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-5901
NEWPORT SCHOOL COMMITTEE	:	

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 Newport School Committee (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated February 21, 2008, and filed on February 25, 2008, by Rhode Island Council 94, Local 841, AFSCME, AFL-CIO (hereinafter "Union.").

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

> "The Newport School Department has violated the cited paragraphs by refusing to sign a collective bargaining agreement after it was ratified by the Newport School Committee and RI Council 94, AFSCME, AFL-CIO, Local 841, the Newport School employees."

The Charge was amended on February 28, 2008. Following the filing of the Charge, an informal conference was held on March 24, 2008, in accordance with R.I.G.L. 28-7-9. On May 7, 2008 the Board issued its Complaint alleging: "The Employer violated RIGL 28-7-13 (6) and (10) when it failed to sign a collective bargaining agreement after the Employer and the Union ratified it." The Employer filed its answer denying the charges on May 12, 2008.

The matter was then set down for formal hearing on March 24, 2008, but was postponed to June 26, 2008. Representatives from the Union and the Employer were present at the hearing and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. On

July 17, 2008, the Union requested that the matter be placed into abeyance to allow the parties and opportunity to settle the matter and on December 4, 2008, the Union requested that the matter be set down for briefing. The Employer filed its Brief on January 29, 2009 and the Union filed its Brief on January 30, 2009. 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.

SUMMARY OF FACTS AND TESTIMONY

The Union and the Employer had long been parties to a Collective Bargaining Agreement ("CBA") which covers the non-teaching Newport School employees. In May 2006, the parties commenced bargaining for a CBA for the period of July 1, 2006-June 30, 2010. Negotiations for this successor CBA lasted for approximately a year, including a period of mediation. On May 9, 2007, the parties met and reached a Tentative Agreement. (Union Exhibit # 1) (Also see testimony of John Vars, at (TR. p. 13, lines 20-22) and statement by the Employer's Legal Counsel at (TR. p. 10, lines 3-4.) At their meeting on May 9, 2007, the parties did not initial any final, all-inclusive document as their Tentative Agreement.

On May 21, 2007, the Employer sent a five (5) page fax to the Union at 11:22 AM. (Union Exhibit #3)

> "Article 43 Early Retirement. Section 43.5 Replace the beginning through a. with the following: All employees employed effective on or after July 1, 1999, who retired as of June 30, 2006, selecting the early retirement program shall be eligible to receive as their medical insurance coverage the coverage as referenced in Section 26.1 above. All retired employees receiving this benefit shall pay a cost share of 3% of the annual premium, to be paid annually on or before July 1st. [1]

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[1] Article 26 Insurance and Annuity Plan Section 26.1 Delete and replace with:

a) Except for current employees enrolled in a plan different than the plan set forth below (e.g. Blue Cross and/or Blue Chip), all employees shall be eligible to receive an individual or family plan, as applicable, as their medical insurance the "HeathMate Coast to Coast" Plan from Blue Cross, including the following riders: 1. Organ transplant; 2. $300.00 cap on Preferred Rx; 3. 12 Chiropractic visits; and 4. Student coverage to age 25 and Delta Dental coverage in existence as of June 30, 2006.

The aforementioned Section "a" was not followed by any section "b" or "c" in its typed format sent to the Union. The following sentence immediately followed section "a" :

"The Extended Health Care Benefit Plan hereinafter referred to relates to that health coverage provided to retirees who are otherwise eligible and who have elected previous hereto to participate in said Plan."

Retirement- Medical Benefits

A. Participation in the Extended Health Care Benefit Plan not including extended dental or paid life insurance shall only be available to individuals with a minimum of ten (10) years of service in the Newport School Department.

B. Employees hired during the 2006-2007 fiscal years shall have the option of participating in the Extended Health Care Benefit Plan during the life of the 2006-2010 contracts. If said hiree opts not to participate in the Extended Health Care Benefit Plan, said hiree may not opt to do so in the future.

C. As of July 1, 2007, the Extended Health Care Benefit Plan shall not be available for new hires.

D. The following benefits are in addition to retirement benefits provided elsewhere in this agreement.

    a. All employees who are eligible for retirement and retire after June 30, 2006 who are participants in the Extended Health Care Benefit Plan, shall receive when said retiree becomes Medicare eligible, up to two Plan 65 plans provided by Blue Cross for the employee and spouse (if applicable) with a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, 12 chiropractic visits rider and student coverage to age 25 rider.

The cost share of the extended health care benefit is:

2006-2007 - 6% of the premium for health insurance (3% for Section 26.1 coverage and 3% for the Extended Health Care Benefit Plan)

2007-2008 - 9% of the premium for health insurance (5% for Section 26.1 coverage and 4% for the Extended Health Care Benefit Plan)

2008-2009 - 12% of the premium for health insurance (7% for Section 26.1 coverage and 5% for the Extended Health Care Benefit Plan)

2009-2010 - 15% of the premium for health insurance (10% for Section 26.1 coverage and 5% for the Extended Health Care Benefit Plan)

Cost share payment is available through payroll deduction as an active employee or by direct payment if as a retiree.

