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 WARWICK	CASE NO: ULP-5896

AMENDED

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 Warwick (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on December 28, 2007 by the Rhode Island Laborers' District Council, Local 1033 (hereinafter "Union"). The Charge alleged various violations of R.I.G.L. 28-7-13 (3) (6) and (10) in connection with terms and conditions of employment for Crossing Guard employees.

Following the filing of the Charge an informal hearing was held on January 23, 2008. On February 18, 2008, the Board issued its Complaint alleging: (1) that the Employer violated R.I.G.L. 28-7-13 (3) and (5) by discouraging membership in the Union by discriminating in regard to tenure and in terms and conditions of employment; and (2) That the Employer violated R.I.G.L. 28-7-13 (6) and (10) when it wholly failed and refused to continue bargaining in good faith after the City Council refused to ratify a proposed Tentative Agreement. The Employer's Answer to the Complaint was dated February 21, 2008. The matter was heard formally on April 3, 2008 and May 20, 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.

RELEVANT FACTS

The Union and the Employer have long been parties to a series of negotiated Collective Bargaining Agreements ("CBA"). In fact, there has been at least a thirty-year (30) history of prior collective bargaining. The most recent CBA had a stated term of July 1, 2003 through June 30, 2006, but the parties extended it for a one (1) year period to June 30, 2007. On February 15, 2006, the City Council passed an ordinance which required that all municipal labor contracts be ratified by the City Council before becoming effective.

On February 12, 2007, the Warwick City Council passed a "Resolution Relative to the Contract with the Crossing Guards." (Union Exhibit 1-I) The resolution directed the Administration to notify the "Union representing the school Crossing Guards that it is exercising its option not to renew the Collective Bargaining Agreement in order to explore the possibility of privatizing the Crossing Guards and the potential cost savings associated therewith, and that a Request for Proposals (RFP) be immediately issued so that said cost savings may be properly evaluated in light of the City's fiscal condition."

In March 2007, the parties began to negotiate a successor CBA. The Employer utilized the services of its Director of Personnel, Oscar Shelton, as its Negotiator. On or about June 26, 2007, the parties reached agreement for a "Tentative Agreement." On or about July 10, 2007, Mr. Shelton forwarded the proposed Tentative Agreement to the City Council for its review and opportunity to ratify or not. The record before the Board was silent as to any rationale for delay, but the City Council did not even take up the issue of the proposed Tentative Agreement until mid-fall 2007 (October 15, 2007). The City Council did not vote one way or the other on the proposed Tentative Agreement that evening and tabled the matter for another month to see if the Mayor could negotiate something better. The issue of health care benefits was a major sticking point between the parties. Mayor Scott Avedisian testified before the Board and stated that there were several City Council members who were adamantly opposed to any contract and that there were approximately six (6) or seven (7) members who were willing to have an open discussion. (TR 5/20/08, p. 60) On November 15, 2007, Mayor Avedisian, Mr. Shelton, and the Union's representative met again and amended the proposed Tentative Agreement in regards to retiree healthcare. On November 16, 2007, Mr. Shelton forwarded the amended Tentative Agreement to the City Council members. On November 19, 2007, the City Council met and enacted a second "Resolution" seeking a Request for Proposals (RFP) for the privatization of the Crossing Guard services and unanimously rejected ratification of the proposed, amended Tentative Agreement. Thereafter, the City published an advertisement for Crossing Guard services with a due date of no later than December 12, 2007.

On December 5, 2007, the Union sent correspondence to the City seeking to recommence negotiations for a successor Collective Bargaining Agreement. (Union Exhibit 1-C) The City did not respond. On December 21, 2007, the Union, again, sent correspondence to the City seeking to engage in negotiations and again, the City failed to respond. (See Union Exhibit 1-D) On December 28, 2007, without ever having responded to the Union, the City, through its Mayor, announced that the City would lay-off all members of the bargaining unit that perform Crossing Guard services, effective February 15, 2008, and hire new, part-time City employees, with no benefits, to perform Crossing Guard services, commencing February 25, 2008.[1] Also on December 28, 2007, the Union notified the City that it was invoking interest arbitration pursuant to R.I.G.L. 28-9.4-10 and 28-9.4-11. The Union also again requested that the City return to the bargaining table. (Union Exhibit 1-J) On December 31, 2007, the City sent written notification to the Union that the City was terminating the CBA. (Union Exhibit 1-K) On January 3, 2008, the Union responded the City's December 31, 2007 letter and, again, requested the City return to the bargaining table. (Union Exhibit 1-L)

