

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

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IN THE MATTER OF	:	
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RHODE ISLAND STATE LABOR	:	
RELATIONS BOARD	:	
	:	
-AND-	:	CASE NO: ULP-5665
	:	
THE CITY OF PROVIDENCE	:	

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**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 City of Providence (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on March 5, 2003 by RI Laborers District Council on behalf of Local Union 1033, LIUNA, AFL-CIO (hereinafter "Union").

The Charge alleged:

"On or about March 4, 2003, City of Providence, Department of Public Works Laborer and Local Union bargaining unit member Anthony Calenda was reassigned from duties associated with custodial care of the Department's Administration Building to duties associated with its highway division, all in retaliation of his having filed a grievance under the terms of parties' collective bargaining agreement on or about February 21, 2003."

Following the filing of the Charge, an informal conference was held on May 14, 2003. The Board issued its Complaint on June 12, 2003. The Employer filed its Answer to the Complaint on June 16, 2003. A formal hearing on this matter was held on August 21, 2003. Upon conclusion of the hearing, post-hearing briefs were submitted by both the Employer and the Union. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony, evidence, and oral arguments.

**SUMMARY OF UNDERLYING FACTS**

The Union in this case represents employees of the City of Providence who are assigned to the Department of Public Works. Among these employees is Anthony Calenda, a twelve-year employee, whose ordinary and customary day-to-day assignment is to perform indoor janitorial duties at the Administration Building of the Department of Public Works. On or about February 17, 2003, the City of Providence experienced a winter storm that brought a significant amount of

snowfall, necessitating round-the-clock assignments for snow removal operations. Many of these work assignments were filled on an “overtime” basis. Among the various employees working these hours were Truck Drivers, Mechanics and Laborers, some of whom were assigned to “stand watch” over piles of sand and salt.<sup>1</sup> During a “watch”, employees are protected from the winter elements by sitting in a heated Department of Public Works truck.

Mr. Calenda was not “called back” for overtime for the February 17<sup>th</sup> storm.<sup>2</sup> As a result, he decided to file a grievance over the manner in which overtime was assigned. Shortly after Mr. Calenda filed the grievance, he was re-assigned from his indoor janitorial duties to outside work, patching potholes. After 2-3 days of performing the pothole work, Mr. Calenda was returned to his indoor janitorial duties.

### **POSITIONS OF THE PARTIES**

The Union alleges that Mr. Calenda’s reassignment from indoor janitorial duties to outside highway work was done unilaterally by the Employer, in order to retaliate against Mr. Calenda for having filed his grievance. The Employer maintains that it transferred Mr. Calenda, with his consent, so that Mr. Calenda could be eligible for overtime during storms. The Employer also argues that it was attempting to resolve Mr. Calenda’s grievance, and that the Employer was attempting to comply with contract provisions in the assignment of overtime slots.

### **SUMMARY OF TESTIMONY**

The Union presented the testimony of Ricky Maccarone, a Union steward. Mr. Maccarone testified that a few days after Mr. Calenda filed his overtime grievance, Mr. Maccarone participated in a meeting with Mr. Gerald Florio, “Operations Manager” for the City, and Mr. Calenda. Mr. Maccarone testified that he was a bit late for the meeting which was underway when he arrived. (TR. p 22) On cross-examination, he testified that to the best of his knowledge, only Mr. Florio, Mr. Calenda and he were present at the meeting; he did not recall Mr. Kevin Holt being at the meeting. (TR. p 30)<sup>3</sup> He also testified that one of the jobs of the union stewards is to sit with the administration when making the calls for overtime and that he assumed this function in April, 2003. (TR. p 26)<sup>4</sup> He testified that when calling employees for

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<sup>1</sup> Employees are assigned to “pile watching” to prevent theft of the materials.

<sup>2</sup> Mr. Calenda had not been called in for overtime for any of the preceding storms that season either.

<sup>3</sup> The Employer has attempted to discredit Mr. Maccarone because he testified that he did not recall Mr. Holt’s presence in the meeting. However, as will be set forth more fully herein, no one testified that Mr. Holt said or did anything in this meeting. Mr. Holt’s testimony in this proceeding is limited to what he observed. Thus, the Board will not find fault with Mr. Maccarone’s testimony on the basis that he did not recall the presence of someone who did not actively participate in the meeting.