For those current employees appointed prior to July 1, 1999 who had previously elected to participate in the Extended Health Care Benefit Plan, the School Committee shall provide the health insurance coverage as referenced in Section 26.1 above until the retiree becomes eligible for Medicare. At that time, the Committee shall provide up to two single Plan 65 plans provided by Blue Cross for the employee and spouse (if applicable) with 80/20 co-pay prescription plan rider with a $300.00 out of pocket cap and organ transplant rider, 12 chiropractic visits rider and student coverage to age 25 rider."

On the evening of May 21, 2007, the Union membership met and voted to ratify the terms of the new CBA. At its meeting, the Union membership

reviewed a document prepared by its leader which outlined the proposed terms and conditions for the new CBA.[2] In that document was the following language: "Article 43: Early Retirement. Section 43.5

Benefits for support staff personnel selecting the early retirement program would be as follows:

(a) For those members electing the Health Mate 2000 PPO Extended Benefits Plan, the School Committee shall provide the Health Mate 2000 PPO Plan, inclusive of the current co-pay of the annual premium at the time of retirement until the Retiree becomes eligible for Medicare. At that time, if eligible for Medicare, the Committee shall provide up to two single Medigap plans for the employee and spouse (if applicable), with the riders necessary to provide equivalent coverage to the Health Mate 2000 PPO plan. Retirees covered under this plan will pay any current co-pay of the annual premium to be paid at the time of their retirement, said payment to be made annually on or before July 1st."

On May 24, 2007, The Employer's Attorney (and Chief Negotiator) sent another five (5) page fax to the Union at 3:19 pm. The cover sheet to that fax stated: "Attached is the updated response to your proposed Tentative Agreement. As we discussed, there are other contractual and style issues we need to review. However, 9(b) (second sentence) remains essential to the agreement. 9(b) of that document referred to section 26.1 of the Contract and added the following section (which was not contained in the May 21, 2007 version of the proposed Contract language): "Substantially equivalent health care coverage may be substituted with mutual consent of the Union and the School Committee. Consent shall not be unreasonably withheld. An individual member or members of the Union may accept, but will not be required to accept, different health insurance coverage if offered by the School Committee (e.g. Cafeteria Plan)"

On the evening of May 24, 2007, the School Committee met and "voted to ratify the Collective Bargaining Tentative Agreement between Council 94 and the Newport School Committee effective July 1, 2006 through June 30, 2010, subject to review of contractual language by Counsel Galvin." (Union Exhibit #4, Minutes of the May 24, 2006 Newport School Committee Special Session).

[2] When reviewing the terms of the proposal, the Union membership did not see the May 24th letter from the Employer.

Thereafter, the Union and the Employer began the process of finalizing Contract language. Sometime during this period of time, from May 2007 to January 2008, it became abundantly clear that the parties had a fundamental disagreement as to what the parties had each ratified, as it pertains to retiree health coverage.[3]

The Union believed that the School Committee had ratified the language/proposals that were set forth in the May 24, 2007 fax which the Employer sent to the Union, just a few hours prior to the ratification by the School Committee. At least four (4) versions of the Contract were ultimately exchanged between the parties, over the course of several subsequent months. All language, with the exception of the language pertaining to Retiree health benefits was finally agreed upon. Finally, on January 28, 2008, the Union wrote to the School Committee's Attorney and Chief Negotiator. In that letter, the Union's representative stated: "After a review of my notes, the Newport School contract proposals, Local 841 contract proposals, and your fax of May 24, 2007, I find no evidence of the Union giving up medical benefits for retirees under the extended healthcare plan. Specifically, the organ transplant rider, students for age 25, twelve (12) chiropractic visits, and most importantly an 80/20 co-pay for prescription plan with a $300.00 cap. If you review your fax of May 24, 2007, page 6, paragraph (a), these benefits are listed.

The Union's position is that you must either accept the most recent contract language forwarded to you or maintain the existing language of 43.5 in the previous collective bargaining agreement."

The Employer's response was in pertinent part as follows: "It is the School Committee's position that anyone retiring after July 1, 2007, upon reaching age 65, would be entitled to Plan 65 with 80/20 co-pay for prescriptions with no out-of-pocket cap and a skilled nursing care facility rider. That is what was used in the teacher's contract and has consistently been sought in the negotiation process. .... Inaccurate reference by both parties to unavailable riders for Plan 65 does not rise to an agreement on such as any

[3] At some point, the parties met with representatives of Blue Cross who apparently advised that some of the health insurance riders mentioned in the Employer's May 24th fax were not in fact available from Blue Cross.

agreement was subject to working out the language and final health care language continued to be changed and negotiated between the parties even up to the present time. Although the parties have come to agreement on all other issues related to the contract, if the parties cannot finalize this remaining issue and come to agreement, then the parties do not have a final agreement. We would very much like to avoid that situation as both sides worked extremely hard first on the negotiations and then on the exact language to be used for the final agreement. Please let me know your position after you have reviewed this." Three (3) days later, the Union filed the within charge of Unfair Labor Practice.

