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- THE TOWN OF NORTH SMITHFIELD	**CASE NO: ULP-5759 (REVISED AFTER REMAND)**

DECISION AND ORDER

TRAVEL OF CASE

This matter is before the Board on Remand from the Rhode Island Superior Court Order, granting the Union's Motion to Clarify the Board's Decision and Order dated May 15, 2006.

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as an Unfair Labor Practice Complaint (hereinafter "Complaint") issued by the Board against the Town of North Smithfield (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated June 14, 2005 and filed on June 16, 2005 by RI Council 94, AFSCME, AFL-CIO.

The Charge alleged violations of R.I.G.L. 28-7-13 (6) and (10) as follows:

> "The Town through its finance Director, Jill Gemma, has unilaterally changed working conditions without negotiations with the union. (See attached memo) The Town has changed the weekly pay to a bi-weekly payroll."

Following the filing of the Charge, an informal conference was scheduled for July 11, 2005, in accordance with R.I.G.L. 28-7-9. On September 8, 2005, the Board issued its complaint. The Employer filed an answer on September 14, 2005. The matter was heard formally on November 10, 2005. 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. After three extensions, both parties filed their post-hearing briefs with the Board on February 10, 2006. In arriving at the Decision and Order herein, the Board

has reviewed and considered the testimony, evidence, oral arguments and written briefs submitted by the parties.

FACTUAL SUMMARY

Until the summer of 2005, employees of the Town of North Smithfield, including members of the complaining union, were paid their wages via a weekly payroll. On or about June 7, 2005, the Town notified its employees through a memorandum that effective June 30th, the Town would alter its payroll so as to issue bi-weekly checks, instead of weekly checks. (Union Exhibit #2) The Union prepared and filed its charge of unfair labor practice by June 16th. Although the parties were set to negotiate a new contract at this very time, the Employer had not submitted a proposal to the Union to make a change in payment frequency.[1] The change was implemented by the Town and the first payroll for the 2005-06 fiscal year was made on July 14, 2005.

DISCUSSION

The Union argues that the subject of payroll frequency is a mandatory subject of bargaining because it concerns the wages of the employees. The Union further argues that although the Town informally mentioned the desirability of a payroll change to its business agent in the spring of 2005, the Town never negotiated the change or proposed a change for the upcoming contract negotiations, but instead, unilaterally implemented the change in violation of law.

The Employer argues that the subject of payroll frequency is not a mandatory subject for bargaining and that the Employer had no obligation to bargain with the Union over this matter. Additionally, the Employer argues that because the Union was aware of the Employer's intent to change the payroll, the union was then obligated to request bargaining. The Employer claims that the Union waived its right to bargain over the change because it did not request bargaining prior to filing the within charge of unfair labor practice.

DISCUSSION

The threshold issue in this matter is whether or not payroll frequency is a mandatory subject for bargaining. The Employer argues that the contract is silent

[1] The expiring collective bargaining agreement was silent on the issue of payment frequency.

on the subject, that not one employee has lost even a dime of his or her pay, and that Rhode Island wage laws permit a municipality to pay employees on a bi-weekly basis. R.I.G.L. 28-14-2.2 (2005).[2] The Employer also emphasizes that prior Board decisions on the topic of mandatory subjects for bargaining have not listed payroll frequency as a mandatory subject for bargaining. The Employer also argues that the timing of payroll does not "vitally affect" employees and therefore, cannot be a mandatory subject for bargaining. The Employer argues that changing payroll frequency is a management right which does not require further bargaining.

The Union argues that the frequency of payroll is a mandatory subject for bargaining because it does vitally affect the working conditions of employees, especially those who for years had come to rely upon a weekly paycheck. The Union cites two NLRB cases as support for its position: Abernathy Excavating Inc. and International Union of Operating Engineers, Local No. 77, AFL-CIO, 313 NLRB 3, Case 5-CA-23192 (1993) and Visiting Nurse Services of Western Massachusetts, Inc. and Service Employees International Union, Local 285, AFL-CIO, CLC 325 NLRB 212 (1998)

In Abernathy, the Employer was charged with failing to continue in effect the terms and conditions of the collective bargaining agreement, in part, by changing the payday by one day, from Thursday to Friday. The decision is silent as to whether the collective bargaining agreement specified a specific payday. However, the Board stated, "these unilateral changes relate to wages, hours, and conditions of employment and are mandatory subjects for the purposes of collective bargaining." Abernathy at 69.