<sup>4</sup> Previously, this role was filled by Mr. Holt.

overtime, the callers go right down the seniority list, whether the employees are located in the sewer division or environmental control division. (TR. p 27) He also testified that the employees that normally stand watch over the sand and salt piles are from the environmental control division of public works. On cross-examination, he testified that during the meeting, Mr. Florio stated that Mr. Calenda “was coming over to highway” to work. (TR. p. 31) Mr. Maccarone testified that he did not remember Mr. Florio stating that Mr. Calenda could go back to work at the administration building if he didn’t like working on the highway crew. (TR. p. 32)

The Union also presented the testimony of Anthony Calenda, the employee who had filed the grievance with respect to not being offered overtime. He testified that he had been employed by the City within the Department of Public Works since October 1990. (TR. p 37) His basic duties include washing floors, scrubbing toilets, vacuuming and running errands. (TR. p 38) He testified that he filed a grievance because he found out that there were guys standing watch over the sand and salt piles and that he had not been called to work. (TR. p 38) Mr. Calenda testified that after he filed the grievance, he received a call from Gerry Florio, the Operations Manager, directing Mr. Calenda to report to Mr. Florio’s office “right away.” (TR. p 40) He testified that when he first arrived, only he and Mr. Florio were present in the office and that Mr. Florio told him that the day was going to be very ,very cold and he asked whether Mr. Calenda had a hat and scarf so he could go out and patch [potholes]. (TR. p 40-41) Mr. Calenda testified that the next day, he did report to the highway division and that he worked with it for a few days before being told by a Mr. D’Amico (who Calenda described as a union official) that he (Calenda) could return to work at the administration building. (TR. p 49)

The Employer presented the testimony of Mr. Kevin Holt, a twenty-eight (28) year veteran employee of the Department of Public Works. He testified that during his career, he held a number of different positions and that for approximately 20 of those years, he served as a union steward. (TR. p 52) He testified that during approximately ten (10) of those years, he assisted Gerry Florio in the call-back procedure for overtime, to make sure that employees were called back to work in accordance with the contract. (TR. p. 53)<sup>5</sup> Mr. Holt testified that he was present for the entire meeting in Mr. Florio’s office with Mr. Calenda and Mr. Maccarone.<sup>6</sup> Mr. Holt testified that Mr. Florio basically told Mr. Calenda that if he really wanted to get into the overtime, he had to go over to the highway department and do the same work (patching holes) as

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<sup>5</sup> During Mr. Holt’s testimony, the Employer introduced its Exhibit #1, the call back list for Public Works employees, divided into an “A” team and a “B” team.

<sup>6</sup> Mr. Holt confirmed that Mr. Maccarone arrived late to this meeting.

everyone else. (TR. p 59) Mr. Holt testified that Mr. Florio did not order Mr. Calenda, but that he gave Calenda the option of going to highway. (TR. p 59) Mr. Holt testified that he recalled that Mr. Calenda wanted to “come over and try it out.” (TR. p 59) On cross-examination, Mr. Holt testified again that Mr. Calenda was given the option of going to highway, and that going there was “his choice.” (TR. p 68)

The Employer also presented the testimony of Mr. Gerald Florio, the Operations Manager of the City of Providence. Part of his duties and responsibilities include the snow removal overtime callback. (TR. p 82) He testified that when calling back employees, they call in the “CDL” people (drivers) first and then get into secondary people that use small trucks. All the people that get called in are usually employees who customarily work outside. Depending upon when employees on overtime start dropping out- going home or begin to get sick, Mr. Florio then starts calling “secondary” employees that work in other divisions or other departments. (TR. p. 82)

Mr. Florio testified that after he received a call from the director about Calenda’s grievance, that he notified Ricky Maccarone and Anthony Calenda to come to his office. (TR. p 84) He testified that he told Maccarone to pick up Calenda on the way in and that they came to his office. (TR. p 84) Mr. Florio testified that he explained the overtime callback procedure to Mr. Calenda and offered him the opportunity to transfer to highway, so that he would be eligible for overtime. (TR. p 85) He testified that his exact words were: Why don’t you try it for three days. If you don’t like it, go back.” Mr. Florio testified that in response to this statement, Mr. Calenda didn’t say anything, but that Calenda just laughed at him and giggled. (TR. 86, 87) Mr. Florio testified that he did not interpret Mr. Calenda’s laugh because “that’s the way Anthony is.” (TR. p. 87) Mr. Florio also stated that he didn’t get any vibe either way whether Mr. Calenda wanted to go or not [to “highway”]. Mr. Florio stated he was under the impression that Mr. Calenda was going to give it a shot and that he’d be back the next day to try it out at the highway division. (TR. p 88)

### **DISCUSSION**

When an employer is accused of discriminating against an employee for union activity, the Board must consider whether the employee’s protected conduct was a substantial or motivating factor in the adverse action. NLRB v Transportation Management Corporation, 462 U.S. 393,401 (1983). If so, the burden then shifts to the Employer to show that it would have

treated the employee in the same manner, irrespective of his or her union activity. If the Employer meets this burden, then it cannot be found to have committed an unfair labor practice.

