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 CITY OF CRANSTON	CASE NO: ULP-5761

DECISION AND ORDER

TRAVEL OF CASE

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 City of Cranston (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated July 7, 2005 and filed on July 11, 2005 by the Rhode Island Laborers District Council.

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

> "The Employer has committed unfair labor practices by failing to meet and confer with the Union over the future status of the terms and conditions of employment regarding the City's Crossing Guards, by unilaterally repudiating the current Collective Bargaining Agreement by and between the Employer and the Union, and by assigning bargaining unit work outside the bargaining unit.

Following the filing of the Charge, an informal conference was held on August 5, 2005, in accordance with R.I.G.L. 28-7-9. On October 19, 2005, the Board issued its complaint. The Employer filed an answer on October 24, 2005. The matter was originally scheduled for formal hearing on November 15, 2005, but the matter was then rescheduled to December 6, 2005. Representatives from the Union and the Employer submitted several joint exhibits, including a stipulation of facts submitted in a related proceeding before the American Arbitration Association. Upon conclusion of the formal hearing, the parties were directed to submit written briefs. After an extension granted by the Board's Administrator, both parties filed their post-hearing briefs with the Board on

March 3, 2006. The Employer also submitted a written Motion to Amend its Answer to add an affirmative defense, pursuant to Rule 9.01.2.

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. In addition, the Board has taken judicial notice of a decision dated January 11, 2005, written by Superior Court Justice Procaccini, as well as an Arbitration Decision issued by Arbitrator Philip Dunn on February 2, 2006.

FACTUAL SUMMARY

On February 4, 1991, pursuant to Title 28, Chapter 9.4 R.I.G.L., as amended, the Union was certified by the Rhode Island State Labor Relations Board as the exclusive bargaining representative of the City of Cranston Municipal Employees who perform Crossing Guard duties. Pursuant to that certification, the parties executed various Collective Bargaining Agreements (hereinafter "CBA") throughout the years. In July 2002, during the pendency of a CBA for the July 1, 2001 through June 30, 2004, the Rhode Island Auditor General, Ernest Almonte, conducted an assessment of all aspects of the City's finances and issued a report directing the City to take certain actions to address the City's growing fiscal crisis. In part, Almonte ordered the City to engage in "concession bargaining" with the City's various Unions. As a result of that order, the Union and then Mayor John O'Leary, did engage in concession bargaining which resulted in the execution of a revised and extended CBA for the period July 1, 2002 through June 30, 2005. This agreement contained a "No Restructuring" clause (Article I) which prohibited the City from either laying off or furloughing any member of the bargaining unit during the pendency of the CBA. Article I further stated that on June 30, 2005, the provisions of the prior CBA concerning layoffs, furloughs, and staffing will be reinstated.

In January 2003, Mayor Steven Laffey took office as the Mayor for the City of Cranston and requested the Unions to return to the bargaining table for additional concession bargaining. Mayor Laffey also had his administration engage in a search for alternatives to provide crossing guard services for the City. The concession bargaining was unproductive as the City moved into the

budget process for the fiscal year commencing July 1, 2003. The City Council then decided not to include any funding in the 2003 budget for crossing services and on July 22, 2003, the City sent layoff notices to all members of the crossing guards bargaining unit.

On July 24, 2004, the Union filed a grievance with respect to the City's termination of the crossing guards' employment. The City denied the grievance and the matter ultimately proceeded to arbitration before Arbitrator Gary Altman. While that matter was pending, the Union also filed litigation in the Rhode Island Superior Court and on September 5, 2003, the Court issued a "Permanent Injunction" enjoining the City from laying off or furloughing any bargaining unit employee and from failing to maintain less than thirty-nine (39) crossing posts staffed by bargaining unit employees. The Superior Court's order was appealed to the Supreme Court and on February 24, 2004, the Supreme Court issued an order deferring action on the matter until the arbitration was concluded.

On May 7, 2004, Arbitrator Gary D. Altman, issued an award sustaining the Union's grievance and in June 2004, the City filed an action in the Rhode Island Superior Court, seeking to vacate Arbitrator Altman's decision. On September 25, 2004, the Supreme Court issued an order holding the 2003 appeal in abeyance until the Superior Court could issue a ruling on the 2004 Altman arbitration appeal. In his award, Arbitrator Altman determined that the issue between the parties was substantively arbitrable and that the substance of the "No Restructuring" clause was subject to the grievance arbitration process. Arbitrator Altman also concluded that the layoff of all crossing guards violated the terms of the parties' CBA and ruled that the City was contractually barred from laying off employees for the duration of the CBA.

