

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-5681
	:	
-AND-	:	
	:	
RHODE ISLAND BOARD OF	:	
GOVERNORS	:	
(Rhode Island College)	:	
	:	

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 RI Board of Governors for Higher Education (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on August 26, 2003 by PSA @ RIC, Local 3302, AFT/RIFT AFL-CIO (hereinafter "Union").

The charge alleged:

"The Employer acted in bad faith through its placement of an individual on its bargaining team when the employment position of said individual is the continuing subject of a Unit Clarification by the Labor Board, at the initiation of the Union. The Labor Board's Preliminary Finding placed the position 'Director, User Support Services' in the PSA @ RIC bargaining unit, and prior to the formal hearing on the matter, the College placed the position's occupant on its bargaining team for the sole purpose of enhancing its position on the Unit Clarification case."

The charge further alleged:

"The Union has asked for negotiations to commence for the successor to the 2000-2003 Contract. The Union learned on or about July 1, 2003 that the College has placed the 'Director, User Support Services' on its bargaining team. On July 21, 2003, the Union met with the Administration and requested that the occupant of the 'Director, User Support Services' position be replaced on the Administration's bargaining team pending resolution of the Board's findings on the Unit Clarification of the position. The College has refused, and is therefore acting in bad faith."

Following the filing of the Charge, an informal conference was held on September 15, 2003. The Board issued its Complaint on September 30, 2003. The Employer filed a Motion to Dismiss on October 15, 2003. A formal hearing on this matter was held on November 18, 2003. The Union filed two (2) separate briefs in this matter; one (1) in

response to the Memorandum of Law filed with the Employer's Motion to Dismiss and one (1) on the case in chief. The Employer elected not to file a post-hearing brief, positing that the formal hearing produced no additional relevant information and that the Employer would thereby rely on its Memorandum in Support of its Motion to Dismiss. The Board deliberated this matter at its meeting on May 11, 2004. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony, evidence, and oral and written arguments.

FACTUAL SUMMARY

The relevant facts in this case are essentially undisputed. On or about January 16, 2002, the Union filed a Unit Clarification petition with this Board seeking to accrete the position of Director, User Support Services, held by Patricia Hays, to its bargaining unit. The following Spring, the Union began preparing for upcoming contract negotiations for a successor contract to the one due to expire on June 30, 2003. In March 2003, the Union notified the Employer of its desire to commence negotiations. In June, the Union contacted the Employer and established July 18, 2003 as the first day to begin negotiations.

Meanwhile, on or about May 13, 2003, after an informal hearing and investigation, this Board made a preliminary determination that the position of Director, User Support Services, should be accreted to the bargaining unit. The Board then set the matter down for August 8, 2003 to commence formal evidentiary hearings in accordance with R.I.G.L. 28-7-9.

In June 2003, Robert Bower, the Union's President, learned from Rhode Island College's President that the College had placed Ms. Hays on the Employer's negotiating team for the upcoming contract negotiations with the Union. When Mr. Bower learned that Ms. Hays had been placed on the Employer's negotiating team, he had a meeting in either June or July of 2003 with the Vice President Lenore DeLucia and the Employer's Chief negotiator, Ann Marie Coleman. Mr. Bower testified that the Employer refused to agree to the Union's request to remove Ms. Hays from its bargaining team. After some internal discussions, the Union filed its charge of Unfair Labor Practice in August 2003.

DISCUSSION

The issue in this case is whether the Employer's appointment of an employee as a representative to its bargaining team, when the employee's position is the subject of a pending Unit Clarification petition, and when the Labor Board has already made a preliminary determination that the position should be accreted to the Union's bargaining unit, is an Unfair Labor Practice.

The Union presented the testimony of Rob Bower, the Union President. Mr. Bower testified that he had served on three (3) prior negotiating teams for the parties' three (3) prior collective bargaining agreements. He stated that for those prior contracts, the Employer's bargaining team consisted of Vice Presidents, Assistant Vice Presidents, the Director of Human Resources, the Director of Personnel Services, and the Director of Affirmative Action. He also testified that during the years he was a member of the Union's negotiating team, there were two (2) major information services initiatives implemented by the College: the "Y2K" changeover, and the implementation of the "Peoplesoft" programming. Mr. Bower testified that, despite these major technological initiatives, the Employer did not have any representative from the information services area seated as a member of the Employer's bargaining team.

Mr. Bower also testified that he researched and reviewed the signature pages from all the parties' contracts since 1975 and found that the Employer's negotiating teams were made up of high-level administrators. In no case was there any representative from the information services or information technology area on any of the Employer's bargaining teams.

