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-6102
TOWN OF NORTH SMITHFIELD	:	

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 Town of North Smithfield (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated January 10, 2013, and filed on January 14, 2013, by Rhode Island Council 94, AFSCME, AFL-CIO, Local 937 (hereinafter "Union").

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

> "The Town of North Smithfield is not bargaining in good faith. Rhode Island Council 94, AFSCME, AFL-CIO received a letter dated January 7, 2013, (see attached) which states that the Town of North Smithfield had unilaterally decided to no longer employ Civilian Dispatchers as of July 1, 2013 prior to reaching impasse. Said Civilian Dispatchers are part of the bargaining unit. The Town of North Smithfield is scheduled to begin successor negotiations with Rhode Island Council 94 starting January 10, 2013.

Following the filing of the Charge, the parties submitted written statements on January 28, 2013 and January 29, 2013 (Union and Employer respectively). The Union submitted a response on February 5, 2013. The Employer did not file a response. After the informal process had concluded, the Board reviewed the matter and on June 6, 2013, issued a complaint alleging:

> "That the Employer violated R.I.G.L. 28-7-13 (6) and (10) when it decided to eliminate the bargaining unit positions of Civilian Dispatchers and to assign the bargaining unit work to non-bargaining unit members, with an effective date of July 1, 2013."

The Employer filed its answer on June 11, 2013, denying the allegation of unfair labor practice and raised several affirmative defenses, including waiver, an offer to bargain the effects of the decision, and the Town's Home Rule Charter rights.

The matter was then scheduled for formal hearing on August 22, 2013. 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. The Union filed its

post-hearing Brief on October 25, 2013; and the Employer filed its post-hearing Brief on October 30, 2013. 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 TESTIMONY AND FACTS

The parties, herein, have long been collective bargaining partners, with the Union representing the Civilian Dispatchers in the Employer's Police Department since 1991. In July 2010, the North Smithfield Fire Marshall's Office conducted a fire safety inspection of the Police Department. The Police Department is housed in an old converted school building. The Fire Marshall determined that the prisoner cell-blocks were not in compliance with the fire-safety code and cited the Police Department. The Employer appealed the violation to the Rhode Island Fire Safety Code of Appeal and Review. The Board of Appeals granted the Employer a variance to continue the use of the cell-blocks for prisoners, with the stipulation that the Employer ensure that the cell-blocks could be evacuated within two (2) minutes of a fire alarm sounding in the building. (See Respondent's Exhibit #2)

The practical problem imposed by the Fire Safety Board's two (2) minute stipulation is that the Civilian Dispatchers, who often worked alone in the station, were not trained to undertake prisoner "extractions" from the holding blocks. This duty is one reserved specifically for trained Police Officers. (TR. pgs. 35-36) Since there was no way to guarantee that a Police Officer could return to the station and extract prisoners within a two (2) minute time period, the Employer's insurer determined that a "call-back" method of emergency compliance would not be acceptable. After much discussion on how to deal with this stipulation, (ie:// whether the Employer should build an addition to the station, use another municipality's cell-block, move the cell-blocks, etc.) the Employer initially decided to bring in Police Officers to work alongside the Dispatchers in a stand-by capacity in the event of an emergency.[1] The Employer's use of the stand-by Officers commenced in October 2010. The Town Council then created a Committee to review this problem to come up with a permanent solution. (TR. pg. 43) Eventually, the Committee determined that the problem was a personnel problem, not a structural one pertaining to the building. (TR. pg. 43) At some point, the Police Chief recommended that sworn Police Officers take over the dispatching duties so they could "wear both hats" that is, both "dispatching" and "prisoner extraction." The record is not clear as to when the Chief came to this recommendation or when the Committee agreed to this as a final conclusion on the issue. While the Town Administrator was initially opposed to such a plan,

[1] The Employer does not have any other cell-blocks.

after working with the Committee and examining the various options, she too came to believe that it was the appropriate solution. Again, the record is not clear as to when she came to this conclusion.

On November 20, 2012, the Union wrote to the Employer expressing its desire and intention to enter into negotiations for a successor Collective Bargaining Agreement and requested the Employer to be in contact to schedule accordingly. (Union Exhibit #2) This document was sent via certified mail, return receipt requested.[2] According to R.I.G.L 28-9.4-5, the Employer had an obligation to meet and confer in good faith with the Union's representatives within ten (10) days of its receipt of the Union's request to bargain.[3] This meeting, however, did not occur. Instead, the Employer waited until January 7, 2013 to even respond to the Union's request to bargain, but when it did so, the Employer did not attempt to or agree to schedule any negotiating sessions with the Union. (which represented additional employees other than the Civilian Dispatchers) Instead, the Police Chief wrote a letter which stated:

