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- STATE OF RHODE ISLAND - DEPARTMENT OF CORRECTIONS	CASE NO: ULP - 6073

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 State of Rhode Island Department of Corrections (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated January 11, 2012, and filed on January 12, 2012, by the Rhode Island Probation and Parole Association (RIPPA) (hereinafter "Union").

The Charge alleged:

> "The employer has violated RIGL 28-7-13(3), 28-7-13(6) and 28-7-13(10) by unilaterally changing the work schedule of bargaining unit employees without negotiation with the Rhode Island Probation and Parole Association, the certified bargaining agent.
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> The employer, by and through its agent, Assistant Administrator Shelley Cortese, has violated RIGL 28-7-13(2), RIGL 28-7-13(5) and RIGL 28-7-13(10) by threatening to abolish the position of a bargaining unit member for contesting the addition of additional duties to his workload."

Following the filing of the Charge, the parties each submitted written position statements on January 30, 2012, as part of the Board's informal hearing process. Neither the Union nor the Employer filed a response to each other's statement. On April 26, 2012, the Board issued an Amended Complaint[1] alleging: (1) That the Employer has violated R.I.G.L. 28-7-13(3) (6) and (10) by unilaterally changing the work schedule of bargaining unit employees without negotiation with the Rhode Island Probation and Parole Association, the certified bargaining agent; and (2) That the Employer has violated R.I.G.L. 28-7-13(2) (5) and (10), by and through its agent,

[1] The Board's Complaint was originally issued on March 22, 2012. Due to a typographical error in the Notice of Hearing, the Board issued an Amended Complaint on April 26, 2012.

Assistant Administrator Shelley Cortese, by threatening to abolish the position of a bargaining unit member for contesting the addition of additional duties to his workload.

The Employer failed to file an Answer and the matter was set down for formal hearing on May 10, 2012. The formal hearing took place over the course of two (2) hearing dates, May 10, 2012 and May 29, 2012. Representatives from the Union and the Employer were present at the hearings and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. A post hearing brief was filed by the Union on October 10, 2012 and by the Employer on October 12, 2012.[2] In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony, evidence, oral arguments, and written briefs submitted by the parties.

SUMMARY OF FACTS AND TESTIMONY

Rhode Island Probation and Parole Association (RIPPA) represent Probation and Parole Officers at the Department of Corrections. The issues in this case involve the assignment of court coverage duties to Geno Piccoli, a Probation and Parole Officer employed by the Department of Corrections; and a member of the Union. The issues stem from the fact that Probation and Parole Officer Piccoli's initial job posting did not include court coverage. A number of years ago, the issue of court coverage assignments were the subject of arbitration and a subsequent settlement agreement dated August 13, 2009. (Joint Exhibit 2, hereinafter, "Settlement Agreement"). Pursuant to the Settlement Agreement, Geno Piccoli would be required to provide court coverage not more than once in a 4-week cycle. (Joint Exhibit 2). By its own terms, the Settlement Agreement was to expire after six (6) months, unless extended. (Joint Exhibit #2). The Settlement Agreement was never extended. (TR #1 pg. 79, TR #2 pg. 31).[3]

Although the issue of Geno Piccoli's court coverage assignments has a long history, the time period relevant to the instant proceeding is September 2011 until January 2012, when the Charge was filed. Beginning in September 2011, Rebecca Adams, then interim President of the Union, sought to set up a meeting with Richard Delfino, Administrator of Probation and Parole within the Department of Corrections, to discuss various issues, including Probation and Parole Officer,

[2] Post hearing briefs were due on July 23, 2012. After multiple requests for extensions by the Employer, and no objection thereto by the Union, post hearing briefs were ultimately due and filed on October 12, 2012.

[3] References to transcripts shall be deemed a follows: Formal Hearing of May 10, 2012 (TR #1); Formal Hearing of May 29, 2012 (TR #2).

Geno Piccoli's court coverage assignments. (TR #1 pg. 22). Ms. Adams never did meet with Mr. Delfino, but on November 17, 2011, a meeting between the Union and Employer took place (TR #1 pg. 28). Present at that meeting were Adams (Union President) and Robert Baxter (Union Vice President), Shelley Cortese (Assistant Administrator of Probation and Parole) and Donna Broccoli (Administrative Officer). (TR #1 pg. 28). Ms. Adams testified that at that meeting, she raised the issue of Mr. Piccoli's court coverage assignments. (TR #1 pg. 28). In response, Ms. Cortese stated that she would "take [it] under advisement (TR #1 pg. 44, Respondent's Exhibit 1).