On January 5, 2005, Superior Court Justice Procaccini issued a written decision and order, which vacated the Altman arbitration decision. The Court found that the "No Restructuring" clause violated the terms of the city of Cranston's Home Rule Charter, specifically Sections 3.16 and 5.05 and as such, an arbitrator had no authority to enforce the "No Restructuring' clause. [1]

[1] This decision has been appealed to the Rhode Island Supreme Court.

(Decision at 11) In addition, the Court also held that the "No Restructuring clause" in addition to being non-arbitrable, is adverse to the public interest and therefore void as against public policy. (Decision at 14) [2]

This decision, however, was not the end of the Collective Bargaining Agreement or relationship between the parties. In addition to the "No Restructuring" clause that the Superior Court voided as against public policy, the revised CBA, which resulted from the concession bargaining with Mayor O'Leary, also contained other revisions, which were not the subject of the Superior Court's decision. The revised Articles included Article XXIII, Article VII, and Article IX. In the revisions to the CBA, the parties agreed: "The document entitled 'Agreement between the City of Cranston, Rhode Island and the Laborer's District Council on behalf of Local Union 1033 of the Laborers' International Union on North America, AFL-CIO, effective July 1, 2001 through June 30, 2004, is hereby incorporated by reference as if fully reproduced. The terms and conditions of this Agreement shall continue and remain in effect for the period of July 1, 2002 through June 30, 2005, except as expressly modified herein."

In the spring of 2005, shortly after the issuance of the Procaccini decision vacating Arbitrator Altman's award, the City and Union had yet another dispute concerning the life of the CBA which has been modified by the O'Leary administration's concession bargaining. The City contended that the CBA had expired as of June 30, 2005 and the Union argued that the agreement automatically renewed for a one year period to June 30, 2006, through the provision of Article XXIII.

Article XXIII, Section 1 of the CBA for the period July 1, 2001 through June 30, 2004 states:

> "The provisions of this Agreement shall remain in effect from July 1, 2001 through June 30, 2004, and shall continue thereafter from year to year unless either party gives notice in writing one hundred twenty (120) days prior to the expiration date to the other party of his/her desire to terminate this Agreement in which event this Agreement shall terminate on June 30, 2004, except that the Union may express its desire to reopen the Agreement one hundred twenty (120) days prior to June 30, 2004. Upon such notice

[2] The Court also found that the 2002 extension of the CBA did not violate the statute prohibiting agreements for period of longer than three years.

> being given, the duly authorized representative designated by the parties will meet on March 12, 2004, or such later date as the parties may mutually agree to, to commence negotiations. It is agreed that all provisions of this Agreement shall remain in full force and effect during said negotiations, and shall continue thereafter in full force and affect, with such modifications as the parties may agree to in writing until the termination of this Agreement."

This Article was amended by the O'Leary administration's concession bargaining as follows: "July 1, 2002 through July 30, 2005."

The City contended that this amendment meant that the CBA was terminated in its entirety on June 30, 2005. The Union contended that the words "July 1, 2002" were simply to be substituted for "July 1, 2001" in the original CBA and that the words "June 30, 2005" would be in place of "June 30, 2004" wherever that date appeared in Article XXIII. Neither party gave the other notice, 120 days prior or otherwise that it desired to terminate the CBA as of June 30, 2005.

Therefore, the Union argued that because neither party had given each other notice to terminate the agreement within 120 days prior to the expiration of the agreement, then the agreement continued in force (as amended in 2002 by the parties and in 2005 by the Court) for one more year, to wit, to June 30, 2006.

In reliance on the position that the contract was in effect through June 20, 2006, the Union wrote on April 11, 2005 to the Mayor and the City Finance Committee, expressing concerns over the upcoming budget proposals and the City's apparently expressed intention to contract with a third party for crossing guards' services. (Joint Exhibit # 4) On April 14, 2005, the Mayor responded in writing to the Union stating "that under any scenario, the City has the unfettered right to layoff all crossing guards."

On April 22, 2005, the Union filed a grievance with the City, which alleged an "Anticipatory Breach of all Articles and Title 28, Chapters 7 and 9.4 of the Rhode Island General Laws. The Employer has explicitly and implicitly announced its intention to repudiate the Collective Bargaining Agreement." As a remedy, the Union sought: "Cease and desist, strict adherence to contractual and legal requirements imposed on the City of Cranston, plus interest, costs,

attorney's fees, and any other appropriate remedy. The City denied the Union's grievance and the Union filed for binding grievance arbitration on May 27, 2005.