On January 9, 2008, prior to the layoff of the Crossing Guard employees, Mr. Shelton sent a two (2) page letter to the Union indicating that Mr. Shelton had taken a Union offer to "the powers that be" and that it was his [Shelton's] belief

[1] The period between February 15 and February 25 was school vacation week, and thus, no Crossing Guard services were scheduled.

that the City Council would "soundly defeat ratification of any Contract or Tentative Agreement that contained <u>any</u> provision for health insurance and pensions." (Union Exhibit 1-M) In that letter, Mr. Shelton stated, however, "if you think that it might be useful to meet and discuss a scenario where the Union could continue to represent the Guards without health or pension benefits, I would be happy to do that. I will be out of the office on vacation the week of January 14, 2008, but my schedule is very flexible after that." (Union 1-M) On January 10, 2008, the Union's attorney wrote back to Mr. Shelton and stated: "Without responding to each sentence, I once again implore the City to attend to bargaining and categorically state that assumptions as to what the Council's response will be to an undefined contract is counterproductive. However, to the extend that you believe that healthcare for life 'remains the biggest obstacle' to Council ratification, *consider it removed from the future contract.*" [Emphasis added herein] In addition, the Union's attorney also wrote: "I once again ask that negotiations commence at once, actions to hire new employees cease, and that a legitimate cooling off period occur." (Union Exhibit 1-N)

The City followed through on it stated course of action and laid off all the Crossing Guards. Out of economic necessity, most of the Crossing Guards applied for the "new" positions and were re-hired, albeit as part-time employees with limited wages and benefits. According to the Union's brief, as of June 2008, the City had completely failed to respond to the Union's invocation of interest arbitration.

POSITIONS OF THE PARTIES

In its complete and well-written Brief, with extensive helpful citations to Federal and State Law, the Union makes the following arguments: (1) The City committed an Unfair Labor Practice by refusing to engage in exhaustive good faith negotiations when it refused to bargain after the Council failed to ratify the Tentative Agreement after one vote; (2) The totality of the City's conduct evinces a failure to bargain in good faith; (3) the City committed an Unfair Labor Practice by unilaterally changing the terms and conditions of employment without reaching impasse. As remedies for these serious charges, the Union seeks a

Cease and Desist Order preventing the Employer from employing replacement employees; an Order directing the Employer to adhere to the terms of the 2003-2006 contract until such time as the parties enter into a successor CBA; a Make Whole Order for any losses sustained as a result of the Employer's departure from the terms of the 2003-2006 CBA and any other appropriate relief.

The City argues simply that while it has a duty to bargain in good faith, nothing compels it to reach agreement with the Union and that despite best efforts, the parties reached an impasse. The City maintains that once impasse (which escapes precise definition) was reached, the City was no longer required to maintain the status quo and can make unilateral changes to support its position. The City believes its action were fully justified and seeks dismissal of the Complaint.

DISCUSSION

Public employees, specifically Municipal employees, are afforded the right to engage in collective bargaining with their Employer by virtue of the Municipal Employees Arbitration Act, Chapter 9.4 of Title 28 of the Rhode Island General Laws. Under that Act, an obligation to bargain in good faith is imposed upon the Employer.[2] Pursuant to R.I.G.L. 28-9.4-1, the Legislature has declared, as a matter of public policy, that a Municipal Employer's obligation to bargain on a collective basis includes hours, salary, working conditions, and other terms of employment.

It is well-settled that when questions arise under Rhode Island State Labor Law, this Board and the Rhode Island Courts will look to Federal law for *guidance* on an issue. DiGuilio v Rhode Island Brotherhood of Correctional Officers, 819 A.2d 1271 (R.I. 2003) Board of Trustees v Labor Relations Board, 694 A.2d 1185 (R.I. 1997) Fraternal Order of Police, Westerly Lodge No. 10 v.

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[2] 28-9.4-5 Obligation to bargain:
It shall be the obligation of the Municipal Employer to meet and confer in good faith with the representative or representatives of the negotiating or bargaining agent within ten (10) days after receipt of written notice from the Agent of the request for a meeting for negotiating or collective bargaining purposes. This obligation includes the duty to cause any agreement resulting from negotiation or bargaining to be reduced to a written Contract; provided, that no Contract shall exceed the term of three (3) years. Failure to negotiate or bargain in good faith may be complained of by either the negotiating or bargaining agent or the Municipal Employer to the State Labor Relations Board, which shall deal with the Complaint in the manner provided in chapter 7 of this title. An unfair labor practice charge may be complained of by either the bargaining agent or Employer's representative to the State Labor Relations Board, which shall deal with the Complaint in the manner provided in chapter 7 of this title.