In Visiting Nurses, the parties were engaged in collective bargaining for a successor collective bargaining agreement when the Employer unilaterally implemented five of its proposals in the absence of an overall impasse in bargaining for the agreement as a whole. In finding that the Employer committed an unfair labor practice, the NLRB held that during negotiations for a successor

[2] Except as provided in R.I.G.L. 28-14-4 and 28-14-5, every employee other then employees of the state and its political subdivisions and of religious, literary, or charitable corporations shall be paid weekly all due wages from his or her employer, except those employees whose compensation is fixed at a biweekly, semi-monthly, monthly or yearly rate.

agreement, an Employer's obligation to refrain from unilateral changes extends beyond a mere duty to provide a Union with notice and opportunity to bargain about a particular subject matter before implementing such changes. Rather, an Employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes, absent an overall impasse on bargaining for the agreement as a whole. Id at 1131.

This Board recognizes and understands that many employees live paycheck to paycheck and that a change to payroll frequency could indeed wreak havoc on planning and paying bills. This Board believes that the NLRB is correct in holding that the change of paydays is a mandatory subject for bargaining and this Board hereby adopts the same position.

Having determined that payroll frequency is a mandatory subject for bargaining, the Board will next examine whether or not R.I.G.L. 28-14-2.2 provides any legal basis to eliminate payroll frequency as a mandatory subject for bargaining or whether the provisions of that statute can be harmonized with the State Labor Relations Act.

R.I.G.L. 28-14-2.2 provides:

> "Except as provided in R.I.G.L. 28-14-4 and 28-14-5, every employee other then employees of the state and its political subdivisions and of religious, literary, or charitable corporations shall be paid weekly all due wages from his or her employer, except those employees whose compensation is fixed at a biweekly, semi-monthly, monthly or yearly rate."

The Board interprets this statute as requiring that certain classes of employees be paid on a weekly basis and that municipal employees are not included in the class that requires weekly payments. The statute certainly permits the payment of wages to municipal employees on a weekly basis, but does not require the payment on a weekly basis. The statute does not address whether a municipality with collective bargaining agreements in place, which has historically paid employees weekly, may unilaterally change the frequency of payroll during the term of a contract. However, R.I.G.L. 27-7-13 (6) requires good faith bargaining with the certified bargaining representative of employees concerning terms and conditions of employment. There can be no questions that the Town's payroll

was historically done on a weekly basis and that the contract was silent on this issue. Therefore, the Board finds that once the municipality has chosen the payroll frequency for the life of a contract, the payroll frequency may not be changed during the life of the contract, absent prior bargaining.

Additionally, in reviewing this matter, the Board notes that R.I.G.L. 28-7-44 provides:

> "Insofar as the provisions of this chapter are inconsistent with the provisions of any other general, special, or local law, the provisions of this chapter shall be controlling."

The Board believes that the two statutes can be read to give effect to both. The Board believes that the discretion afforded to municipalities to make payroll on a bi-weekly basis must be exercised with regard to existing collective bargaining agreements and existing terms and conditions of employment. The Board believes that while a CBA is in effect, the parties must negotiate and agree on mid-term changes to terms and conditions of employment, including payroll frequency. Upon the expiration of the collective bargaining agreement however, it appears to the Board that R.I.G.L. 28-14-2.2 would permit the municipality to change the payroll frequency if is so desired.

In this case, the testimony established that the employees had been receiving their pay on a weekly basis for many, many years. The evidence supports a finding that at least one discussion between the Employer and Union took place in the spring of 2005 concerning the Employer's desire to change payroll frequency, in order to save $6,000.00 per year in payroll costs. Both the Union's business agent, Mr. Joseph Peckham, and the Town's Administrator, Mr. Robert Lowe, testified that after a grievance hearing in the spring of 2005, Mr. Lowe mentioned to Mr. Peckham and the Union President, Russell Carpenter, that the Town would like to change the payroll frequency from weekly to bi-weekly, to save money. The parties differ however on the exact nature of this conversation.

Mr. Peckham testified that he had a clear recollection that Mr. Lowe also stated that the Town would be looking for changes in the employees' health insurance co-pays. Mr. Peckham indicated that Mr. Lowe may have also

mentioned one or two other items that the Town would be looking for in the new contract. Mr. Peckham testified that he told Mr. Lowe that the issue of payroll frequency, the health insurance co-pays, and the other items should be taken up in the negotiation process and that Mr. Lowe should submit proposals for contract negotiations for these items. On cross-examination, Mr. Peckham acknowledged that neither he nor Mr. Carpenter notified the Union membership on the proposed change in payroll frequency. Mr. Peckham stated that there was no reason to tell the membership anything at that particular point in time because negotiations had not yet begun and no formal proposals had yet been made by the Town. Mr. Peckham stated that "we would have no reason to talk to the membership about general discussions with management." (TR. p 17)

Mr. Lowe's recollection of this conversation differs from Mr. Peckham's recollection. Mr. Lowe testified that when he advised Mr. Peckham and Mr. Carpenter of the Town's desire to change payroll frequency, Mr. Peckham asked if the Town would wait until July to implement. According to Mr. Lowe, Mr. Peckham wanted to use the proposal as a bargaining tool in the negotiations and that if the parties reached agreement on a new contract before July, the change to payroll frequency could simply be added to the contract language. Mr. Lowe testified that he told Mr. Peckham that Lowe would think about it. Mr. Lowe also testified that Mr. Peckham called him about a week later and that Lowe told Peckham that he would agree to wait until July to implement the payroll change and that Peckham thanked Lowe for agreeing to wait.

