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- PORTSMOUTH SCHOOL COMMITTEE	CASE NO: ULP-5996

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 Portsmouth School Committee (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated November 16, 2009 and filed on November 19, 2009 by National Education Association/ Portsmouth (hereinafter "Union").

The Charge alleged violations of R.I.G.L. 28-7-13 (3) and (6) and (10) as follows:

> "The Employer has refused to bargain over changes to working conditions for teachers in the Computer Science Department at Portsmouth High School. The changes include requiring teachers to pay for additional certification beyond statutory requirements, changes to the contractual work day, and other unilaterally changed conditions. The Union has twice demanded bargaining over the changes but has received no response from the Employer."

Following the filing of the Charge, the parties submitted written statements on December 11, 2011 and responses were filed on December 19, 2010. After the informal process had concluded the Board reviewed the matter and issued a Complaint on April 13, 2010. The Employer filed an answer denying the charges and asserting an affirmative defense on April 19, 2010.

The matter was then scheduled for formal hearing on May 13, 2010, but was rescheduled on multiple occasions to accommodate a change in legal counsel and the parties' varying schedules. The hearing was finally held on March 3, 2011. 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. Post-hearing Briefs were filed on or about May 19, 2011. 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.

At the commencement of the formal hearing, the parties submitted a joint statement of facts, which is now set forth herein: (1) In June 2009, High School Principal, Robert Littlefield, met with Portsmouth High School Computer Teachers Greg Costa, Claire Dumas, Elizabeth Patterson, and Union Vice President, Michelle Beaulieu, to present them with a copy of the "Portsmouth High School Technology Plan 2009-2010. [A copy of the plan was attached to the Joint Statement of Facts as Exhibit 1A.] (2) At that meeting, Ms. Beaulieu did not request bargaining (sic) said Technology Plan. (3) On or about July 20, 2009, Cindy Perry, the then President of the NEA Portsmouth, sent an email to Susan Lusi, Superintendent of Schools. [Copy of email attached as Exhibit 1B] (4) Between the June 2009 meeting and the July 20, 2009, the NEA Portsmouth did not request bargaining regarding the Plan. (5) Between the July 20, 2009 email and November 2009, the NEA Portsmouth did not request bargaining regarding the Plan. (6) On November 16, 2009, Patrick Crowley filed the Unfair Labor Practice Charge. (7) On November 17, 2009, Superintendent Lusi sent an email to Patrick Crowley stating that she did not believe that the changes, which were imposed, were subject to bargaining. [Copy of email attached as Exhibit 1D] (8) On April 13, 2010, the SLRB issued its Complaint.

POSITIONS OF THE PARTIES

The Union argues that by requiring the Computer Teachers to obtain Microsoft Certified Application Specialist [MCAS] Certifications, which is in excess of the State of Rhode Island's Department of Education's requirements, as a condition of continued employment, the Employer unilaterally changed terms and conditions of employment, which are mandatory subjects for bargaining, without prior bargaining. In addition, the Employer ignored the Union's two (2) written requests for bargaining.

The Employer argues that requiring the teachers to obtain these Certifications (Microsoft Word 2007, Microsoft Excell 2007, Microsoft Access 2007, Microsoft PowerPoint 2007 and Adobe Photoshop for Teachers) was within its rights to create Educational Curriculum and was a topic, on which, the Employer had no right, let alone

duty, to bargain. The Employer argues that it is a teacher's job to teach his/her class; and that asking teachers to adequately prepare to teach the classes is already expected of the teacher. The Employer also argues that everything the teachers needed was supplied to them to accomplish their own certifications, including laptops, software, and time in school to prepare for the Certification tests. Finally, the Employer argues that even if there was a duty to bargain, the Union waived its right to bargaining by not requesting the same at the June 2009 meeting or for six (6) additional weeks thereafter.