A subsequent meeting took place.[4] Again, Ms. Adams raised the issue of Geno Piccoli's court coverage assignments. In response, Ms. Adams testified, that Ms. Cortese stated, "maybe we should just abolish his position and repost it." (TR #1 pg. 29). According to Ms. Adams, Ms. Cortese continued, "but I can't guarantee you that he will get his same office or his same caseload." (TR #1 pg. 29) The testimony reflects that Ms. Cortese's response was simple and direct and effectively ended all further discussion of the issue. (TR #1 pgs. 35, 36, 45, 49).

According to Ms. Adam's testimony, "the way she [Ms. Cortese] said it [referring to the abolishing and reposting statement] was that they would, if they had to, and they could." (TR #1 pg. 35). Ms. Adams recollected that upon hearing Ms. Cortese's response she "just was open-mouthed. ... very shocked." (TR #1 pg. 29). Ms. Adam's testified that she replied, "well, that's not what we're looking for. You know, that's not necessary." (TR #1 pgs. 29, 35). Ms. Adams continued, at that point, that she, "just didn't want to talk about it anymore because I didn't -- I felt like she had threatened Geno's job, and I felt like 'this poor guy; I just hurt him.'" (TR # 1 pg. 29).

The testimony of Union Vice President, Richard Baxter, is consistent with Ms. Adams testimony. Mr. Baxter confirms that the exchange between Ms. Adams and Ms. Cortese took place as Ms. Adams testified; and that he too, upon hearing Ms. Cortese's response, felt Geno Piccoli's position had been threatened. He testified, that upon hearing Ms. Cortese's remark, ". . . at that point, I looked up. I didn't say

[4] While the record reflects that there may have been a series of meetings between the parties in November and December 2011, the Union did not provide testimony as to specific dates at which Mr. Piccoli's court coverage assignment was discussed. Mr. Baxter recollected two meetings and the Employer's Meet and Confer Records entered into evidence supports this. (Respondent's Exhibit #1, Respondent's Exhibit #5).

anything because I immediately took that as a threat." (TR #1 pgs. 44-45). He testified, ". . . the very last time I remember the subject [Geno Piccoli's court coverage assignment] being discussed was when that [abolishing and reposting his position] came up." (TR #1 pg. 49).

The Employer asserts that abolishment and reposting is a management tool. (TR #2 pgs. 12, 47). However, Ms. Adams, who had been present at negotiations, between the Employer and the Union since approximately September 2009, has no recollection of the parties discussing abolishing and reposting as an option for dealing with the assignment of court coverage duty, with respect to Geno Piccoli's position. (TR #1 pgs. 38-40).

Richard Delfino, Administrator of the probation and parole unit, at the Rhode Island Department of Corrections, testified that at one point Paul Mancini, Human Resources Administrator, said to him, "we should notify the Union that we're looking at abolishing the position and reposting it if we can't arrive at some decision that puts Geno on the same level of court coverage as everyone else." (TR #1 pg. 66). Mr. Delfino testified that Mr. Mancini suggested, "[i]nform the Union that you're looking to abolish it and see what their response is to that." (TR #1 pg. 79). Mr. Delfino could not recollect when that conversation with Mr. Mancini occurred. (TR #1 pg. 66). Nor did Mr. Delfino provide any testimony to reflect that he informed the Union that the Employer may have been considering this action.

Mr. Delfino and Ms. Cortese testified that on occasion the Union, itself, raised the possibility of abolishing and reposting (TR #1 pg. 67; TR #2 pgs. 15, 33-36). In support of this testimony, the Employer entered into evidence Meet and Confer Minutes from November 2010 and December 2010, which reflect then Union President, Chris Hebert, and Mr. Delfino discussing reposting a drug court position. (Respondent's Exhibit #3, Respondent's Exhibit #4). However, the Employer did not enter into evidence Meet and Confer Minutes reflecting any discussion by the Union of abolishing and reposting Geno Piccoli's position. When questioned on cross-examination about when the Union may have suggested abolishing and reposting Geno Piccoli's position, Ms. Cortese answered, "that happened a couple of years ago." (TR # 2, pg. 35). There was no evidence presented to suggest that at the meetings that took place in

November/December 2011, the Union ever suggested or even considered abolishing and reposting Geno Piccoli's position. Ms. Cortese admitted as much while testifying. (TR #2 pg. 22, 33).

Ms. Cortese in her testimony, admits to suggesting to Ms. Adams, during the December 2011 meeting, abolishing and reposting Geno Piccoli's position. (TR #2 pgs.11, 22, Respondent's Exhibit #5). In addition, Ms. Cortese stated that abolishing and reposting is "extraordinary ... we try to use it as judicially [sic] and fairly as we possibly can if we can avoid it." (TR # 2 pgs. 15-16). She testified, "there's always a risk when you repost it that somebody else is going to bid on it that has seniority and that potentially can displace somebody." (TR # 2 pgs. 15, 24). Mr. Delfino acknowledged this risk as well, through his testimony, "the problem with abolishing, it means that the person sitting in that position could lose that position. I don't mean lose the position by going to the street. I mean lose that seat in that office. And that abolishment ... could mean that they sit in another office doing a different kind of caseload." (TR #1 pg. 67).