POSITIONS OF THE PARTIES

The Union's position, in this case, is that this is a simple case of an Unfair Labor Practice, with the Employer engaged in both a failure to bargain in good faith and in regressive bargaining. As a remedy for these alleged violations of law, the Union seeks an order from the Board requiring the Employer to execute a contract with language providing the Plan 65 coverage with a $300.00 cap on prescriptions and applicable riders to provide coverage equivalent to that enjoyed by active employees.

The Employer defends against the Board's Complaint by arguing that the parties never reached a final agreement on the terms of the retiree health coverage and that therefore, the Board lacks jurisdiction to order the Employer to execute a contract containing language that the Employer has allegedly not agreed to. The Employer also argues that even if its Chief Negotiator had wanted to bind the School Committee to the language that he sent in his fax of May 24, 2007, he had no actual authority to do so; and therefore, the School Committee cannot be bound by his acts. Finally, and alternatively, the Employer argues that the parties made a mutual mistake as to what insurance riders were and were not available with Plan 65 and that even if the parties had agreed to the language contained in the May 24th fax, then there is in essence, an impossibility of performance for this term; and therefore, the same is unenforceable.

DISCUSSION

This case serves to highlight the extreme difficulties that heath care insurance coverage has come to present to public sector collective bargaining in recent years. In this case, despite nearly two (2) years of efforts of collective bargaining and mediation, the parties find themselves disagreeing as to what they achieved during the collective bargaining process on retiree health benefits. This one (1) element of the contract has overshadowed the dozens of other issues that were finally resolved and left the parties without a contract. Therefore, some background discussion is necessary before we address the various claims and defenses set forth by the parties.

In the contract that expired on July 1, 2006, Section 43 outlined the health insurance benefits offered to retired employees. In that CBA, employees received fully paid basic health benefits after retirement, until such time as the employee became eligible for Medicare.[4] As an option, employees were also permitted, during their employment, to sign up for an "Extended Health Care Plan." For employees who elected this option, they paid an annual premium of 3% of the cost for the plan and upon retirement, they would receive several insurance riders of extended benefits, including Organ transplant, $300.00 cap on Preferred Rx, twelve (12) Chiropractic visits, Student coverage to age 25 and Delta Dental coverage in existence as of June 30, 2006. When contract proposals were first exchanged for the 2006-2010 contracts, the Employer proposed that all post retirement health benefits be eliminated in their entirety and the Union was not seeking any change from the expiring CBA on this issue. (Employer exhibit # 3). Sometime after the initial round of contract proposals, the School Committee settled its contract with the Teachers Association of Newport ("TAN"). The Employer's representatives, thereafter, provided the Union with a copy of the newly agreed upon TAN contract provision on retiree health care. In August, 2006, the Union presented a second set of contract proposals that apparently closely followed the newly adopted TAN retiree health care plan and which included the following language:

[4] This insurance, while called a "Medigap" policy in the CBA, was in reality, a full blown insurance policy with many benefits.

> "All employees who are eligible for retirement and retire after the date of January 1, 2007 who are participants in the Extended Health Care Benefit Plan shall receive when said retiree becomes Medicare eligible, which includes Plan 65 provided by Blue Cross with a 80/20 co-pay prescription plan with no out of pocket cap and a skilled nursing care facility rider."

The Union's contract proposals also called for increases in the co-pays for the basic health plan and the extended care plan. Unfortunately, the parties could not reach an agreement on the contract proposals which were rejected as a package and in the fall of 2006, sought the assistance of a mediator through the Rhode Island Department of Labor & Training. Apparently and amazingly, the parties claim that they did not have any further discussions on the issue of retiree health care throughout the course of the next several months. Neither party made any additional formal, written proposals for retiree health care. However, while the record does not indicate ***why***, by May 21, 2007, the Employer's Chief Negotiator clearly understood the parties' agreement to be what he himself transmitted that morning, to the Union. As stated supra, that fax clearly identified that the Employer believed their agreement included the following retiree health benefits:

> "All employees who are eligible for retirement and retire after June 30, 2006 who are participants in the Extended Health Care Benefit Plan, shall receive when said retiree becomes Medicare eligible, up to two Plan 65 plans provided by Blue Cross for the employee and spouse (if applicable) with a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, 12 chiropractic visits rider and student coverage to age 25 rider."

Yet, in his letter dated February 6, 2008, the Employer's Chief Negotiator stated: "It is the School Committee's position that anyone retiring after July 1, 2007, upon reaching age 65, would be entitled to Plan 65 with 80/20 co-pay for prescriptions with no out-of-pocket cap and a skilled nursing care facility rider. *That is what was used in the teacher's contract and has consistently been sought in the negotiation process. (Emphasis added herein)*

The stark difference between these two (2) statements, set forth in Union Exhibit # 3 and Union Exhibit # 6 is very troubling to this Board. How can the Employer's Chief Negotiator claim that the language of his February 8, 2008 letter purports to represent what has been "consistently sought in the negotiation process", when faced with his own writing to the Union of May 21,

2007, which clearly provides for very different benefits? At what point did the Chief Negotiator come to the determination that the Employer was ***not*** agreeing to a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider, as set forth in the May 21, 2007 letter?