SUMMARY OF TESTIMONY

The Union's witness at the Formal Hearing was Elizabeth Paterson, a sixteen (16) year Computer Teacher at Portsmouth High School. She testified that in June of 2009, she was summoned, along with Claire Dumas, Gregory Costa, and Michele Beaulieu, to Principal Robert Littlefield's office, who presented the group with a document, entitled "Portsmouth High School Technology Plan 2009-2010." (TR 3/3/11, pg. 17) Ms. Paterson testified that at the time she received this document, she was not aware that there had been a group that had been meeting to formulate this plan. (TR 3/3/11, pg. 17) Ms. Paterson stated that at the meeting, Principal Littlefield told the group that the Computer Teachers (who had all already received layoff notices for the following school year) that the school wanted to offer students specific computer certification classes and that the teachers would be required to become certified in these areas, in order to be able to teach.[1] (TR 3/3/11, pg. 18) Ms. Paterson testified that the Rhode Island Department of Education does not require these Certifications. Ms. Paterson testified that Mr. Littlefield told the teachers that it was their professional responsibility to obtain these Certifications as part of their preparation work for teaching. (TR 3/3/11, pgs. 19-20) Mr. Littlefield did not have or present any information on how the teachers were to secure this Certificate only that it had to be done by the end of the coming school year; and that information would be provided at a later date. (TR 3/3/11, pgs. 20-21) Moreover, Mr. Littlefield also told the teachers (who were on layoff) that if they accepted recall notices for the coming school year, which he was prepared to issue, then they were accepting these new terms and conditions of employment. (TR 3/3/11, pg. 21) Mr. Littlefield told the group that if the teachers did not

[1] The certification was known as MCAS Certification, which consisted of four separate courses: Microsoft Word, Microsoft Excel, Microsoft PowerPoint, and Microsoft Access. One of the teachers would also be required to be certified in Adobe Workshop.

get the certifications, they would all be laid off again. (TR 3/3/11, pg. 21) Ms. Paterson also testified that the teachers were told, that day, that this was something they had to do, that this was on their own time, and that "release" time would not be provided. (TR 3/3/11, pg. 23) The teachers were, essentially, left to their own devices as to figure out how to comply with this new mandate. (TR 3/3/11, pg. 24) On June 25, 2009, Mr. Littlefield called a second meeting with the Computer Teachers to tell them they would be recalled from layoff if they accepted the conditions. Mrs. Paterson testified that they asked him for support, asked for training, and inquired as to how they were supposed to accomplish this task. At that meeting, Mr. Littlefield agreed to purchase each teacher a study book, but it was not a book that had been pre-selected and was ready to be provided that day. The teachers would have to figure out what they needed first and then get back to him. (TR 3/3/11, pgs. 25-26) Ms. Paterson testified that there was no contact between the school and teachers between the last day of school of the 2008-2009 school year and the first day of school of the 2009-2010 school year. (TR 3/3/11, pg. 27)

When the teachers reported at the beginning of the 2009-2010 school year, no information was provided to them on any training courses that might be available to the teachers, so they could learn this new material and take the Certification test. (TR 3/3/11, pg. 27) Ms. Paterson stated that "word on the street" had it that the school was planning to become a testing center and that they would eventually get the software. (TR 3/3/11, pg. 27) At some point thereafter, Gail Domonity, the Integration Technology Specialist for the high school, provided an email with a "link" to the Microsoft website. (TR 3/3/11, pg. 29) Ms. Paterson visited the site, but found it overwhelming. Later in the school year, a course was ultimately offered to teachers and Ms. Paterson took the Microsoft Excel and Microsoft Word classes during her lunch hours. (TR 3/3/11, pg. 31) Ms. Paterson stated that after she completed the courses, she spoke with the course instructor, Ms. Trisha Hill, another Integration Specialist for the school, to see what the tests would be like. Ms. Hill advised her that the Certification tests were very much like the practice tests that Ms. Paterson had taken during the course, so Ms. Paterson focused then on practice tests.(TR 3/3/11, pg. 32) Ms. Paterson passed the tests. (TR 3/3/11, pg. 32)

After being told to get the Certifications, one of Ms. Paterson's colleagues, Greg Costa, took it upon himself to research available courses in the community. Mr. Costa found training courses for Microsoft Office specialist at the On-Line Career and Workforce Training, for $2,295.00. (Union Exhibits # 1 and #2)

On cross-examination, Ms. Paterson agreed that with her seniority and Certification that even if she had been bumped from her position as a Computer Teacher, (for either not taking or failing the certification tests) she would have been able to bid on open math positions. (TR 3/3/11, pg. 36) Ms. Paterson also clarified that while she had been teaching some elements of Microsoft Office in her classes during the 2008-2009 school year, she was using the 2003 version, not the 2007 version, which she termed "a very different upgrade." In some of her classes, she would not be teaching this material. (TR 3/3/11, pg. 39) Ms. Paterson also testified that in the past, when there were changes to software, teachers were trained in the changes. (TR 3/3/11, pg. 40) Ms. Paterson agreed that as a normal part of her teaching duties, she prepares herself and learns about new software. Ms. Paterson also testified that Ms. Beauliau did not request bargaining at the June 2009 meeting when the teachers were first presented with the new Technology Plan.

