

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-
RI DEPARTMENT OF EDUCATION

CASE NO: ULP-6017

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 Rhode Island Department of Education (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on August 18, 2010 by RIDE Professional Employees' Union, Local 2012, AFT CIO (hereinafter "Union."). The Charge alleged violations of R.I.G.L. 28-7-13 (1) and (3) and (10) as follows:

"That the Employer has violated RIGL 28-7-13 (1) (3) and (10) when the Commissioner of Education sent an email, on February 19, 2010, to all employees of the RIDE Professional Employees Union, Local 2012, AFT, which interfered with, restrained and coerced employees, in exercising their rights guaranteed by RIGL 28-7-12 by threatening employees that 'she will not hesitate to take action against any employee of RIDE who purposefully works to thwart RIDE policy.' This threat was issued in response to notices posted on the Local 2012 AFT workplace bulletin board that called for members of Local 2012, AFT to support terminated Central Falls teachers by attending a rally in support of the teachers, and by communication support for the terminated teachers to the Administration of the Central Falls School District, and interfered with the rights of Local 2012 AFT members to act in support of the terminated teachers of Central Falls, who are members of a sister-Union AFT, and RIFTHP affiliate of Local 2012, AFT. The Employer further violated members' rights under the Act by directing Local 2012 President, Karen Cooper, to remove noticed posted on the Local 2012 bulletin board that called for support for the terminated Central Falls Teachers, including through attendance at a rally and through expressions of support to the Administration of the Central Falls School District. Local President, Karen Cooper, was also told by management of RIDE that her visible attendance at the rally, which had been requested of all RIFTHP Local Presidents, would not be viewed positively by the Commissioner."

Following the filing of the Charge, the parties submitted written statements on October 4, 2010 and responses were filed on October 12, 2010. After the informal process had concluded, the Board reviewed the matter and issued a Complaint on January 18, 2011. The Employer received the Complaint on January 25, 2011 and filed an answer denying the charges and asserting affirmative defenses on January 31, 2011.

The matter was then set down for formal hearings, which commenced on March 15, 2011 and continued by agreement of the parties to April 7, 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. Thereafter, the parties took depositions of two (2) witnesses and submitted the Transcripts as part of the record. Post-hearing Briefs were filed on May 12 & 13, 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.

SUMMARY OF FACTS & TESTIMONY

At the hearing on March 15, 2011, the Union presented the testimony of Karen Cooper, a twenty-seven (27) year employee of the Department of Education and the President of Local 2012, AFT.¹ At the time of the charged incident, the Department of Education was in the process of completely re-organizing its structure and Ms. Cooper had been notified that her position was eliminated.² Also at the time of this incident, there was an on-going labor dispute between the City of Central Falls' Teachers Union and the Central Falls Board of School Trustees, which stemmed from the Superintendent's (Francis Gallo) decision to implement the "turn-around" model of school reformation, wherein she decided to fire all the teachers at Central Falls High School. This action caused national notoriety and significant displeasure among Union members, especially those in teachers' Unions. As a result, Marcia Reback, of the American Federation of Teachers, sent an email to "sister" Unions indicating that the teachers of Central Falls need support and implored Union members to attend a "rally" on February 23, 2010 at "Jenks Park", a public park located approximately a block from Central Falls High School. (Union Exhibit #1) In addition, on February 16, 2010 at 10:59 am, Ms. Reback also sent out a flyer and asked Union Presidents to either email or copy and distribute to their Unions' memberships. (See Union Exhibits #2 & #3). The flyer was entitled "Firing Teachers Instead of Helping Kids." The flyer instructed readers to "CALL SUPERINTENDENT FRANCIS GALLO at 401-727-7700 or send an email to GALLOF@CFSCHOOLS.NET AND TELL HER TO LISTEN TO TEACHERS AND DO WHAT IS RIGHT FOR STUDENTS." Ms. Cooper asked other Union members to copy the flyer (outside of the office) and distribute only to Union members inside the Department of Education's downtown building; she instructed that the flyers be posted on the Union bulletin boards located

¹ The Local represents approximately seventy (70) Department of Education employees from within the "Shepard" building, as well as employees in other work sites, such as the School for the Deaf, Channel 36, and the Department of Higher Education. (TR. 3/15/11, pgs. 21-22)

² However, as a "statutory status" employee, Ms. Cooper was not laid off and she eventually was provided with a new job within the Department.

on the fourth, fifth, and sixth floors of the RIDE building. (TR. 3/15/11 pgs. 25-26.) At 5:23 pm on February 16, 2010, Marvin Abney, the Interim Director of Human Services, sent an email to Martin Haggarty, copied to Ms. Cooper, Mr. David Abbott, Esq., Deputy Commissioner of Education, Carolyn Dias, Chief of Efficiencies - RIDE, Clark Green, Chief of Staff - RIDE, and Deborah Gist, Rhode Island Commissioner of Education, with the title "Union Note."

(Union Exhibit # 4) The email stated:

"Reference our meeting today regarding the alleged distribution of a note to Local 2012 members in the RIDE workplace. This is to inform you that the matter is under the advisement of the RIDE legal office for further recommendations as to any necessary next steps. Please be advised to consider Union/Legal Counsel, should subsequent inquiry or conversations with you concerning this matter be required."

