STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- THE CITY OF PROVIDENCE	CASE NO: ULP-5928

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 Providence (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on September 3, 2008 by Local 799, International Association of Fire Fighters, (hereinafter "Union.").

The Charge alleged violations of R.I.G.L. 28-7-13 (3) (7) and (10) as follows:

> "Failure to give necessary records to Vice President Mellor to prepare for a hearing regarding Fire Fighter Kristopher Wright."

Following the filing of the Charge, the parties submitted written position statements, in lieu of an informal conference. On November 13, 2008, the Board issued its Complaint alleging that the Employer violated R.I.G.L. 28-7-13 (3) (7) and (10) when it failed to produce raw data requested by the Union which was reasonably necessary for collective bargaining. The matter was set down for formal hearing on April 28, 2009. The formal hearing was postponed and the matter was placed into abeyance, on May 11, 2009, at the Union's request. On September 8, 2009, the Union requested that the matter be taken out of abeyance and placed back on the Board's Formal Hearing Calendar. At the formal hearing held on December 15, 2008, representatives from the Union and the Employer were present and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. Upon conclusion of the

formal hearing, both the Union and the Employer submitted written Briefs. 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. The Board voted, preliminarily, on May 11, 2010 to uphold the Charge and find an Unfair Labor Practice and referred the matter to Legal Counsel for drafting. At its meeting on August 19, 2010, the Board voted to issue an amended Complaint, in accordance with Board Rule 9.02.8, to conform the Complaint to the initial Charge. Prior to voting to issue the amended Complaint, the Board carefully reviewed both the original Charge, the Complaint, the Transcripts and evidence adduced at hearing, to determine whether or not the formal hearings should be re-opened. The initial Charge alleged that the Employer "failed to give necessary records to Vice President Mellor to prepare for a hearing regarding Fire Fighter Kristopher Wright." The Complaint that was originally issued contained a scrivener's error and did not reflect this Charge. However, a review of the transcripts and the Briefs filed by the parties made it abundantly clear that the charged issue was exactly what had been litigated before the Board. Therefore, the Board found it appropriate to conform the pleadings to the initial Charge and the evidence at hearing. Both the Employer and the Union were notified of the amended Complaint; and while the Employer filed an objection to the Board's action, the Employer did not request that the hearings be re-opened or offer any indication that the Employer wished to add to the record in any way.

FACTUAL SUMMARY

The facts in this case are not in dispute. On June 19, 2008, the Employer notified Fire Fighter ("FF") Kristopher Wright that Police Department charges had been preferred against him and ordered him to appear at a hearing to be held on September 18, 2008. (Union Exhibit #1) On July 16, 2008, the Union Vice President, Joseph F. Mellor, wrote to Assistant Chief Thomas Warren, requesting certain documentation to allow the Union to prepare for Wright's Departmental hearing. The request sought copies of "any and all documents related to the charges pending against FF Wright, including but not limited to: any

correspondence, investigatory reports, F-17's, and affidavits." (Union Exhibit #4) On July 29, 2008, Assistant Chief Warren responded to the Union's request in which he stated that the Department "presumed" that the Union was representing FF Wright in this matter. In the same letter, Assistant Chief Warren directs the Union to submit "a letter to the Department, containing a legally binding release, signed by FF Kristopher Wright, which authorizes the release of his personnel file." (Union Exhibit #5) The letter also stated, "upon receipt of such document, we will release the requested documents." At some point later, either on or prior to September 15, 2008, the City released some "written materials relating to the Kristopher Wright Departmental Hearing" to Attorney Olin Thompson, Fire Fighter Wright's personal Attorney. (Employer # 1) These same documents were not afforded to the Union. The September 15, 2008 hearing did not proceed and on March 17, 2009, the Fire Department's Investigative Chief, Michael F. Morgan, notified Fire Fighter Wright that his "departmental hearing" was being changed to a "summary proceeding." (See Union Exhibit #3 and # 6)[1]

TESTIMONY

Joseph Mellor was the Union Vice President in June 2008. Mellor testified that prior to the Wright disciplinary matter, he had been involved in other Fire Fighter disciplinary cases and the Chief had never previously asked for any "releases" in order for Mellor to receive documents. Mellor also testified that despite the request for a copy of Lt. Masse's personnel file, the Chief never asked the Union for a release for that file. (TR. p. 23) Mr. Mellor testified that he did not provide a release from FF Wright, nor did he respond to the Chief's request for a release. Mr. Mellor also testified that at some point, he was informed that the disciplinary "departmental hearing" had been changed to a "summary proceeding." (TR. p. 23) The summary proceeding took place on April 28, 2009. Mr. Mellor testified that the Union representatives were in attendance at the summary proceeding and still did not have the documents that