> "The agreement between the Town of North Smithfield and Rhode Island Council 94, AFSCME, AFL-CIO, Local 37 (the 'CBA') vests in the Town exclusive rights regarding the management of the Town working forces and operations. Specifically, under Sections 1.3 and 29.1 and 29.5 of the CBA, the Town has the authority 'to determine the type, kind and quality of the service to be rendered to the community'; 'to determine what constitutes good and efficient Town service'; and 'to determine the methods, means, and personnel by which [Town services and operations] are to be conducted.' Pursuant to the above-stated management rights provisions, the Town has decided that effective July 1, 2013, the North Smithfield Police Department will no longer employ Civilian Dispatchers. The Town is willing to meet with the Union to discuss in good faith the impacts of the Town's decision on the Dispatchers. Please contact me at your earliest convenience if you would like to schedule a meeting to discuss this issue."

The Union's response to this letter was filing the within unfair labor practice charge.

On April 23, 2013, while the charge was pending, the Union and Employer executed a set of "Ground Rules for Negotiation." (Union Exhibit #5) Ground Rule #7 provides: "In the event that a new agreement has not been reached by July 1, 2013, then the present

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[2] Receipt # 7006 0810 0001 5759 3228

[3] § 28-9.4-5. Obligation to bargain - It shall be the obligation of the municipal employer to meet and confer in good faith with the representative or representatives of the negotiating or bargaining agent within ten (10) days after receipt of written notice from the agent of the request for a meeting for negotiating or collective bargaining purposes. This obligation includes the duty to cause any agreement resulting from negotiation or bargaining to be reduced to a written contract; provided, that no contract shall exceed the term of three (3) years unless a budget commission or a receiver has been appointed for a municipality pursuant to chapter 45-9 or if a municipality has a locally administered pension plan in" critical status", and is required to submit a funding improvement plan pursuant to § 45-65-6(2), in either of which cases the contract shall not exceed the term of five (5) years. Failure to negotiate or bargain in good faith may be complained of by either the negotiating or bargaining agent or the municipal employer to the state labor relations board, which shall deal with the complaint in the manner provided in chapter 7 of this title. An unfair labor practice charge may be complained of by either the bargaining agent or Employer's representative to the State Labor Relations Board, which shall deal with the complaint in the manner provided in chapter 7 of this title.

agreement shall be extended until a new agreement is reached and the new agreement shall be retroactive to July 1, 2013." Id.

POSITION OF THE PARTIES

The Union argues that dispatching is the bargaining unit work of Local No. 937, as set forth in the parties' Collective Bargaining Agreement since 1991 and not of the Police Union, Local 401. The Union argues that the Employer had an obligation to bargain any changes to the Dispatchers' terms and conditions of employment, *especially* the elimination of their jobs. The Union argues that since Dispatchers were not "laid off" and the dispatching work itself was not being eliminated, but instead, given to another bargaining unit, that the Employer committed an unfair labor practice by undertaking such actions unilaterally and without prior negotiations.

The Employer argues that the "starting point" in this discussion is the parties' Collective Bargaining Agreement, specifically, the Recognition Clause (Article1) and the Management Rights Clause (Article 29). The Employer argues that the CBA vests the Employer with exclusive authority to decide to use sworn Officers for Police dispatching and that no provision of the CBA restricted their exclusive authority under the Management Rights provisions to take this action. In addition, the Employer argues that this case involves the distinction between decisional bargaining and effects bargaining and that this case should only involve effects bargaining. The Employer cites Barrington School Committee v Rhode Island State Labor Relations Board, 388 A.2d 1369, 1375 (R.I. 1978) as support for this argument. The Employer also argues that that there is no duty to bargain about a subject that is covered by the CBA under a "contract coverage analysis" as defined by N.L.R.B. v U.S. Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993). The Employer notes that the First Circuit Court of Appeals concurs with this approach, as well, and that an Employer may act unilaterally when it has a sound arguable basis in contract language to so act. This approach requires an interpretation of the contract in place, applying the "sound, arguable basis standard." National Labor Relations Board v Solutia, Inc. 699 F.3d 50, 67 (1st Cir.) citing Bath Marine Draftsmen's Assoc. v National Labor Relations Board, 475 F.3d 14, 25 (1st Cir. 2007). The Employer's arguments state that the NLRB has articulated a different standard for determining whether an Employer has a right to make a unilateral change (without decisional bargaining) by examining the Collective Bargaining Agreement to see if the Union "clearly and unmistakably waived" its right to bargain. The Employer argues that this Board must interpret the CBA to determine whether the contract covers the subject at issue; using Police personnel to perform dispatching duties, and that the

CBA's language can lead to no other conclusion, except that the Employer had no legal obligation to bargain over the decision to assign the Dispatchers' work to Police Officers, because the clear language of the CBA reserved this right to the Employer. Finally, the Employer argues that the Union clearly waived its right to bargain over the "effects" of the decision to assign the Dispatcher work to the Police Officers by failing to respond to the Employer's January 7, 2013 invitation to bargain over the effects.