On May 4, 2005, the Union wrote to the members of the City Council requesting that it restore all necessary funds to the budget for the Crossing Guards program. On May 6, 2005, the City Council adopted a Fiscal Year 2006 Budget, as proposed by the Mayor, which funded the Crossing Guard line item in the amount of $350,000.00. On June 8, 2005, the Mayor sent a letter to each bargaining unit member stating among other matters, that effective July 31, 2005, their employment with the City of Cranston was terminated. On June 23, 2005, the Union wrote to the City Council members requesting a meeting to discuss the Mayor's intentions to subcontract crossing guard services. On July 11, 2005, having received no response from the City Council, the Union filed the instant unfair labor practice. The Crossing Guards were terminated from employment, effective July 21, 2005.

On August 17, 2005, the City executed an Agreement with NESCTC Security Agency, LLC for the performance of crossing guards' services. On February 2, 2006, Arbitrator Philip Dunn issued an award on the April 2005 grievance finding that the CBA between the City and Union remained in full force and effect through June 30, 2006. Arbitrator Dunn also ruled "under the terms of that CBA, the City had the right to layoff all the bargaining unit members based on economic reasons effective July 31, 2005; and, the City did not violate any express provision of the Collective Bargaining Agreement when it did so while at the same time utilizing an outside contractor to provide crossing guard services to the City at an appreciably lower cost." In addition, the Arbitrator ruled that the "Union continues to be the exclusive bargaining agent of these employees who are currently on layoff status" and that "because the bargaining unit employees were laid off for economic reasons (rather than being discharged for cause), they have recall rights for two (2) years from the date of their layoff".

The Arbitrator also ruled that he "...lacked authority to consider the Union's allegation that the City violated labor laws of the State of Rhode Island by failing to negotiate with Local 1033 before it laid off all the employees in the

bargaining unit and subcontracted the crossing guard work to an outside provider. Jurisdiction to consider that statutory claim resides with the State Labor Relations Board, not with this Grievance Arbitrator."

DISCUSSION

The first issue for the Board to consider in this decision is the Employer's Motion to Amend its Answer to include an affirmative defense concerning the statute of limitations for the filing of unfair labor practices. The Employer argues that the Board's rule permitting amendment at any time prior to the issuance of a final order (Rule 9.02.9) should be liberally construed and that since the Board follows the practice of the Rhode Island Superior Court concerning filing deadlines, then the Board should follow the Court's practice in liberally allowing amendments by leave of court which shall be freely given when justice so requires. Finally, the City argues that the Union is not prejudiced by allowing this affirmative defense to be raised at this stage of the proceedings. The Union has not opposed the Motion. Therefore, and in light of the fact that there is certainly no prejudice to either the Union or the Board's ability to conduct its business, the Board grants the Employer's Motion to Amend its Answer, to add an affirmative defense.

As to the substance of the defense, the Employer argues that the Union knew as far back as mid 2003, that the City had "repudiated" the parties' CBA and that the City's failure to meet and confer over the future status of terms and conditions of employment of the crossing guards and the assignment of crossing guard work to an outside contractor in August 2005, are deemed "consequences" of this initial repudiation from which the Union may not recover. (In support of these arguments, the City cites cases arising under section 10(b) of the National Labor Relations Act.) The Board sees a distinction between the NLRB cases and the facts presented in this matter.

The Board notes that both the Altman arbitration and the Superior Court litigation (which resulted in the "Procaccini" decision) both dealt with the "No Restructuring" clause and the City's acts in regards to the same. The facts indicate that in 2003, the City Council decided not to include *any funding in the*

2003 budget for crossing guard services and sent layoff notices to all members of the crossing guards bargaining unit. This differed significantly from the facts set forth in 2005. By then, the City had apparently realized that the crossing guard services were still a necessary and vital service for the school children of Cranston. In 2005, the City budgeted $350,000.00 for these services, laid off the bargaining unit employees, and then replaced them with non-bargaining unit employees of a subcontractor. Therefore, the Board finds that the acts which triggered the six (6) month statute of limitations were the City's April 2005 publication of a Request for Proposals for Crossing Guards Services, indicating the City's intention to contract out the work of the crossing guards' bargaining unit coupled with the refusal of the City to discuss this issue with the collective bargaining representative. Thus, the Union's filing of the charge of unfair labor practice in July, 2005 was well within the six (6) month statute of limitations and this Board so holds.