[1] A summary proceeding permits the Chief of the Department to issue punishment for "minor violations" of the Department's Rules and Regulations. A Departmental Hearing is held for alleged violations of the Department's Rules and Regulations, for which a member's dismissal from the department is not sought.

had been requested the previous summer.[2] In fact, the Union never received the requested documents. (TR. p. 42)

The Employer presented the testimony of Assistant Chief Thomas Warren, who testified that on other occasions in the past (prior to the Wright case) he has requested "verifications" from Attorneys, including releases, prior to releasing documents. (TR. p. 52) He stated that it is the Department's responsibility to somewhat protect the sensitive nature of some documents and thus, the Fire Fighters. (TR. p. 52) On cross-examination, Assistant Chief Warren admitted that he did not have any correspondence from Attorney Thompson's Law Office, nor did he demand a release from Attorney Thompson's Law Office. Assistant Chief Warren also admitted that prior to the end of July 2008, he did not provide any documents to the Thompson & Millay firm, nor did the Thompson & Millay Law Firm members notify him that one of them would be representing FF Wright. (TR. pgs. 57-58) On further examination, Assistant Chief Warren stated that he sent the "documents" directly to Attorney Thompson in either late August or early September. (TR. pgs. 59-60) The Employer stipulated that the documents were not produced to Attorney Thompson until after the charge of unfair labor practice was filed.

DISCUSSION

The Employer has raised several defenses to this action. The first defense is that the matter is moot because the documents that were requested were provided to "the representative of Mr. Wright" well prior to any disciplinary hearing being held or any discipline being imposed. The Employer argues that there is no "live controversy" and that the matter should be dismissed. The Employer also argues that the Union has waived its right to complain about the fact that the Department was requiring a release because when the Department issued its July 29, 2008 letter, the Union did not complain or provide the requested information. The Employer also claims that under the Personnel File Statute and the Access to Public Records Act, the document sought are not available "to just anybody." (TR. p. 14) The Employer defends its refusal to

[2] Fire Fighter Wright did also have a private Attorney present at the summary proceeding.

provide the requested documents because it claims that the Union is not consistently the representative of Fire Fighters with regard to disciplinary matters.

The Board has dealt with this same basic issue on at least two (2) occasions in recent years. See ULP 5744 City of Cranston and International Brotherhood of Teamsters, Local 251, decided March 26, 2007 (blanker refusal to supply a Union with an employee's personnel file without employee's consent constitutes a violation of R.I.G.L. 28-7-13 (6) and (10); affirmed, City of Cranston v Rhode Island State Labor Relations Board, PC 07-2109, July 14, 2008) and ULP 5848, Community College of Rhode Island and CCRI Educational Support Personnel Association/NEARI, decided March 31, 2009 (blanker refusal to release payroll records to Union without employee's consent violates R.I.G.L. 28-7-13 (6) and (10).

In City of Cranston v Rhode Island State Labor Relations Board, PC 07-2109, July 14, 2008, Justice Vogel noted that the Rhode Island Courts often turn to Federal Labor Law for guidance in determining labor issues. In ruling on a very similar case, she quoted from federal law as follows:

> "The duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the National Labor Relations Act [29 U.S.C. §§ 151-158], includes a duty to provide relevant information needed by a labor Union for the proper performance of its duties as the employees' bargaining representative." Detroit Edison v. National Labor Relations Board, 440U.S. 301, 303 (1979). That is because "[t]he right to bargain collectively would be little more than a hollow promise if a bargaining agent did not have the concomitant right to muster the information needed to conduct that bargaining effectively." Providence Hospital v. National Labor Relations Board, 93 F.3d 1012, 1016 (1st Cir. 1996).

