



electronic posting of grades, which required advanced teacher training, when bargaining was requested by the Union. (2) That the Employer violated R.I.G.L. 28-7-13 (6) and (10) when it unilaterally implemented a change to the terms and conditions of employment, mandatory posting of grades electronically, a requirement that the Employer had unsuccessfully sought during prior negotiations.

The Employer filed its Answer on January 15, 2014 and the matter was set down for formal hearings, which were held on April 8, 2014 and May 13, 2014. 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. Post-hearing briefs were filed by both parties on July 21, 2014. 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**

The facts in this case, concerning the Warwick School Committee's unilateral implementation of a computerized Gradebook called "Aspen Gradebook", are not in dispute. The Warwick Teachers' Union has been the collective bargaining agent for teachers employed by the Warwick School Department since at least 1970. (See EE 1929) As of March 2011, the parties' Collective Bargaining Agreement ("CBA") contained an Article 12-15 entitled "Pupils' Report Card Marks" (See Joint Exhibit #1). This article provided in pertinent part:

"Section 12-15.2 Grade reporting sheets in the secondary schools shall be made available to teachers two (2) school days prior to the close of each marking period and shall be due in the main office of each school on the third (3<sup>rd</sup>) school day after marks close.

Section 12-15.3 A report card of the carbon type shall be used in the elementary schools. The original shall be sent home and other copies retained for office use. Such forms shall be made available to the teachers five (5) days before they are due."

In 2010, the Warwick School Department purchased the "Aspen Student Information System", an electronic program used to record student demographic data and other information. (TR. 5/13/14, pg. 10) Teacher and administrator training for using this new system commenced in early 2011 and after the initial training, the system went "live" in April 2011 for purposing of recording daily student attendance. (TR. 5/13/14, pg. 17) At that time, teachers were also permitted voluntary access to the Gradebook portion of the program, if they so elected. Also at that time, the "parent portal" of the program was opened. (TR 4/8/14, pg. 77) The parent portal is means by which parents can log into the system, via a password, and have access to see all their student's information, including medical data, emergency contact information, attendance,

and any grades or assignments that may have been entered by a teacher. (TR 4/8/14, pg. 77)

Use of the electronic Gradebook by teachers was optional and voluntary.

During contract negotiations in both 2011 and 2012, the Employer sought to make the use of the electronic Gradebook "module" of the ASPEN system by teachers a mandatory requirement. (See Union Exhibits #9 and #10) Specifically, the language proposed by the School Committee would have eliminated Section 12-15.2 of the contract, as set forth above and replaced it with the following:

"Grades shall be due in the main office of each school of the third (3<sup>rd</sup>) school day after marks close in accordance with district schedules and requirements. All teachers will enter Student Information System (SIS) related information (as required by the district and in accordance with the calendars established by the district.)"

During both of the 2011 and 2012 contract negotiations, the foregoing language was rejected by the Union and the pre-existing contract language in Section 12-15 remained intact. The parties entered into a two (2) year agreement extension for the period September 1, 2012 to August 31, 2014.

In the spring of 2013, the Superintendent decided, notwithstanding the School Committee's prior unsuccessful bargaining of the mandatory use of the Gradebook, that the topic no longer required bargaining and that a unilateral implementation of its mandatory use by teachers was a permissible exercise of the Employer's "management rights" and also constituted a non-delegable administrative decision pertaining to educational policy. As such, on the last day of school in the 2012-2013 school year, Superintendent Richard D'Agostino issued the following memorandum:

"Re: WPS Cost Savings

As you are aware, the district will be experiencing financial shortfalls at the beginning of the 2013-2014 school year. We are making every attempt at cost savings measures, to include the following:

1. Any memorandum directives from principals to their staff will be paperless. This communication should be done utilizing FirstClass.
2. The School Department has supplied Gradebooks and lesson plans in the past. We will no longer purchase these books and any that have been purchased should be returned if possible. All grades and plans must be entered in the ASPEN system. As a result of utilizing these books through ASPEN, we approximate cost savings of \$5,000.00 annually.

