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- STATE OF RHODE ISLAND DEPARTMENT OF HEALTH	CASE NO: ULP-5827

DECISION AND ORDER OF DISMISSAL

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 State of Rhode Island, Department of Health (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated December 4, 2006, and filed on December 6, 2006 by RI Council 94, AFL-CIO (hereinafter "Union.").

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

> "In September 2006, the State authorized non bargaining unit people to perform food inspections in elementary and secondary schools without negotiating with the certified collective bargaining representative."

The Board's administrative staff conducted an informal conference on May 2, 2007. On June 26, 2007 the Board issued its Complaint alleging: "The Employer violated R.I.G.L. 28-7-13 (6) and (10) by permitting non bargaining unit personnel to perform the bargaining work of food safety inspections in elementary schools and secondary schools, on an ongoing basis, without prior bargaining with the certified bargaining representative.

The formal hearing in this matter was originally scheduled for October 2, 2007, but was postponed on several occasions. On March 18, 2008, the case was placed into abeyance, at the request of the charging party. On December 4, 2008, the case was taken out of abeyance by the request of the charging party and a formal hearing was scheduled for April 7, 2009. The formal

hearing was again postponed and rescheduled and finally proceeded on October 15, 2009 and was completed on January 21, 2010. Representatives from the Union and the Employer were present at the hearings and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. Upon conclusion of the formal hearing, both the Union and the Employer filed written briefs.

SUMMARY OF RELEVANT FACTS AND TESTIMONY

In 2004, Congress enacted Section 111 of the Child Nutrition and WIC Reauthorization Act of 2004 which amended section 9(h) of the Richard B. Russell National School Lunch Act regarding food safety inspections required for schools participating in the National School Lunch or School Breakfast Program. (Employer Exhibit #2) Prior to this amendment, schools participating in these food programs were required to obtain one (1) food safety inspection each school year, or comply with the frequency required by local standards. (State and/or local governments were and are free to require more frequent inspections.)

The 2004 Act also required States to annually submit a report on food safety inspections to the Secretary of the United States Department of Agriculture (hereafter USDA). The language of the Act specifically stated that "Schools shall obtain a minimum of two food safety inspections per school year conducted by a State or local governmental agency responsible for food safety inspections. Schools participating in more than one child nutrition program shall only be required to obtain a minimum of two food safety inspections per school year if the food preparation and service for all meal programs take place at the same facility. Schools must post in a publicly visible location a report of the most recent inspections conducted and provide a copy of the inspection report to a member of the public upon request." 42 U.S.C. 1773, 1779. Underlining added herein. (Employer's Exhibit #2) The Act was designed to take effect on July 1, 2005 for the 2005-2006 school year.

In Rhode Island, the Department of Health, Office of Food Protection, is the "State or local governmental agency responsible for food safety inspections."

As a result of this mandate, the Director of the Office of Food Protection, Dr. Ernest Julian, determined that this Act would result in approximately 1,000 new food safety inspections per year; at a time when approximately 18,000 required food safety inspections were already not taking place by state-employed inspectors at other food establishments across the state due to severe staffing shortages. Dr. Julian noted in his testimony that the Congressional requirement for inspections was administered by the USDA and placed directly upon the State Departments of Education, which, in turn, were required to report back to Congress though the USDA each year. (TR. 1/21/10 pgs. 133-34) A memorandum, dated December 16, 2004, issued by Stanley G. Garrett, Director of the Child Nutrition Division of the USDA, was entered into the record as Employer's Exhibit # 2. In this memo, Mr. Garrett states, "In addition, we encourage state agencies to contact their state/and or local agencies responsible for food safety inspections to help facilitate schools' compliance with the new requirements." (Employer's Exhibit # 2)