Her opinion continued:

> However, "[a] Union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Detroit Edison, 440 U.S. 301 at 314. "The duty to supply information . . . turns upon 'the circumstances of the particular case.'" Id. Furthermore, "[a] breach of this duty constitutes an unfair labor practice . . . ." Providence Hospital, 93 F.3d at 1016. However, "an employer's commitment to, or genuine need for, confidentiality sometimes can constitute an appropriate reason for keeping documents—even documents that are potentially relevant to the collective bargaining process—out of a Union's hands." Id. at 1020. In situations where confidentiality is an issue, "the Board must carefully balance the employer's need for privacy against a Union's need to make informed decisions in its capacity as the employees' bargaining representative." Id. Due to the fact that "confidentiality is in the nature of an affirmative defense, it is the employer's burden to

> demonstrate that the requested information is shielded by a legitimate privacy claim." Id. Furthermore, "to permit the requisite balancing, the employer must advance its claim of confidentiality in its response to the Union's information request." Id. That way, "the parties have a fair opportunity to confront the problem head-on and bargain for a partial disclosure that will satisfy the legitimate concerns of both sides." Id. The Court considers three factors when determining whether confidential information may be released. See New Jersey Bell Telephone Company v. National Labor Relations Board, 720 F.2d 789, 791 (3rd Cir. 1983). Those factors are "(1) the sensitive nature of the information sought; (2) the minimal burden that a requirement of employee consent would impose on the Union; and (3) the lack of evidence that the employer had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities." Id. Furthermore, "any possible impairment of the Union's function in processing grievances is more than justified by the interests served in conditioning disclosure on the consent of the very employees whose grievances are being processed." Id.

In this case, there was a blanket refusal to release personnel records that were pertinent to the disciplinary charge against FF Wright. Chief Warren, in responding to the Union's request on July 29, 2008, stated that he "presumed" that the Union would be representing FF Wright. On cross-examination, Assistant Chief Warren admitted that at the time he wrote that letter, he had not been contacted by any Attorney for FF Wright. In fact, the Assistant Chief was not contacted by an Attorney until after the Unfair Labor Practice Charge had been filed.

In his letter, Chief Warren did not assert that there was any sensitive material that must be "protected" as he claimed during his testimony. He simply asserted a blanket refusal to cooperate with the Union's legitimate request for relevant documents. Such a refusal, is, as set forth above, a clear and unacceptable violation of R.I.G.L. 28-7-13 (6) and (10). What is even more outrageous in this case, however, is the fact that Chief Warren testified that he routinely requests releases for this information, even from Attorneys; yet in this case, he simply faxed over documents to Attorney Thompson after a phoned-in request! Chief Warren's conduct is simply indefensible under the circumstances.

As part of its oral defense in its opening statement the Employer claims that the requested records are "protected" and cannot be released to the Union on request, due to the protections of the Personnel Records Statute and Statutes pertaining to the Public's Access of Records. Since the Employer did not address

these claims in its written Brief, we are assuming that the claims have been rightfully abandoned. Nevertheless, we will state for the record that we agree with the Union's arguments in this regard. The plain language of R.I.G.L. 28-6.4-1 (Inspection of Personnel File) only places limitations on an employee's right to inspect his/her own personnel file and contain no limitations on the rights of an employee's Collective Bargaining Representative. In addition, the Board does not believe that the Access to Public Records Act, R.I.G.L. 38-2-1 prohibits a Collective Bargaining Representative to access relevant information from a Municipal Employer's records that are reasonably necessary for the performance of the Union's duties. Finally, pursuant to R.I.G.L. 28-7-44, the provision of the Rhode Island State Labor Relations Act controls if there is any conflict with either of these Statutes.[3]

The Employer next argues that the case is "moot" because FF Wright's Attorney eventually got the documents. First of all, we don't know what Attorney Thompson received because that information was never entered into the record of the proceedings before this Board. Secondly, it is the *Union* that requested the information and it is the *Union*, as the exclusive Bargaining Representative, that has an absolute right to secure the information. While an individual Union member can secure private Legal Counsel, doing so does not eliminate the Union's primary authority and responsibility in the case. This is even more so when there are disciplinary proceedings that involve alleged altercations or issues between two (2) or more bargaining unit members. The Union has duties to *all* the members of the Union. Without the ability to review pertinent documents and information, the Union is simply unable to fulfill its responsibilities when bargaining unit members have competing interests. An Employer's refusal to cooperate with legitimate requests for information may very well lead a bargaining unit member to conclude that its exclusive Representative is ineffectual, or even worse yet, refusing to provide fair representation. While there was no evidence that such claims arose in this case, the Union's primary

[3] Insofar as the provisions of this chapter are inconsistent with the provisions of any other general, special, or local law, the provisions of this chapter shall be controlling. R.I.G.L. 28-7-44.

authority for this matter was clearly and wrongfully impacted. Therefore, the matter is not moot by any measure.