On further cross examination, Ms. Paterson testified that it was her belief that the MCAS certification was a Corporate Certification that would be required of an Administrative Assistant working in a large firm and that it went well beyond what a high school student would need to create a senior project paper or senior project presentation. (TR 3/3/11, pg. 42) Ms. Paterson also testified that during the 2008-2009 school year, she and the other Computer Teachers met occasionally with the Integration Specialist and submitted curriculum suggestions and timelines, to enhance the computer Department's offerings to line them up with standards. (TR 3/3/11, pgs. 44-45) Ms. Paterson also acknowledged that at some point, she was provided with a laptop by the school, which had training software on it. (TR 3/3/11, pgs. 45-46) Ms. Paterson recalled a meeting held in December 2009 with Principal Littlefield, the Computer Teachers, and a woman named Jean Campbell. Ms. Paterson stated that at this meeting, the teachers were told that they were generally going to have to study on their

own time, but if they had common planning time in school, that time could be used. (TR 3/3/11, pg. 46)

The Employer presented testimony from Dr. Susan Lusi, the Superintendent of Portsmouth Schools. Dr. Lusi testified that in August 2008, all School Departments in the State received a communication from the Rhode Island Department of Education, which stated that the U.S. Department of Education was going to be requiring states to have an 8th grade technology test; and that the results would be reported at both the State and Federal levels. Dr. Lusi stated that this communication caused the Portsmouth School District to fundamentally re-examine the entire technology curriculum, because much of what would be required of the new 8th grade test was then being taught in the 9th grade. So according to Dr. Lusi's testimony, the District started looking very closely at preparing the students to meet the 8th grade expectations and the implications for further technology learning at the high school. (TR 3/3/11, pg. 54) According to Dr. Lusi, during the 2008-2009 school year, common planning time was afforded with the "hope" that the Computer Teachers would develop a new curriculum and the new expectations for the 8th grade. (TR 3/3/11, pg. 55) Dr. Lusi stated that the teachers did not develop a new curriculum; and so the effort was then spear-headed by the Technology Integration Specialist, working with the Assistant Superintendent and the Director of Information Technology, who undertook a close examination of the standards. (TR 3/3/11, pg. 56)

On further direct examination, Dr. Lusi testified that during the 2008-2009 school year, high school students were provided with instruction in Microsoft applications, which were chosen because of their wide application throughout industry; and because they meet the need of the seniors for projects and papers. (TR 3/3/11, pg. 56) Dr. Lusi acknowledged that Dr. Littlefield had followed her direction when he instructed the teachers to become certified; and that the suggestion to have the Computer Teachers become MCAS certified came from the Technology Integration Specialist. (TR 3/3/11, pg. 57) Dr. Lusi acknowledged that MCAS certification is not required of the students to graduate, but this program provides them with the option to obtain that certification, which can then be used on college applications. (TR 3/3/11, pg. 58) The

school eventually became a testing site for the certification and neither the students nor the teachers are required to pay to take the tests. (TR 3/3/11, pgs. 58-59)

Dr. Lusi acknowledged having received the email from Union President, Cindy Perry, requesting bargaining. Dr. Lusi testified that she could not find any indication of a response email from herself. (TR 3/3/11, pg. 63) Dr. Lusi further testified that throughout the 2008-2009 school year, she and her Assistant Superintendent met with Union leadership, and in that timeframe had spoken numerous times about the "changing expectations" for the Computer Teacher. She also testified that she remembered stating during these meetings that she did not believe that the changes were subject to collective bargaining. (TR 3/3/11, pgs. 63-64) Dr. Lusi also acknowledged that she received a second request to bargain from Patrick Crowley in November 2009. (TR 3/3/11, pg. 64) Finally, Dr. Lusi testified that if the July request to bargain was going to "stop the implementation process" of the new curriculum, it would have been a huge problem, because all incoming freshmen were already scheduled to take the full year computer course which had been designed during the 2008-2009 school year. (TR 3/3/11, pg. 64) On cross-examination, Dr. Lusi agreed that because it was her opinion that no bargaining was required at all, that even if the Union had asked for it at the June 2009 meeting, the answer would have been "no." (TR 3/3/11, pgs. 67-68)

The Employer's next witness was Robert Littlefield, the Principal of Portsmouth High School. Robert testified that until the new plan was implemented, the Computer Teachers were "operating independently, teaching what they wanted to teach, assessing what they wanted to assess; and that there was no real uniform approach to teaching technology. Mr. Littlefield stated that they felt that it was really doing our students a disservice not to have a unified, organized, codified curriculum for the teaching of technology. So, at the beginning of 2008-2009, I directed our Computer Teachers to work with the Technology Integration Specialist throughout the year, saying I wanted you people to work together, I want you to create a Portsmouth High School technology curriculum and afforded them common planning time in which they could do it." (TR 3/3/11, pgs. 77-78) Mr. Littlefield said that despite common planning time all year, the teachers did not develop a curriculum. At the end of that year, he said that he

was seriously concerned as to whether the school was going to be able to continue with a Computer Technology Program at all and considered moving it to the middle school level, which gave rise to the layoff notices that were issued in the spring of 2009. (TR 3/3/11, pg. 79) Mr. Littlefield further testified that despite the fact that the teachers had not developed the curriculum, he worked with the Computer Integration Specialist, the Director of Information Technology, and the Assistant Superintendent to develop a curriculum for the 2009-2010 year. (TR 3/3/11, pg. 80)