DISCUSSION

Since the Employer has raised the defense of "contract coverage", the Board will in fact look to the language of the contract to see whether or not there is in fact a "sound arguable basis" for the Employer to argue that it has the sole and exclusive right to unilaterally re-assign all Police dispatching duties from the Civilian Dispatchers who have been performing this duty since 1991, to sworn Police Officers.[4] The Employer cited Articles 1.3, 29.1, 29.4, and 29.5 in support of its position that it has the sole and exclusive authority to undertake this decision, without the need for any consultation or negotiation with the Union representing the Police Dispatchers.

As identified by the Employer in its Brief, the CBA contains the following provisions:

Section 1.3: The management of the Town of North Smithfield and the direction of the working forces is vested exclusively in the Town, including, but not limited to...determine the type, kind and quality of service to be rendered to the community;...to determine the methods, procedures and means of providing such services; [and] to determine what constitutes good and efficient Town service, ***subject to the terms of this agreement.***(Emphasis added)

Article 29 – Management Rights

Section 29.1: The Union recognizes that except as specifically limited, abridged, or relinquished by the terms and provisions of this Agreement, all rights to manage, direct or supervise the operations of the Town and the employees are vested solely in the Town. For example, but not limited thereto, the Employer shall have the exclusive rights, ***subject to the provisions of this agreement, and consistent with applicable laws and regulations.*** (Emphasis added)

Section 29.4: To maintain the efficiency of the operations entrusted to it.

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[4] As under federal law, the Labor Board does not usually get into the specifics of contracts, as that topic is normally within the purview of arbitrators. It is only when a defense is raised that certain conduct is permitted under the contract that we will look to the language of the contract.

Section 29.5: To determine the methods, mean, and personnel by which such operations are to be conducted.

The Employer argues that these provisions taken together permit it to unilaterally re-assign the Civilian Police Dispatchers' work to sworn Police Officers. The Employer argued that "no provision of the CBA restricted their exclusive authority under the management rights provisions to take this action."

In order to rule on the Employer's claim, we need to review the entire CBA, to see whether, reviewed in its totality, it can support the Employer's claim that it has the unfettered right to eliminate the Civilian Dispatchers positions. The first thing to note is that the CBA applies to an entire bargaining unit, consisting of several other positions, in addition to the Dispatchers. (See Article 1.1) "The Town of North Smithfield recognizes AFSCME Council 94, hereafter referred to as the Union, as the sole and exclusive bargaining representative for those employees in the defined bargaining unit for the purposes of collective bargaining with respect to rates of pay, hours of employment, and other conditions of employment. (Article 1.2) The bargaining unit consists of all employees, either full or part time, in the North Smithfield Highway Department, Police Department, and Town Hall, as defined in the Rhode Island State Labor Relations Board, Case Nos. EE-3139, 3263, 3489 and 3587, excluding emergency personnel, for the purpose of collective bargaining with respect to hours, wages, and working conditions. All references to a single gender will be understood as applying to both genders. Thus, it is clear that the sworn Police Officers, as emergency personnel, are not members of this bargaining unit. (See Union Exhibit #1).

There are several sections of the CBA, however, that deal solely with the Dispatchers. Article 4, Sections 4.5 through 4.13, refer exclusively to the Police Department's Civilian Dispatchers, both full-time and part-time. Section 4.8 is particularly instructive as to the need for dispatching services and provides: "Dispatching will be on a continuous basis through the seven (7) day workweek." Other provisions include:

Section 5.4: Any Police Department employee called back to work from vacation, sick time, etc. will be paid their regular day's pay and not have time deducted from his vacation, sick time, etc.

Section 5.9: The part time Dispatchers and full time Dispatchers shall be used to fill vacancies for overtime only from the rotating overtime list.

Section 5.10: The part-time dispatcher shall be paid straight time up to forty (40) in any work week.

Section 5.12: Compensatory time for Dispatchers may be granted at the discretion of the Chief of Police.

Section 5.14: All second (2nd) shift full time Dispatchers shall receive a thirty-five (.35) cent per hour wage differential; and all third (3rd) shift full time Dispatchers shall receive a fifty (.50) cent per hour wage differential.

Section 5.16: Employees may elect to have the time and one-half as pay or compensatory time of not more than ninety (90) cumulative hours, except Dispatchers.

Section 6.5: The Town shall not call in anyone to do work within the bargaining unit unless every qualified member of the bargaining unit is first given an opportunity to perform such work, assuming job classification is equal.

Section 7.16: Dispatchers are required to work on holidays that fall within their regular work schedule.