We are looking into other areas for savings and to integrate technology into our daily teaching, learning and assessments. At the click of a button, the dashboard includes subject scope and sequence, content curriculum and resources, assignments and formative assessments. To make this vision a reality, we must begin to use the modules we already have available in ASPEN. Gradebook is one of those modules. The Gradebook module will help increase communication between our teachers and parents. The RTI module coming soon will assist in monitoring student's progress in an early warning system. Professional Development will be provided to teachers as we fully implement the ASPEN

modules. As a result, the use of the ASPEN Gradebook will be required of all teachers for the 2013-2014 school year.

We are looking at additional cost saving measures and I welcome your suggestions and recommendations to help us prevent cutting student programs. Thank you and have a wonderful summer.”<sup>1</sup>

(Joint Exhibit #2)

On July 9, 2013, the Warwick School District sent out a “robo-call” to all Warwick Teachers. A transcript of that call was submitted as Union Exhibit #1. In that message, the District directed teachers to access training videos for the ASPEN Gradebook on the District’s website. A second robo-call went out to teachers on July 20, 2013. The transcript to this call is also part of Union Exhibit #1. This particular call notified the teachers of a live training to be conducted on July 31, 2013, as well as repeating some of the information provided in the prior call.

As a result of numerous calls from teachers concerning this issue, Union President James Ginolfi, contacted Rosemary Healey, the Director of Human Resources & Compliance, Department Attorney and Labor Relations Chief Negotiator, and they scheduled a meeting for July 24, 2013. At that meeting, also attended by Robert Casey, representing the American Federation of Teachers’ Field Representative, the Union advised the School Department that the implementation of the ASPEN Gradebook was a mandatory subject for bargaining. Ms. Healey disagreed but said that she would discuss the issue with Superintendent D’Agostino. Between July 24, 2013 and August 8, 2013, the Union was unable to persuade the School Department to rescind the policy or to meet at the table. Therefore, on August 8<sup>th</sup>, Mr. Ginolfi wrote to the School Department to reiterate the request for bargaining in writing and to request a delay of the implementation of the ASPEN Gradebook. (See Union Exhibit #6) On August 30, 2013, after the start of the 2013-2014 school year, the School Committee responded that its decision to unilaterally implement the ASPEN Gradebook was a management right under the contract, as well as a non-delegable right of the School Committee and that it would neither negotiate the same or delay its implementation. (Union Exhibit # 8)

#### **POSITION OF THE PARTIES**

The Union contends that there is no non-delegable statutory duty that excuses the School Committee from bargaining with the Union because the change to the method and means of recording grades impacts teachers’ terms and conditions of employment, and is therefore, a mandatory subject for bargaining. The Union further argues that the School Committee committed an unfair labor practice when it refused to bargain with the Union prior to

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<sup>1</sup> According to the testimony of Rosemary Healey, on June 21, 2013, she called the Union President as a courtesy to give him a heads-up about the Superintendent’s intended message.

implementing unilateral change to the terms and conditions of employment. Finally, the Union argues that the School Committee committed an unfair labor practice when it implemented the ASPEN Gradebook program, after it was rejected by the Union twice at the bargaining table. The Union seeks a make-whole remedy that orders the School Department to cease and desist from ordering the teachers to record grades electronically, an order that the June 24, 2013 memo be withdrawn, and an order for the School Committee to bargain in good faith.

The School Committee argues that it has a non-delegable statutory right and the exclusive authority to implement the ASPEN Gradebook as a matter of educational policy and therefore, had no duty to bargain with the Union over the decision to implement the same. The School Committee also argues that the Union waived its right to bargain over the implementation of the ASPEN system. Additionally, the School Committee argues that it had the authority under the management rights clause of the CBA to require teachers to use the ASPEN Gradebook. Finally the School Committee posits that it fulfilled its obligation to bargain with the Union over the effects of the implementation and that the implementation did not in fact materially alter the terms and conditions of the teachers' employment.

#### **DISCUSSION**

This Board issued a complaint against the School Committee on January 9, 2014, alleging two counts of an unfair labor practice as follows:

1) The Employer violated RIGL 28-7-13 (6) and (10) when it refused to bargain over a mandatory subject for bargaining, the implementation of electronic posting of grades, which required advanced teacher training, when bargaining was requested by the Union.

2) The Employer violated RIGL 28-7-13 (6) and (10) when it unilaterally implemented a change to the terms and conditions of employment, mandatory posting of grades electronically, a requirement that the Employer had unsuccessfully sought during prior negotiations.