Mr. Littlefield also testified that at the June 2009 meeting, neither the Union representative nor the teachers made any protest or objection; and there was no request to engage in bargaining. (TR 3/3/11, pg. 82) Mr. Littlefield also testified that the teachers were provided with quite a bit of assistance during the 2009-2010 school years to get them ready for the Certification tests. The school provided laptops with practice software; the teachers were afforded common planning time, and at the beginning of the school year, the Principal provided an outside consultant. The clerical staff at the high school also took the course, which was eventually offered at the high school. (TR 3/3/11, pgs. 83-84) Mr. Littlefield also testified that in December of 2010, he met with the teachers to see what progress had made and he claims that he was told by one of the teachers, that they had been "told by Patrick" not to comply. (TR 3/3/11, pgs. 84-85) According to Mr. Littlefield, none of the teachers had any out-of-pocket expenses for software, training, or for the testing fee. He also claims they were not required to work outside of their contractual day. (TR 3/3/11, pg. 85)

On cross-examination, Mr. Littlefield acknowledged that he made the MCAS certification a requirement of the Computer Teachers' positions. (TR 3/3/11, pg. 86) Mr. Littlefield acknowledged that during the 2008-2009 school year there was no Department Head for the Computer Teachers and that as Principal, he was ultimately responsible for the effort to secure a new curriculum. (TR 3/3/11, pg. 91) Mr. Littlefield acknowledged that he did receive some input into the curriculum from the Computer Teachers at different times during that year and that it was taken into consideration when the curriculum was eventually designed. (TR 3/3/11, pg. 92) On examination by the Board's Chairman, Mr. Littlefield indicated that while he acknowledges that the teachers had provided "input", he was expecting a curriculum and what he received

wasn't anything close to a curriculum.(TR 3/3/11, pg. 93) Finally, Mr. Littlefield candidly acknowledged that there was no effort made during the summer of 2009 to provide the teachers with any training towards the MCAS Certifications. (TR 3/3/11, pg. 94)

The Employer's final witness was Rosemary Muller, a former Computer Teacher who serves as the Technology Director for the Portsmouth High School. She testified that she was involved with the curriculum development. She also testified as to the efforts she took to assist the teachers in obtaining the Certification, which included providing the teachers with laptops loaded with training software, setting up virtual servers, and arranging proctors to be trained. (TR 3/3/11, pg. 96) She testified that the tests take approximately forty-five (45) minutes to one (1) hour to complete. Ms. Muller also testified that in approximately March of 2010, she arranged for Trisha Hill, the school's Technology Integrations Specialist, arranged for classes and tip sheets for the teachers. (TR 3/3/11, pgs. 97-99) Ms. Muller acknowledged that while she has been in the testing room when the MCAS tests have been given, she has not taken them herself. (TR 3/3/11, pg. 100)

DISCUSSION

We begin our analysis of this case by noting that Dr. Littlefield readily acknowledged that the MCAS Certification requirement was indeed made a condition of continued employment for the Computer Teachers; and that the school undertook no effort, whatsoever, to provide any books, materials, or training for the teachers during the summer of 2009-2010, immediately after the imposition of the requirement, despite the teachers' request on June 25, 2009 for the same. We also note that Dr. Lusi candidly admitted that even if the Union had stated in June 2009 that it wished to bargain, that she had no intention of doing so because she did not believe there was any mandatory subject for bargaining.

The Employer argues in its Brief that the requirement for teachers to obtain the MCAS Certification by the end of the 2009-2010 school year, as a condition of continued employment, was not a mandatory subject for bargaining. Moreover, the Employer argues that the requirement imposed no substantial and material change to the teacher's working conditions. Finally, the Employer argues that the Union had timely

notice of the issue and failed to request bargaining in a timely manner. We shall take each of the arguments sequentially.

MANDATORY SUBJECT FOR BARGAINING OR NOT?