The Union claims that these two (2) documents (the May 24th fax and the February 6th letter) when viewed together, establish unequivocally that the Employer is engaged in bad faith and regressive bargaining and that the Employer must be ordered to either live with the language of the expired agreement or accept the Union's version of language. At the first blush, the Board is inclined to agree wholeheartedly that a blatant Unfair Labor Practice has occurred and that the remedy sought by the Union might indeed be appropriate. However, there are also a few other factors which we must consider. First, as noted by the Employer, despite ground rules that required the Chief Negotiator from each side to initial all Tentative Agreements as they are reached, the Chief Negotiators in this case clearly did not do so. When the Union membership voted, it did so based upon a document that its own Chief Negotiator had prepared as *his understanding* of the Tentative Agreement, subject to "fleshing out" the actual contract language at a later date. The Employer's Chief Negotiator did not initial this document. As it turns out, the Union identified the post-retirement health plan in Section 43 of its draft of the Tentative Agreement by the generic use of the word "Medigap", as had been contained in prior CBA's. In the version that the Employer sent to the Union on the morning of May 21, the Employer identified the health plan specifically as a Blue Cross product known as "Plan 65." The Union's Chief Negotiator testified that he did not use that fax in his membership vote that evening (which contained the Plan 65 reference) because he believed that the use of the words "Plan 65" was simply a contract language issue that could be worked out at a later time during the drafting of the contract. He testified that the Union had agreed to increased co-share percentages and other language concerning the Union's agreement not to unreasonably withhold consent for alternative health

providers. The Union's Chief Negotiator testified that the Union did not agree in the "Tentative Agreement" to change the word "Medigap" to "Plan 65." (TR. p. 47) However, after receiving the faxes of both May 21, 2007 and May 24, 2007, both of which referred to Plan 65, the Union did not notify the Employer either that the Union was objecting to the use of the words "Plan 65," or to the fact that the Tentative Agreement it was presenting to its membership still contained the prior CBA's reference to a "Medigap" policy. The Board cannot help but think that if the parties had been initialing Tentative Agreements as time went by that perhaps this disconnect on the language may have been picked up and resolved. There is certainly blame for both parties when it comes to the failure to initial Tentative Agreements as they were reached and for the failure to clarify the disconnect of the "Medigap" vs. "Plan 65. [5]

That having been said, however, there is another more troubling aspect to the conduct in this case, of which the Union rightfully complains. The issue has to do with the various riders that the Employer itself says in its faxes of May 21, 2007 and May 24, 2007 had been agreed to. There is simply no mistaking the fact that the Employer's Chief Negotiator clearly stated in his written faxes to the Union's Chief Negotiator that the Employer had agreed to the riders for 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider. In its defense, the Employer now claims that its Chief Negotiator never had any actual authority to offer these benefits to the Union and that therefore, the Employer cannot be bound to its Negotiator's actions. As support therefore, the Employer cites the case of Warwick Teacher's Union Local 915 v Warwick School Committee, 624 A.2d 849 (RI 1993). In Warwick, the negotiating team authorized its representative to offer only a certain number of personal days in negotiations. Despite this directive, the School Committee's representative, in the heat of negotiations, exceeded the cap authorized by the

[5] We also note that despite the parties' failure to comply with the rule requiring the initialing of Tentative Agreements, that they reached dozens of agreements on other contract terms. The fact that the parties did not initial a Tentative Agreement on an issue does not mean that they have not in fact reached agreement. The purpose of initialing is to avoid the very kind of dispute that has arisen in this case.

rest of the School Committee.[6] When the School Committee refused to execute a contract with this term included, the Union complained of an Unfair Labor Practice. This Board held that the School Committee was authorized to grant plenary power to its bargaining representatives in order to achieve good-faith bargaining. This Board further held that the negotiating team did in fact have authority to bind the School Committee and in fact did so when some members of the team agreed to benefits not authorized by the School Committee. The Board's decision was reversed by the Rhode Island Superior Court which found that the authority of a public agent to bind a municipality must be actual, citing School Committee of Providence v Board of Regents for Education, 429 A.2d 1297, (RI 1981) and the general principle enunciated in 2 *Williston on Contracts* 305 at 414-23 (Jaeger 3ed. 1959) The Superior Court's reversal of this Board was upheld by the Supreme Court. In that case, the Court stated that the Court found no federal case supporting the idea that an Employer is required to give unlimited authority to a negotiating representative or be guilty of an Unfair Labor Practice. Warwick Teacher's Union Local 915 v Warwick School Committee, 624 A.2d 849, 851 (RI 1993). The Court also stated, however, that the degree of authority given to Employer representatives may be considered when evaluating whether good-faith bargaining has taken place. Id. The Court also stated, "we do not hold that a School Committee whose specific instructions to its negotiating team have been followed would have the authority to reject an agreement by its representatives. Id.