Mr. Bower also testified that it had been the PSA's objective to commence and conclude negotiations for a successor contract early on because the College was celebrating its 150th Anniversary. He testified that, once the College's administration refused to remove Ms. Hays from the bargaining team, the Union debated what to do. Ultimately, the Union decided that it had to file an Unfair Labor Practice because it was concerned about the outcome of the Unit Clarification petition down the road, if nothing was done. He also testified that the parties' relationship, which had survived many tough times and honest disagreements, is now strained. At the time of the formal hearing in this matter, in November

2003, there had been no negotiating sessions, even though the contract had expired in June 2003.

The Union argues that the Employer's placement of Ms. Hays, and its refusal to remove her from the bargaining team, constitutes bargaining in bad faith, or a refusal to bargain, and is an interference and restraint on: (1) the Union's rights to proceed with the Unit Clarification; and (2) the Union's rights to successor contract negotiations. The Union also argues that, since the Employer hasn't shown a compelling reason as to why the Employer must have the Director of User Support Services on its negotiating team, she should be removed. Otherwise, the Employer will have been successful in artificially ascribing to the position one of the indicia of supervisory and/or confidential status, thus making that position now ineligible for collective bargaining.

The Employer argues that: "Nothing in the law prevents the Board of Governors" from choosing whomever it wants to serve on its bargaining team and that "choosing a non-union supervisory employee to serve on its bargaining team does not in any way amount to a 'refusal to bargain', nor does it 'interfere with, retrain or coerce employees in the exercise of the rights guaranteed by R.I.G.L. 28-7-12.'" (Memorandum p. 2) The Employer also argues that the Board's Complaint in this matter is "founded the notion that a pre-hearing preliminary finding on the underlying issue is equivalent to a post-formal-hearing ruling." The Employer also accuses the Board of "Alice-in Wonderland" jurisprudence and concludes that the Board's "formal hearing is substantively of no moment and merely a sham."

The Employer, in its glib and condescending dismissal of the Board's Complaint and disrespectful categorization of the Board's processes as a "sham", conveniently ignores the fact that the question of the status of the so-called "non-union supervisory employee" was already pending before this Board before the Employer placed this employee on its bargaining team. Although the Employer is technically free to categorize this employee as "supervisory", the Employer does so at its own possible peril because it is the Board that will ultimately determine the nature of the employee's status. We believe it would be more prudent for an Employer to await the decision of the Board on the employee's status, prior to such sweeping pronouncements of the Employer's rights.

Furthermore, although the Employer is not required to be clairvoyant as to the outcome of the Unit Clarification petition; the Employer is required to refrain from any acts,

which interfere with or restrain employees in the exercise of protected rights. The Board finds that the placement of an employee on a bargaining team, whose position is the subject of an actively pending accretion petition, smacks of an attempt to artificially categorize a position as either supervisory or confidential, which in turn chills the climate for effective collective bargaining negotiations.

In light of the fact that the Board had just issued a preliminary determination of accretion for Ms. Hays' position, and scheduled the accretion petition for formal hearing in August 2003, and in light of the fact that the Employer then placed Ms. Hays on the its bargaining team, this Board finds that the Employer's acts have interfered with and restrained the Union in its efforts to engage in collective bargaining, in violation of R.I.G.L. 28-7-13 (10). The Board finds that to place an employee on a bargaining team after his or her position has become the subject of a Unit Clarification petition is an act that interferes with employees in the exercise of rights guaranteed by the R.I.G.L. 28-7-12, in violation of R.I.G.L. 28-7-13 (10).

As a remedy in this case, the Union seeks the removal of Ms. Patricia Hays, Director of User Support Services, from the Employer's negotiating team. While the Board fully understands the Union's position, this Board is loath to travel down the path of interfering with the composition of existing negotiating teams. Although it seems to the members of this Board that the personal individual loyalties of the members of negotiating teams should be enough of a deterrent to most Employers from appointing members in bad faith, the Board will order a restraint on future appointments when there is a pending unit clarification petition, and the Board has issued a preliminary determination for accretion.

The Board believes that the appropriate remedy for this situation is to put the Employer on notice that the service of any employee on an Employer's negotiating team, when the employee's position is the subject of a pending Unit Clarification petition, and after the Board has made a preliminary determination that the position should be accreted, will not be considered by the Board in its final determination of the Unit Clarification petition. Thus, any unfair advantage sought to be gained by an Employer during a pending Unit Clarification petition, will not be secured. Indeed, the Employer seats members of its team at its own peril. If the Employer seats an employee on its team who is sympathetic to the Union, or who is later accreted to the Union, then the Employer need only blame itself.