An identical email was sent from Mr. Marvin Abney, Interim Director of Human Resources, to Dennis Juchnik, Controller-RIDE, at 5:25 pm. (Union Exhibit # 5). On direct examination, Ms. Cooper testified that she had not ever seen the phrase "be advised to consider Union/Legal Counsel, should subsequent inquiry or conversations with you concerning this matter be required" in any directive from Mr. Abney previously. (TR. 3/15/11, pgs. 28-29)

Ms. Cooper testified that she received a second flyer entitled "Injury To One - Is Injury To All" which she posted on the three (3) bulletin boards at RIDE. This flyer urged readers to come to a "Union Rally for Fairness" at Jenks Park on February 23, 2010 at 5:00 pm. The flyer also prominently stated: "The Commissioner of Education, Deborah Gist, and the Superintendent of Schools in Central Falls, Frances Gallo, have decided to fire all 74 teachers at Central Falls High School." The flyer also stated: "This outrageous act is being used simply to 'bust' the Union. They're starting in Central Falls - but where will it end - is your Union next?" (Union Exhibit #6) Ms. Cooper posted this flyer on the three (3) Union bulletin Boards within the RIDE building.

On the morning of February 19, 2010, Ms. Cooper received an email dated February 19, 2010 at 8:34 am, addressed to "ALLRIDE" from Deborah Gist, in her capacity as Commissioner of Education, which begins with the following sentence: "It has come to my attention that some of you have been approached to take an active role in the events transpiring in Central Falls."³ The email concludes with the following sentences: "To that end, please be assured that I will not hesitate to take action against any employee of RIDE who purposefully works to thwart RIDE policy. As members of RIDE, we each have a responsibility to represent this Agency and its mission at all times." (See Union Exhibit #7)

³ An "ALLRIDE" email is distributed to all personnel that work within the RIDE building, including all Union and non-Union employees, independent contractors, and temporary employees.

Ms. Cooper testified that she took Ms. Gist's email as a threat, especially since it included the first and last sentences. Ms. Cooper also felt as though she and/or others might be under surveillance. Ms. Cooper stated that she understood the email to mean that attendance at the upcoming rally was going to be interpreted as being against RIDE policy and that she was not free to attend the rally during her non-work hours. As a result, Ms. Cooper immediately contacted Ms. Reback, via email, and stated that she felt that Commissioner Gist had made a threat against her and the Union members for exercising their rights to free speech and right to assembly. She also stated that she noticed that one of the flyers was "pulled down" from the bulletin board and that she had replaced the same. Ms. Cooper asked Ms. Reback if she should be contacting the Local's legal representative and or the ACLU. (See Union Exhibit #8)

Later, on the morning of February 19, 2010, at 11:57 am, Ms. Cooper received an email marked "high importance" from her Supervisor, Paulajo Gaines, directing her to remove any "postings or signs related to RIDE interventions in any LEA." At the bottom of that email, the heading of Commissioner Gist's email is visible. (See Union Exhibit #9) Ms. Cooper responded to this email by requesting clarification as to what needs to be removed. In that email, she respectfully reminded her Supervisor of the Union's contractual right to post on the bulletin boards. (See Union Exhibit #10) Ms. Gaines responded that "she was referring to the two signs relating to the actions of Superintendent Gallo" and indicated that she was going to ask David Abbott, Deputy Commissioner, about the use of floor bulletin boards. (See Union Exhibit #11) This email was also copied to Ms. Gaines' Supervisor, Ms. MaryAnn Snider. Ms. Cooper did not remove the signs because she was waiting for Mr. Abbott to "weigh in." (TR 3/15/11 pg. 43)

On Saturday February 20, 2010, Ms. Cooper received an email from Carolyn Dias, the Chief of Operations - RIDE, inquiring as to whether Ms. Cooper wanted to have a meeting with Dave [Abbott] concerning the communication from Deborah related to CF [Central Falls]. (Union Exhibit #12) Ms. Cooper did not respond to this email, but she did forward it to Mike Mullane, her Union Representative, to ask what she should do. (TR. 3/15/11 pg. 46)

On Monday, February 21, 2010, Ms. Cooper had a meeting with Carolyn Dias, Marvin Abney, Mike Mullane, and others concerning collective bargaining matters. Upon conclusion of the formal meeting, an informal discussion about Commissioner Gist's email arose. Ms. Cooper testified that Michael [Mullane] was pressing for an answer as to clarification of the email concerning whether or not RIDE employees could attend the rally. Ms. Cooper testified that Ms. Dias stated that she did not see a problem with Union members attending the rally. However, when Ms. Cooper asked about being able to be up on the stage with Jane Sessums

at the rally, in support of the sister Union, Ms. Dias reportedly laughed and stated that she didn't think that the Commissioner would "take too kindly" to that. (TR. 3/15/11, pg. 48)⁴

On Tuesday, the February 23, 2010, Ms. Cooper received a copy of an email sent by Michael Mullane, at 1:46 pm, to Carolyn Dias seeking a confirmation of the previous day's conversation concerning the rally and the fact that it would be all right for Union members to attend the 5:00 pm rally, without being subject to discipline. (See Union Exhibit #13) By 5:00 pm, Ms. Cooper had not received any written assurances that it was all right to attend the rally and she did not do so. She stated that she did not go because she was in fear for her job. (TR. 3/15/11 pg. 49) Ms. Cooper also stated that she ultimately received a copy of an email dated February 23, 2010, sent at 8:49 pm, from Ms. Dias which stated:

"Mike: the intent of the e-mail was not to prohibit members from going to any specific Union event after hours as long as they are not going in the capacity of a RIDE employee. As discussed, we should meet with Dave Abbott to assure that we all have an understanding of this issue from both perspectives. I also want to confirm that at this time there are no plans to discipline 2012 members due to the distribution of the Central Falls' note last week. I will have a meeting scheduled so we can meet on this very important issue.