The facts in this case are distinguishable from the facts in the aforementioned Warwick case. In this case, the Employer presented testimony from two (2) witnesses, each who testify differently as to what authority was given to the negotiating team and as to what they believed they each voted for on the night of May 24, 2007. The first witness, Ms. Jo Eva Gaines first testified that the School Committee negotiating team had no authority to make any offers to the Union, other than what was contained in the School Committee's

[6] The record reflected that this representative thought he had the approval of the other members of the negotiating committee, but later learned that one of his fellow committee members disputed this authority.

original proposals dated June 22, 2006 (Employer Exhibit # 2). TR. p. 52, lines 13-19.

Q. And did you authorize Dr. Ambrogi and myself to present those proposals?

A. Right.

Q. And can you tell us, did we have any authority beyond what was submitted in the proposals that were presented.

A. No.

This testimony was unequivocal and emphatic. Yet, a few minutes later, when Ms. Gaines was asked whether the School Committee gave directions to the Negotiators to seek the same health care benefits as TAN, she agreed that such authority had been given. (TR. p. 53, lines 13-24 and p. 54, lines 1-6.)

Q. And was one of the topics of heavy negotiation with the teachers surrounding health care issues?

A. Yes.

Q. What was your, you as a School Committee, direction to your Negotiators regarding the health care issue as it would relate to Council 94?

A. We came to agree as a School Committee that we should have the same coverage for Council 94 that we have for TAN, that there should be, as close as possible, to have the same language.

Q. Okay. So that was the direction that you gave to the Negotiators; is that correct?

A. Yes.

Q. And to your recollection, do you recall whether you gave your Negotiator any different direction than to the same language that was agreed to as the teachers?

A. No.

Based on this testimony alone, the Board finds the Employer's Negotiators had in fact been given, and that they believed that they had been given, authority to negotiate the same deal as the teachers or ***as close to***

possible[7] to the TAN agreement. To the Board, this would explain how it eventually came to be that the Employer's Chief Negotiator, a seasoned labor Attorney, would have issued a fax to the Union, identifying retiree health benefits with great specificity that apparently varied from what TAN had received. Additionally, when asked whether she had ever seen the May 24, 2007 fax sent from the Employer's Chief Negotiator to the Union, Ms. Gaines testified that she did not recall ever seeing that specific document. However, she also testified that even though the School Committee did not specifically authorize the conveyance of that document, the School Committee's Chief Negotiator was authorized to "take the message from us to the Union" and that if he had to send a document to the Union to convey a message, that would be part of his job. (TR. p. 56, lines 21-24 and p. 57, lines 1- 17) Ms. Gaines further testified that at the School Committee meeting of May 24, 2007, it was discussed that the proposed language for retiree health care was not what the School Committee had agreed to with TAN and that the Chief Negotiator was supposed to then go back to the Union and return to the School Committee with language that the Committee could ratify. Ms. Gaines was very specific that she believed the authority that was given that night was for the Chief Negotiator to definitely return to the School Committee, a second time, for ratification because the School Committee was not accepting the language for health care. When asked if she meant a second ratification, she stated: "If necessary. We wanted to see the language we had with TAN." (TR. p. 62, lines 2-10) So, in just a few minutes of testimony, Ms. Gaines shifts her statements from not granting the Negotiators any authority different than that which was authorized under the Employer's initial set of proposals, to authorizing the Negotiators to get health care language as close as possible to the TAN agreement, to authorizing the Negotiators to simply bringing the message to the Union and finally to directing the Negotiator to bring language back to the School Committee for a second ratification. Finally Ms. Gaines also testified that while she saw a copy of a Tentative Agreement, she cannot recall whether it would

[7] In the words of Ms. Gaines.

have been on the evening of May 24th at the ratification meeting, or whether it was later than that evening. (TR. p. 65)

The next Employer witness to testify was Dr. Charles Shoemaker, also a member of the School Committee. Dr. Shoemaker testified that it was he who first raised the issue of the retiree benefits as a contract issue to be amended. He stated: "well, as a newcomer, I said, 'well, it if says Medigap, why are we providing HeathMate 2000, what ever it was called, which is basically a family program"? (TR. p. 68, lines 11-17) He further testified, "so we wanted to eliminate our basic philosophy, from my point of view, was we wanted to get rid of that family plan and wanted to substitute a Medigap policy as was originally stated...Our goal was to make it a strict Medigap policy." Dr. Shoemaker did not state that the School Committee was trying to "come as close to the same language as TAN"; he stated that it would be "nothing more" it was very clear. We had worked it out before. We knew exactly what it was going to be, TAN, period." (TR. p. 68 lines 23-24 and p. 69, lines 17-19) Dr. Shoemaker also testified that as far as he was concerned, the Union had accepted the TAN language in August of 2006 but on the evening of May 24, 2007, the School Committee was told that "new language" had come up and for him, "being a physician who has been involved with medical care and also a School Committee, this was a red light", especially in view of the Chief Negotiator's statement that the language had changed and would need to be changed, "before we ratified." Dr. Shoemaker testified that, "we tentatively approved that [the agreement] provided we get the language on the medical care changed back to the original language that had been accepted or proposed in August." (TR. p. 71, lines 12-15) However, when asked whether "you were ratifying this subject to all the contractual language being satisfactory to legal counsel, Dr. Shoemaker replied, "except for the Medigap issue." (TR. p. 71, lines 16-20) On cross-examination, Dr, Shoemaker was asked whether or not the School Committee had accepted the Union's August 24, 2006 proposal on health care. He replied that the School Committee accepted that language. However, when confronted with the Employer's February 6, 2008 letter to the Union, where the