This critical distinction between 2003 and 2005, coupled with Arbitrator Dunn's February 2006 decision, provides the factual fabric upon which the rest of this decision is based. As stated by the Employer in its brief, this Board is not "writing upon a clean slate" and the Board must give deference to and indeed abide by the decision of the Rhode Island Superior Court, to the extent that it is applicable to facts which occurred after its issuance. Moreover, the Board is also mindful of the decision of Arbitrator Dunn (as well as his own expressed limitations of his authority and that of the Board.)

The Employer argues that the charge of unfair labor practice cannot be sustained because the City had a nonnegotiable municipal/managerial prerogative to abolish the crossing guards division and terminate the crossing guards. In his decision, Justice Procaccini reviewed the provision of the Cranston City Charter, section 3.16 and 5.05 and concluded, "the clear language of sections 3.16 and 5.05 empowers the City and the Mayor to 'modify' or 'abolish' organizational units in City government." (Decision p. 11) He also stated: "The City was confronted with enormous financial difficulties and a directive from the Auditor General to revisit all Collective Bargaining Agreements in an effort to

control this looming fiscal crisis. This Court cannot envision a more appropriate set of dire and unfortunate financial circumstances warranting the exercise of the power conferred by the Charter." Id. Justice Procaccini also held:

> "...while there is no question that the Municipal Employees Arbitration Act endows employees and the City with the right to enter into Collective Bargaining Agreements regarding terms of employment, it is clear to this Court that the MEAA does not deprive the City of its power to make executive decisions pursuant to specific charter provisions." Id.

In light of these pronouncements, Justice Procaccini went on to find the "No Restructuring" clause both substantively non-arbitrable and void as against public policy. He stated:

> "in this Court's view, the authority and duty vested in a City Council to make decisions regarding the City's organizational units cannot be relinquished. In the instant case, the City, pursuant to its powers under the Cranston charter, made the decision to abolish the crossing guards programs because the City could not afford to maintain the costly municipal crossing guards program. As previously stated, it is difficult to conceive of a more appropriate use of the powers and duties delegated to the Mayor and City Council in the Cranston charter that during this time of severe financial instability. Accordingly, this Court finds that the No Restructuring Clause, in addition to being non-arbitrable, is adverse to the public interest and therefore void as against public policy."

It seems clear to this Board that the facts presented to the Court (from 2003) were significantly different than the facts presented to this Board (from 2005). In 2003, the entire crossing guards program was eliminated from the budget. Indeed, in the words of the City's Director of Administration- "it was clear that in our budget proposal we zeroed out, and the Council was behind us on this, they voted nine (9) to zero (0) in adopting the budget to zero (0) out the crossing guards program in the budget adopted that evening of May 14th." (TR. 12/15/05 p. 59) Judge Procaccini also specifically made note of the fact that "the City council concluded that the City could no longer afford to maintain the City-run crossing guards program. The City Council then voted unanimously to provide no funding for the crossing guards program in its budget, which was formally adopted in June 2003."

That scenario is vastly different than the one presented in the spring of 2005. By that time, the City had concluded that the crossing guard program was still a vital service needed for the children of its residents and taxpayers. The

Council acknowledged this by providing funding in the amount of $350,000.00 in the budget.

Although the Procaccini decision made it clear that the contractual promise (ie, "No Restructuring Clause") to not layoff employees violated the provisions of the City Charter and was not enforceable, the Court was not asked to, nor did it rule upon the implications of the Rhode Island State Labor Relations Act as it pertained to the employees and the continuation of bargaining unit work. This Board does not agree with the employer's assertion that the Procaccini decision held that the City's Charter provided it with the "unfettered municipal/managerial prerogative to abolish the crossing guards division and terminate the guards." (Argued at p. 16 of Employer's Brief) Indeed, from his discussion, Justice Procaccini acknowledged that the MEAA provides the right to collectively bargain to municipal employees, including those in the City of Cranston. This Board believes that the clear language of the Procaccini decision was limited to the "No-Restructuring Clause" in relation to the City Charter. Justice Procaccini did not void the entire Collective Bargaining Agreement, nor did he affirm any so called "repudiation of the entire contract" by the City, as the City now alleges.

Since Judge Procaccini made no pronouncements on the validity of the rest of the CBA, (or the impact of the State Labor Relations Act) and since Arbitrator Dunn determined that the parties' CBA continues in effect until June 30, 2006, the employees continue to have representational rights under the State Labor Relations Act. As such, this Board must now analyze the extent of these rights in the spring of 2005 when the alleged unfair labor practice is alleged to have occurred.