As a result of the December 2004 Garrett memo, many, many discussions took place between and among representatives of the Rhode Island Departments of Education, the RI Department of Health, and the USDA, including personnel from the Washington DC USDA offices. (TR. 1/21/10 p. 137) Dr. Julian testified that there were multiple discussions on how to meet the unfunded mandate with existing resources, with child protection regarding food safety being a primary concern. (TR. 1/21/10, p. 137) According to Dr. Julian's unrebutted testimony, as a result of all these discussions, the USDA agreed that the requirement for food safety inspections could be met through the utilization of third–party inspectors, so-called, instead of existing staff of the "state or local governmental agency" responsible for conducting inspections. Dr. Julian also testified that the Division of Food Protection still wanted to assist the Department of Education in meeting the mandate and in protecting the children, by providing to the Department of Education, criteria for third-party inspectors, including education and experience of the inspectors. Dr. Julian indicated that he wanted to make sure that the third-party inspectors would call in the Office of Food Protection, if problems were

discovered during these inspections, because the third-party inspectors have no legal authority for enforcement with the food code. (TR. 1/21/10, p. 141)

On March 2, 2006, Dr. Peter McWalters, the Commissioner of Education issued a memorandum to all Rhode Island School Superintendents, School Business Managers, and School Food Service Administrators, advising them of the requirement for the USDA food safety inspections. In that memo, Mr. McWalters indicated that the inspection requirement could be satisfied by the use of "state approved" third party vendors, at the expense of the local school district. In that memo, Mr. McWalters advised that the third-party vendors would be required to file electronic reports on the day of inspections and be required to report any imminent health hazards to the Department of Health. (TR 1/21/10, p. 141) Upon the Board's inquiry, Dr. Julian testified that the Department of Health "approved" of the third-party vendors that met the Department's criteria and then provided a copy of approved vendors to the Department of Education.

Upon further Board inquiry, Dr. Julian testified that while there were ongoing updates with the Department of Health's staff as to how this issue was going to be handled by management, there were no "negotiations" with bargaining unit members on how the Department of Education's federally mandated food safety inspection work would get done. (TR. 1/21/10 p. 145) Dr. Julian further testified that the Department of Health did not contract with any third-party vendors to conduct inspections to comply with this federal mandate. (TR 1/21/11 p, 151)

Dr. Julian also testified that at the time that this new inspection issue arose, there was a "freeze" on state hiring, so even if the Department of Education could use its school lunch funds to cover the cost of hiring new state food inspectors, the same was still not allowed. (TR. 1/21/10 p. 163) Dr. Julian also testified that the Food and Drug Administration publishes a document known as the "food code" and that the appendix to that document indicates that inspectors should do about 300 inspections per year. Dr. Julian stated that the required inspections in RI totaled about 18,000.00, which would require

approximately 300 inspectors, to do the job. The Division of Food Protection employs seven (7) inspectors.

POSITION OF THE PARTIES

The Union argued to the Board that: (1) The 2004 Federal Act did not require the schools to use third-party vendors for food safety inspections, but that the law required the schools to use the "state or local agency" entrusted with food safety inspections; in this case, the RI Department of Health, Division of Food Protection. (2) The lack of personnel did not excuse the Department of Health's use of third-party vendors for health inspections because the Department could have negotiated with the existing staff on how to get the work performed.

The Employer argued: (1) That the Board lacks jurisdiction to hear the complaint because the matter involves an issue of contract interpretation. (2) Failure to state a claim upon which relief may be granted. (3) The actions of the Department of Health in assisting the Department of Education to comply with a federal mandate do not constitute an unfair labor practice.

DISCUSSION

The factual circumstances giving rise to this dispute illustrate an example of a negative local impact from a federally enacted unfunded mandate. There can be no question that the actual language of the Acts required schools to obtain a "minimum of two food safety inspections per school year, conducted by a state or local governmental agency responsible for food safety inspections." (Employer Exhibit #2). However, there is no direction or mandate on how the schools are to go about achieving this result. The Act does not require schools to use state or local governmental employees to secure the necessary inspections.

In this case, Dr. Julian testified that as a result of this legislation, he participated in many discussions with Department of Education and USDA officials on how to implement the new federal requirements, in light of the staffing shortage within his department and the state's hiring freeze. He testified that the parties were able to secure permission from the USDA to permit third-party inspectors to conduct the new inspections. This method of inspection apparently satisfied the USDA personnel that the "state or local governmental agency

responsible for food safety inspections" was adequately involved in handling the inspections. There was no testimony, whatsoever, that rebutted this statement. Indeed, the March 2, 2006 memo from Commissioner McWalters supported Dr. Julian's testimony because it also stated the same understanding that third-party vendors, approved by the states, would be permitted to conduct food safety inspections and be in compliance with the new federal mandate.