Employer's Chief Negotiator said that the August 2006 proposal was not accepted, Dr. Shoemaker stated that the School Committee had accepted the part of the language that restricted the post-retirement benefits to a Medigap policy. Dr. Shoemaker also testified that he did not know who had authorized the language that he considered to be a "red flag", but that he recognized it as language from the old contract. (TR. p. 76, lines 3-14) Interestingly, despite the hugeness of this issue, Dr, Shoemaker did not recall whether there was discussion at the May 24th meeting on the issue of the riders and the caps that had been contained in the Chief Negotiator's fax from that same day.

The third witness to testify from the School Committee was Dr. John Hinton Ambrogi, the second member of the Employer's authorized negotiating team, who was called on direct-examination by the Union's attorney. Dr. Ambrogi was the last witness to testify. When asked whether he recognized the May 24th fax (Union Exhibit #2) sent from the Employer's Chief Negotiator to the Union, Dr. Ambrogi stated, "It looked a lot of the different things we sent back and forth." (TR. p. 80, lines 15-24) When asked whether the information that was contained in the May 24th fax (Union Exhibit #2) was presented to the School Committee on the evening of May 24th, Dr. Ambrogi stated that he could not recall specifically whether that document was shown to the School Committee that evening. Dr. Ambrogi also testified as follows: "But, what I do recall very specifically was that there was an understanding that some of the health care language still needed to be worked on, that we weren't sure how some of the specifics of the health care language were going to play out and that we would work with Council 94 to make sure that that was taken care of and based upon those assertions, the School Committee decided to authorize Mr. Galvin to continue to pursue that with the caveat that this wasn't the end of it in terms of health care." (TR. p. 83, p. 6-16)

The minutes of the School Committee's May 24, 2007 meeting show that Ms. Gaines made the motion to ratify the Collective Bargaining Tentative Agreement, subject to review of contractual language by Counsel Galvin. (Union Exhibit # 4) The minutes also indicate that "highlights of the agreement

were reviewed as follows: the elimination of summer hours; the elimination of lifetime health benefits for new employees; the increase in cost share for existing coverage and contributions for retirement health care; and 15 percent cost share for new employees." Finally, the minutes also reflect that one (1) member of the School Committee voted against the proposed contract for six (6) very detailed reasons; none of which related to the retiree health care benefit or the riders.

There is simply no mention at all in the minutes of this huge "problem" with the proposed health care language. Moreover, there is no reference in the minutes that indicated that the tentative contract would need to come back to the committee for a second ratification on any issue, let alone the Medigap issue, as testified to by Ms. Gaines and Dr. Shoemaker respectively. The minutes simply indicate that the motion was subject to review of contract language by legal counsel.

Based upon the evidence discussed herein, the Board believes that the School Committee did indeed authorize its Negotiators to try to achieve ***either*** the same deal as TAN for the retiree health care, ***or*** as close as possible to the TAN deal. It seems that in the minds of some School Committee members that when the Union tendered its second set of proposals on August 24, 2006, which contained retiree health care language similar to the TAN language, that issue was "resolved" when in fact the proposal package was rejected and the parties proceeded to mediation. While the record does not reflect how it came to be however, sometime between August 24, 2006 and May 21, 2007, the School Committee's Chief Negotiator clearly came to believe that the parties had agreed upon a Plan 65 policy ***with*** riders for 80/20 co-pay prescription plan with $300.00 out of pocket cap, organ transplant, twelve (12) chiropractic visits, and student coverage to age 25. This is the language that he himself inserted into the fax that he then sent to the Union. The Board finds that since this is the language that the School Committee's Chief Negotiator presented to the Union as representing the culmination of his negotiations, (armed with authority to come as close to TAN as possible) a deal was in fact made during negotiations

to provide insurance riders for 80/20 co-pay prescription plan with $300.00 out of pocket cap, organ transplant, twelve (12) chiropractic visits and student coverage to age 25. This conclusion is also supported by the School Committee's Chief Negotiator's letter of February 6, 2008. (Union exhibit #6) In that letter, he stated, "inaccurate reference by both parties to unavailable riders for Plan 65 does not rise to an agreement on such as any agreement was subject to working out the language and final health care language continued to be changed and negotiated between the parties up to the present time." What is clear by this language is that the School Committee's Chief Negotiator thought at the time he wrote the May 21, 2007 letter, was that the specified insurance riders were in fact available with Blue Cross Plan 65. For the Board to believe otherwise would be to find that the Chief Negotiator was acting in complete disregard of his duties and deliberately misleading the Union with the May 21 and 24 faxes; this the Board refuses to believe.