In this case, there is no question that Mr. Calenda filed grievance over what he perceived to be unfair treatment in the assignment of overtime slots.<sup>7</sup> There is also no question that the meeting conducted by Mr. Florio several days later in his office was in direct response to the Director's inquiry and mandate to Mr. Florio to find out what the grievance was all about. There are however, several questions as to what exactly happened, both in the calling of that meeting and the conducting of it. Mr. Calenda testified that he received a call directly from Mr. Florio and that Mr. Calenda responded by immediately reporting to Mr. Florio's office. Mr. Florio testified that he called Mr. Maccarone and directed him to pick up Mr. Calenda and bring him to the meeting. Yet, Mr. Maccarone testified that Mr. Florio did not ask him to pick up Calenda and that when Maccarone arrived, the meeting was underway. (TR. p 31) Mr. Holt confirmed the fact that Mr. Maccarone arrived late (alone) and that the meeting was already underway with Mr. Calenda. (TR. p 58)

Whether or not the Employer unilaterally transferred Mr. Calenda to highway is the key issue in contention. The Employer argues that it merely gave Mr. Calenda the option to try working outside at the highway division so that he could be eligible for overtime. All four witnesses testified differently on this issue.

Mr. Calenda testified that when he first arrived in Mr. Florio's office, only he and Mr. Florio were present and that Mr. Florio told him that the day was going to be very ,very cold and he asked whether Mr. Calenda had a hat and scarf so he could go out and patch [potholes]. Mr. Calenda also stated that Mr. Florio then reached out and put a hat on his head and then a scarf. (TR. p 41)<sup>8</sup> Mr. Maccarone testified that when he arrived, he did not hear any offers made to Mr. Calenda, and that Maccarone was told by Mr. Florio that Mr. Calenda was "coming over to highway" to work. (TR. p. 31) Mr. Maccarone testified that he did not remember Mr. Florio stating that Mr. Calenda could go back to work at the administration building if he didn't like working on the highway crew. (TR. p. 32)

Mr. Holt, who had worked with Mr. Florio closely over the years on the call-back procedure, and who has subsequently been promoted to a management position, stated that Mr.

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<sup>7</sup> Whether or not Mr. Calenda's grievance is meritorious is beyond the jurisdiction of the Board and is irrelevant to the question of whether or not he was retaliated against for filing the same.

<sup>8</sup> It should be noted that neither Mr. Florio or Mr. Holt ever denied that Mr. Florio made this statement or that he put the hat and scarf on Mr. Calenda's head early on in this meeting.

Florio did not order Mr. Calenda, but that Florio gave Calenda the option of going to highway. (TR. p 59) Mr. Holt testified that he recalled that Mr. Calenda wanted to “come over and try it out.” (TR. p 59) On cross-examination, Mr. Holt testified again that Mr. Calenda was given the option of going to highway, and that going there was “his choice.” (TR. p 68).

Mr. Florio testified that his exact words were: Why don't you try it for three days. If you don't like it, go back.” Mr. Florio testified that in response to this statement, Mr. Calenda didn't say anything, but that Calenda just laughed at him and giggled. (TR. 86, 87) Mr. Florio testified that he did not interpret Mr. Calenda's laugh because “that's the way Anthony is”. The Board has to wonder then how it is that Mr. Holt came to the conclusion that Mr. Calenda wanted to go over to highway and try it out, when Mr. Calenda' only response to the alleged offer made by Florio, was laughing and giggling, especially when Mr. Florio didn't get “any vibe either way whether Mr. Calenda wanted to go or not” to the highway division.

There was also some conflicting testimony on the process of assigning overtime, especially as it pertains to the call-back list. The Board notes that whether the actual process complies with the collective bargaining agreement is not relevant to the proceedings herein. In addition, the variations between the methods described by Mr. Holt, Mr. Maccarone and Mr. Florio are not necessarily relevant to the within proceedings. However, although Mr. Holt testified that people in administration [where Mr. Calenda works] would only be called after the regular highway workers, it should be noted that the documentary evidence suggests that Mr. Calenda would never receive a call because neither his name nor phone number is posted on the eligibility list. (See Employer's exhibit #1)<sup>9</sup>

In this case, the Board finds the testimony of Mr. Calenda, which was un-rebutted as to his arrival at the meeting and as to the statements and actions he attributed to Mr. Florio, to be most compelling. Mr. Calenda also testified that he felt he had no option but to report to the highway department the day after the meeting. Despite repeated attempts on cross-examination to get Mr. Calenda to say that it was Mr. Maccarone (Calenda's union steward) who told Calenda he had no option, Mr. Calenda steadfastly refused to change his testimony. The Board finds that Mr. Calenda's report of Mr. Florio's statements about the cold weather and Mr.