The Union argues that the topic of subcontracting out bargaining unit work is a mandatory subject for bargaining. As such, and since the Arbitrator ruled that the CBA was in existence until June 30, 2006, the Union argues that the Employer was obligated to negotiate in good faith for both a successor Collective Bargaining Agreement and all changes in terms and conditions of employment including the contracting out of crossing guard services. The Union submits that

under the MEAA, the rights of employees to bargain collectively with their Municipal Employers regarding "all other terms and conditions of employment" include the right to bargain about the Employer's intentions about subcontracting work. The Union argues that although the precise question of whether subcontracting is a mandatory subject for bargaining has not been decided by the Rhode Island Supreme Court, the Court would be likely to find that it is, based upon federal labor law precedent. The Union argues that it is clear under law that parties must bargain to impasse on mandatory subjects for bargaining and refusal to do so is a *per se* violation of the duty to bargain.

The Employer argues that the "City's Charter based right and duty to restructure its organizational scheme, which duty has the force and effect of state law, is not a mandatory subject for bargaining." The Employer also argues that Justice Procaccini's decision held that the City must be free from the constraints of the bargaining process with respect to its Charter based duties to abolish City Departments, Divisions, or other organizational units when circumstances so dictate. The Employer also argues that the Board should not look to federal labor law for guidance on this topic inasmuch as this Board has previously recognized in ULP-4647 (In Re: Warwick School Committee) that "private sector collective bargaining model is not transferable to the public sector."

As far as federal labor law precedent is concerned, the seminal case on that topic is Fiberboard Paper Products Corp., 379 US 203 (1964) where the United States Supreme Court held that an Employer's decision to subcontract was a mandatory subject for bargaining because for economic reasons, it was replacing bargaining unit employees with those of an independent contractor to do the same work under similar conditions of employment. As noted in the Union's brief, in interpreting Fiberboard, both the Courts and the NLRB have found limited exceptions. For instance, subcontracting is not a mandatory subject for bargaining if it is the Employer's custom to subcontract various kinds of work; the subcontracted work does not vary significantly in kind or degree from the work subcontracted under the company's established practice; the subcontracting has no demonstrable adverse impact on employees in a

bargaining unit; and the Union has an opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

Bargaining about a decision to subcontract must occur if any of the following conditions are present:

a) the subcontracting involves a departure form previously established operating policies;

b) the practice effects a change in the conditions of employment;

c) the subcontracting results in significant impairment of job tenure, or

d) employment security; or

e) reasonably anticipated work opportunities for unit employees.

See Westinghouse Elec. Corp., 150 NLRB 1574, 58 LRRM 1257 (1965) Regardless of an alleged futility of bargaining, when a subcontracting decision turns on labor cost considerations and involves the same work under similar conditions of employment, it is a prototype case under Fiberboard and the decision must be bargained. *See* Rock –Tenn Co. v NLRB, 101 F.3d 1441, 154 LRRM 2021 (D.C. Cir. 1996)

In addition to citing the federal line of cases regarding the issue of subcontracting, the Union also cites a series of public sector cases as well. In Van Buren Public School District v Wayne County Circuit Judge, 61 Mich App 6, 232 NW2d 278 (1975), the Court held that a decision to subcontract the busing of students constituted a "term and condition of employment" within the State's Public Employment Relations Act and was a mandatory subject for bargaining, because the termination of the Union members' employment necessarily resulted from the subcontracting decision. Interestingly, the Court reasoned that Union input to the decision to subcontract might have been able to offer an alternative, which would fairly protect the interests of the district, and the employees and discussion of the subject would have done much to promote industrial peace and prevent lawsuits. [3]

The Union also cited the case of In Re Hillsboro-Deering School District, 737 A.2d 1098, 138 Ed. Law Rep. 447, 162 LRRM 2082 9N.H. 1999) which held

[3] Attempts towards the promotion of industrial peace are woefully lacking in this matter.

that a school district's unilateral action, in terminating all members of custodial workers' bargaining unit and subcontracting with private contractors to perform the same work, constituted an unfair labor practice. Similarly, subcontracting for student transportation becomes a mandatory subject for bargaining when the replacement private contractors perform the same duties under similar standards. Civil Service Employees Asssoc. v Newman 457 NYS 2d 620 (1982) Also see generally, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*. 84 A.L.R. 242.

It is this Board's opinion that the issue of subcontracting, generally, vitally affects the issue of the terms and conditions of employment. Indeed, the issue sometimes determines, as in this case, whether or not the employees even remain employed. As such, the Board finds that the issue of subcontracting is a mandatory subject for bargaining. The question in this case then becomes to what extent, if any, is the duty of the City of Cranston, in this case, to bargain affected by the January 2005 decision issued by Justice Procaccini?