Under these circumstances, the Board is of the opinion that the inspections required by Section 111 of the Child Nutrition and WIC Reauthorization Act of 2004, as interpreted by the USDA, did not ultimately require that the inspections be performed by employees of the state or local governmental agencies. As such, the inspection work was not work which was exclusive to bargaining unit members. Indeed, under the facts presented in this case, the state approved third-party inspectors could be almost looked at as "triage" type inspectors. They were charged with examining school food facilities and directed to report problems to the Department of Health for follow-up. In this Board's opinion, bargaining unit work did not come into play until such time as one of the third-party vendor triage inspectors reported an unsafe condition that warranted correction and/or enforcement of the food code. There was no evidence or testimony in the record that any of the third-party inspectors usurped the role of the state employee inspectors when it came to follow-up inspections or enforcement of the food code. Accordingly, since the work at issue was not exclusively bargaining unit work, there exists no violation of the State Labor Relations Act herein, and the complaint against the Employer is hereby dismissed.

FINDINGS OF FACT

1) The State of Rhode Island, Department of Health 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) In 2004, Congress enacted Section 111 of the Child Nutrition and WIC Reauthorization Act of 2004 which amended section 9(h) of the Richard B. Russell National School Lunch Act regarding food safety inspections required for schools participating in the National School Lunch or School Breakfast Program. (Employer Exhibit #2) Prior to this amendment, schools participating in these food programs were required to obtain one (1) food safety inspection each school year, or comply with the frequency required by local standards.

4) In Rhode Island, the Department of Health, Office of Food Protection, is the "State or local governmental agency responsible for food safety inspections."

5) As a result of this mandate, the Director of the Office of Food Protection, Dr. Ernest Julian, determined that this Act would result in approximately 1,000 new food safety inspections per year; at a time when approximately 18,000 required food safety inspections were already not taking place by state employed inspectors at other food establishments across the state, due to severe staffing shortages.

6) A memorandum, dated December 16, 2004, issued by Stanley G. Garrett, Director of the Child Nutrition Division of the USDA, was entered into the record as Employer's Exhibit # 2. In this memo, Mr. Garrett states: "In addition, we encourage state agencies to contact their state/and or local agencies responsible for food safety inspections to help facilitate schools' compliance with the new requirements."

7) As a result of the December 2004 Garrett memo, many, many discussions took place between and among representatives of the Rhode Island Departments of Education, the RI Department of Health and the USDA, including personnel from the Washington DC USDA offices.

8) As a result of all these discussions, the USDA agreed that the requirement for food safety inspections could be met through the utilization of third-party

inspectors, so-called, instead of existing staff of the "state or local governmental agency" responsible for conducting inspections.

9) Third-party inspectors have no legal authority for enforcement with the food code.

10) On March 2, 2006, Dr. Peter McWalters, the Commissioner of Education issued a memorandum to all Rhode Island School Superintendents, School Business Managers and School Food Service Administrators, advising them of the requirement for the USDA food safety inspections. In that memo, Mr. McWalters indicated that the inspection requirement could be satisfied by the use of "state approved" third-party vendors, at the expense of the local school district.

11) The Department of Health "approved" of the third-party vendors that met with the Department's criteria and provided a copy of the approved vendors to the Department of Education.

12) The Department of Health did not contract with any third-party vendors; individual school districts contracted directly with the third-party vendors.

CONCLUSIONS OF LAW

1) The Union has not established by a preponderance of the credible evidence in the record that the Employer violated R.I.G.L. 28-7-13 (6) or (10).

ORDER

The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

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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. 5827** dated **October 12, 2011**, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **October 12, 2011**.

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

Dated: October 12, 2011

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank Montanaro, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

John R. Capobianco, Member (Dissent)

Elizabeth S. Dolan, Member

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

Dated: OCTOBER 12, 2011

By: Robyn H. Golden

Robyn H. Golden, Administrator