Examples of mandatory subjects "are wages, bonuses, vacations, holidays, sick time, leaves, hours, lunch breaks, rest breaks, health insurance, pensions, profit sharing, dental insurance, job posting, seniority, bumping, layoffs, subcontracting, and transfers." *Hirsch and Farrrel Labor and Employment in Rhode Island* § 8-4(c), at 8-29 (2003). This list is not all-inclusive and will vary, depending upon the nature of the employment. The Employer argues that its issuance of the Technology Plan is a non-delegable right and duty to enact educational policy; and therefore, no aspect of it can possibly be a mandatory subject for bargaining, citing in support of this position, our Rhode Island Supreme Court's decisions in *Pawtucket School Committee v Pawtucket Teachers Alliance* 652 A.2d 970 (R.I. 1995), and *North Providence School Committee v North Providence Federation of Teachers, Local 920, AFT* , 945 A.2d 339 (R.I. 2008) .

In *Pawtucket School Committee v Pawtucket Teachers Alliance* 652 A.2d 970 (R.I. 1995), the Union had challenged a 1993 school directive that all teachers in the English as a Second Language (ESL) program submit lesson plans to the program Director on a weekly basis, for the purpose of providing the Director with "a greater knowledge of what's being taught" in the ESL classes. The Union grieved the matter and sought arbitration. The School Department filed for a Declaratory Judgment in Superior Court, seeking to enjoin the arbitration. The School Department took the position that the new directive was a management right and was, therefore, not arbitrable. On appeal, the Rhode Island Supreme Court agreed with the Superior Court's decision and held that a School Committee cannot bargain away statutory powers and responsibilities. The court stated: "In our opinion, evaluating ESL programs and determining whether they conform with state law and the rules and regulations promulgated by the Board of Regents for Secondary Education are requirements of state law and cannot be submitted to arbitration." Id at 972.

In North Providence School Committee v North Providence Federation of Teachers, Local 920, AFT , 945 A.2d 339 (R.I. 2008) the Union, claiming a "past practice", challenged the School Committee's cost-savings decision to eliminate an

English Composition class, as a violation of the contract's "savings clause." The Arbitrator determined that the decision to eliminate the composition period was based on money and the ability to cover the teaching loan; and opined that such decisions are "not educational policy decisions, but rather work load decisions, which are always subject to negotiation." Id at 342. In *North Providence*, the Supreme Court reiterated the fact that while Title 16 of the General Laws vests the State's School Committees with extraordinarily broad powers and authority over public schools, these powers *must be read in harmony with the provisions of the Michaelson Act* [the act that provides teachers with the right to engage in collective bargaining]. (Emphasis added herein) Id.

The Employer argues, simplistically in its Brief, that economic matters may be bargained away under the Michaelson Act, but if a decision is one *involving* educational policy, it cannot be delegated to an Arbitrator. (Emphasis added herein) We do not read North Providence as broadly as the Employer: indeed, not so, at all. The Employer's position is essentially that it is free to ignore bargaining by couching its decision with the cloak and mantra of "educational policy." This position wholly ignores the facts that: (1) The Union did not challenge the Employer's right to adopt the Technology Plan itself, but rather the changes to working conditions, including the cost of obtaining certification, changes to the contractual work day and other unilaterally changed conditions." (See Union charge). (2) The Employer's obligation to engage in "effects bargaining."

In this case, the Union has not challenged the Employer's right to re-design the Computer Department or even the fact that they must teach certain courses. The redesigned Technology Plan, which would provide freshmen with one (1) year of computer technology, is a three (3) page document, which spells out the overall goals of the curriculum, along with specific content areas for each Computer Teacher. (Joint Exhibit #1) Not one (1) teacher challenged the substantive content or their delineated areas of responsibilities. On the first page of the plan, under "Recommended Action", it states: "(1) Recall all PHS Computer Teachers for the 2009-2010 school year. (2) Make clear expectations to the Computer Teachers for the 2009-2010 school year." Of particular note, the document does *not* state: "make the teachers continued employment *contingent* upon securing MCAS certification." Further down on page one, under expectations for the teachers, the document provides: "Obtain Microsoft Certified

Application Specialist (MCAS) certification in four (4) areas: Word 2007, Excel 2007, PowerPoint 2007, and ACCESS 2007 by June 2010. The Portsmouth School Department will pay the cost of the certification exams." (See Joint Exhibit # 1)

While it might be fairly inferred from Ms. Paterson's demeanor on the stand and her testimony that she was not *enthused* by the idea of offering MCAS Certification for freshmen students, she did not challenge the School Department's right to change the curriculum; and she complied with the directive by taking training courses that prepared her to sit for and pass the four (4) new examinations. The challenge that the Union makes here is the lack of "effects bargaining" on the Computer Teachers' terms and conditions of employment. Effects bargaining requires an Employer, though not required to bargain over an actual non-negotiable decision itself, to negotiate the effects of said non-negotiable decisions with its employees' duly-elected collective bargaining representative (see generally *First National Maintenance Corpg. v NLRB,* 452 U.S. 666, 681 [1981]