It is unclear to the Board, at what point the School Committee's Chief Negotiator came to the conclusion that the retiree insurance terms, which had been agreed to in the negotiations, were not going to be acceptable to the School Committee. The testimony suggests that the School Committee's Negotiator made a presentation, likely without the May 24, 2007 fax being presented to the School Committee. At some time during that presentation, the School Committee's Negotiator and the School Committee came to a conclusion that some of the health care "language" needed to be worked out. The School Committee then decided to "ratify", subject to language being worked out. The Board finds that the School Committee's "ratification" was not made in good faith, under these circumstances. It is abundantly clear that the concern which was raised at that meeting, about not coming close to the TAN contract, was not simply an issue of working out "contract language" to implement an agreed upon term; this was a significant issue about the ***substantive terms of the agreement.*** When the School Committee and its Chief Negotiator came to the conclusion that the proposed terms for the Tentative Agreement were not supposedly what the School Committee had

intended or authorized, the contract should not have been "ratified." If this issue was in fact known, understood and discussed in detail on the evening of May 24, 2007, then the School Committee should have rejected the contract on that basis and sent the negotiating team back to the table to straighten the matter out immediately.

Webster's New World dictionary defines ratification as: "Affirmation or approval; adoption of an action that was done on one's behalf and treating that action as if it had been authorized by that person before the fact of it having been done. By ratifying an act or action, a person becomes responsible for the consequences of that act or action." In labor law, the act of ratification of a contract or Tentative Agreement is huge and signifies that the terms and conditions of employment, which have been the subject of collective bargaining have been finalized and agreed upon, leading to labor peace. A party who agrees to ratify a contract cannot unilaterally later change substantive terms or conditions of employment. In this case then, the Board concludes the following: (1) The School Committee imbued its Chief Negotiator with authority to negotiate retiree health benefits that were either the same as what TAN had agreed to ***or*** as to terms that were as close as possible to TAN. (2) Under that mantel of authority, and as evidenced by the May 21, 2007 and May 24, 2007 faxes, the School Committee's Chief Negotiator negotiated and agreed to several health insurance riders, including 80/20 co-pay prescription plan with $300.00 out of pocket cap, organ transplant, twelve (12) chiropractic visits and student coverage to age 25. (3) The School Committee members knew when they voted on the evening of May 24, 2007 to ratify the Tentative Agreement, that they did not agree on the **substantive nature** of the retiree health benefits, as either provided or described to them by their Chief Negotiator. (4) The School Committee did not excise that component [retiree health benefits] of the Tentative Agreement or indicate clearly in their vote that the members had a problem with the substantive nature of the retiree health benefits. The Board finds, therefore, that the School Committee's vote to ratify the Tentative Agreement, with a substantive issue knowingly in dispute and not making that

dispute clearly known to the other party, is bad faith bargaining, in violation of R.I.G.L. 28-7-13 (6) and (10). The Board also finds that the School Committee is bound by its ratification vote and its refusal to execute a contract with retiree health insurance riders is also a violation of R.I.G.L. 28-7-13 (6) and (10).

As a remedy for these violations, the Union has sought an Order compelling the Employer to execute a contract with either the same terms as set forth under the expired contract or the language attached to the Union's January 28, 2008 letter. What the Board clearly understands from this case is that the insurance riders which were negotiated were not, at least at the time of the formal hearing in this matter, available as riders to Plan 65. Therefore, it would be a futile remedy to order the Employer to provide something that everyone knows is impossible to provide. This we decline to do. Moreover, we also have no authority to award the Union something that it has not achieved in negotiations; that is the continuation of the language from the expired contract. Therefore, the Employer is hereby ordered to ratify a contract that contains the following language:

> All employees who are eligible for retirement and retire after June 30, 2006 who are participants in the Extended Health Care Benefit Plan, shall receive when said retiree becomes Medicare eligible, up to two Medigap plans for the employee and spouse (if applicable) with a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider.

This language is the same that was sent to the Union on May 21st; except that the word "Medigap" has been substituted for the words "Plan 65" and that the words "provided by Blue Cross" have been eliminated. This language provides the benefits that were set forth in the Employer's May 21, 2007 and May 24, 2007 faxes, but provides the Employer the flexibility to purchase the benefits from a provider other than Blue Cross.

FINDINGS OF FACT

1) The Newport School Committee of Rhode Island 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 May 2006, the parties commenced bargaining for a CBA for the period of July 1, 2006 - June 30, 2010. Negotiations for this successor CBA lasted for approximately a year, including a period of mediation.

4) On May 2, 2007, the parties met and reached a Tentative Agreement.

On May 21, 2007, the Employer sent a five (5) page fax to the Union at 11:22 AM. The language concerning retiree health benefits sent from the Employer to the Union was, in pertinent part, as follows: "All employees who are eligible for retirement and retire after June 30, 2006 who are participants in the Extended Health Care Benefit Plan, shall receive when said retiree becomes Medicare eligible, up to two Plan 65 plans provided by Blue Cross for the employee and spouse (if applicable) with a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider.

For those current employees appointed prior to July 1, 1999 who had previously elected to participate in the Extended Health Care Benefit Plan, the School Committee shall provide the health insurance coverage as referenced in Section 26.1 above until the retiree becomes eligible for Medicare. At that time, the Committee shall provide up to two single Plan 65 plans provided by Blue Cross for the employee and spouse (if applicable) with 80/20 co-pay prescription plan rider with a $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider."

