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-

TIVERTON SCHOOL COMMITTEE CASE NO: ULP-5578 & 5596

-AND-

RHODE ISLAND COUNCIL 94, AFSCME
AFL-CIO

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as a consolidated hearing for two Unfair Labor Practice Complaints (hereinafter "Complaints") issued by the Board against the Tiverton School Committee (hereinafter "Employer") and R. Council 94, AFSCME, Local 2869 (hereinafter "Union").

The first Complaint was based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated November 7, 2001 and filed on November 9, 2001 by the Union.

The Charge alleged: Violation of 28-7-13 subsections (3) (5) (6) and (10)

> "The Tiverton School Department has violated the above cited paragraphs by unilaterally and without negotiations using part-time Non Bargaining Unit Workers to perform Bargaining Unit Work, Special Education Aide at several schools including Fort Barton, Pocasset and the Middle Schools.

Following the filing of the Charge, an informal conference was held on February 19, 2002 The Board issued its Complaint on February May 20, 2002. The Employer filed its answer on May 23, 2002

In the interim, a second charge was filed on February 14, 2002 by the Employer against the Union. The Charge alleged

> "R.I. Council 94 has violated R.I.G.L. 28-7-13.1 (2) by failing to negotiate and/or bargain in good faith with the authorized representatives of the Tiverton School Committee. Specifically, R.I. Council 94 has refused to negotiate regarding working conditions for part-time aides, but has presented its proposals in a "take-it-or-leave-it" fashion indicative of intent to refuse to reach agreement. Council 94 has also refused to provide salary proposals."

Both Complaints were held in abeyance by the request of the charging parties while they attempted to resolve the matters. A formal hearing was ultimately held on June 10, 2004. Representatives from both the Union and the Employer were in attendance and had full opportunity to present evidence and to examine and cross-examine witnesses. Upon conclusion of the formal hearing, the parties submitted briefs. In arriving at the Decision and Orders herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

FACTUAL SUMMARY

R Council 94 AFSCME, Local 2670 is certified to represent all non-teaching personnel except supervisors in the Tiverton School Department. At the time the charge was filed, the parties had an active collective bargaining agreement with an effective date of July 1, 1999, through June 30, 2002.

Included within the bargaining unit covered by the collective bargaining agreement are positions known as "special education aides." The terms and conditions of employment for special education aides is set forth within the agreement which provides that they shall work six (6) hours per day and thirty (30) hours per week. The agreement also provides that the workday of these positions will coincide with the hours established for classes in the school or schools to which they are assigned. The agreement also provides that these positions shall work one hundred eighty (180) days per year. Finally, the agreement provides: "Due to occasional variations in the District's schedule and needs, the administration reserves the right to temporarily modify the time when an employee reports to work and the time an employee leaves work Any such modification would require the employee's consent and notification to the Union." (Union Exhibit #1) In addition, according to the testimony of John Vars, the Union's long-time business agent, the Union has bargained for the special

education aides to receive other benefits such as vacation time, sick time, personal leave, military training leave, maternity leave, severance pay, longevity bereavement time, educational opportunity pay, and "working out of classification" pay. (TR. p. 12)

In November 2001, the Union learned that the School Department had hired and was employing several persons to perform the bargaining unit work of special education aides in three of its schools. These non-bargaining unit special education aides were not receiving contractual hours, wages or benefits, as provided for in the collective bargaining agreement. The Employer admitted that it employed these individuals and that they were indeed performing bargaining unit work. (Employer Exhibit #1) The Employer asserted two main defenses to its assignment of bargaining unit work to non-bargaining unit personnel which will be discussed in detail, *infra*. It should be noted that the School Department paid these non-bargaining unit workers significantly less than the bargaining unit workers and did not provide any of the benefits set forth in the collective bargaining agreement. (TR. p 13-14)

After the Union discovered the use of non-bargaining unit personnel performing bargaining unit work and had filed its charge of unfair labor practice the Union did respond to a request from the School Department made at the informal hearing on these matters, and subsequently met with Superintendent Tarro to discuss a possible resolution of the unfair labor practice charge. Mr. Vars characterized Superintendent Tarro's position on this matter as "intractable." (TR. p. 36) The Employer then filed its charge of unfair labor practice on February 14, 2002, alleging that the Union had refused to bargain in good faith over the terms and conditions for part-time, non-bargaining unit special education aides.

On June 10, 2004, at the formal hearing on this matter, the Employer advised the Board that the School Committee was prepared to negotiate the terms and conditions of employment for the part-time, non-bargaining unit special education aides, but that the Employer felt that these employees should be part of another bargaining unit (also represented by Council 94) which is comprised of

part-time teacher aides The Employer argued that the part-time, non-bargaining unit special education aides do not have a community of interest with the full-time special education aides who are members of the bargaining unit represented by Local 2670. As such, the Employer argues that since it agreed at the formal hearing to negotiate with the Union over the terms and conditions of employment for the non-bargaining unit special education aides in a part-time unit, that the issue before the Board had become moot.