In the Board's opinion, tucking additional terms and conditions of employment, that is, the security of continued employment, as well as qualifications for the position in an "educational policy" document, does not hide or change the fact that the Computer Teachers were in jeopardy of losing their employment, if they failed to secure the MCAS Certification by June 2010. The teachers asked for assistance at the June 25, 2009 meeting and received nothing. They followed this up the following month with the Union's written request for bargaining:

> "Spoke with Patrick regarding the new requirements (MCAS) for the Computer Teachers at PHS. He left a message with Rick, however, he did not receive a response as of yet. At this time, I am respectfully submitting a request to bargain pertaining to the newly instituted requirement that all PHS Computer Teachers be required to become certified (MCAS by the close of the school year 2009-2010." (Joint Exhibit 1B)

The Union's request went unanswered and apparently ignored. As it clear on its face, the request to bargain was limited to the "newly instituted requirement that all PHS Computer Teachers be required to become certified (MCAS) by the close of the school year 2009-2010." The request to bargain did not touch or invade upon the Employer's

right to set curriculum or educational policy or any other management right reserved to it under Title 16. The request for "effects bargaining" clearly invoked terms and conditions of [continued] employment, and as such, constituted a mandatory subject for bargaining.

While we fully understand the Employer's need, desire, and rationale for the change in curriculum and do not question its right to make establish educational curriculum and policy or the concurrent desire to increase the minimum teaching qualifications, the simple fact of the matter is that minimum qualifications, job security, and the potential expenditure of teachers' personal funds to secure additional qualifications are clearly terms and conditions of employment, which are mandatory subjects for bargaining.

DID THE REQUIREMENT TO OBTAIN MCAS CERTIFICATION BY THE END OF 2009-2010 CONSTITUTE A MATERIAL AND SUBSTANTIAL CHANGE IN EMPLOYMENT?

The Employer argues that "even if we accepted the proposition that the MCAs Certification requirement did involve a subject of mandatory bargaining, the Union's unfair labor practice charge must still fail. Before a charge of changing work conditions without bargaining can be sustained, it must be established that the change in working conditions was material and substantial." The Employer claims that the Union failed to establish that obtaining the MCAS certification "worked any such material and substantial change" and that the MCAS certification "did not require the teachers to do anything more than was already required of them." (Employer's Brief pgs. 13-14) Yet, immediately prior to this argument, the Employer states:

> "The Portsmouth School Department had a particular need to ensure that the High School technology teachers were equipped to provide MCAS-level instruction. The High School teachers had never been required to teach to this level before. Furthermore, the Portsmouth School Department had no reliable way to determine whether the teachers were in fact prepared to teach the technology curriculum at the High School to that standard. This situation is due to the fact that there is a longstanding gap in the state scheme for certification. There is simply no RIDE certification for technology instruction. All that is needed is certification to teach at the appropriate grade level. Theoretically then, an individual with certification in Secondary English or Physical Education could teach a technology course. Schools are thus left without any verification of whether teachers are truly prepared to teach the material. In order to fulfill its duty to ensure that students receive instruction from qualified teachers, Portsmouth was thus required to find a measure of proficiency....The decision to require the technology teachers to obtain that certification was an entirely logical extension of the right to select curriculum." (Employer's Brief pgs. 12-13)

So, the question for this Board becomes: How can the MCAS Certification require the teachers to do "nothing more than was previously required of them," when securing the certification was filling the gap for minimum State standards and when the Employer states concurrently that the new Technology Plan would require teachers to teach to a new "level", especially when their continued employment was tied to their success in securing the Certifications? If the threat of loss of employment as a Computer Teacher, after sixteen (16) years of teaching, for the failure to secure a Certification that is not required by Teacher Certification by the Rhode Island Department of Education, is not a material or substantial change in working conditions, then it is hard for Board members to fathom what this particular Employer might think qualifies as a material change in terms and conditions of employment [2]