Section 7.20: Effective 7/1/11, part-time Dispatchers will be paid double time for the following holidays: Thanksgiving and Christmas Day for the first and second shifts, Christmas Eve for second shift only.

Section 8.8: Part-time Dispatchers receive prorated vacation days beginning one (1) year from the date of hire based upon number of hours worked in a forty (40) hour per week schedule not to exceed six (6) days. Effective 6/30/11, this section will be eliminated from the contract.

The following general provisions of the CBA are also applicable in this analysis:

Section 19.6: The Employer shall not discharge or suspend an employee without just cause. Within two (2) weeks of such suspension or discharge, the Union may file a grievance with the Employer Administrator as set forth in Article 27.

Section 27.8: It is also agreed that in all cases of dismissal the aggrieved and/or Union Committee may go immediately to Section 27.1 of the grievance procedure.

Article 30 - Postings of Vacancies and New Groups

Section 30.1: The Town agrees to post all vacancies and all new positions on all department bulletin boards within seven (7) days of their occurrence.

Section 30.2: When a position covered by this agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing the pay, duties, and qualifications. This notice of vacancy shall remain posted for seven (7) working days. Employees interested shall

apply in writing within the seven (7) day period. Within thirty (30) calendar days of expiration of the posting period, the Town will award the position to the most senior qualified applicant from the same Department as determined by the Town Administrator and Finance Director. If there are no qualified applicants from the Department where the vacancy exists, bargaining unit applicants from other Departments will be considered based on Town seniority and qualifications as determined by the Town Administrator and Department Head or his/her designee. The successful applicant shall be given thirty (30) calendar days in the new position as a trial period at the applicable rate of pay.

Section 30.3: If within the trial period it is determined by the appropriate Department Head that the employee is not qualified to perform the work or the employee chooses to return to his previous position, he shall be returned to his prior position and rate of pay. Said employee may pursue this matter subject the grievance and arbitration provisions of this agreement, as to his qualifications and trial period.

Section 30.4: If no applicant is qualified as determined by the Town Administrator and the Finance Director, the Town may fill the position from outside the bargaining unit and the Union may pursue the matter subject to the grievance and arbitration provisions of this agreement.

Section 30.5: The Town will have the right to fill any position vacant due to a leave of absence, if they so choose, with a temporary employee subject to Paragraph 30.2. Such position will be posted as a restricted position for a limited period subject to the return of the incumbent's leave of absence. The temporary employee will be placed in a probationary period. The temporary employee will be subject to all the rights and privileges contained herein, except that the temporary employee can be terminated at any time without recourse if the incumbent employee returns from his leave. Qualified part-time employees will have first option to work temporarily in a full time vacancy because of a leave and will return to the previous position upon return of the incumbent employee. Nothing herein stated will deny the right of the incumbent to return to their position prior to their leave expiring. Temporary employees shall pay to the Union each month a service charge as a contribution toward the administration of this agreement in an amount equal to the regular monthly dues from the first day of employment.

Section 30.6: The Town Administrator shall be allowed to hire seasonal employees who will not be part of this contract. Temporary employment shall not exceed twelve (12) weeks.

Section 30.7: Temporary help can be used in all Union positions due to a leave of absence, reclassification, sick leave or Workers' Compensation leave only. Vacancies must be posted in a timely manner.

Article 33 – Length of Agreement

Section 33.1: This agreement shall become effective on the date of the signing of the agreement and no sooner than July 1, 2010 and shall remain in effect through the 30th of June, 2013, and shall be renewed automatically from year to year thereafter, unless either party gives written notice of the desire to modify or terminate to the other party at least one hundred twenty (120) days before the last day on which money can be appropriated by the Municipal Employer in the year the contract expires. The Town must notify the Union as to when that date is so that the Union has sufficient time to submit a request for negotiations. ***It is understood by both parties that the contract in effect at the start of negotiations will continue until negotiations have culminated in the new agreement.***" (Emphasis added herein)

The Employer claims that the language in Section 29.5, which permits it to "determine the methods, means and personnel by which such operations are to be conducted", permits this unilateral elimination of one category of employees, without bargaining. In reviewing the CBA, however, there is absolutely no language that provides that the Employer may unilaterally remove the work being performed by one category of employees in one bargaining unit, eliminate the positions of those employees and then give the work to another category of employees. All of these forgoing contract provisions concerning the terms and conditions of employment for Dispatchers, taken as a totality, make it abundantly clear that the parties have clearly agreed that civilian dispatching is bargaining unit work that is highly regulated and is protected from unilateral change.

