued to meet during the period of time after applications were made. It would have been so simple for her to say to him that "it looks like you don't have five years of teaching experience as required for the position of department head, is there a mistake in the records"?

3) The Union President, all during the negotiations, strike, work-to rule and thereafter, through the 1999-2000 school year, was Michael Twohey, a high school teacher, who was also serving in his fourth year as "Department Head" of the high school, Social Studies Department.

4) Ms. Barboza, the Superintendent, was strongly opposed to the "work-to-rule" campaign and she repeatedly requested Mr. Twohey to recommend to the teaching staff that this approach should be abandoned, for the benefit of the students. Mr. Twohey repeatedly declined and "work-to-rule" continued until the contract was settled in December, 1999.

5) As a result of the strike, February vacation week was cancelled for that school year, to make up the lost time. Mr. Twohey took a contractually granted personal day off that week to attend an event with his son at the University of Vermont.

6) On March 3, 2000, Ms. Barboza sent a letter addressed to Mr. Twohey at his home, wherein she commented upon his decision to "be absent from his classroom" during the week of February 22-25 and characterizes his conduct in taking the day off as "unprofessional behavior."

7) On or about May 8, 2000, Dr. Barboza posted a notice advising all Department Heads that their job descriptions had been changed to reflect both contractual and programmatic changes. She did not repost the Middle School Grade Leader positions, even though those positions had contractual changes as well.

8) Ms. Barbosa's memo, which accompanied the reposting, advised that "preference will be given to teachers currently holding the positions" and directs interested parties to submit a letter of intent no later than May 26, 2000.

9) In response to the posting, Mr. Twohey filed two class action grievances and also submitted his letter of intent for both the Social Studies Department Head position and the Business Department Head.

10) Ms. Barboza did not attempt at any time to discuss Mr. Twohey's application with him.

11) On June 26, 2000, the Bristol Warren School Committee, acting upon the recommendations of Ms. Barbosa, appointed Gregory S. Arruda to the position of Social Studies Department Head.

12) At an interview for the position of Business Department Head, Mr. Twohey told administrators that he *did* meet the five-year requirement for Social Studies because he had taught a year of geography (within the Social Studies disciplines) in Kickemuit (prior to the merger of the Bristol Warren regionalization).

13) On July 18, 2000, Ms. Barboza sent Mr. Twohey a second letter, specifying that he had not received either the Social Studies Department Head position or the Business Department Head position.

14) On July 21, 2000, Mr. Twohey filed another grievance concerning the school district's failure to reappoint him to the Social Studies Department Head position. Sometime prior to the start of the school year, Mr. Twohey was offered the position of Guidance Department Head and accepted the same. In September 2000, Mr. Twohey requested and was granted a leave of absence from his position and took a job teaching in the Town of Smithfield.

CONCLUSIONS OF LAW

1) 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 (5) and (8).

ORDER

1) The Employer is hereby ordered to cease and desist.
2) The Employer is ordered to post a copy of this decision and order for a period of thirty (30) days on all employee bulletin boards during the upcoming fall semester.

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-	:	CASE NO: ULP-5506
BRISTOL/WARREN REGIONAL SCHOOL DISTRICT	:	

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 ULP No. 5506 dated 8-17-05, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after 8-17-05.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-31.

Dated: August 17, 2005

By: Robyn H. Golden
Robyn H. Golden, Acting Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK J. MONTANARO, MEMBER

JOSEPH V. MULVEY, MEMBER

GERALD S. GOLDSTEIN, MEMBER

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: August 17, 2005

By: _____
ROBYN H. GOLDEN, ACTING ADMINISTRATOR

ULP-5506

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-5506
	:	
-AND-	:	
	:	
BRISTOL/WARREN REGIONAL SCHOOL DISTRICT	:	
	:	

ORDER OF DENIAL OF

RESPONDENT'S MOTION TO DISMISS

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 Bristol/Warren Regional School District (hereinafter "Respondent"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated October 26, 2000, and filed on October 31, 2000, by the Bristol/Warren Education Association/NEARI (hereinafter "Union").

The Charge alleged:

> The Bristol/Warren School Committee failed and refused to reappoint Michael Twohey to the position of Social Studies Department Head at Mt. Hope High School. Said action by the School Committee was retaliation against Michael Twohey for his protected union activities as President of Bristol/Warren Education Association/NEARI, including leading a strike in Sept. 1999. Such actions constitute interference harassment, restraint and coercion of union members in the exercise of concerted and protected activities in violation of RIGL 28-7-13 (3), (5), (8), (10)

Following the filing of the Charge, an informal conference was scheduled for November 29, 2000, but was rescheduled to January 24, 2001. Representatives of the Union and Respondent and an Agent of the Board all attended and had the opportunity to try to resolve the matter. After the informal conference failed to resolve the Charge, the Board reviewed the matter at a meeting held on February 15, 2001, and determined that a Complaint would issue. The parties were advised of the Board's decision by letter dated February 19, 2001. The Complaint was issued on July 13, 2001. The Employer filed its Answer to the Complaint on July 25, 2001, denying the allegations therein and asserting numerous affirmative defenses. The matter was then set down for formal hearing scheduled for November 15, 2001. At the request of the parties, the formal hearing was continued twice and was finally held on November 21, 2002.