Town of Westerly, 659 A.2d 1104, 1108 (R.I.1995); State v. Local No. 2883, AFSCME, 463 A.2d 186, 189 (R.I.1983).

The determination of whether parties have fulfilled their bargaining obligations is a fact intensive analysis for the Board. A key consideration for the Board is whether the parties' bargaining has been done in good faith, with a desire and view to reach an Agreement. NLRB v Highland Park Manufacturing Co. 110 F.2d 632, 6 LRRM 786 (4th Cir. 1940) As cited by the Union in its brief, while parties are compelled to bargain as to mandatory subjects of bargaining, this obligation does not require a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. NLRB v American Nat'l Ins. Co., 343 U.S. 395, 30 LRRM 2147 (1952). Parties are not required to reach an agreement and if irreconcilable differences exist after the parties have engaged in "exhaustive good-faith bargaining", the existence of an impasse can be declared. Taft Broad Co., 163 NLRB 475, 64 LRRM 1386 (1967). However, an Employer violates its obligation to bargain in good faith when negotiations are sought or are in progress, and the Employer unilaterally institutes changes in existing terms and conditions of employment. Id at 478, citing NLRB v Katz, etc. d/b/a/ Williamsburg Steel Products Co., 396 U.S. 736. (1962) On the other hand, after bargaining to impasse, where good faith negotiation have exhausted the prospects of concluding an Agreement, an Employer does not violate the Act by making unilateral changes that are reasonably contemplated within its pre-impasse proposals. Id. "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue(s) to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse to bargaining existed." Id at 478. An Employer who has entered into negotiations with a mind "hermetically sealed against even the thought of entering into an Agreement with the Union" does not make for good faith. NLRB v George Pilling & Son, 119 F.2d, 32, 37 (3rd. Cir. 1941) citing NLRB v Griswold Mfg. Co., 106 F. 2d 713, 723

"Collective bargaining requires that the parties deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles of difficulties existing between the Employers and the employees to the end that employment relations may be stabilized. Obstruction or pretend bargaining will not suffice. NLRB v Boss Mfg. Co., 118 F.2d 187.189 (7^{th} Cir.)

In this case, the record discloses that as early as February 2007, the City Council issued a resolution directing the City's administration to "formally notify the Union representing the Crossing Guards that it [the City] is exercising its option not to renew the Collective Bargaining Agreement in order to explore the possibility of privatizing the Crossing Guards and the potential cost savings associated therewith..." (Union Exhibit 1-I) Despite this directive from the City Council, the Union and the Personnel Director did meet and confer and came up with a Tentative Agreement for submission to the City Council.

The record indicates, however, that no members of the City Council were members of the Employer's negotiating team.[3] This Board is very concerned about the apparent disconnect between the City's "Administration" and the City's Political Leaders relative to the negotiation of this Contract. Forcing the Union to negotiate with representatives that have no real authority to negotiate is not indicative of good faith. In his email of November 14, 2007 to Union representative Donald Iannazzi, Mr. Shelton states: "I don't pretend to have any idea whether or not this proposal will satisfy the Council and I know that it would be difficult for you to accept a deal without that assurance, but, given the circumstances, it's the best we can do." With all due respect to Mr. Shelton, whom this Board recognizes to be between the proverbial "rock and hard place", it is not acceptable for the City to conduct collective bargaining negotiations with its Unions through such a disjointed and ill-informed process. The reasonable inference here is that the true power to settle the Contract lies with the City Council, which has political differences with the Mayor's administration. This is an issue beyond the Union's control.

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[3] Because of the City Council's prior ordinance which required City Council ratification of all labor Contracts, it seems to this Board that the City Council and Mayor should have negotiated among themselves the membership of the City's negotiating team.

Despite the disconnect between the City's Administration and the City Council, the Union bargained in good faith to try to reach an Agreement with the City. However, the Union's efforts to reach agreement were completely thwarted by the City's Political Leaders, as evidenced by the fact that once the proposed agreement was submitted by the City's Negotiator to the Council for its review, it took three (3) months for the matter to be reached on the Council's docket. Additionally, despite multiple written requests for bargaining from the Union, the City simply declared "impasse" and unilaterally implemented its own solution to the issue.