The Employer cited National Labor Relations Board v U.S. Postal Serv. 8 F.3d 832, 836 (D.C. Cir. 1993) in support for its reading of the Management Rights Clause. There, the Court held that it was clear that service reductions (of the "supplemental" work force) without negotiations were permissible because the broad Management Rights Clause granted the Postal Service the "exclusive right to transfer and assign employees"; "to determine the methods, means, and personnel by which its operations are to be conducted" and the "right to maintain the efficiency of the operations entrusted to it." The Employer argues that this is exactly the type of management clause at issue here and so the result should be the same; the Employer can unilaterally eliminate positions without bargaining. However, the Employer's Brief and argument ignores several pertinent facts of that case, to wit: (1) The contract in issue

specifically provided for a "regular work force" (both full-time and part-time) who were members of the Union and for a "supplemental" work force made up strictly of casual, non-Union workers, called "part-time flexible" or "PTF." (2) The contract specifically provided that in the event of service reductions, the Employer was required, to the extent possible, to minimize the impact on full-time positions *by reducing part-time flexible hours*. (Emphasis in original) Id at 838. (3) The NLRB was unable to point to a single contractual provision that the Postal Service had violated: No unit employees were laid off, no full-time employees worked less than their contractually-guaranteed minimum of forty (40) hours per week, and no regular, part-time employees suffered reductions in work hours. "Any reduction in work time affected only the PTF's, the very workers whom the CBA dictates should bear the effects of such reduction." Id.

In this case however, the contract did not specifically contemplate service reductions, other than layoffs. The employees, herein, were not "laid off." Their positions were completely eliminated, but the full complement of work performed by them was continued. In addition, there are at least three (3) provisions of the CBA that we believe are violated by the Employer's acts:

> Section 6.5: The Town shall not call in anyone to do work within the bargaining unit unless every qualified member of the bargaining unit is first given an opportunity to perform such work, assuming job classification is equal.

This provision clearly prohibits the Employer from utilizing any other workers to do bargaining unit work, unless the opportunity is first given to the bargaining unit members. Taking necessary and on-going bargaining unit work away from bargaining unit members and giving it to other employees clearly violates this provision of the CBA.

> Section 19.6: The Town shall not discharge or suspend an employee without just cause. Within two weeks of such suspension or discharge, the Union may file a grievance with the Employer Administrator as set forth in Article 27.

The Employer's decision to discharge the Dispatchers from employment was without just cause. The employees were not alleged to have performed their duties incorrectly. The Employer's decision on January 7, 2013 to unilaterally discharge these employees without just cause clearly violates the CBA.

> Article 33 - Length of Agreement
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> Section 33.1: This agreement shall become effective on the date of the signing of the agreement and no sooner than July 1, 2010 and shall remain in effect through the 30th of June, 2013, and shall be renewed automatically from year to year thereafter, unless either party gives written notice of the desire to modify or terminate to the other party at least one hundred twenty (120) days before the last day on which money can be appropriated by the Municipal Employer in the year the contract expires. The Town must notify the Union as to when that date is so that the Union has sufficient time to submit a request for negotiations. **It is understood by both parties that the contract in effect at the start of negotiations will continue until negotiations have culminated in the new agreement.** (Emphasis and underlining added herein)

In this case, the evidence established that in November, 2012, the Union, within the requisite statutory timeframe, notified the Employer that the Union wished to enter into negotiations for a successor Collective Bargaining Agreement. According to R.I.G.L 28-9.4-5, this action triggered the collective bargaining process for a successor agreement and the requirement that this contract stay in effect until the negotiation of the successor agreement. Moreover, even after the unfair labor practice charge herein was filed, the Union and the Employer entered into ground rules for negotiations for a successor CBA. (See Union Exhibit #5). The ground rules state that in the event that a new agreement has not been reached by July 1, 2013, then the present agreement shall be extended until a new agreement is reached and the new agreement shall be retroactive to July 1, 2013. At the time of the formal hearing in this case in August 2013, the parties had not yet negotiated a new CBA and the Dispatchers' employment had been terminated and the dispatching work was being done by sworn Police Officers exclusively.

Both the Recognition Clause of the CBA (Article 1.3) and the Management's Rights Clause, set forth in Article 29, specifically provide that the reserved rights of management are "subject to the terms of this agreement." The agreement, as set forth above, contains significant limitations concerning the Employer's ability to regulate the terms and conditions of employment of the employees performing dispatch duties. The Employer's rights are specifically delineated and detailed, going so far as to outline the limitations for temporary and even seasonal employees. It is simply not plausible, let alone reasonable, to interpret either the Management Rights Clause or the Recognition Clause as having reserved the Employer a right to simply eliminate positions without any bargaining, when all aspects of the job protections set forth, are protective of the bargaining unit positions and designed to ensure longevity. The CBA is simply devoid of any "service reduction" provisions, as were present in the Postal Service case.

