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-	:	CASE NO: ULP-5867
MIDDLETOWN SCHOOL COMMITTEE	:	

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 Middletown School Committee (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated July 11, 2007 and filed on July 16, 2007 by Middletown/ NEARI (hereinafter "Union").

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

> On or about July 1, 2007, the Employer unilaterally changed the working conditions required for promotional bargaining unit conditions. Current bargaining unit members were required to report additional confidential information in order to be considered for promotional bargaining unit positions.

Following the filing of the Charge, the parties submitted written statements, in lieu of an oral informal hearing. On December 4, 2007, the Board issued its Complaint. The Employer's Answer to the Complaint was dated March 6, 2008. The matter was heard formally on March 13, 2008. 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. Both the Employer and the Union submitted post-hearing briefs on April 23, 2008.

FACTUAL SUMMARY AND DISCUSSION

In the spring of 2006, the Middletown School District contracted with "School Spring", a vendor, to receive and process employment applications for the school district. This would include applications for yearly appointments

among existing employees, such as department chairs. The first that the Union was aware of this was in either May or June 2006 when the topic was brought up at a routinely scheduled meeting. Ms. Rosemary Kraeger, the Superintendent of Middletown Schools testified that the then, Union President, Ms. Elizabeth Hughes, Union President Elect, Ms. Lisa Wood, and the Director of Technology, Ms. Linda Savastano, were all present at this meeting. Ms. Savastano made a technical presentation of the electronic application process, as well as presentations on other electronic programs the district was implementing.

During this meeting, the Union's representatives expressed concerns that employees may not have access to a computer or understand how to navigate the electronic process. The parties agreed that for the following school year, teachers would not be required to utilize the electronic application process, but would be able to submit "letters of intent", as had been done traditionally.

On June 7, 2006, Ms. Hughes sent a note to Ms. Kraeger confirming that the parties agreed that teachers would be able to submit paper letters of intent for openings during the following school year. In response, Ms. Kraeger sent an email on June 9, 2006 to Ms. Hughes, Ms. Wood, and Ms. Colaneri, as follows:

> "Just a clarification regarding our school spring conversation and your 6/7 letter… I also mentioned that I would personally "walk through" the 4 step on line process to anyone who wishes to apply for an internal posting. I view technology as a means to enhance our productivity, not a barrier. I appreciate that you are encouraging staff to apply on line. Also, I believe I mentioned that this was the only year that we would accept a letter of intent, next year all including reappointments would be done through School Spring." (Employer Exhibit 1)

A year later, when teachers began using the electronic application process, the Union apparently discovered for the first time that the application process included a questionnaire, which the Union found objectionable. The Union argues that the questions seek "confidential" information and that the questions violate Rhode Island General Laws.[1] The Union also argues that the process itself, which affects promotions, is a mandatory subject for bargaining.

[1] We make no ruling on the legality of the questions presented in the application process. We note that the Union has other venues available to it to resolve that question. This Board is not empowered to make that type of statutory interpretation.

The Employer argues that the application process is not a mandatory subject for bargaining and is a reserved management right. The Employer also argues that it in fact did discuss this issue with the Union and made a concession to delay its requirement for a full year. The Employer then argues that the Union's complaint, a year later, is out of time. The Employer also argues that the issue of whether the questions are unlawful is not before this Board.

This Board finds that the promotional process is in fact a mandatory subject for bargaining because it does affect terms and conditions of employment. Promotional procedures are often contained in collective bargaining agreements. That having been said, however, this Board finds that the Union has waived whatever rights it may have had for further bargaining, by failing to pursue the matter after receiving the Superintendent's email dated June 9, 2006. The Union was clearly on notice as to the Employer's intent and had an obligation at that point in time to notify the Employer that it viewed this issue to be bargainable and to try to resolve the issue then. The Union should have also actually reviewed the process in a timely manner, as invited by the Superintendent, to discern whether it had any additional objections. The Employer should be able to rely upon a year's worth of silence.