Ms. Cooper testified that no meeting was ever called specifically to discuss this topic and no written follow-up from RIDE or Commissioner Gist was ever issued. (TR 3/15/11 pg. 52)

The Union's second witness, Mr. Michael Mullane, Field Representative, testified at the second hearing on April 7, 2011. Mr. Mullane testified that he reviewed Commissioner Gist's email at the request of Karen Cooper, and found the content to be concerning. He testified that he felt the first sentence ["it has come to my attention that some of you have been approached to take an active role in the events transpiring in Central Falls"] had an "air of surveillance, as if employees were being watched" (TR 4/7/11. pgs. 7-8) Mr. Mullane was also concerned that the email referenced protocols and processes without identifying them specifically and that the Commissioner stated that "she would not hesitate to take action against any employee who purposefully works to thwart RIDE policy." (TR 4/7/11. pgs. 8-9) Mr. Mullane further described the Unions concerns as follows:

"The Commissioner did not specify what protocols, processes, policy that she was talking about, and this email was written right around the time our members had been notified of a rally that was scheduled in Central Falls for February 23 in support of teachers in Central Falls who had been notified that they were being fired. That concerned me because we felt that our members had the right to attend such a rally in support of these teachers. Those teachers in Central Falls belonged to a sister affiliate of the Rhode Island Federation of Teachers and Health Professionals. It also concerned me because this was occurring at a time when the Department of Education was undergoing a total reorganization, and as a result of that reorganization, there were several members of ours whose employment status at the Department was uncertain. Their positions had been eliminated, and it hadn't yet been indicated there it was that they would be working or whether there would be positions for them within the Department. It included among those people whose status was uncertain was the Local

⁴ Jane Sessums is the President of the Central Falls Teachers' Union.

President, Karen Cooper. That concerned me. So, we had people that were vulnerable because of the reorganization. And, it also concerned me because we were close to concluding our contract negotiations with the Department, contract negotiations that had gone on for well over a year, and elements of those negotiations included job protection such as in the layoff clause that we hadn't yet secured and reorganization rights that we hadn't yet secured that other state employee Unions had secured. So, all of this, this was a very tenuous time for our Members at the Department of Education." (TR. 4/7/11, pgs. 9 -10)

Mr. Mullane went on to testify that at the conclusion of the collective bargaining meeting held on February 22, 2010, he told Carolyn Dias that the Commissioner's February 19, 2010 email stood "as a threat" from the Union's perspective to bargaining unit members, should they decide to attend the rally. Mr. Mullane told Ms. Dias that the email really needed to be retracted because the members should have the right to attend the rally, free from the fear of reprisal. (TR 4/7/11, pgs. 11-12) Mr. Mullane testified that Ms. Dias stated that she did not think that the email said that people would be disciplined if they attended the rally. Mr. Mullane told Ms. Dias that her verbal opinion was not going to be enough; and that if it was true that people could attend the rally, without fear of discipline, then the Commissioner needed to make that clear. Mr. Mullane went on to testify that he told Ms. Dias that Marcia Reback was asking the Presidents of all the Locals to stand on the podium at the rally, in support of Jane Sessums. According to Mr. Mullane, Ms. Dias "smiled" and stated that she did not think the "Commissioner would look favorable upon seeing Karen [Cooper] standing behind Jane Sessums on the stage at this rally." (TR. 4/7/11, pg. 13)

Mr. Mullane testified that he sent an email the following day, again, asking for written clarification that attendance at the rally by Union members would not result in discipline; and that he did not receive a reply to this email until late that evening after the rally was over. (Union Exhibit #13 and Exhibit #14) The evening email went only to Mike Mullane, Karen Cooper, and David Abbott, and not to the entire membership, as requested by the Union. Mr. Mullane stated that this email fell far short of what he was seeking for several reasons: (1) It was too late, the rally had ended; (2) It was only sent to a few people, not the ALLRIDE email list; (3) It was worded too generally; it did not say that people could attend the rally; and (4) It held the possibility of discipline in the future.

Mr. Mullane further testified that approximately ten (10) days later, he was at a meeting with David Abbott and this topic of discussion came up. Mr. Mullane stated that Mr. Abbott agreed that there should be clear definition as to what the off-duty rights of employees were in regards to their obligations as employees. (TR. 4/7/11 pg. 19) On or about March 10, 2010, Mr. Mullane sent Mr. Abbott a follow-up email reminding Mr. Abbott that he was supposed to provide clarification. (Union Exhibit #17) Mr. Abbott responded by thanking Mr. Mullane for the

reminder, but did not provide the clarification. (Union Exhibit #17) On May 21, 2010, Mr. Mullane, again, forwarded his email of March 10, 2012 to Mr. Abbott inquiring as to a response. Mr. Abbott responded on June 10, 2010, by referring Mr. Mullane to George Muksian, Esq., the new Legal Counsel for RIDE. Mr. Abbott informed Mr. Mullane that he [Abbott] had requested that Attorney Muksian follow-up on the matter. (See Union Exhibit # 18) Mr. Muksian did not follow-up with Mr. Mullane on the matter.