There can be no question that the continuation of the very existence of the Dispatchers' positions is a mandatory subject for bargaining in that it clearly affects hours of work and compensation! Indeed, the parties' CBA is filled with provisions dealing with these issues and more. At the time that the Employer undertook the decision to unilaterally eliminate the Dispatchers' positions, the parties had a valid CBA in existence that clearly did not permit any such unilateral action. Therefore, the Employer committed an unfair labor practice when it

unilaterally decided, during the existence of the CBA, to eliminate the Dispatchers' positions and this Board so finds.[5]

EFFECTS BARGAINING AND OTHER REMEDIES

The Employer argues that in addition to it not being required to engage in "decisional" bargaining, that the Union waived its rights to engage in "effects" bargaining, after being offered the opportunity in January, 2013. As set forth above, the record reflects that the Employer notified the Union that although the Employer did not believe it had any obligation to bargain over the decision to eliminate the Dispatchers' positions that the Employer would indeed be willing to bargain over the impacts of the decision. (See Union Exhibit #4) Additionally, the records reflects the fact that the Union's response to the Employer's "invitation" to engage in effects bargaining, was to file the within unfair labor practice complaint. Thus, the Employer argues that the Union waived its right to engage in effects bargaining. [6]

It is well settled that a Union may waive its right to engage in bargaining, when given notice of a proposed change. The Employer argues that it was only required to engage in "effects" bargaining, not decisional bargaining and that the Union waived its right to engage in effects bargaining. However, as noted by the Employer, no waiver occurs if the proposed change has been made irrevocable prior to the notification to the Union. Employer of Burrillville v Rhode Island State Labor Relations Board, 921 A.2d 113, 120 (R.I. 2007). In this case, the Employer notified the Union, in no uncertain terms, that the Employer did not believe it had the obligation to bargain over the decision to eliminate the Dispatchers' positions, and that as of July 1, 2013, the Dispatchers' positions would in fact be eliminated. The Employer's letter then stated: "The Employer is willing to meet with the Union to discuss in good faith the impacts of the Employer's decision on the Dispatchers."

The Board acknowledges and agrees that, generally speaking, if a Union is invited to engage in bargaining and fails to do so, there will indeed be a waiver of its right to bargain. This concept is well supported in Board decisions and in case-law. However, when the decision and the effects are "part and parcel" or "one in the same thing", such as terminating positions as of a date certain, we ask, what is left to bargain? The Employer argued in its Brief: "The law is clear that after receiving notice from an Employer of an intended change, a Union's failure to

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[5] In addition, although not separately complained of, the facts revealed during the formal hearing on this matter support a finding of a separate unfair labor practice charge of dealing in bad faith, when the Employer agreed to the ground rule in April 2013 and then promptly ignored those ground rules in July 2013, when it actually fired the Dispatchers.

[6] The testimony at the hearing also revealed, quite embarrassingly, that the Union representative did not know, in January 2013, what the Employer even meant when it offered to engage in "effects" bargaining.

only after Sasser's failure to respond with any new proposal, even a proposal for further bargaining, that Kauffman showed Sasser the letter that he wanted to distribute the next day. Not only did Sasser fail to request bargaining at this point, as was his obligation when confronted with the proposed change, he in fact stated there was no point in doing so. Further, Sasser sought no further opportunity to propose alternative solutions, and, indeed, suggested none, aside from his statement at the Union meeting, after the decision itself had been made, that the drivers would agree to extend the parties' contract. Moreover, at the July 21st meeting, the Union, after being told that the decision itself had been made, had another opportunity to request effects bargaining and failed to do so.

We conclude that, in the circumstances of this case, the Union failed to exercise due diligence in appraising Vandalia of its desire to negotiate over the takeover decision or its effects on unit employees. Thus, the Union waived its right to bargain, when, Sasser's being repeatedly confronted with the urgency of Vandalia's situation, it failed to request bargaining or to request information concerning the takeover decision for more than ten (10) days. Accordingly, on the basis of the foregoing, we agree with the judge that "there was no violation of Section 8 (a) (5) and (1)."

The case presented herein, is vastly different than the fact pattern presented in Vandalia (supra). Here, despite the fact that the Employer convened a Committee to study the issue of the Fire Code Appeal Board's decision on the cell-block violations; the Employer did not attempt to discuss the matter with any Union representatives or even include Union representatives on the Committee that was studying the issue. Additionally, when the Committee came to its conclusion, this information was not shared with the Union. Finally, when the Police Chief and the Employer Administrator decided that they wanted to go with the Committee's recommendation to eliminate the Civilian Dispatchers and give their work to sworn Police Officers, they did not seek out the Union or discuss this serious issue with the Union. Instead, they made a final, irrevocable decision and then notified the Union of this fait accompli. It was only after the announcement of the decision itself that an offer of "effects" bargaining was made. However, since the decision was final and had a date certain for implementation, what else was there for the Union to bargain? This proffer for "effects bargaining" under such a circumstance, is, in this Board's opinion, nothing more than a red herring or smokescreen. It is an effort to appear as if bargaining was a possibility, when the irrevocable decision had already been made. As such, the Union did not waive its right to bargain, which we have already determined, was a right to engage in decisional bargaining.