5) On the evening of May 21, 2007, the Union membership met and voted to ratify the terms of the new CBA. At its meeting, the Union membership reviewed a document prepared by its leader, which outlined the proposed terms and conditions for the new CBA. In that document was the following language: "Article 43: Early Retirement. Section 43.5: Benefits for support staff personnel selecting the early retirement program would be as follows:

> For those members electing the Health Mate 2000 PPO Extended Benefits Plan, the School Committee shall provide the Health Mate 2000 PPO Plan, inclusive of the current co-pay of the annual premium at the time of retirement until the Retiree becomes eligible for Medicare. At that time, if eligible for Medicare, the Committee shall provide up to two single Medigap plans for the employee and spouse (if applicable), with the riders necessary to provide equivalent coverage to the Health Mate 2000 PPO plan. Retirees covered under this plan will pay any current co-pay of the annual premium to be paid at the time of their retirement, said payment to be made annually on or before July 1st.

6) On May 24, 2007, The Employer's Attorney, who also served as the Employer's Chief Negotiator, sent another five (5) page fax to the Union at 3:19 pm. The cover sheet to that fax stated: "Attached is the updated response to your proposed Tentative Agreement. As we discussed, there are other contractual and style issues we need to review. However, 9(b) (second sentence) remains essential to the agreement. 9(b) of that document referred to section 26.1 of the contract and added the following section (which was not contained in the May 21, 2007 version of the proposed contract language): "Substantially equivalent health care coverage may be substituted with mutual consent of the Union and the School Committee. Consent shall not be unreasonably withheld. An individual member or members of the Union may accept, but will not be required to accept, different health insurance coverage if offered by the School Committee (e.g. Cafeteria Plan)"

7) On the evening of May 24, 2007, the School Committee met and "voted to ratify the Collective Bargaining Tentative Agreement between Council 94 and the Newport School Committee effective July 1, 2006 through June 30, 2010, subject to review of contractual language by Counsel Galvin." (Union Exhibit #4, Minutes of the May 24, 2006 Newport School Committee Special Session).

8) On February 6, 2008, after considerable disagreement with the Union over the terms for the retiree health benefits in the CBA, the Employer's Chief Negotiator wrote to the Union and stated: "It is the School Committee's position that anyone retiring after July 1, 2007, upon reaching age 65, would be entitled to Plan 65 with 80/20 co-pay for prescriptions with no out-of-pocket cap and a skilled nursing care facility rider. That is what was used in the teacher's contract and has consistently been sought in the negotiation process."

9) The School Committee imbued its Chief Negotiator with authority to negotiate retiree health benefits that were either the same as what TAN had agreed to ***or*** as to terms that were as close as possible to TAN.

10) Under that mantel of authority, and as evidenced by the May 21, 2007 and May 24, 2007 faxes, the School Committee's Chief Negotiator negotiated and agreed to several health insurance riders, including 80/20 co-pay prescription plan with $300.00 out of pocket cap, organ transplant, twelve (12) chiropractic visits and student coverage to age 25.

11) The School Committee members knew when they voted on the evening of May 24, 2007 to ratify the Tentative Agreement that they did not agree on the **substantive nature** of the retiree health benefits, as either provided or described to them by their Chief Negotiator.

12) The School Committee did not excise that component [retiree health benefits] of the Tentative Agreement or indicate clearly in their vote that the members had a problem with the substantive nature of the retiree health benefits.

CONCLUSIONS OF LAW

1) The Employer's Chief Negotiator had actual authority from the School Committee to negotiate retiree health benefits that were the same as the Teacher Association of Newport or as close to those benefits as possible.

2) Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (3) and (10).

ORDER

1) The Employer is hereby ordered to execute a collective bargaining agreement for the period of July 1, 2006 - June 30, 2010 that contains the following provision in Section 43.5 of the contract:

> All employees who are eligible for retirement and retire after June 30, 2006 who are participants in the Extended Health Care Benefit Plan, shall receive when said retiree becomes Medicare eligible, up to two Medigap plans for the employee and spouse (if applicable) with a 80/20 co-pay prescription plan with $300.00 out of pocket cap and organ transplant rider, twelve (12) chiropractic visits rider and student coverage to age 25 rider.

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-5901
NEWPORT SCHOOL COMMITTEE	:	

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 Case No. ULP-5901 dated November 3, 2010 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **November 3, 2010**.

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

Dated: November 3, 2010

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK J. MONTANARO, MEMBER

GERALD S. GOLDSTEIN, MEMBER

ELLEN L. JORDAN, MEMBER

JOHN R. CAPOBIANCO, MEMBER

(DID NOT PARTICIPATE IN VOTE)

ELIZABETH S. DOLAN, MEMBER

ENTERED AS AN ORDER OF THE
RHODE ISLAND STATE LABOR RELATIONS BOARD

Dated: December 3, 2010

By: _____
ROBYN H. GOLDEN, ACTING ADMINISTRATOR

ULP- 5901