As to the Union's charge under subsection (6) of R.I.G.L. 28-7-13, although the Board recognizes that the Employer's placement of Ms. Hays chilled the climate for effective bargaining and interfered with the Union's position to proceed, we do not find that the Employer actually *refused to bargain*. Thus, the Board does not find that the Employer's *refusal to remove* Ms. Hays from the bargaining team amounts to a refusal to bargain in good faith, and the charge of unfair labor practice pursuant to subsection (6) is hereby dismissed.

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) On or about January 16, 2002, the Union filed a Unit Clarification petition with this Board seeking to accrete the position of Director, User Support Services, held by Patricia Hays, to its bargaining unit.
- 4) In early 2003, the Union began preparing for upcoming contract negotiations for a successor contract to the one due to expire on June 30, 2003. In March, 2003, the Union notified the Employer of its desire to commence negotiations. In June, the Union contacted the Employer and established July 18, 2003 as the first day to begin negotiations.
- 5) Meanwhile, on or about May 14, 2003, after an informal hearing and investigation, this Board made a preliminary determination that the position of Director, User Support Services, should be accreted to the bargaining unit. The Board then set the matter down for August 8, 2003 to commence formal evidentiary hearings in accordance with R.I.G.L. 28-7-9.
- 6) In June 2003, Robert Bower, the Union's President, learned from Rhode Island College's President that the College had placed Ms. Hays on the Employer's negotiating team for the upcoming contract negotiations with the Union. When Mr. Bower learned that Ms. Hays had been placed on the Employer's negotiating team, he had a meeting in either

June or July of 2003 with the Vice President Lenore DeLucia and the Employer's Chief negotiator, Ann Marie Coleman. The Employer refused to agree to the Union's request to remove Ms. Hays from its bargaining team.

- 7) By November 2003 there had been no negotiating sessions, even though the parties' contract expired in June, 2003.

CONCLUSIONS OF LAW

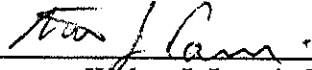
- 1) The Union has proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (10).
- 2) The Union has not proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (6).

ORDER

- 1) The Employer is hereby ordered to cease and desist, in the future, from appointing any employee to the Employer's negotiating team when:
 - (a) A Unit Clarification petition is pending before the Board, and;
 - (b) The Board has made a preliminary determination to accrete the position, and;
 - (c) The Board has not issued a final Decision and Order, and;
 - (d) If the Board's Decision and Order is appealed, then until a final determination has been made by a court of competent jurisdiction.¹
- 2) The Employer's Motion to Dismiss is denied.

¹ Conversely, in the event of a pending removal petition where the Board has made a preliminary determination to remove an employee from a bargaining unit, the Union shall not place that employee on its bargaining team during the pendency of the petition, or until a final determination is made by a court of competent jurisdiction.

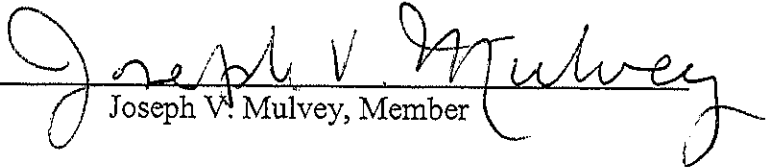
RHODE ISLAND STATE LABOR RELATIONS BOARD



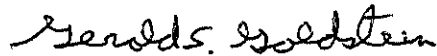
Walter J. Lanni, Chairman



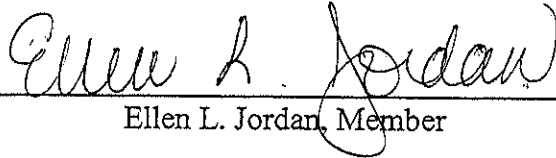
Frank J. Montanaro, Member



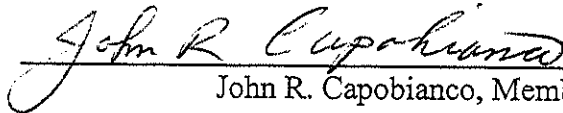
Joseph V. Mulvey, Member



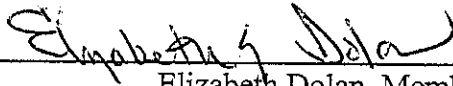
Gerald S. Goldstein, Member



Ellen L. Jordan, Member



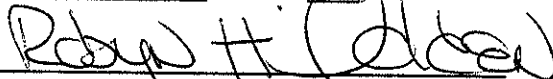
John R. Capobianco, Member



Elizabeth Dolan, Member

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

Dated: 6-23 2004

By: 
Robyn H. Golden, Acting Administrator