The Board does not read Justice Procaccini's decision quite as broadly as the Employer. As previously noted, Justice Procaccini did not void the parties' entire CBA; he voided the "No Restructuring' clause and he did so when the City Council had decided not to fund the crossing guard program with any funds for the 2003-04 fiscal year. As previously mentioned, Justice Procaccini was not asked to, nor did he analyze the provisions of the City Charter in regard to the issue of mandatory subjects for bargaining. Nor did Justice Procaccini have the occasion to determine the obligations of the City, if any, under circumstances of less than abolishment of the crossing guard program, such as was presented in 2005. Justice Procaccini determined that the "No Restructuring" clause was void, but left the balance of the CBA intact. He indicated that no CBA could require the City to keep funding a program that it wished to terminate; however, he did not address what the CBA would permit or require when the City is merely reducing the costs associated with funding the program; nor did he rule on the parties' bargaining obligations under any circumstances.

In this case, by 2005, the City had determined that it would still provide crossing guard services, but that the expense associated with the program would be limited by budget to $350,000.00. The Board believes that this decision by the City to retain the crossing guard services, but to significantly lower the annual cost, changed the facts and consequently, the legal duties of the parties significantly, in light of Justice Procaccini's decision. Thus, the case changed from one in which (2003) an Arbitrator ruled that because of a contract provision, the City had no authority to help avert a financial crisis by repudiating a no layoff/no restructuring clause to one in which (2005) the City's subcontracting decision turns on labor cost considerations and involves the same work under similar conditions of employment. Justice Procaccini ruled the former situation unlawful and the latter situation, this Board believes, violates the State Labor Relations Act, because subcontracting under those circumstances is a mandatory subject for bargaining.

The City argued in it brief that even if it had a duty to bargain (which it certainly did not concede) bargaining with this Union would be futile because of the prior bargaining in 2003, where the Union had allegedly rejected anything less than what the contract provided. The Board notes that a lot of time, energy, and money had clearly been expended by both parties in litigation between 2003 and 2005, and the Board cannot speculate, as does the City, as to the details of the Union's position in the spring of 2005. However, the documentary evidence in this case indicated that the Union was reaching out repeatedly to re-negotiate the CBA, all to no avail. (Joint exhibits #5, #6 and Union Exhibit #1) Had the parties simply sat down to re-negotiate the CBA within the confines of the new budget, perhaps they could have reached an agreement and obtained a much needed and long overdue level of industrial peace.

Thus, while the Charter provides the Mayor and City Council with the right to abolish and modify City departments, to the extent that members of a collective bargaining unit (with a valid CBA) are employed to provide certain services (bargaining unit work), this Board holds that the bargaining unit work may not be subcontracted out to non-bargaining unit members.

The City argues in its Brief that the Union waived any right that it had to bargain mid-term concerning the terms and conditions of employment. The basis for this argument is a bit unclear and appears to rely on the proposition that since the Union was seeking to discuss wages and other benefits, all of which were covered by the contract, then the City was not obligated to engage in bargaining. This argument convolutes the factual circumstances, which gave rise to the Union's requests. The Union was not simply asking the Employer for a "reopener" for its own benefit. Instead, the Union was clearly making overtures to the Employer to persuade the Employer not to attempt to subcontract out the crossing guard services. The Board believes that the Union's letters in the spring and early summer of 2005 demonstrate that the Union was clearly indicating a climate of concession in order to induce the Employer not to unlawfully engage in subcontracting. Thus, the Employer's argument of waiver under these circumstances is entirely misplaced.

The Employer also argues that the City had a sound arguable basis for adopting the position that it did in the spring of 2005, to wit, Justice Procaccini's decision. The City also argued that it had a sound arguable basis for its belief that the prior contract terminated in June 30, 2005. The Board finds that argument curious, at best, given the fact that Arbitrator Dunn ruled otherwise, prior to the submission of the Employer's brief in this matter.

As previously stated, the Board does not concur with the City's position that the Procaccini decision gave the City the "unfettered right" to layoff all the crossing guards, without thought as to the ramifications of the State Labor Relations Act. This is clearly a case that falls within the straightforward holding of Fiberboard Paper Products Corp., 379 US 203 (1964) and the multiple public sector cases cited by the Union in its Brief to the Board. The issue of subcontracting was a mandatory subject for bargaining under the circumstances presented in the spring and summer of 2005. The Employer has admittedly failed to engage in bargaining and therefore, this Board finds, as prayed by the Union, that a *per se* violation of the duty to bargain has occurred.