As of the hearing date, Probation and Parole Officer, Geno Piccoli's position had not been abolished and he was covering court two times each month. (TR #1 pg. 81, TR #2 pg. 62).

POSITION OF THE PARTIES

It is the Union's position that the Employer has engaged in an unfair labor practice by unilaterally changing the work schedule of bargaining unit member, Probation and Parole Officer, Geno Piccoli, without negotiation with the Union. In addition, the Employer has engaged in an unfair labor practice by and through its agent, Shelley Cortese, by threatening to abolish and repost Geno Piccoli's position for contesting the change in his working conditions.

The Employer argues it did not violate the Labor Relations Act. It is the Employer's position that it is within its rights to not only require court coverage from Probation and Parole Officer Piccoli, but to require additional days of court coverage without negotiation with the Union. Furthermore, the Employer disagrees with the characterization of Ms. Cortese's comments as threatening. It is the Employer's position that Ms. Cortese was merely attempting to have an honest discussion.

DISCUSSION

There are two legal questions present in this case, which we will address herein.

1) Whether the Employer has violated R.I.G.L. 28-7-13(3) (6) and (10) by unilaterally changing the work schedule of bargaining unit employees without negotiation with the Union, the certified bargaining agent?

On December 11, 2012, Board Member, Frank Montanaro, made a motion to uphold the charge of an unfair labor practice as it relates to section 28-7-13(3)(6) and (10) concerning a unilateral change in the work schedule of bargaining unit employees without negotiation with the Union, the certified bargaining agent. The motion was seconded by Board Member John Capobianco. Board Members Walter Lanni, Frank Montanaro, and John Capobianco, voted in favor of the motion and Board Members Elizabeth Dolan, Gerald Goldstein, and Ellen Jordan voted against the motion. With the vote being 3-3, the motion failed. A subsequent motion was made by Board Member, Elizabeth Dolan, to dismiss the charge of unfair labor practice as it relates to R.I.G.L. 28-7-13 (3) (6) and (10) concerning a unilateral change in the work schedule of bargaining unit employees without negotiation with the Union, the certified bargaining agent. The motion was seconded by Board Member Ellen Jordan. Board Members Elizabeth Dolan, Ellen Jordan, and Gerald Goldstein voted in favor of the motion and Board Members Walter Lanni, Frank Montanaro, and John Capobianco voted against the motion. With the vote being 3-3, this motion also failed.

In this case, the Board finds itself once again in the position of having a deadlocked Board for the purposes of voting, due to a vacancy on the Board.[5] The vote of the Board is deadlocked on the substantive issue of whether the Employer has committed an unfair labor practice concerning a unilateral change in the work schedule of bargaining unit employees without negotiation with the certified bargaining agent. Unfortunately, the Board has no mechanism to deal with deadlocked opposing motions. The Board's enabling act does not provide for alternate members who can be utilized for breaking tie votes. Thus, without a majority to support either a motion to uphold the charge or dismiss the charge on substantive grounds, the Board has no choice but to dismiss the within matter on procedural grounds. Thus, the complaint as it relates to this

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[5] While this result was once rare, deadlocked votes have become fairly common since the vacancy of the 7th position, due to death of a member, in January 2009. This position was not filled at the Board Meeting held on December 11, 2012, at which this matter was discussed and voted upon. As of June 2013, however, the vacant position has been filled.

charge is being dismissed solely due to the inability of motions to sustain sufficient votes for passage.

2) Whether the Employer has violated R.I.G.L. 28-7-13(2) (5) and (10), by and through its agent, Assistant Administrator Shelly Cortese, by threatening to abolish the position of a bargaining unit member for contesting the addition of additional duties to his workload.

The testimony with respect to this allegation is largely undisputed. In the course of a meeting between the Union, represented by Union President, Rebecca Adams, and the Employer, represented by Assistant Administrator of Probation and Parole, Shelley Cortese, Ms. Adams raised the issue of Probation and Parole Officer, Geno Piccoli's court coverage assignments. In response, Ms. Cortese stated, "Well, since you've brought it, maybe we should just abolish his position and repost it." (TR #1 pg. 29).

To Ms. Adams, Ms. Cortese's response was the type of threat explicitly prohibited by the RI State Labor Relations Act and this Board concurs. Not only did Ms. Cortese's statement suggest Probation and Parole Officer Piccoli's position could be in jeopardy, as a result of the Union's seeking to discuss his work assignment, but it had the immediate effect of stifling any further discussion of the matter.