The Municipal Employee Arbitration Act, like most public sector statutes, both in Rhode Island and across the nation, requires dispute resolution procedures prior to any declaration of impasse is possible. These procedures include mediation, conciliation, and arbitration. R.I.G.L. 28-9.4-10. These procedures are designed to ensure that the state's public policy for public sector collective bargaining is effective. The dispute resolution process is designed to encourage and indeed strive for a negotiated settlement of labor disputes. This Board has previously had the occasion to review the necessity of exhaustion of the dispute resolution process within the context of unilateral changes made by an Employer to the terms and conditions of employment. In the case of public sector employees, however, this Board has previously ruled that "exhaustive" bargaining necessarily includes any and all statutory dispute resolution mechanisms such as mediation, conciliation, and arbitration. ULP 4647, Warwick School Committee, (1992) In addition, the "unilateral departure from the terms of an expired contract, prior to all available statutory dispute resolution procedures violates the obligation to bargain under R.I.G.L. 29-7-13. This requirement to engage in all available dispute mechanism procedures still exists today, despite the seemingly ever-increasing public hostility to public-sector labor relations. Therefore, this Board finds that impasse in bargaining for successor Collective

Bargaining Agreements for municipal employees is not possible unless and until all statutory dispute mechanism procedures have been exhausted. [4]

This Board finds that the City's refusal to meet and confer, after the Union has repeatedly indicated that it is still willing to bargain, coupled with the fact that the City exercised very little effort or due diligence in its prior bargaining, evidences a finding that the City was not negotiating in good faith with the Union, even prior to declaring "impasse." In this case, not only was there a lack of good faith in the bargaining that did take place, the Employer repudiated the bargaining relationship and simply refused to comply with statutory mechanisms for dispute resolutions. The Board, therefore, finds that the Employer has engaged in unfair labor practices by refusing to bargain in good faith and by unilateral implementation of terms and conditions of employment, and by failing to participate in statutory dispute resolution procedures.

FINDINGS OF FACT

1) The City of Warwick is a Municipality 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) There has been at least a thirty-year (30) history of prior collective bargaining between the Union and the Employer. The most recent CBA had a stated term of July 1, 2003 through June 30, 2006, but the parties extended it for a one (1) year period to June 30, 2007. On February 15, 2006, the City Council passed an ordinance which required that all Municipal labor Contracts be ratified by the City Council before becoming effective.

[4] Several other states have adopted the position of maintaining the "status quo" during the period after the expiration of a Collective Bargaining Agreement and during the negotiations for a new Collective Bargaining Agreement, on the theory that maintaining the status quo serves to continue the balance of bargaining power between the two (2) parties. See In re Appeal of Cumberland Valley School District, 483 PA 134, 394 A.2d 946; City of Lewiston v Maine State Employees Association, 638 A.2d 739, (1993) adopting the doctrine of the "static status quo."

4) On February 12, 2007, the Warwick City Council passed a "Resolution Relative to the Contract with the Crossing Guards." The resolution directed the Administration to notify the "Union representing the school Crossing Guards that it is exercising its option not to renew the Collective Bargaining Agreement in order to explore the possibility of privatizing the Crossing Guards and the potential cost savings associated therewith, and that a Request for Proposals (RFP) be immediately issued so that said cost savings may be properly evaluated in light of the City's fiscal condition."

5) In March 2007, the parties began to negotiate a successor CBA. The Employer utilized the services of its Director of Personnel, Oscar Shelton, as its Negotiator. On or about June 26, 2007, the parties reached agreement for a "Tentative Agreement." On or about July 10, 2007, Mr. Shelton forwarded the proposed Tentative Agreement to the City Council for its review and opportunity to ratify or not.

6) The City Council did not review the Tentative Agreement until its meeting on October 15, 2007 and then tabled the matter.

7) On November 15, 2007, Mayor Scott Avedisian, Mr. Shelton, and the Union's representative met again and amended the proposed Tentative Agreement in regards to retiree health care and on November 16, 2007, Mr. Shelton forwarded the amended Tentative Agreement to the City Council members.

8) On November 19, 2007, the City Council met and enacted a second "Resolution" seeking a Request for Proposals (RFP) for the privatization of the Crossing Guard services and unanimously rejected ratification of the proposed, amended Tentative Agreement. Thereafter, the City published an advertisement for Crossing Guard services with a due date of no later than December 12, 2007.

9) On December 5, 2007, the Union sent correspondence to the City seeking to recommence negotiations for a successor Collective Bargaining Agreement. (Union Exhibit 1-C) The City did not respond. On December 21, 2007, the Union, again, sent correspondence to the City seeking to engage in negotiations and again, the City failed to respond.

10) On December 28, 2007, without ever having responded to the Union, the City, through its Mayor, announced that the City would lay off all members of the bargaining unit that perform Crossing Guard services, effective February 15, 2008 and hire new, part-time City employees, with no benefits, to perform Crossing Guard services, commencing February 25, 2008.