request bargaining, here effects bargaining, results in a waiver of the right to bargain" citing, Vandalia Air Freight, Inc. 297 NLRB 1012, 1014 (1990) (Union after being told that Employer had made decision, had another opportunity to request effects bargaining, but failed to do so; waiver of right to bargain occurred.) (Employer's Brief pg. 10)

The facts set forth in Vandalia are very different than the facts set forth here. In Vandalia, a trucking company was facing bankruptcy. The company president, Ronald Kauffman, sent a letter in May 1985 to the Union, seeking a one year extension to an existing contract, because the company could not afford to increase benefits or wages. The Union did not reply. The company's financial situation deteriorated rapidly, even though it was attempting additional bank financing. On July 16th, the company President met with the Union representative, Mr. Sasser, at the company's request. At that meeting, Kauffman explained the company's financial flight in detail to Sasser and showed him the company's bleak financial statements. Kauffman asked Sasser if he had any suggestions on what to do about the looming financial catastrophe. During that meeting, Kauffman inquired of Sasser on four (4) separate occasions, if he could offer any suggestions on what to do. Sasser did not offer any suggestions and said he had no more ideas. Towards the end of the meeting, Kauffman indicated that he had a letter that he wanted to distribute to drivers, which explained about a company takeover being the only solution that Kauffman had to the problem. Sasser read the letter and indicated that there was no point in meeting with the negotiating Committee, but requested Kauffman to meet with the drivers to explain the impact. When Kauffman met with the drivers on July 21st, he was told that they would now agree to the one (1) year extension requested in May. Kaufmann explained that this offer was too late and that he had entered into an agreement to contract with another company to manage the company's business affairs. On July 27th, the Union's attorney sent a letter asking for both decisional and effects bargaining. By the time Kauffman received the Union's July 27th letter, the decision, which he explained on July 21st, had been effectuated. In finding for the Employer in this case, the NLRB stated:

"A review of the entire July 16th conversation reveals that the Union was made aware of Kaufmann's sense of urgency. Kaufmann presented to Sasser an accurate description of the proposed takeover the parent company was considering. He neither concealed nor misrepresented the details of the proposal. Moreover, by his repeated request for suggestions, Kauffman clearly indicated that no irrevocable decision had been made and that he was receptive to other ideas. The Union's silence, in the face of Kauffman's remarks precluded, in effect, a test of the sincerity of Kauffman's solicitation of Sasser's input. In this regard, it was

REMEDY

In this case the Union seeks an order, prohibiting the Employer from unilaterally altering working conditions, cease and desist from eliminating bargaining unit positions and such other relief as deemed just by this Board. By the time this matter was heard formally by the Board in August 2013, the Employer's plan to discharge the Dispatchers from their jobs had already occurred. In reviewing the CBA for this matter, we note that the Union had a contractual remedy available to it for the Employer's violation of contractual provisions 6.5, 19.6 and 33.1. The record does not reflect whether the Union exercised its grievance rights, but we assume that it did. Indeed, since the actual implementation of the Employer's plan is a direct contract violation, it is more appropriate for an arbitrator to issue a remedy for the effectuation of the plan. In the event, however, that the Union did not file a grievance, because there was a complete lack of effort on the Employer's part to engage in decisional bargaining herein, we order a return to the status quo that existed as of January 2013, with an order for the Employer to engage in decisional bargaining with the Union.

FINDINGS OF FACT

1) The Town of North Smithfield 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) The parties, herein, have long been collective bargaining partners, with the Union representing the Civilian Dispatchers in the Town's Police Department since 1991.

4) In July 2010, the North Smithfield Fire Marshall's Office conducted a fire safety inspection of the Police Department. The Police Department is housed in an old converted school building. The Fire Marshall determined that the prisoner cell-blocks were not in compliance with the fire-safety code and cited the Police Department. The Town appealed the violation to the Rhode Island Fire Safety Code of Appeal and Review. The Board of Appeals granted the Town a variance to continue the use of the cell-blocks for prisoners, with the stipulation that the Town ensure that the cell-blocks could be evacuated within two (2) minutes of a fire alarm sounding in the building. (See Respondent's Exhibit #2)

5) The practical problem imposed by the Fire Safety Board's two (2) minute stipulation is that the Civilian Dispatchers who often worked alone in the station were not trained to undertake prisoner "extractions" from the holding blocks. This duty is one reserved specifically for trained Police Officers. (TR. pgs 35-36)

6) Since there was no way to guarantee that a Police Officer could return to the station and extract prisoners within a two (2) minute time period, the Town's insurer determined that a "call-back" method of emergency compliance would not be acceptable. After much discussion on how to deal with this stipulation, (ie:// whether the Town should build an addition to the station, use another municipality's cell-block, move the cell-blocks, etc.) the Town initially decided to bring in Police Officers to work alongside the Dispatchers in a stand-by capacity in the event of an emergency.