The Rhode Island Supreme Court has recently had the occasion to consider the issue of waiver when it reversed this Board's decision in ULP-5419, Burrillville v. Rhode Island Labor Relations Board, 921 A.2d 113, 120 (R.I. 2007). The Court stated:

> The National Labor Relations Board has emphasized that "it is incumbent upon [a] union to act with due diligence" with respect to requesting bargaining once the union has received adequate notice of a proposed modification in the terms or conditions of employment. *Kansas Education Association v. Kansas Staff Organization,* 275 N.L.R.B. 638, 639 (1985); *Clarkwood Corp. v. Local 258 and Local 438, Graphic Arts Intern. Union,* 233 N.L.R.B. 1172, 1172 (1977); *see also Bell Atlantic Corp.,* 336 N.L.R.B. 1076, 1086 (2001); *W-I Forest Products Co.,* 304 N.L.R.B. 957, 960 (1991). We are in full agreement with that principle. A union must do more than merely protest the proposed change or file an unfair labor practice action in order to preserve its right to bargain; a union must affirmatively advise the employer of its desire to engage in bargaining. *See Citizens National Bank of Willmar v. Willmar Bank Employees Ass'n,* 245 N.L.R.B. 389, 390 (1979); *see also Kansas Education Association,* 275 N.L.R.B. at 639. However, the employer's notification to the union concerning the contemplated

> modification in the terms or conditions of employment "must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Smurfit-Stone Container Corp.,* 344 N.L.R.B. No. 82, 2005 WL 1181103 at *20 (May 16, 2005) (quoting *Ciba-Geigy Pharmaceuticals Division v. Intern. Chemical Workers' Union, Local No. 9,* 264 N.L.R.B. 1013, 1017 (1982)).
>
> Consequently, a union with sufficient notice of a contemplated change waives its bargaining rights if it fails to request bargaining prior to the implementation of that change. *See W-I Forest Products Co.,* 304 N.L.R.B. at 960. It should be noted, however, that this Court will not find waiver if a proposed change has been made irrevocable prior to the notification of the union or if the change "has otherwise been announced as a matter on which the employer will not bargain." *See id.* at 961; *see also Smurfit-Stone Container Corp.,* 2005 WL 1181103 at *20.

Therefore, since the RI Supreme Court has clearly enunciated the principle that a "union must do more than merely protest the proposed change or file an unfair labor practice action in order to preserve its right to bargain; a union must affirmatively advise the employer of its desire to engage in bargaining", this Board has no choice but to find a waiver of the Union's right to bargain, based upon the clear evidence set forth in the record.

FINDINGS OF FACT

1) The Town of Middletown 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 the spring of 2006, the Middletown School District contracted with "School Spring", a vendor, to receive and process employment applications for the school district. This would include applications for yearly appointments among existing employees, such as department chairs.
4) The first time that the Union was aware of this was in either May or June 2006 when the topic was brought up at a routinely scheduled meeting. During this meeting, the Union's representative expressed concerns that employees may not have access to a computer or understand how to navigate the electronic

process. The parties agreed that for the following school year, teachers would not be required to utilize the electronic application process, but would be able to submit "letters of intent", as had been done traditionally.

5) On June 7, 2006, Ms. Hughes sent a note to Ms. Kraeger confirming that the parties agreed that teachers would be able to submit paper letters of intent for openings during the following school year.

6) In response, Ms. Kraeger sent an email on June 9, 2006 to Ms. Hughes, Ms. Wood, and Ms. Colaneri, as follows:

> "Just a clarification regarding our school spring conversation and your 6/7 letter… I also mentioned that I would personally "walk through" the 4 step on line process to anyone who wishes to apply for an internal posting. I view technology as a means to enhance our productivity, not a barrier. I appreciate that you are encouraging staff to apply on line. Also, I believe I mentioned that this was the only year that we would accept a letter of intent, next year all including reappointments would be done through School Spring." (Employer Exhibit 1)

7) The Union did not respond to or dispute the superintendent's position that School Spring would be mandatory the following year.

8) The Union did not notify the Superintendent that it desired to engage in further collective bargaining over this issue.

9) A year later, when teachers began using the electronic application process, the Union apparently discovered for the first time that the application process included a questionnaire, which the Union found objectionable.

CONCLUSIONS OF LAW

1) The promotional process is a mandatory subject for bargaining.

2) The Union has waived its right to engage in collective bargaining over this issue by failing to notify the Employer in a timely manner in 2006 that it was requesting bargaining.

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

ORDER

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

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-AND-	:	CASE NO: ULP-5867
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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. 5867** dated **February 6, 2009**, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **February 6, 2009**.

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

Dated: February 6, 2009

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member (Dissent)

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: FEBRUARY 6, 2009

By: _____
Robyn H. Golden, Administrator

ULP- 5867