The Employer also claims that the Union waived any right that it had to complain about Chief Warren's refusal to release the records. In support of this defense, the Employer relies upon the Rhode Island Supreme Court's holding in Town of Burrillville v Rhode Island State Labor Relations Board, 921 A.2d 113 (R.I. 2007). The Employer's reliance on Town of Burrillville is simply misplaced. In that case, the Town gave the Union advance notice of its intent to change a policy and the Union did not request bargaining prior to implementation. The Court, therefore, found that the Union had waived its right to bargain and could not later complain of an unfair labor practice. In this case, the Union representative had received documents without signed releases on many prior occasions. The Town gave no advance notice or warning that it was going to be following a new policy or procedure as it pertained to the release of records, so there was no opportunity for the Union to have requested bargaining. The Employer suggests that once the first request was denied, then the Union should have asked again. The Union is not under any duty to make repeated requests for information that has already been wrongfully withheld. Wayne Memorial Hospital Association and Service Employees International Union, AFL-CIO, Local 668, 322 NLRB 100 (1996).

The Employer also argued that sending whatever documents that it did to FF Wright's Attorney in September 2008 complied with whatever obligation that the Employer had. The Employer argues that federal law is controlling on this issue, citing 29 USCA 159 (a) which provides an explicit limitation on a Union's exclusive representation of bargaining unit members. The Employer argues that when there is no State Statute on point; our Supreme Court has indicated that Rhode Island shall look to and follow federal law. In this case, however, the Employer wants to ignore the fact that we do have a State Statute on the representation of Fire Fighters by their Unions and that it does ***not*** contain the limiting language of federal law:

> **28-9.1-4 Right to organize and bargain collectively.** – The fire fighters in any city or town have the right to bargain collectively with their respective cities or towns and be represented by a labor organization in the collective bargaining as to wages, rates of pay, hours, working conditions, and all other terms and conditions of employment.

Looking to Federal Law for guidance does not mean substituting the Federal Law for State Law simply because a party happens to prefer a limitation that a party prefers! The Employer is wrong; there is no limitation on the Union's right to serve as the exclusive bargaining agent for these employees. (See certification of EE-1445, dated May 21, 1962.)

Finally, the Employer argued that the Board's Complaint which stated that the "Employer failed to produce raw data which was reasonably necessary for collective bargaining" was an incorrect Complaint, based upon the Charge, which stated that the Employer had committed an unfair labor practice due to its "failure to give necessary records to Vice President Mellor to prepare for a hearing regarding Fire Fighter Kristopher Wright." In reviewing the Complaint, the Board realizes that a scrivener's error was contained therein. In determining whether the Employer has, therefore, had a full and fair opportunity to defend itself against the Union's Charge, the Board has looked carefully at the transcript and documents submitted at the formal hearing and has determined that the Employer knew exactly what it was defending against. The Employer never raised the issue of "raw data for collective bargaining" at the hearing at any time. Indeed, when the Board raised an issue as to the timeliness of the Charge, it was the Employer who stipulated on the record that the incident of failure to produce records arose in July 2008. The Employer fully defended against the Union's original Charge and fully briefed its defenses to this Charge. Therefore, pursuant to the Board's Rule 9.02.8, Amendment of Complaint, the Board voted at its August 19, 2010 meeting to issue an Amended Complaint with corrected language.[4] On the rare occasion that the Board must exercise its authority under

[4] In the discretion of the Board, the Board's Administrator or its Agent may amend the Complaint upon due notice to all parties, at any time before the issuance of the final decision and order. Where a charge has been amended in accordance with Section 9.01.4 hereof, the Board may amend the Complaint. Such amendment(s) to the Complaint may be made on notice to all parties in accordance with this section, upon such terms as may be deemed just and proper.

this rule, it does so with the full awareness of the due process rights of the parties. The Employer was provided the opportunity to file its Answer to the amended Complaint. Therefore, the Board may now issue its final Decision and Order in this case, finding that the Employer did in fact fail and refuse to provide necessary records to Vice President Mellor to prepare for a hearing regarding Fire Fighter Kristopher Wright, in violation of R.I.G.L, 28-7-13 (6) and (10).

As a remedy for this violation, the Union seeks an order setting aside the disciplinary action taken against FF Wright. The Employer argues that the Board has no such right to order such a remedy. Pursuant to R.I.G.L. 28-7-22, the Board has broad remedial powers available to it to correct and abate unfair labor practices.[5] Thus, the Board believes that it certainly has the authority to set aside a disciplinary action that violated a bargaining unit member's due process rights. However, in this case, the record established that the aggrieved member also has an alternative avenue available to him to rectify that issue; namely, the grievance process, which is already underway, and which seeks the same remedy as now sought hereunder. Due to the Doctrine of Election of Remedies, the Board is now without the ability to issue this remedy. [6] Therefore, the Board will decline to issue such remedy, under the circumstances presented.