On cross-examination, Mr. Mullane was asked whether he really expected a response from Carolyn Dias to his February 23, 2010, 1:45 pm email, before the rally began at 5:00 pm that day; and he replied that he did. When Mr. Mullane was asked why he did not call Ms. Dias that afternoon, he responded:

“Because I knew that Carolyn was very prompt in her receiving email, whether it was receiving email at work or if she was not at her desk at the Department of Education, through her mobile device. And, so based upon my experience with Carolyn receiving email communication in a prompt fashion, I had every expectation that she would have had the ability to receive this and act on this in a timely manner.” (TR 4/7/11, pg. 52)

In addition, on cross-examination, Mr. Mullane acknowledged that his 1:45 pm email was sent to Carolyn Dias and copied only to Karen Cooper. Mr. Mullane also acknowledged that he did not request an answer by a specific timeframe, but rather, “as soon as possible.” (TR 4/7/11 pg. 56)

The Employer began presenting its case at the April 2011 hearing and presented the testimony of David Abbott, Esq., who serves as General Counsel for the Rhode Island Department of Education, (DOE), the Rhode Island Deputy Commissioner for Education, and other positions as well. Mr. Abbott testified that he has a close working relationship with the Commissioner and that he is in constant contact with her throughout the day. (TR 4/7/11, pg. 64) Mr. Abbott testified as to the Department’s protocols in dealing with troubled schools, as required by a Federal program entitled “School Improvement Grant.” He indicated that School Superintendents may choose from one (1) of four (4) approved “models” for school reform and that the Superintendent’s decision is an entirely “local” decision in, which the DOE has no say. (TR 4/7/11, pgs. 68, 70) Mr. Abbott testified that in order for Superintendents to maintain local control over the schools, it is very important for DOE to have a “rigid process” in that decision making process, so that a Superintendent is not unduly influenced by parties outside the District. Mr. Abbott also testified that he had been told that a flyer had been distributed that specifically urged Local 2012 members to contact the Central Falls Superintendent, Fran Gallo, and that he, after hearing the contents of the flyer over the phone, drafted an email response for the Commissioner. (TR. 4/7/11 pgs. 77-78) He was unable to say with certainty that the email that Commissioner Gist actually sent was the one he drafted.

Mr. Abbott testified that when he drafted the email for the Commissioner, it was not his intention to restrict the attendance of Local 2012 members at the rally or to impose sanctions against anyone who attended the rally. (TR 4/7/11, pg. 87) Mr. Abbott further testified that his reference to “actions” that could be taken against employees referred to any direct contact by RIDE employees with the Superintendent or the Administration of the Central Falls School District. (TR 4/7/11, pg. 87)

On cross-examination, Mr. Abbott testified that he believed that it was legal, under State Labor Law, to tell employees that they may not communicate with an Administration Official of a School District without first getting permission from the Commissioner of Education, if it involves the matter of protocols. (TR. 4/7/11, pg. 90) Mr. Abbott also testified that even employees of RIDE, who have no direct involvement in the Central Falls matter, could be required to get permission from their boss before commenting to any [Central Falls] Administration Official. (TR. 4/7/11, pg. 91) He also indicated that having a face-to-face conversation, sending a letter or signing a petition, could all be considered as prohibited “interacting” with Central Falls Administration Officials. (TR. 4/7/11, pgs. 91-92) On further cross, Mr. Abbott said that while attendance at a rally would not be prohibited, chanting, such as “Don’t fire teachers, don’t fire teachers” could have been a problem. On further cross, Mr. Abbott stated that it was not the content of any communication that would be prohibited; it was the act of engaging in the communication with Central Falls Officials without express permission from the Commissioner. Mr. Abbott acknowledged that he knew nearly right away or at least the same day, after the email was sent, that the Union considered the email a threat. (TR 4/7/11 pgs. 98-99) When asked if he had relayed the Union’s concern to the Commissioner, Mr. Abbott responded: “I think you can---it is fair for you to assume that I communicated the conversation I had with Mr. Mullane to the Commissioner.” (TR 4/7/11 pg. 99) Finally, Mr. Abbott confirmed that there was never any written retraction or clarification to “ALLRIDE” concerning the original email of February 19, 2010.

The Employer concluded its case outside of the formal hearing process by conducting depositions of Margaret Santiago, Human Resources Associate for the DOE and Carolyn Dias, the Chief of Fiscal Integrity and Statewide Efficiencies for DOE. Ms. Santiago testified that she attended a meeting with Marvin Abney, in which she brought in Union members Dennis Juchnik and Martin Haggarty, to question them about where the flyers were printed and who was placing them on employee desks. (Santiago Depo, pgs. 8-9) She also testified that Local 2012’s Contract was vague about the process of discipline, but that Council 94’s disciplinary process was very detailed and progressive. (Santiago Depo. pgs. 10-11) Ms. Santiago also

acknowledged that the DOE was undergoing reorganization during February 2010 when Commissioner Gist's email was sent; and that Ms. Cooper's position was in the process of having duties being re-assigned. (Santiago Depo. p 13)