The final issue for the Board is to fashion an appropriate remedy for this *per se* violation. Although some individual Board members may have personal knowledge as to the status of Crossing Guard services in the City of Cranston, that information is not present in the record. Therefore, to the extent that the City still provides and will continue to provide such services to the taxpayers and residents, the City is hereby ordered to engage in bargaining with this Union relative to those services for the upcoming school year. The Employer is ordered to meet with the Union and begin negotiations for the provision of crossing guard services for the upcoming school year within thirty (30) days of the date of this decision and order. [4]

FINDINGS OF FACT

1) The City of Cranston 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 April 11, 2005, the Union wrote to the Mayor and the City Finance Committee, expressing concerns over the upcoming budget proposals and the City's apparently expressed intention to contract with a third party for crossing guards' services. (Joint Exhibit # 4)
4) On April 14, 2005, the Mayor responded in writing to the Union stating, "that under any scenario, the City has the unfettered right to layoff all crossing guards."
5) On April 22, 2005, the Union filed a grievance with the City, which alleged an "Anticipatory Breach of all Articles and Title 28, Chapters 7 and 9.4 of the Rhode Island General Laws. The Employer has explicitly and implicitly announced its intention to repudiate the Collective Bargaining Agreement." As a remedy, the Union sought: "Cease and desist, strict adherence to

[4] The Board declines to order bargaining for the provision of such services for the remainder of this school year due to the need to avoid any disruption of services.

contractual and legal requirements imposed on the City of Cranston, plus interest, costs, attorney's fees, and any other appropriate remedy. The City denied the Union's grievance.

6) On May 4, 2005, the Union wrote to the members of the City Council requesting that it restore all necessary funds to the budget for the Crossing Guards program.

7) On May 6, 2005, the City Council adopted a Fiscal Year 2006 Budget, as proposed by the Mayor, which funded the Crossing Guard line item in the amount of $350,000.00.

8) The Union filed for binding grievance arbitration on May 27, 2005.

9) On June 8, 2005, the Mayor sent a letter to each bargaining unit member stating among other matters, that effective July 31, 2005, their employment with the City of Cranston was terminated.

10) On June 23, 2005, the Union wrote to the City Council Members requesting a meeting to discuss the Mayor's intentions to subcontract Crossing Guard services.

11) On July 11, 2005, having received no response from the City Council, the Union filed the instant unfair labor practice.

12) On August 17, 2005, the City executed an Agreement with NESCTC Security Agency, LLC for the performance of crossing guards' services.

13) On February 2, 2006, Arbitrator Philip Dunn issued an Award on the April 2005 grievance, finding that the CBA between the City and Union remained in full force and effect through June 30, 2006. Arbitrator Dunn also ruled "under the terms of that CBA, the City had the right to layoff all the bargaining unit members based on economic reasons effective July 31, 2005; and, the City did not violate any express provision of the Collective Bargaining Agreement when it did so while at the same time utilizing an outside contractor to provide crossing guard services to the City at an appreciably lower cost."

14) The Employer's decision to subcontract Crossing Guard services was made for economic reasons and resulted in the replacement of bargaining unit employees with those of an independent contractor to do the same work under similar conditions of employment.

15) The decision to subcontract Crossing Guard services: (1) involved a departure from previously established operating policies; (2) effected a change in the conditions of employment; (3) resulted in significant impairment of job tenure and job security and reasonably anticipated work opportunities for the existing Crossing Guard employees.

CONCLUSIONS OF LAW

1) The Union's filing of the within charge was timely because the date which triggered the filing statute of limitations was the Employer's April 2005 publication of a "Request for Proposals for Crossing Guard Services."

2) Since the CBA was in full force and effect through June 30, 2006, the issue of subcontracting existing bargaining unit work was a mandatory subject for bargaining in the spring and summer of 2005.

3) Since the decision to subcontract Crossing Guard services: (1) involved a departure from previously established operating policies; (2) effected a change in the conditions of employment; (3) resulted in significant impairment of job tenure and job security and reasonably anticipated work opportunities for the existing Crossing Guard employees, the Employer was obligated to bargain with the Union concerning the subcontracting.

4) 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) and (10) by failing to negotiate the terms and conditions of employment for employees providing the bargaining unit work of "school crossing guards.

ORDER

1) The Employer's Motion to Amend its Answer to include an affirmative defense is hereby granted.

2) To the extent that the Employer still provides crossing guard services as a service to its taxpayers, the Employer is hereby ordered to negotiate with

the Union relative to the terms and conditions of employment for employees providing the bargaining unit work of Crossing Guard services for the upcoming school year.