7) The Town's use of the stand-by Officers commenced in October 2010. The Town Council then created a Committee to review this problem to come up with a permanent solution. (TR. pg. 43)

8) Eventually, the Committee determined that the problem was a personnel problem, not a structural one pertaining to the building.

9) At some point, the Police Chief recommended that sworn Police Officers take over the dispatching duties so they could "wear both hats", that is, both "dispatching" and "prisoner extraction."

10) The Union was not included in the Committee and had no input into the deliberations.

11) On November 20, 2012, the Union wrote to the Town expressing its desire and intention to enter into negotiations for a successor Collective Bargaining Agreement and requested the Town to be in contact to schedule accordingly. (Union Exhibit # 2) This document was sent via certified mail, return receipt requested.

12) According to R.I.G.L 28-9.4-5, the Town had an obligation to meet and confer in good faith with the Union's representatives within ten (10) days of its receipt of the Union's request to bargain. This meeting, however, did not occur.

13) Instead, the Town waited until January 7, 2013 to even respond to the Union's request to bargain, but when it did so, the Town did not attempt to or agree to schedule any negotiating sessions with the Union.

14) The Town's correspondence stated: "The agreement between the Town of North Smithfield and Rhode Island Council 94, AFSCME, AFL-CIO, Local 37 (the 'CBA') vests in the

Town exclusive rights regarding the management of the Town working forces and operations. Specifically, under Sections 1.3 and 29.1 and 29.5 of the CBA, the Town has the authority 'to determine the type, kind and quality of the service to be rendered to the community'; 'to determine what constitutes good and efficient Town service'; and 'to determine the methods, means, and personnel by which [Town services and operations] are to be conducted.' Pursuant to the above-stated management rights provisions, the Town has decided that effective July 1, 2013, the North Smithfield Police Department will no longer employ Civilian Dispatchers. The Town is willing to meet with the Union to discuss in good faith the impacts of the Town's decision on the Dispatchers. Please contact me at your earliest convenience if you would like to schedule a meeting to discuss this issue."

15) The Union's response to this letter was filing the within unfair labor practice charge.

16) On April 23, 2013, while the charge was pending, the Union and Town executed a set of "Ground Rules for Negotiation." (Union Exhibit # 5) Ground Rule # 7 provides: "In the event that a new agreement has not been reached by July 1, 2013, then the present agreement shall be extended until a new agreement is reached and the new agreement shall be retroactive to July 1, 2013." Id.

17) On July 1, 2013, the Civilian Dispatchers were no longer employed by the Town and thereafter, this bargaining unit work was performed by sworn Police Officers.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer committed a violation of R.I.G.L. 28-7-13 (6) and (10) when it decided to eliminate the bargaining unit positions of Civilian Dispatchers and to assign the work to non-bargaining unit members, with an effective date of July 1, 2013.

2) The Union has proven by a fair preponderance of the evidence that the Employer has committed a violation of R.I.G.L 28-7-13 (6) and (10) when it assigned bargaining unit work to non-bargaining unit personnel.

ORDER

1) The Employer is ordered to cease and desist from abolishing bargaining unit positions without first bargaining with the Union.

2) The Employer is ordered to cease and desist from assigning bargaining unit work to non-bargaining unit personnel.

3) The Employer is ordered to return bargaining unit work previously performed by the Civilian Dispatchers back to the bargaining unit.

4) The Employer is ordered to engage in decisional bargaining with the unit concerning the elimination of the Civilian Dispatchers' positions.

5) The Employer is ordered to post a copy of this Decision and Order on all employee bulletin boards and the Employer's website, if applicable, for period of sixty (60) days.

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- TOWN OF NORTH SMITHFIELD	CASE NO: ULP-6102

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-6102, dated June 20, 2014, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **June 20, 2014**.

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

Dated: June 20, 2014

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK MONTANARO, MEMBER

GERALD S. GOLDSTEIN, MEMBER

ELIZABETH S. DOLAN, MEMBER (DISSENT)

SCOTT G. DUHAMEL, MEMBER

BRUCE A. WOLPERT, MEMBER (DISSENT)

GERALD S. GOLDSTEIN WAS NOT PRESENT TO VOTE ON THE CONCLUDED CASE BUT IS SIGNING THE DECISION AND ORDER AS WRITTEN.

BOARD MEMBER MARCIA B. REBACK ABSTAINED FROM VOTING IN THIS MATTER.

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

Dated: JUNE 20, 2014

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 6102