Ms. Dias testified that she did say that she did not think the Commissioner would be happy if Ms. Cooper stood on the stage at the Central Falls rally; but that statement was totally her own opinion and that she was not expressing an opinion of the Commissioner. (Dias Depo. pg. 8) She further testified that it was very clear at the February 22, 2010 meeting with Mike Mullane and Karen Cooper that there would be no discipline if any Union member attended the Central Falls rally; and she referenced the fact that Union members had also been to a rally in Providence. Ms. Dias further testified that she did not see Mr. Mullane's email sent during the afternoon of February 23rd until later that evening, because she usually does not review her emails until between 8:00 pm and 11:00 pm in the evenings. (Dias Depo. pg. 12)

On cross-examination, Ms. Dias clarified her earlier testimony and stated that while she does respond to some emails during the day, they would typically be ones that she receives from the General Assembly, the State Budget Officer or any members of the Board of Regents, and the Commissioner; and that the more routine ones are the ones she will answer during the evening. Upon further cross-examination, Ms. Dias was shown an email that she sent to Mr. Mullane at approximately 4:34 pm; about one-half hour before the rally, concerning a memorandum of understanding. (Dias Depo. pg. 33) Upon further cross, Ms. Dias stated that she is very selective on emails during the day and that this particular matter had significant urgency. (Dias Depo. pg. 33) She also stated that they were very busy and focused on these issues and that Mr. Mullane's email was not marked urgent. She also stated that she did not perceive urgency because she had communicated to the Union the day before that there would be no discipline against personnel that attended the rally. (Dias Depo. pgs. 34-35)

On further cross-examination, Ms. Dias testified that there was a difference between attending the rally in one's own personal capacity (which would be permissible) and attending the rally in an "official capacity" (which would not be permissible.) On cross, Ms. Dias was asked why she stated in her email that the "intent" of Commissioner Gist's email was not to prohibit members from going to the rally; and that "at this time" there is not a plan to discipline members for distributing the Central Falls flyer; as well as why she did not just state categorically that there would be no discipline. She responded that it was just a "choice of words", but that there was no intent to discipline. Ms. Dias also stated that although her email of February 23, 2010 suggested that a meeting to discuss "this very important issue" be conducted, it never occurred.

She also stated that she believed that the Employer "had reached out." She also acknowledged that there has never been any retraction of Commissioner Gist's email.

POSITION OF THE PARTIES

The Union's position in this case is that Commissioner Gist's email was intended to and did interfere with employees' rights to freely post notices on the Union bulletin board and to attend a Union rally, to show solidarity with a sister Union. The Union argues that the e-mail's plain language, its timing, the Department's contemporaneous actions, and the fact that both the Union perceived it to be threatening and that management understood the rationale for that concern, all support a finding that an unfair labor practice was committed. Finally, the Union submits that the Employer's argument that the filing of the charge was untimely is simply without merit, because the statute of limitations for unfair labor practices is six (6) months, not 180 days, as argued by the Employer.

The Employer has argued orally and now in writing that the within Complaint should be dismissed on procedural grounds for the Board's failure to have an informal hearing, as required by R.I.G.L. 28-7-9 (b) (5); for convening the formal hearing more than sixty (60) days after the filing of the charge, and because the Employer was not "served" with a copy of the Complaint until 200 days after the actions alleged in the Complaint. The Employer also argues that the matter should be dismissed on substantive grounds in that the Union failed to meet its burden of proof and that the testimony and evidence failed to establish by a fair preponderance of the credible evidence that there were any violations of R.I.G.L. 28-7- 12 (3) or (10).

DISCUSSION

We begin our review of this case by responding to and denying the Employer's Motion to Dismiss on procedural grounds. We will first address the claim that the charge was filed in an untimely manner. The Board's Rules and Regulations provide:

The Unfair Labor Practice Charge shall be typewritten and submitted on legal size paper (8.5 x 14 in size). The petitioner shall submit an original, signed in blue ink, with the Board. Petition forms will be gratuitously supplied by the Board, upon request, or may be obtained on the Board's website at (www.dlt.ri.gov/lrb). Charges must be filed with the Board within six (6) months from the date of knowledge of the alleged unfair labor practice. [Rule 9.01.2]

Commissioner Gist's email was issued on February 19, 2010 and the charge was filed on August 18, 2010, just inside the six (6) month window statute of limitations. The plain language of the rule is six (6) months, not 180 days as alleged by the Employer. In addition, the Board's rule does not have a "service" requirement as is found in Section 10(b) of the National Labor Relations Board's rules. Thus, the Employer's arguments as to the timeliness and service of the Complaint are unfounded and its Motion to Dismiss on that basis is denied.