11) On December 28, 2007, the Union notified the City that it was invoking interest arbitration pursuant to R.I.G.L. 28-9.4-10 and 28-9.4-11. The Union also again requested that the City return to the bargaining table.

12) On December 31, 2007, the City sent written notification to the Union that the City was terminating the CBA. (Union Exhibit 1-K) On January 3, 2008, the Union responded the City's December 31, 2007 letter and again requested the City return to the bargaining table.

13) On January 10, 2008, the Union's Attorney wrote back to Mr. Shelton and stated: "Without responding to each sentence, I once again implore the City to attend to bargaining and categorically state that assumptions as to what the Council's response will be to an undefined contract is counterproductive. However, to the extent that you believe that healthcare for life 'remains the biggest obstacle' to Council ratification, *consider it removed from the future contract.*" [Emphasis added herein] In addition, the Union's Attorney also wrote: "I once again ask that negotiations commence at once, actions to hire new employees cease, and that a legitimate cooling off period occur."

14) The City refused to negotiate further and refused to participate in arbitration.

CONCLUSIONS OF LAW

1) 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) and (10) by failing to engage in statutory dispute mechanism procedures and by unilaterally repudiating the employment relationship and unilaterally implementing new terms and conditions of employment for Crossing Guards.

ORDER

1) The Employer is hereby ordered to reinstate and maintain the status quo relative to terms and conditions of employment for Crossing Guards that existed at the expiration of the most recent Collective Bargaining Agreement. This Order constitutes a final Order of the Board for appellate purposes.

2) The Employer is also ordered to immediately participate fully and completely in all statutory dispute resolution mechanisms provided for in the Municipal Employees Arbitration Act, up to and including interest arbitration, as has been demanded by the Union. The Employer shall maintain the status quo of the Crossing Guard employees during the pendency of all statutory dispute mechanism procedures. This Order constitutes a final Order of the Board for appellate purposes.

3) The Employer is also ordered to make whole, any and all employees who have lost benefits and/or wages as a result of the City's unilateral action. The Employer is hereby ordered to submit to this Board within thirty (30) days from the issuance of this Decision, a list of all affected employees and the amounts of wages/benefits that would have been due, at the rate set forth under the last year of the expired contract, had the Employer not unilaterally implemented terms and conditions of employment. The Employer shall simultaneously provide a copy of said filing to the Union. This Order constitutes a final Order of the Board for appellate purposes.

4) To the extent that there is any dispute as to the identity of the affected employees or the amount of wages or benefits due to the employees, pursuant to the immediately preceding Order, this Board retains jurisdiction of that issue. As such, this particular order (#4) is not a final Order of the Board at this time, for appellate purposes, but is interlocutory.

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 WARWICK	CASE NO: ULP-5896

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. 5896 dated September 25, 2009 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 25, 2009**.

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

Dated: September 25, 2009

By: Robyn H. Golden

Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

/s/ Walter Lanni
Walter J. Lanni, Chairman

/s/ Frank Montanaro
Frank J. Montanaro, Member

Joseph V. Mulvey, Member
DECEASED AT TIME OF SIGNING

/s/ Gerald Goldstein
Gerald S. Goldstein, Member (Dissent)

/s/ Ellen Jordan
Ellen L. Jordan, Member (Dissent)

/s/ John Capobianco
John R. Capobianco, Member

/s/ Elizabeth Dolan
Elizabeth S. Dolan, Member (Dissent)

Administrative Note[1]: At the Board's meeting held on August 19, 2008, Member Montanaro made a Motion, seconded by Member Capobianco, to uphold the charge and find that the Employer had committed an Unfair Labor Practice. After discussion, Walter Lanni voted in favor of the Motion. Gerald Goldstein, Elizabeth Dolan, and Ellen Jordan voted in opposition to the Motion. Staff contacted Member Mulvey who voted in Favor the Motion. The Motion passed on a 4-3 vote. Subsequent to voting substantively on this matter, Member Mulvey passed away. On September 17, 2009, a Motion was made by Frank Montanaro and seconded by John Capobianco to sign the Decision and Order, as written. After discussion, all Board Members voted in favor of the Motion and did sign the Decision and Order, as written. Motion passed. (6-0)

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

Dated: DECEMBER 15, 2009

By: Robyn H Golden
Robyn H. Golden, Administrator

ULP-5896

[1] This Administrative note is added pursuant to the leave granted by the RI Superior Court in C.A. KC 09-1390.