---

[5] **§ 28-7-22**

(b) If upon all the testimony taken the board determines that the respondent has engaged in or is engaging in any unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unfair labor practice, and to take any further affirmative or other action that will effectuate the policies of this chapter, including, but not limited to:

(i) Withdrawal of recognition from and refraining from bargaining collectively with any employee organization or association, agency, or plan defined in this chapter as a company Union, or established, maintained, or assisted by any action defined in this chapter as an unfair labor practice;

(ii) Awarding of back pay;

(iii) Reinstatement with or without back pay of any employee discriminated against in violation of § 28-7-13, or maintenance of a preferential list from which the employee shall be returned to work;

(iv) Reinstatement with or without back pay of all employees whose work has ceased or whose return to work has been delayed or prevented as the result of the aforementioned or any other unfair labor practice in respect to any employee or employees or maintenance of a preferential list from which the employees shall be returned to work.

[6] The Board also notes, the due to the timing if these issues, when the Union first filed its charge, FF Wright had not yet been disciplined and the only remedy sought at that time was an order releasing the records.

It is unknown to the Board whether or not the requested documents have been provided to the Union since the conclusion of the formal hearing in this matter or when the Union's grievance will proceed to Arbitration. However, since we have made it abundantly clear that notwithstanding the Employer's release of some documents to FF Wright's private Attorney, that it is the Union that is entitled to the documents, we hereby order the Employer to provide the requested documents to the Union within ten (10) calendar days from the date that this decision and order is issued.

FINDINGS OF FACT

1) The City of Providence is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) On June 19, 2008, the Employer notified Fire Fighter Kristopher Wright that Police Department charges had been preferred against him and ordered him to appear at a hearing to be held on September 18, 2008.
4) On July 16, 2008, the Union Vice President, Joseph F. Mellor, wrote to Assistant Chief Thomas Warren requesting certain documentation to allow the Union to prepare for Wright's Departmental hearing. The request sought copies of "any and all documents related to the charges pending against FF Wright, including but not limited to: any correspondence, investigatory reports, F-17s and affidavits."
5) On July 29, 2008, Assistant Chief Warren responded to the Union's request in which he stated that the Department "presumed" that the Union was representing FF Wright in this matter. In the same letter, Assistant Chief Warren directs the Union to submit "a letter to the Department, containing a legally binding release, signed by FF Kristopher Wright, which authorizes the release of his personnel file."

6) The letter also stated, "upon receipt of such document, we will release the requested documents." At some point later, either on or prior to September 15, 2008, the City released some "written materials relating to the Kristopher Wright Departmental hearing" to Attorney Olin Thompson, Fire Fighter Wright's personal Attorney.

7) Chief Warren did not request a written release from Attorney Thompson and faxed unknown documents to him, based upon a verbal request.

8) These same documents were not afforded to the Union. The September 15, 2008 hearing did not proceed and on March 17, 2009, the Fire Department's Investigative Chief, Michael F. Morgan, notified Fire Fighter Wright that his "departmental hearing" was being changed to a "summary proceeding." (See Union Exhibit #3 and # 6)

9) FF Wright was eventually disciplined and filed a grievance over the issuance of said discipline.

CONCLUSIONS OF LAW

1) The 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 (6) and (10).

ORDER

1) The Employer is hereby ordered to provide the requested documents to the Union within ten (10) calendar days from the date that this Decision and Order is issued.

2) The Employer is also hereby ordered to Cease and Desist from requiring written releases from employees prior to releasing personnel records that are requested by the Union in the course of their exclusive representation of bargaining unit members.

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

GERALD S. GOLDSTEIN, MEMBER

ELLEN L. JORDAN, MEMBER

JOHN R. CAPOBIANCO, MEMBER

ELIZABETH S. DOLAN, MEMBER

BOARD MEMBER, FRANK MONTANARO, RECUSED HIMSELF FROM PARTICIPATION IN THIS MATTER.

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

Dated: JANUARY 14, 2011

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 5928

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 PROVIDENCE	CASE NO: ULP-5928

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-5928 dated January 14, 2011 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **January 14, 2011**.

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

Dated: January 14, 2011

By: _____
Robyn H. Golden, Administrator