The threshold issue here then is whether or not the implementation of the mandatory use of an electronic method for posting grades is a mandatory subject for bargaining. Pursuant to R.I.G.L. 28-9.3-2, Rhode Island teachers have the right to bargain collectively with their employers and to be represented by an association or labor organization in the negotiation or collective bargaining concerning hours, salary, working conditions, and all other terms and conditions of professional employment. (Emphasis added herein)

Recognizing the parallels between the State and Federal Statutes governing the obligation to bargain, the Rhode Island Supreme Court has "consistently looked to federal law for guidance in the field of labor law." *DiGuilio v. Rhode Island Brotherhood of Correctional Officers*, 819 A.2d 1271, 1273 (R.I. 2003); see also *Barrington Sch. Comm. v. Rhode Island*

*State Labor Relations Bd*, 120 R.I. 470, 479, 388 A.2d 1369, 1375 (1978); *Town of Narragansett v. International Ass'n of Fire Fighters, Local 1589*, 119 R.I. 506, 508, 380 A.2d 521, 522 (1977).

In analyzing the phrase, "terms and conditions of employment," the NLRB has stated that the concept is "a broad one, and deliberately so, for Congress intended it to be broad." *Peerless Publications, Inc. v. NLRB*, 283 N.L.R.B. 334, 335 (NLRB 1987); see also *Fibreboard Paper Products Corpg. v. NLRB*, 379 U.S. 203, 210 (U.S 1964).

In the instant case, the typical statutory phrase "terms and conditions of employment" has been modified by the Rhode Island General Assembly to be "terms and conditions of professional employment." In comparison, see R.I.G.L. 28-9.1-4 under the Firefighters Arbitration Act, R.I.G.L. 28-9.2-4 under the Municipal Police Arbitration Act, R.I.G.L. 28-9.4-3 under the Municipal Employees Arbitration Act, R.I.G.L. 28-9.5-4 under the State Police Arbitration Act, R.I.G.L. 28-9.6-4 under the 911 Employees Arbitration Act, R.I.G.L. 28-9.7-4 under the Correctional Officers Arbitration Act and R.I.G.L. 36-11-1 under the State Employees' Arbitration Act. None of these other Acts specifically mention "professional" employment, even though there are many professional positions organized under those acts. Therefore, we believe that in analyzing mandatory subjects for bargaining for teachers, we must consider professional teaching issues. As such, we cannot think of anything more basic to the position of teaching than the grades, which teachers must tender to their students upon the completion of completed work, quizzes, tests, etc. Indeed, in this Board's opinion, the accurate and timely recording of grades and providing personal discretion in marking is one of a teacher's most fundamental *professional* terms of employment.

The Employer argues that there has been no impact at all to the teachers; and that all it has done with the implementation of this directive is the manner of recording the grades. Teachers have always had to record grades for student work and to communicate those grades via report cards and other paper methods. The Employer argues that "the small step of requiring those other teachers who weren't using this to switch to this new system is simply taking that next step of bringing them into the 21<sup>st</sup> century, when technology is permeated throughout our lives." (TR. 4/8/2014 pg. 11) The Employer argues that this decision is one that is reserved to it as a matter of educational policy and that there was no impact to the terms and conditions of the teachers' employment at all.

At first blush, the way the Employer argues, one could almost agree that this charge was much ado about nothing. However, as the testimony and evidence evolved, it became very clear to the Board that there is far more here than meets the eye initially. The Union presented testimony from James Ginolfi, the Union President. He testified that one of the major concerns

that teachers brought to him was the issue of *when* the teachers would be required to log the time to record the grades into the electronic system. (TR. 4/8/2014 pg. 31) Mr. Ginolfi testified that when he met with Ms. Healey on July 24<sup>th</sup>, there was no decision as to when grades would be entered; whether during the school day, after the school day, or how that would relate to when the teacher is actually teaching. *Id.* Mr. Ginolfi also raised the issue of the timeliness of recording the grades. Mr. Ginolfi stated that having been a teacher for thirty-two (32) years, when a student goes home and says “we had a test today”, the parents are going to be anxious to know how their student performed. He anticipated problems from parents going on-line to look for grades when they were not yet posted. (TR. 4/8/2014 pg. 32) Mr. Ginolfi also testified that they did not know how the new system was intended to or would affect the manner in which teachers would issue grades. He stated that teachers each have their own way of grading and there was no answer as to whether there would now be a “uniform” manner of grading required. *Id.* On cross-examination, Mr. Ginolfi stated that the Union’s concerns included: whether there was going to be a uniform grading system, how often were grades going to have to be entered, how long it would take for teachers to enter the data into the system, and access to computers for that purpose.