In this case, it is undisputed that the Employer came to a determination that it could unilaterally implement a change to the payroll frequency. The Employer came to this conclusion after discussing the matter with representatives of the School Department who advised that they simply unilaterally implemented this change without prior bargaining, about four years previously.

To the extent, therefore, that the Employer decided during the existence of a CBA to change payroll frequency, a mandatory subject for bargaining, without bargaining, the Employer has committed a violation of R.I.G.L. 28-7-13 (6) which

requires good faith bargaining. To the extent that implementation actually took place after the expiration of the contract, the Employer has not committed an unfair labor practice, since the Employer is not required to issue payroll on a weekly basis. However, in this case, Article 31 of the parties' contract specifically provides: "It is understood by both parties that the contract in effect at the start of negotiations will continue until negotiations have culminated in the new agreement." (Union Exhibit #1) Therefore, although the CBA had a facial "expiration date" of June 30, 2005, the CBA continues through negotiations until the future culmination of a new agreement. Under these circumstances, the Board concurs with the decision in Visiting Nurse Services of Western Massachusetts, Inc. and Service Employees International Union, Local 285, AFL-CIO, CLC 325 NLRB 212 (1998) which held: "As a general rule, when, as here, the parties are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond a mere duty to provide a union with notice and opportunity to bargain about a particular subject matter before implementing such changes. Rather, an Employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as whole." Id at 1131

Therefore, the Board finds that since R.I.G.L. 28-14-2.2 permits, but does not require payment of wages on a bi-weekly basis, and since the parties agreed to maintain the status quo with contractual items, the Board believes that R.I.G.L. 28-7-13 (6), which requires good faith bargaining prior to unilateral changes on any term or condition of employment, encompasses the facts in this case.

On the issue of waiver, the Board does not find that the facts support a finding of waiver of the right to bargain. In this case, Mr. Peckham indicated that he told Mr. Lowe that the payroll frequency, the health care issues, and the other issues should be included in the Town's proposals for the new contract. Thus, until the Town submitted proposals for negotiations, the Union would not have

been on notice that this issue was not included and that the Town intended to unilaterally implement.[3] Thus, no waiver can be found.

FINDINGS OF FACT

1) The Town of North Smithfield 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) Until the summer of 2005, employees of the Town of North Smithfield, including members of the complaining union, were paid their wages via a weekly payroll. On or about June 7, 2005, the Town notified its employees through a memorandum that effective June 30th, the Town would alter its payroll so as to issue bi-weekly checks, instead of weekly checks.
4) When advised of the Employer's desire to change payroll frequency to save money, the Union told the Employer that it should include such a provision in its contract proposals.
5) The CBA in existence during the spring of 2005 was silent on the issue of payroll frequency, but the payroll had been made weekly by the Town for many years.
6) The Town unilaterally decided to implement the payroll change and the first payroll for the 2005-06 fiscal year was made on July 14, 2005.

CONCLUSIONS OF LAW

1) The issue of payroll frequency is a mandatory subject for bargaining.

2) RIGL 28-14-2.2 can be harmonized with the provisions of R.I.G.L. 28-7-13 (6) which requires good faith bargaining.

3) The Union has proven by a fair preponderance of the credible evidence that the Employer committed a violation of R.I.G.L. 28-7-13 (6) when it unilaterally

[3] There was no evidence in the record as to when the parties exchanged contract proposals.

implemented a change to a mandatory subject for bargaining without prior bargaining to impasse.

ORDER

1) The Employer is hereby ordered to cease and desist from paying these Union employees on a bi-weekly basis and is ordered to bargain in good faith with the Union concerning the impact of said change on payment frequency.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (DISSENT)

Ellen L. Jordan, Member (DISSENT)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (DISSENT)

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

Dated: 8-21-07, 2007

By: Robyn H. Golden, Administrator

ULP-5759

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- TOWN OF NORTH SMITHFIELD	CASE NO: ULP-5759

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. 5759 dated 8/21/07, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after 8/21/07.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: August 21, 2007

By: _____
Robyn H. Golden, Administrator

ULP- 5759