The Employer also moved to dismiss the Complaint on the basis that no “informal hearing” was conducted, in the manner that the Employer expected. The whole point of informality of this level of the process is to relieve the Board of the necessity of sitting through the initial vetting of the charge, a task which is delegated to the Board’s Administrator and staff. Some years ago, the Board used to have its Administrator or Agent, as the case may be, conduct in-person, informal hearings. As we are all painfully aware, the State FTEs have been reduced and the Labor Board has not been spared in that regard. The Board’s Administrator has full authority to conduct the informal proceedings in a manner that best suits the Board’s workload at a given time and the facts of a particular case. In this case, the issue was a “writing,” which was directly quoted in the submission. There was not a lot for anyone to talk about in person! The Administrator was well within the directives of the Board to conduct this informal proceeding by requesting written statements from the parties. Finally as to the timeframes set out in the Statutes cited by the Employer, the Board has been through this argument on numerous occasions and it is our position that the timeframes set forth therein, are directory and not mandatory, as they are designed to secure order and dispatch. A Justice of the Rhode Island Superior Court has previously upheld this position. State of Rhode Island, Department of Administration vs RI State Labor Relations Board, Sup. Ct. 97-4890 (J. Cresto) Therefore, the Employer’s Motion to Dismiss on this basis is denied, as well.

As to the substance of the case, the Board finds that there can be no question that Commissioner Gist’s February 19, 2010 email, within the context of the times, indeed had an overtly threatening tone to it. Just a few days prior, on February 16, 2010, the Union had posted flyers on its bulletin boards in support of the Central Falls Teachers that asked Union members to call or email Central Falls Superintendent, Frances Gallo, to ask her “to listen to teachers and do what is right for students.” By the end of the day on the 16th, two (2) Union officials had been interrogated on the flyers and had received an email with following admonishment: “please be advised to consider Union/Legal Counsel, should subsequent inquiry or conversations with you concerning this matter be required.” This email was copied to Commissioner Gist. Shortly thereafter, a second flyer was posted on Union bulletin boards within the Department of Education with the phrase “Injury to One - Is Injury to All.” This particular flyer stated:

The Commissioner of Education, Deborah Gist, and the Superintendent of Schools in Central Falls, Frances Gallo, have decided to fire all 74 teachers at Central Falls High School.” The flyer also stated: “This outrageous act is being used to simply ‘bust’ the Union. They’re starting in Central Falls- but where will it end- is your Union next”?

Commissioner Gist had been made aware then of the first flyer and the admonishment to the two (2) Union officials. Despite the admonishment to the Union officials, yet another Union flyer

got posted on bulletin boards right there in the Department of Education Building; this one taking direct aim at her personally. After this flyer was posted, it was not long until Commissioner Gist's February 19, 2010 "ALLRIDE" email was issued. This email begins with the phrase "it has come to my attention that some of you have been approached to take an active role in the events transpiring in Central Falls," a clear reference to the Union flyers urging support for the Union brothers and sisters in Central Falls. The email goes on to state that "no member of the RIDE staff should be corresponding or interacting with the Administration of the Central Falls School District, during this process, without my knowledge and express permission." This clearly amounts to what is colloquially known as a "gag order." She goes on to say that "while she doesn't expect everyone to agree with all her decisions, she does "fully expect" that they will (1) adhere to our own protocols and processes, and (2) do nothing to impede the work of the Department as established by the Commissioner [Gist] and/or the Board of Regents." She goes on to say: "To that end, please be assured that I will not hesitate to take action against any employee of RIDE who purposefully works to thwart RIDE policy. As members of RIDE, we each have a responsibility to represent this agency and its mission at all times."

In the absence of any clarifying testimony from the Commissioner who elected not to appear before this Board or provide any testimony in any other format (ie, a deposition), in this Board's opinion, these last several sentences are clearly intended to deliver a direct and threatening warning to all RIDE employees; even those who have no role, whatsoever, in implementation of the Central Falls "transformation" or even employees who may also happen to be parents of students within the Central Falls School System, to be quiet and to stand-down. Ms. Gist's language is broad and all-encompassing - "do nothing." In fact, it could be viewed as intentionally vague, "do nothing to impede the work of this Department." What does that exactly mean?

During cross-examination of Deputy Commissioner David Abbott, he was asked a series of hypotheticals, as to what *he* thought might be allowed and what might not be allowed under the "do nothing" banner. When asked if an employee who would hypothetically run into the Central Falls Superintendent in the grocery store, who wanted to say "Fran, do the right thing for the kids", would have to first ask the Commissioner if he/she was allowed to speak, Mr. Abbott said that was in fact the directive of the email. His testimony was clear; any and all RIDE employees would have to tell the Commissioner first what he/she wanted to say and then would have to get her permission, regardless of whether or not he/she was involved in any way with the Central Falls matter.

When asked what “interacting” meant in the context of the email, Mr. Abbott was clear that it would include having a face-to-face conversation and sending letters. He was not so sure about signing a petition, especially if it were done anonymously.⁵ However, the Employer’s official position at the hearing was that the email said nothing about not going to a rally, so people should not have construed it that way at all. So, when the Deputy Commissioner cannot answer hypotheticals posed to him about what the content meant, why is it that the rank and file RIDE employees were somehow supposed to intuitively divine that this email that said “do nothing” did not prohibit them from attending a rally? Furthermore, although Mr. Abbott testified that there was not an intent to prohibit employees to “attend the rally”, he was not at all comfortable with the idea that the employees could carry signs or join in chanting, such as “Don’t Fire The Teachers.” The rights of employees set forth under the Rhode Island State Labor Relations Act, R.I.G.L. 28-7-12 states:

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion from any source. Nothing contained in this chapter shall be interpreted to prohibit employees and Employers from conferring with each other at any time; provided, that during that conference there is no attempt by the Employer, directly or indirectly, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this section.