DISCUSSION

The issues set forth in these matters are relatively simple. The parties had a valid collective bargaining agreement in place which set forth the terms and conditions of employment for positions known as special education aides. Notwithstanding this agreement, the Employer hired employees as special education aides under terms and conditions of employment that differed from the terms and conditions it had negotiated with the Union, all without prior negotiation with or notification to the Union. The Employer admits these facts, but raises two defenses to its actions: (1) The charge of unfair labor practice is moot because the Employer had agreed to negotiate the terms and conditions of employment provided the part time special education aides are accreted to another existing bargaining unit which is comprised solely of part-time employees (2) The Employer had the right to create and fill part time positions without bargaining and without the Union's consent because in doing so, the Employer was fulfilling its statutory obligation to effectively execute a student's Individualized Education Program (IEP), pursuant to both Rhode Island and federal law.

It should be noted that at the time the formal hearing in this matter had been concluded, neither the Union nor the Employer had filed any petition to accrete these non-bargaining unit part-time special education aides to any bargaining unit. Thus, all the discussion and arguments both at the formal hearing and in the written briefs concerning the "community of interest" of these part-time employees is irrelevant to the matters currently before the Board.

It is well-settled that the assignment of bargaining unit work to non-bargaining unit personnel is an unfair labor practice Rhode Island State Labor Relations Board and Rhode Island College, ULP 5354, decided September 12, 2002; Rhode Island State Labor Relations Board and State of Rhode Island, Department of Labor and Training, ULP 4905, decided February 26, Rhode Island State Labor Relations Board and State of Rhode Island, ULP 4913, decided December 22, 1997 In this case, the Employer freely admits that it is using non-bargaining unit personnel to perform bargaining unit work As such, the Employer has committed an unfair labor practice.

It is equally well-settled that when a party takes unilateral action without prior bargaining, in violation of R.I.G.L. 28-7-13 (6), that party's subsequent attempts to bargain, if any, do not erase the prior unfair labor practice. In this case, the Employer readily admits that it utilized non-bargaining unit personnel to perform bargaining unit work. By the time the formal hearing had arrived, Employer decided it was ready to acknowledge that the part-time special education aides should be accreted to another bargaining unit The Employer argues, therefore, that the issue of whether it had committed an unfair labor practice had become moot because it was now willing to bargain This argument misses the point entirely and assumes that the Employer has the right to ignore the terms of an existing collective bargaining agreement The Employer has no such right Moreover, the Employer's apparent willingness to negotiate terms and conditions of employment are conditioned on the Union agreeing to an accretion of these employees to a part-time employee unit. Clearly, then, the Employer wants a free pass on the unfair labor practice and the Employer wants to condition its obligation to bargain on a concession from the Union Employer has no such right and this Board will provide it with no such remedy The Employer had the right under its contract to ask the Union to re-open the contract to discuss amending the terms and conditions for special education aides. The Employer failed to exercise that right. The Employer also had the right to petition this Board for a unit clarification R.I.G.L. 28-7-9 (3) (ii) The Employer failed to take this action as well Thus, the Board cannot excuse the Employer's

unilateral change in the terms and conditions of employment for special education aides.

The Employer also argues that since it is statutorily required to implement student IEPs that the Employer essentially gets to ignore the existence of the parties' labor contract. The Employer argues that the school committee cannot bargain away its statutory obligation to serve the needs of its student population. The Employer refers the Board to the Rhode Island Supreme Court's decisions in Vose v R.I. Brotherhood of Correctional Officers, 587 A.2d 913 (1991) and Pawtucket School Committee v. Pawtucket Teachers' Alliance, 652 A.2d, 970 (1990) as support for this argument. It should be noted that both of these cases arose in the context of contractual grievance arbitrations. In Vose, the State of Rhode Island and the R.I. Brotherhood of Correctional Officers were parties to a collective bargaining agreement which provided limitations to the assignment of overtime to the correctional officers. Notwithstanding the contractual limitations on mandatory overtime, Department of Corrections Director Vose instituted a mandatory involuntary overtime policy. Vose at 913. The Union filed a grievance and the matter proceeded to arbitration Subsequently, Director Vose filed a declaratory judgment action in the Superior Court alleging in part that questions of law are not arbitrable. The Court held that when the scope of a governmental officer's statutory authority is questioned, that officer must be entitled to a judicial determination regarding the nature and extent of that authority. Vose at 915 The Court ruled, therefore, that the determination of the director's statutory authority is a justiciable, but not an arbitrable question, properly determined in a declaratory judgment action Id. In Pawtucket School Committee, another declaratory judgment action, the Court held that evaluating English as second language programs and determining whether they conform with state law and the rules and regulations formulated by the Board of Regents, are requirements of state law and cannot be submitted to arbitration. Id at 972