On November 8, 2002, the Employer filed a Motion to Dismiss, relying on an election-of-remedies argument and the Rhode Island Supreme Court's decision of State of Rhode Island, Department of Environmental Management v Rhode Island State Labor Relations Board, 799 A2d 274 (R. I. 2002), hereinafter referred to as the "D.E.M." case. The Union filed an Objection to the Motion to Dismiss on November 12, 2002.

On November 21, 2002, at the commencement of the formal hearing, the Board determined that it would hear argument only on the issue of the Motion to Dismiss and not on any other substantive matters. The parties were advised that the Board would rule on the Motion first, and then reschedule the substantive hearings, if any were necessary after ruling on the Motion.

DISCUSSION

Since the D.E.M. matter was decided after the Board issued its Complaint in the matter herein, the Board must analyze whether or not its jurisdiction in this case has been subsequently impacted thereby. The Employer argues that the exact issue of union discrimination has already been heard by an arbitrator, pursuant to a "retaliation clause" in the parties' collective bargaining agreement. The Employer also argues the legal doctrine of stare decisis precludes the Board from hearing this matter. The Employer cites the Board's recent decision in ULP-5370, wherein the Board dismissed a Complaint based upon the election-of-remedies doctrine..

The Employer also argues that the issue of the unfair labor practice herein was also before the arbitrator, and that the arbitrator has already ruled thereon. The Employer also argues that even the arbitrator made a ruling that the issue before him, and the unfair labor practice were one in the same issue.

The Union argues that the Board's decisions in ULP-5370 and ULP-5493 provide no valuable precedent for this Board to follow, because in both of those cases, the Unions did not object, for whatever reason, to Motions to Dismiss pursuant to the election-of-remedies doctrine. The Union argues that the DEM case stands for the proposition that, for the election-of-remedies doctrine to apply, the party seeking relief in two different forums must be seeking essentially the same relief from both forums. The Union argues that, multiple proceedings are not automatically foreclosed, and that the Board must determine whether the relief sought is "essentially the same". The Union argues that the arbitration sought the remedy of reinstatement to a position and the

award of back pay -- not an uncommon request in an arbitration setting. The remedy sought from the Board within this proceeding is a finding that the Employer's actions were repugnant to the State Labor Relations Act, in that an employee was discriminated against in his role as a union officer, and a cease and desist order. The Union argues that these remedies are very different. The Union also argues that the arbitrator did not make a finding on the issue of discrimination. The arbitrator merely stated that he did not conclude that the employee had been discriminated against. The Union argues that the arbitrator never really did much inquiry into this issue, or make any conclusions on this issue for two reasons: (1) because the arbitrator had already ruled in favor of the Union and did not need to reach the question of discrimination; and, (2) the arbitrator realized that the discrimination issue was one for the Labor Board to review. Thus, the Union argues that the arbitrator deferred and stepped to the side on this issue.

First of all, the Board finds that the Union's argument regarding the differing nature of the remedies sought persuasive. There can be no question that reinstatement and back pay are remedies unique to the individual grievant, and do not truly affect the collective bargaining process or the Union itself, in a practical manner. The remedy of a cease and desist order barring an employer from engaging in discrimination for union activities protects the union itself and the collective bargaining process, and is a remedy for the common good. Therefore, the Board finds that the remedies sought from the arbitration and the Board herein are not essentially the same, or even similar, in that they are designed to protect differing interests.

As to the issue of whether the arbitrator made a decision on the issue of discrimination, although the Board wishes the award was written more clearly, it does appear to the Board that the arbitrator did not reach the issue of discrimination, because he had already ruled that the Employer's actions violated the contract. The Board believes that, when the arbitrator stated that he does not conclude, he is implicitly saying that he did not reach the issue, because he did not need to. Therefore, the Board finds that the arbitrator did not consider the specific issues of discrimination and retaliation for union activity and that the arbitration award poses no bar to the Board's jurisdiction in this matter. Therefore, the Employer's Motion to Dismiss is hereby denied, and the case is ordered back to the Board's formal hearing calendar for scheduling.

ORDER

1) The Motion to Dismiss is hereby denied.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

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: March 13, 2003

By: _____
Joan N. Brousseau, Administrator