As noted by the Union in its thorough Brief on the matter, “mutual aid and protection” encompasses activities in support of other employees with a common interest. *Fort Wayne Corrugated Paper Co. v N.L.R.B.*, 111 F.2d 869, 874 (CA7 1940) enf’g *Cayuga Linen & Cotton Mills, Inc.* 11 N.L.R.B. 1, 4-5 (1939) (right to assist in organizing another Employer’s employees) *Washington State Service Employees*, 188 N.L.R.B. 957, 959 (1971) (right to demonstrate in support of another Employer’s employees) and *Yellow Cab, Inc.* 210 N.L.R.B. 568, 569 (1974) (right to distribute literature in support of another Employer’s employees).

In this Board’s opinion, the timing of the Commissioner’s message, coupled with the wording therein, gives rise to an inference, one that has not been effectively rebutted at hearing; that the Commissioner fully and forcefully intended to prohibit RIDE employees from attending or being involved in the Central Falls rally in any way, shape or form, whatsoever. Further, we believe that this language was purposefully intended to quell the Union-based activities (flyers) within the confines of the Commissioner’s own domain and to chill the rights of the RIDE employees to engage in concerted activities or other mutual aid and protection, in violation of R.I.G.L. 28-7-12.

⁵ The Board is not sure how a petition gets signed anonymously, perhaps with a pseudonym.

Further compounding the problem in this case, however, was the fact that the Union asked for clarification, in writing, on this issue so that its members could attend the rally without fear of reprisal or retribution; and the Employer wholly failed to provide the same in a timely manner. On Monday, February 22, 2010, Union Representative, Michael Mullane, met with Ms. Cooper, the Union's Local President, Ms. Dias, and others from RIDE to discuss the on-going reorganization and contractual issues. At the end of that meeting, Mr. Mullane told Carolyn Dias that the Commissioner's February 19, 2010 email stood "as a threat" from the Union's perspective to bargaining unit members should they decide to attend the rally. Ms. Dias told him that is not what the email meant; and Mr. Mullane advised her that if that was the case, the Commissioner needed to make that clear in some form of writing. The Employer has argued that Ms. Dias' verbal assurances, that attendance at the rally was not prohibited, should have been sufficient for the Union and that it was unreasonable for the Union to insist that a communication be in a specific form. In other circumstances, the Board might be inclined to agree that for a Union to insist on a specific form of communication is unreasonable. However, we do not believe the facts presented herein have established one of these situations.

The Commissioner's email was specifically in response to Union members' concerted activity and was designed to shut it down. The Commissioner is a mighty force to reckon with and it is unfair to expect rank and file employees to take on or challenge the directive of "The Boss." So, to ask that the clarification come from the Commissioner was not too much to ask, not under the circumstances presented. In addition, this was not simply a petulant knee-jerk demand by the Union; very legitimate concerns about what was permissible were raised and discussed with higher-level RIDE Officials who had acknowledged that the email needed clarification.

The Employer also argues that Ms. Dias did respond to Mr. Mullane's email of February 23, 2010, when she first opened it on the night of the rally, after the rally was over. This particular testimony was taken via deposition, so the Board cannot fully evaluate this witness's credibility. However, a close examination of her testimony in this regard leaves the Board with less than full confidence in the answers given. Initially, she testified that at that time she did not often review her emails until late in the evening because her workday was so busy; so she had not seen the 1:46 pm email from Mr. Mullane. On cross-examination, this testimony changed somewhat and she stated that she would sort of pick and choose which emails to read during the day; deeming those from the General Assembly and the Commissioner to be worthy of opening during the day and leaving others until the evening. However, the testimony and evidence further revealed that Ms. Dias received and then forwarded an email to

Mr. Mullane at 4:34 in the afternoon, with the subject being the “revised Tentative Agreement”, a document that all parties had been working on and been waiting for. The Board just finds it hard to believe that with all the urgency between the parties on this matter, that Ms. Dias would not have opened any and all emails from Mr. Mullane that afternoon.

Further, even after the rally was over, the Union continued for months to try to find out what the “do nothing” language and the scope of the email meant. The Deputy Commissioner, who agreed that things should be clarified and even thanking the Union at one point for the reminder, validated the Union’s concerns. Nevertheless, no clarification was ever forthcoming, not by the Commissioner, not by the Deputy Commissioner, and not by Legal Counsel. It seems pretty clear to this Board that the Commissioner never had any intention of clarifying her position and that the Deputy Commissioner and others were “taking the fall” by trying to defend the Department’s actions over the flyers and the Commissioner’s email.

In any event, the Employer’s continued refusal to address the matter continued the threat of intimidation for months when this should have been resolved prior to the rally. The Employer’s Representative agreed that the email should be clarified and yet did nothing; leaving employees subject to a chilled environment when it came to protected and concerted activities. The Board finds that this type of obstinate behavior to be violative of R.I.G.L. 28-7-13 (10).