Moreover, while the Technology Plan (Joint Exhibit # 1) and the testimony at hearing established that the teachers did not have to expend personal monies to take the examination, the inquiry does not end there. The testimony at hearing readily established that the school took absolutely no steps, whatsoever, over the summer of 2009, to assist the teachers in achieving the new standards or in even discussing the matter. It seems to us that this summer would have been the perfect opportunity for the teachers to have focused on the new requirements, without the added distraction of trying to teach something they were still learning themselves. The threat of loss of employment was a "Sword of Damocles" hanging over the teachers' heads when they began the 2009-2010 school year; something they had never had to worry about before. Ms. Paterson testified that at the beginning of that year, "word on street" was that the school was going to become a testing site. By inference, it certainly seems clear that no discussion was taking place about how the teachers were going to manage this new requirement. In fact, Mr. Littlefield acknowledges that he did not meet with the teachers until December, to see how things were going. The Board notes that this was after the Union's second written request for bargaining and instant charge was filed. Moreover, the testimony clearly established that it was not until March 2010 that training classes were offered by the school to the teachers to prepare for this exam. The testimony established that at some point, of unknown date, the teachers were also provided with a

[2] Ms. Paterson had been employed as a teacher for 16 years at the time of the hearing.

laptop with software. The testimony did not address whether the software was effective or even whether all the teachers eventually passed the MCAS certifications. There was conflicting testimony as to whether the teachers were eventually able to study and prepare during current works hours or whether the work was done on their own time. Mr. Littlefield testified that release time was made available and Ms. Paterson testified that she worked during her lunch hours. However, there is unrebutted testimony in the record from Ms. Paterson that when the teachers met with Mr. Littlefield in June 2009, they were told that this would be done on their own time, by whatever method they chose. The bottom line here, however, is the fact that the imposition of a new condition of continued employment is clearly and without doubt a material and substantial change in employment, which was required to be bargained, prior to implementation.

DID THE UNION WAIVE ITS RIGHT TO BARGAINING?

The Employer argues that the since the Union failed to request bargaining at the June 2009 meeting with Mr. Littlefield, when the requirement for the MCAS Certification was first presented to the teachers, that the Union waived its right to request bargaining. Despite an Employer's obligation to bargain with the Union over changes to terms and conditions of employment, a Union may waive its right to engage in bargaining by failing to request the same.

As stated by our Supreme Court in *Town of Burrillville v Rhode Island State Labor Relations Board,* 921 A. 2d 113, 120 (R.I. 2007), "the National Labor Relations Board has emphasized that "it is incumbent upon [a] Union to act with due diligence" with respect to requesting bargaining once the Union has received adequate notice of a proposed modification in the terms or conditions of employment. *Kansas Education Association v. Kansas Staff Organization,* 275 N.L.R.B. 638, 639 (1985); *Clarkwood Corpg. v. Local 258 and Local 438, Graphic Arts Intern. Union*, 233 N.L.R.B. 1172, 1172 (1977); *see also Bell Atlantic Corpg.,* 336 N.L.R.B. 1076, 1086 (2001); *W-I Forest Products Co.,* 304 N.L.R.B. 957, 960 (1991). We are in full agreement with that principle. A Union must do more than merely protest the proposed change or file an unfair labor practice action in order to preserve its right to bargain; a Union must affirmatively advise the Employer of its desire to engage in bargaining. *See Citizens National Bank of Willmar v. Willmar Bank Employees Ass'n,* 245 N.L.R.B. 389, 390

(1979); *see also Kansas Education Association,* 275 N.L.R.B. at 639. However, the employer's notification to the Union concerning the contemplated modification in the terms or conditions of employment "must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Smurfit-Stone Container Corpg.,* 344 N.L.R.B. No. 82, 2005 WL 1181103 at *20 (May 16, 2005) (quoting *Ciba-Geigy Pharmaceuticals Division v. Intern. Chemical Workers' Union, Local No. 9,* 264 N.L.R.B. 1013, 1017 (1982))." A waiver of the right to engage in bargaining must be explicit, clear, and unequivocal. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983); *NLRB v. Lion Oil Co.,* 352 U.S. 282, 77 S.Ct. 330, 1 L.Ed.2d 331 (1957).

The Burrillville Court went on to say: consequently, a Union with sufficient notice of a contemplated change waives its bargaining rights if it fails to request bargaining prior to the implementation of that change. *See W-I Forest Products Co.,* 304 N.L.R.B. at 960. It should be noted, however, that this Court will not find waiver if a proposed change has been made irrevocable prior to the notification of the Union or if the change "has otherwise been announced as a matter on which the employer will not bargain." *See id.* at 961; *see also Smurfit-Stone Container Corpg.,* 2005 WL 1181103 at *20. (Underlining added herein)

The evidence here shows that after having been presented with the plan initially sometime in June 2009, on June 25, 2009, (the last day of school) at a meeting with the Principal, the teachers inquired further as to how the plan was to be implemented; how would they be trained for obtaining the new Certifications? They were told they were on their own, in essence. Joint Exhibit # 1 shows that on July 20, 2019, the Union filed its first formal written request for bargaining. Since this was a joint exhibit with no objections to the content, the Board may freely infer that its contents are true. In that email, the Union President, Cindy Perry, references the fact that Patrick [Crowley] previously sent an email message to Rick about the new requirements for the Computer Teachers and the fact that he (Patrick) has not received a response. This request was made long before the start of the new school year and nearly a year before the change was intended to take effect.