ULP 5761 DISSENT

We, Board Members Dolan, Goldstein and Jordan, respectfully dissent.

The majority takes the position that the City (employer) committed unfair labor practices by failing to meet and confer with the Union over the future status of the terms and conditions of employment regarding the City's crossing guards, unilaterally repudiating the collective bargaining agreement between the employer and the union, and by assigning bargaining unit work outside the bargaining unit.

We simply cannot grasp any theory under which a duty to bargain can be found where a charter provision or municipal ordinance gives the municipality the absolute right to restructure or eliminate municipal positions, even when the effects of restructuring necessarily impact what is routinely considered mandatory subjects of bargaining (wages, hours and working conditions).

The Cranston City Charter, Section 3.16 - Powers Over Organization of the City Government, reads: "The Council shall have the power by ordinance not inconsistent with other provisions of this Charter to create, modify or abolish departments and non-departmental agencies in addition to those provided for in the Charter, and to create, modify or abolish departments, divisions, bureaus and other organizational units not established by this Charter." Without repeating the history and judicial myriad of the crossing guards matter, Mayor Laffey took office in January 2003, in the heat of a municipal fiscal crisis, and engaged in extensive restructuring of many departments in an effort to rectify the City's financial debacle.

Municipal laws supersede contractual duties or obligations where the two are in conflict . On January 11, 2005, Judge Procaccini issued a Decision and Order City of Cranston v. RI Laborers LIUNA, AFL-CIO (CA No. 04-2957) Superior Court 1-11-2005. He ruled that "in this Court's view, the authority and the duty vested in the City Council and Mayor under the provisions of the Charter to make decisions regarding the City's organizational units ***"cannot be relinquished..."*** With that conclusion, he ruled that Article 1 Section 4 of the amended collective bargaining agreement (Joint Exhibit 2) wherein the previous administration has agreed to not layoff or furlough any bargaining unit members and agreed to maintain not less than 39 crossing posts staffed by 39 bargaining unit employees was **unenforceable and non-arbitrable.** Judge Procaccini's decision cites State of RI v. RI Alliance of Soc. Sec. Ees Local 580, SEIU 747 A.2d 465 (RI 2000), where the Rhode Island Supreme court ruled that **"if a statute contains or provides for a non-delegable and or no modifiable duties, rights, and or obligations, then neither contractual provisions nor purported past practices nor arbitration awards that would alter those mandates are enforceable."**

While Judge Procaccini's decision is currently on appeal and pending before the Rhode Island Supreme Court his decision remains law absent an order to the contrary (Rule 62, Superior Court Rules). Since the Court found that the "No Restructuring Clause" (Article I Section 4 of the amended agreement) was not legally enforceable, the issue of whether the No Restructuring Clause ended on June 30, 2005 or remained in effect until June 2006 because the city did not give proper notice is irrelevant.

Moreover, even if the "No Restructuring Clause" (Article I Section 4 of the amended agreement) was legally enforceable, we still find no evidence that the City committed an unfair labor practice. The plan language of the Clause is patently clear and unambiguous: it was an express modification of the original contract, and its sunset provision provided that the agreement not to layoff or furlough clause expired on June 30, 2005. The City as noted above, did not layoff the crossing guards until July of 2005, and therefore, abided by the terms of the Clause.

It is noteworthy that legislation (H 7602) was introduced this spring that would have added the following provision to Chapter 28-7 of the State Labor Relations Act:

28-7-49. Conflict between agreement and charter/ordinance - notwithstanding any provision of law to the contrary, in the event of any conflict between the terms of a collective bargaining agreement between a public sector employer and a public sector employee organization, and the terms of any charter or ordinance of any city or town, the conflict shall be resolved in favor of the collective bargaining agreement." On April 5, 2006 the House Committee on Labor held the matter for further study.

If this proposed legislation passes sometime in the future, it will materially change what is existing law. That this material change has been proposed reinforces our understanding that under ***current*** law, a valid City Charter that gives the administration the lawful ability to reorganize or abolish positions supersedes any other agreement. Therefore, there cannot be a **duty to bargain** over the reorganization or abolishment of departments or positions when there is a municipal law that trump's contractual obligations when they are in direct conflict.

For the reasons stated above, we dissent.

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- CITY OF CRANSTON	CASE NO: ULP-5761

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. 5761 dated 3-26-07, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after 3-26-07.

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

Dated: March 26, 2007

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

ULP- 5761

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: MARCH 26, 2007

By: _____
Robyn H. Golden, Administrator

ULP-5761