The Employer's position that such a remark was not a threat but an attempt to honestly discuss various possibilities" (Employer's Brief, pg. 8) is not credible. Very simply, there is no testimony to reflect any discussion with the Union of other "possibilities" with regard to Probation and Parole Officer Piccoli and his court coverage assignments. The testimony of all present at the meeting was essentially the same that is, Ms. Adams raised the court coverage issue and Ms. Cortese responded with the suggestion of abolishing and reposting.

Further, the Employer's testimony that abolishing and reposting had been suggested by the Union, either in connection with other positions or in previous discussions about Geno Piccoli's position is unpersuasive. What is relevant to this Board is the discussions that took place with regard to Geno Piccoli's position in November/December 2011. It is clear that in those discussions, the Union did not suggest or even consider abolishing and reposting as a means to address the issue of court coverage assignments. Ms. Adams testified credibly before this Board that she

was shocked when Ms. Cortese suggested it. Ms. Adams also testified that this comment made her fear that she, in her advocacy, had worsened Mr. Piccoli's situation.

It is well-established that retaliation or even threats of retaliation for filing a grievance or otherwise engaging in protected activity constitutes an unfair labor practice. See Pemberton v. Bethlehem Steel Corp., 66 Md.App. 133, 145, 502 A.2d 1101, 1107 (1986), cert. denied, 306 Md. 289, 508 A.2d 488, cert. denied, 479 U.S. 984 (1986). Upon reviewing the evidence in this case, the Board finds the only reasonable inference that can be deduced was that Ms. Cortese's statement suggesting abolishing and reposting Gino Piccoli's position was a threat made in retaliation for his contesting the additional duties to his workload and therefore, constitutes an unfair labor practice under the law.

FINDINGS OF FACT

1) The Rhode Island Department of Corrections 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) During November and December of 2011, Union President, Rebecca Adams, met with Assistant Probation and Parole Administrator, Shelley Cortese, the designated representative of the Employer for the purposes of meeting and conferring with the Union.
4) At the November 2011 and December 2011 meetings, the assignment of court coverage duties to Probation and Parole Officer, Geno Piccoli, was discussed.
5) In response to the Union raising the assignment of the court coverage issue, Ms. Cortese suggested abolishing and reposting Mr. Piccoli's position.
6) Ms. Cortese's assertion was a threat of retaliation against Mr. Piccoli for contesting the addition of additional duties to his workload and constitutes an unfair labor practice.

CONCLUSIONS OF LAW

1) With respect to the charge of a unilateral change in the work schedule of bargaining unit employees, without negotiation with the Union's certified bargaining agent, since neither a motion to uphold the complaint nor a motion to dismiss the complaint on substantive grounds has carried, the within matter must be dismissed solely on procedural grounds.
2) 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 (2) and (10).

ORDER

1) The charge of a unilateral change in the work schedule of bargaining unit employees without negotiation with the Rhode Island Probation and Parole Association, the certified bargaining agent, is hereby dismissed.
2) The charges of violation of R.I.G.L. 28-7-13 (3) and (6) are hereby dismissed, on procedural grounds only.
3) The Employer is hereby ordered to cease and desist from threatening retaliation against bargaining unit member Piccoli in response to his exercise of rights protected under the Rhode Island State Labor Relations Act, R.I.G.L. 28-7 et seq.
4) The Employer is hereby ordered to post a copy of this Decision and Order on all common area bulletin boards within its designated state buildings and on its website for a period no less than sixty (60) days. The Employer shall effect such publication on its website within five (5) days of receipt of this Decision and Order.

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- STATE OF RHODE ISLAND – DEPARTMENT OF CORRECTIONS	CASE NO: ULP-6073

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-6073, dated February 26, 2014, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **February 26, 2014**.

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

Dated: February 26, 2014

By: Robyn H. Golden
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK J. MONTANARO, MEMBER

GERALD S. GOLDSTEIN, MEMBER

ELIZABETH S. DOLAN, MEMBER (DISSENT)

NOTE: On May 10, 2012 and May 29, 2012, Formal Hearings were held for the aforementioned matter. Board Members, Ellen L. Jordan and John R. Capobianco participated in the Formal Hearing processes; as well as the preliminary votes on the matter, taken on December 11, 2012 to uphold the violations noted as issues (2) and (10). However, as a result of Board Member, Ellen L. Jordan, no longer representing this Board, as well as the passing of Board Member John R. Capobianco, their names will not appear above as voting Members and signing the Decision and Order as written.

NOTE: Current Board Members Marcia B. Reback, Scott G. Duhamel and Bruce A. Wolpert did not participate in any aspect of this matter; thus, they are refraining from participation in the voting and signing of this Decision and Order as written.

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

Dated: February 26, 2014

By:

Robyn H. Golden, Administrator

ULP-6073