In addition, the testimony and evidence established that Dr. Lusi claims to have periodically announced during 2008-2009 that the "changing expectations" for the Computer Teachers required bargaining. Moreover, on cross-examination, she readily admitted that had the Union representative who attended the initial meeting with Mr. Littlefield requested bargaining, the Employer's answer would have been no.

Thus, we cannot say that the Union failed to exercise due diligence in filing its first formal request for bargaining in July 2009 for a change to a term and condition of employment that would not take effect until June 2010. In addition, the Employer's argument that the period between July and November constituted a further waiver of the requests for bargaining fails as a matter of law. The Union is not required to continue to ask "pretty please, bargain with us." The fact that the Union waited to file this charge until after its second request shows that it was being more than fair with this recalcitrant Employer and simply does not constitute a waiver of its right to engage in bargaining over this mandatory subject for bargaining.

FINDINGS OF FACT

1) The Rhode Island Department of Education School 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. In June 2009, High School Principal, Robert Littlefield, met with Portsmouth High School Computer Teachers, Greg Costa, Claire Dumas, and Elizabeth Patterson, as well as Union Vice President, Michelle Beaulieu, and presented them with a copy of the "Portsmouth High School Technology Plan 2009-2010.

3) At that meeting, Ms. Beaulieu did not request bargaining over the said Technology Plan.

4) On June 25, 2009, the Computer Teachers asked Mr. Littlefield for training and support for securing the MCAS Certifications.

5) On or about July 20, 2009, Cindy Perry, the then President of the NEA Portsmouth, sent an email to Susan Lusi, Superintendent of Schools, requesting bargaining over the "new requirements for the Computer Teachers at PHS."

6) Between the June 2009 meeting and the July 20, 2009, the NEA Portsmouth did not request bargaining regarding the Plan.

7) Between the July 20, 2009 email and November 2009, the NEA Portsmouth did not request bargaining regarding the Plan.

8) At the commencement of the 2009-2010 school year, no plan had been offered by Portsmouth High School, as to how the Computer Teachers could secure adequate training for the MCAS Certification.

9) On November 16, 2009, Patrick Crowley filed the Unfair Labor Practice Charge.

10) On November 17, 2009, Superintendent Lusi sent an email to Patrick Crowley stating that she did not believe that the changes, which were imposed, were subject to bargaining.

11) In March 2010, the school offered a training course in some of the content areas which Ms. Paterson took.

12) On April 13, 2010, the SLRB issued a complaint.

CONCLUSIONS OF LAW

1) The requirement for teachers to obtain MCAS Certification, as a condition of continued employment, is a mandatory term and condition of employment that requires bargaining with the Union.

2) The requirement to secure the MCAS Certification, as a condition of continued employment, was a material and substantial change to the terms and conditions of employment for Computer Teachers.

3) The Union did not waive its right to bargaining.

4) 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).

5) The Union has not 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).

ORDER

1) The charge of violation of R.I.G.L. 28-7-13 (3) is hereby dismissed.

2) The Employer is hereby ordered to cease and desist from requiring MCAS certifications as a term and condition of employment without first bargaining said requirement with the Union.

3) The Employer is hereby ordered to reimburse any Computer Teacher for any funds he/she may have expended in securing the MCAS Certifications to date, including but not limited to study guides, courses, materials, and mileage for travel to any course taken to prepare for the MCAS certification.

4) The Employer is hereby ordered to post a copy of this Decision and Order on all common area bulletin boards within the Portsmouth High School for a period no less than sixty (60) days; and to provide an actual physical copy of this Decision and Order to every teacher in the Portsmouth High School.

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK MONTANARO, MEMBER

ELLEN L. JORDAN, MEMBER

ELIZABETH S. DOLAN, MEMBER

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

Dated: November 20, 2012

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 5996

NOTE: BOARD MEMBERS GERALD GOLDSTEIN AND JOHN CAPOBIANCO WERE NOT PRESENT TO SIGN THE DECISION AND ORDER AS WRITTEN.

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- PORTSMOUTH SCHOOL COMMITTEE	CASE NO: ULP-5996

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-5996, dated November 20, 2012, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **November 20, 2012**.

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

Dated: November 20, 2012

By: _____
Robyn H. Golden, Administrator