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<sup>9</sup> The same is true for Paul Callizzo, another Department of Public Works laborer who does not fit into the Department of Public Works' three divisions of “highway”, “sewer” or “environmental”, as described by Mr. Holt at pages 92 and 66 of the transcript, but who was described by Mr. Holt as eligible for overtime, essentially in last position. It should be noted that employees from the Building Inspectors Department, the Planning Department and the Communications department are also on this overtime eligibility list.

Florio's placing of the hat and scarf on Mr. Calenda, is credible. The Board also finds that Mr. Calenda did not affirmatively state in the meeting that he wanted to go to highway to try it out.

The Board finds therefore that the first prong of the discrimination analysis has been met in this case. The meeting conducted by Mr. Florio clearly flowed from the inquiry by the director to find out what it's all about. Mr. Florio's statement about the weather and conduct with the hat and scarf suggest that he had already pre-determined what he was going to do about the grievance. These actions serve to discredit the Employer's proffered defense that it was only trying to settle a grievance by putting Calenda into a position where he would be more eligible for overtime.

If the Employer was really concerned with settling Mr. Calenda's grievance, Mr. Florio would not have signaled the predetermination of the outcome of the meeting by making his weather comment, particularly prior to the arrival of Mr. Maccarone. Moreover, if Mr. Florio was truly concerned with settling the grievance, the Board believes he would have attempted to elicit a more intelligible response from Mr. Calenda, other than giggling and laughing.

Based upon the foregoing, the Board believes that the Employer, through Mr. Florio, decided to transfer Mr. Calenda to the highway division prior to beginning the "grievance meeting" and that Mr. Calenda's input into the matter was not solicited and that his desires and opinion on the subject were not clarified, perhaps deliberately. Thus, the Board finds that the preponderance of the credible evidence in the record supports finding that the Employer, retaliated against Mr. Calenda for filing his grievance about the overtime callback procedure.

#### **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) The Union in this case represents employees of the City of Providence who are assigned to the Department of Public Works, including Anthony Calenda a twelve (12) year employee normally assigned to indoor janitorial duties.

- 4) On or about February 17, 2003, the City of Providence experienced a winter storm that brought a significant amount of snowfall, necessitating round-the-clock overtime assignments for snow removal operations.
- 5) Mr. Calenda was not "called back" for overtime for the February 17<sup>th</sup> storm or for any other storm that season. As a result, Calenda filed a grievance over the manner in which overtime was assigned. Shortly after Mr. Calenda filed the grievance, he was re-assigned from his indoor janitorial duties to outside work, patching potholes. After 2-3 days of performing the pothole work, Mr. Calenda was returned to his indoor janitorial duties.
- 6) After Mr. Calenda filed his grievance, he received a call from Gerry Florio, the Operations Manager, directing Mr. Calenda to report to Mr. Florio's office "right away." When Calenda arrived at Florio's office, Florio asked him whether Calenda had a hat and scarf so he could go out and patch potholes. Mr. Florio also reached over and placed a hat and scarf on Mr. Calenda.
- 7) Calenda did not specifically state that he was agreeable to going to the highway division to patch potholes.
- 8) Upon arriving at a meeting already in progress with Mr. Calenda, Mr. Florio and Mr. Holt, Mr. Maccarone was told that Mr. Calenda was going over to highway to work. Mr. Maccarone did not hear anyone say that Mr. Calenda could go back to administration if he didn't like it at highway.
- 9) Mr. Holt claims that it was Mr. Calenda's choice to go to highway.
- 10) Mr. Florio did not attempt to elicit any additional response from Mr. Calenda as to his desires after Mr. Calenda laughed and giggled.

#### 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 (8) and (10).

#### ORDER

- 1) The Employer is hereby ordered to cease and desist in engaging in retaliatory conduct when members of the bargaining unit file grievances.

RHODE ISLAND STATE LABOR RELATIONS BOARD

*Walter J. Lanni*

Walter J. Lanni, Chairman

*Frank J. Montanaro*

Frank J. Montanaro, Member

*Joseph V. Mulvey*

Joseph V. Mulvey, Member

*Gerald S. Goldstein*

Gerald S. Goldstein, Member (Dissent)

*Ellen L. Jordan*

Ellen L. Jordan, Member (Dissent)

*John R. Capobianco*

John R. Capobianco, Member

*Elizabeth S. Dolan*

Elizabeth S. Dolan, Member (Dissent)

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

Dated: 10-14, 2004

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

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-5665
	:	
-AND-	:	
	:	
THE CITY OF PROVIDENCE	:	

**AMENDED NOTICE**

**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. 5665, dated **10/14/04**, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **10/14/04**.

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

Dated: 10-14, 2004  
By: Robyn H. Golden  
Robyn H. Golden, Acting Administrator