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.
- 3) On or about February 16, 2010, Union members printed and posted flyers on the Union bulletin boards that said: “CALL SUPERINTENDENT FRANCIS GALLO at 401-727-7700 or send an email to GALLOF@CFSSCHOOLS.NET AND TELL HER TO LISTEN TO TEACHERS AND DO WHAT IS RIGHT FOR STUDENTS.”
- 4) At 5:23 pm on February 16, 2010, Marvin Abney, the Interim Director of Human Services, sent an email to Martin Haggarty, copied to Ms. Cooper, Mr. David Abbott, Esq., Deputy Commissioner of Education, Carolyn Dias, Chief of Efficiencies - RIDE, Clark Green, Chief of Staff - RIDE, and Deborah Gist, Rhode Island Commissioner of Education with the title “Union Note.” The email stated: “Reference our meeting today regarding the alleged

distribution of a note to Local 2012 members in the RIDE workplace. This is to advise you that the matter is under the advisement of the RIDE Legal Office for further recommendations as to any necessary next steps. Please be advised to consider Union/Legal Counsel, should subsequent inquiry or conversations with you concerning this matter be required.”

- 5) Shortly thereafter, a second flyer was posted on Union bulletin boards within the Department of Education with the phrase “Injury to One - Is Injury to All.” This particular flyer also stated: The Commissioner of Education, Deborah Gist, and the Superintendent of Schools in Central Falls, Frances Gallo, have decided to fire all 74 teachers at Central Falls High School.” The flyer also stated: “This outrageous act is being used to simply ‘bust’ the Union. They’re starting in Central Falls - but where will it end - is your Union next”?
- 6) On the morning of February 19, 2010, Ms. Cooper received an email dated February 19, 2010, at 8:34 am, addressed to “ALLRIDE” from Deborah Gist, in her capacity as Commissioner of Education, which begins with the following sentence: “It has come to my attention that some of you have been approached to take an active role in the events transpiring in Central Falls.”⁶ The email concludes with the following sentences: “To that end, please be assured that I will not hesitate to take action against any employee of RIDE who purposefully works to thwart RIDE policy. As members of RIDE, we each have a responsibility to represent this agency and its mission at all times.”
- 7) On Saturday, February 20, 2010, Ms. Cooper received an email from Carolyn Dias, the Chief of Operations - RIDE, inquiring as to whether Ms. Cooper wanted to have a meeting with Dave [Abbott] concerning the communication from Deborah related to CF [Central Falls]. (Union Exhibit #12) Ms. Cooper did not respond to this email but she did forward it to Mike Mullane, her Union Representative to ask what she should do.
- 8) On Monday, February 21, 2010, Ms. Cooper had a meeting with Carolyn Dias, Marvin Abney, Mike Mullane, and others concerning collective bargaining matters. Upon conclusion of the formal meeting, an informal discussion about Commissioner Gist’s email arose. Ms. Cooper testified that Michael [Mullane] was pressing for an answer as to clarification of the email concerning whether or not RIDE employees could attend the rally. Ms. Cooper testified that Ms. Dias stated that she did not see a problem with Union members attending the rally. However, when Ms. Cooper asked about being able to be up on the stage with Jane Sessums at the rally, in support of the sister Union, Ms. Dias

⁶ An “ALLRIDE” email is distributed to all personnel that work within the RIDE building, including all Union and non-Union employees, independent contractors and temporary employees.

reportedly laughed and stated that she didn't think that the Commissioner would "take too kindly" to that.

- 9) On Tuesday, the February 23, 2010, Ms. Cooper received a copy of an email sent by Michael Mullane, at 1:46 pm, to Carolyn Dias seeking a confirmation of the previous day's conversation concerning the rally and the fact that it would be all right for Union members to attend the 5:00 pm rally, without being subject to discipline.
- 10) By 5:00 pm, Ms. Cooper had not received any written assurances that it was all right to attend the rally and she did not do so. She stated that she did not go because she was in fear for her job.
- 11) Ms. Cooper also stated that she ultimately received a copy of an email dated February 23, 2010, sent at 8:49 pm, from Ms. Dias which stated: "Mike: the intent of the e-mail was not to prohibit members from going to any specific Union event after hours as long as they are not going in the capacity as a RIDE employee. As discussed, we should meet with Dave Abbott to assure that we have an understanding of this issue from both perspectives. I also want to confirm that at this time there are no plans to discipline 2012 members due to the distribution of the Central Falls' note last week. I will have a meeting scheduled so we can meet on this very important issue."
- 12) Ms. Cooper testified that no meeting was ever called specifically to discuss this topic and no written follow-up from RIDE or Commissioner Gist was ever issued.

CONCLUSION 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 (3) and (10).

ORDER

- 1) The Employer is hereby ordered to post a copy of this decision on all common area bulletin boards within the Department for a period of no less than sixty (60) days.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni

WALTER J. LANNI, CHAIRMAN

Frank J. Montanaro

FRANK MONTANARO, MEMBER

Ellen L. Jordan

ELLEN L. JORDAN, MEMBER

Elizabeth S. Dolan

ELIZABETH S. DOLAN, MEMBER

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

Dated: DECEMBER 5, 2012

By: Robyn H. Golden
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 6017

NOTE: BOARD MEMBERS JOHN CAPOBIANCO AND GERALD GOLDSTEIN 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- :

CASE NO: ULP-6017

RI DEPARTMENT OF EDUCATION

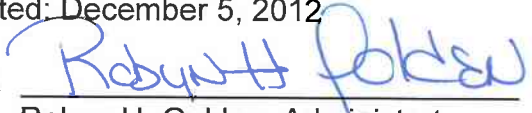
**NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12**

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. ULP-6017, dated December 5, 2012, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 5, 2012**.

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

Dated: December 5, 2012

By:


Robyn H. Golden, Administrator