The Board sees a significant difference between the factual circumstances set forth in Vose and Pawtucket School Committee and the facts presented in this case In both of those cases, the Employers argued that the contractual

limitations contained in the collective bargaining agreement illegally prevented them from fulfilling their statutory obligations to maintain a safe prison population and to teach English as a second language, respectively. In this case, the Employer made no argument that the contractual limitations on the terms and conditions of employment for special education aides, inhibited or hampered the School Committee's ability in any way, to comply with even one (1) IEP, let alone a multitude of them What the evidence established, is that the Employer simply hired 4-5 additional special education aides on a part time basis to perform bargaining unit work under terms and conditions of employment which were not negotiated with the exclusive bargaining agent for special education aides. Employer simply stated that it could assign employees to perform bargaining unit duties because it has a statutory obligation to fulfill IEP needs for its students. The Employer's argument is tantamount to the position that the Employer has no requirement to bargain any term or condition of employment with any of its employees because of its statutory mandate to provide IEPs. The Board does not and cannot accept such a proposition because of the employees' statutory right to engage in collective bargaining and to rely upon the results obtained

The School Committee's statutory obligation to provide IEPs was not a new obligation in 2001 which it could not have anticipated. In fact, the parties' collective bargaining agreement has covered terms and conditions of employment for special education aides for many, many years. (TR. p. 11) There wasn't a shred of evidence before the Board that the existence of the parties' collective bargaining agreement and the agreed upon terms conditions of employment for special education aides contained, therein, in any way affected or hampered the School Committee's ability the provide the necessary services for the students, as required by their IEPs. The current Superintendent of Tiverton Schools, Mr. William Rearick, simply testified that depending upon his or her IEP, a particular child may be in school only one-half day, so that the aide wouldn't need to be present all day. (TR. p. 51-52) He also testified that in such a circumstance, the School Committee simply wouldn't need to hire a full-time individual. (TR. p. 57-58) There was no testimony or evidence

before the Board as to why the School Committee couldn't comply with the negotiated terms and conditions of employment for special education aides even when individual children may only need part-time assistance. For example, there was no evidence before the Board as to why it would be impossible or even inconvenient to have special education aides move from one child to another during the course of a day. There was simply no evidence presented to the Board about the specific work schedules of the four to five non-bargaining unit special education aides, or the needs of the particular schools during the fall of 2001. Indeed, the evidence suggested to this Board that the reason the part-timers were being utilized from the Newport County Collaborative was simply a matter of economics. (TR. p. 48-49) While cost containment and efficient utilization of funds is a necessary function and goal of any employer, especially taxpayer-funded ones, the same cannot just run roughshod over and ignore the State's labor laws. Therefore, this Board finds that the Employer committed an unfair labor practice by utilizing non-bargaining unit workers to perform bargaining unit work under terms and conditions of employment that were different that those set forth in the collective bargaining agreement.

As for the Employer's charge alleging a failure of the Union to bargain in good faith, the same must clearly fail because the terms and conditions of employment for the special education aides had already been negotiated by the parties and was contained in a fully executed collective bargaining agreement. The Employer and the Union could agree to re-open that contract and re-negotiate the terms and conditions of employment for special education aides, if they so choose. However, barring an agreement to re-open the contract, the Employer has no right to demand bargaining with the Union. Therefore, the Employer's charge of unfair labor practice is hereby dismissed.

FINDINGS OF FACT

1) The Complainant in Case No. ULP-5596 and the Respondent in Case No ULP-5578 is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.

2) The Complainant in Case No. ULP-5578 and the Respondent on Case No. ULP-5596 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) R. Council 94 AFSCME, Local 2670, is certified to represent "all non-teaching personnel except supervisors" in the Tiverton School Department. At the time the charge in ULP-5578 was filed, the parties had an active collective bargaining agreement with an effective date of July 1, 1999, through June 30, 2002.

4) The agreement covered the position of Special Education Aide.

5) In November 2001, the Union learned that the School Department had hired and was employing several persons to perform the bargaining unit work of special education aides in three of its schools. These non-bargaining unit special education aides were not receiving contractual hours, wages or benefits, as provided for in the collective bargaining agreement.

6) The Employer admitted that it employed these individuals and that they were indeed performing bargaining unit work.

7) There was no evidence presented to the Board that the existence of the negotiated terms and conditions of employment for special education aides hampered in any way, the ability of the Employer to comply with any IEP.

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. G.L. 28-7-3 (6).

2) The Employer has not proven by a preponderance of the credible evidence that the Union has committed a violation of R. G.L. 28-7-13.1 (2)

ORDER

1) The Employer is hereby ordered to cease and desist the utilization of non-bargaining unit personnel to perform bargaining unit work of special education

aides in a manner that is inconsistent with the currently negotiated terms and conditions of employment for special education aides.

2) That the Unfair Labor Practice Charge and Complaint in the matter of Case No. ULP-5578 is upheld.

3) That the Unfair Labor Practice Charge and Complaint in the matter of Case No. ULP-5596 is hereby dismissed

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: FEBRUARY 10, 2005

By: _____
Robyn H. Golden, Acting Administrator

ULP-5578 & 5596

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

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-AND-

CASE NO. ULP-5578 &5596

TIVERTON SCHOOL COMMITTEE

-AND-

RHODE ISLAND Council 94, AFSCME, AFL-CIO

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. 5578 and ULP No. 5596 dated 2-10-05, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after 2-10-05.

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

Dated: February 10, 2005

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