The Union also presented testimony from Michael Costello, a teacher with twenty-seven (27) years of experience. He testified that for the years prior to 2013-2014, he would record all his grades in a paper Gradebook. He testified that teachers have their own unique individual systems of marking. His personal system included sections for homework, quizzes, tests, essays, projects and separate section for the “portfolio” graduation requirements. (TR. 4/8/2014 pg. 38)<sup>2</sup> Mr. Costello described the portfolio grades as a dual system of marks, both of which he would keep in his Gradebooks together, in the event there were ever any questions. (TR. 4/8/2014 pg. 39) Mr. Costello was asked about the physical act of recording grades. As an example, he described how he graded in one of his ninth grade classes:

“Well, I’ll give you a good example. In the ninth grade classes, I would tend to give quite a bit of homework with my freshmen. So, what I would do—again, everybody does it differently—when they would come in class, I would take attendance. They would have their homework out, and I would walk up and down the rows and just check their homework, you know, flip-it, just, you know, a quick scan; and I did, like, a check-plus, check, check-minus, you know, zero kind of thing. You don’t really have time, you know, to kind of grade homework, because the period would be over by the time—because you have to go over the homework, as well as record it. I’d walk up and down the rows to see who would have it.”

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<sup>2</sup> Mr. Costello explained the difference between a grade and a “proficiency” and how they are scored. Grades are traditional marks of A, B, C, D and F. Proficiency scores are used to assess specific tasks or criteria of assignments and range from one through four, with three and four being “proficient.” For instance, a student could write a really wonderful essay, which he might give a grade of “A”, but the student may have missed one or more of the required elements and not be scored as proficient. (TR. 4/8/2014 pgs. 54-55)

Now, with the electronic marking requirement, Mr. Costello still has to maintain the paper Gradebook, as well as the electronic one, because it would be too cumbersome to try and walk up and down the classroom aisles balancing a laptop while inputting homework marks. So, now he has two (2) sets of marks to maintain; one (1) paper and one (1) electronic. As a result, instead of providing grades regularly for homework, he has decided to provide a homework grade for just the quarter. (TR. 4/8/2014 pg. 41)

Mr. Costello also described how the requirement for electronic recording of grades has changed where he can physically perform the grade recording. He described how, as a teacher, he would utilize downtime at off-duty, outside events such as dance competitions where he could bring his homework bag and mark book and get some grading done. Now, the grade recording is not possible without having a laptop and Internet access wherever he may be. In his opinion, this makes things more difficult. (TR. 4/8/2014 pg. 42) As a result, he sometimes assigns busy-work, so that he can have some time to input grades during the beginning of a class, in order to provide timely feedback to students concerning their performance.

Mr. Costello testified that it is now far more time consuming for him to record grades and that the computerized program will not permit a teacher to "round-up" a grade for a student. So, if a grade is a 69.9, the system will not automatically round up. The teacher can do an end-run around the system, but it takes more effort and time to do so. As such, "sometimes when someone might have gotten the benefit of the doubt before is not going to get the benefit of the doubt." (TR. 4/8/2014 pg. 45) Mr. Costello also testified that the professional development training for using the system consisted of a video. He stated that he got a step behind and could never catch up. After the training, he was completely lost and spent many hours trying to learn the ins and outs of the system. (TR. 4/8/2014 pg. 46)

On cross-examination, Mr. Costello agreed that he had not sought out additional formal help for using the electronic system. Instead, he gets tidbits of help in a passing manner from other teachers. (TR. 4/8/2014 pg. 52) He stated that he's not the type to "complain" and tries to be pretty self-sufficient. He was not able to answer with specificity how long it takes to enter grades using the electronic system because of all the variables such as class size and whether he is entering into two (2) grading systems (regular marks and portfolio marks). When entering into both systems, there is a lot of logging in and out of the two (2) systems, and scrolling up and down in the system, which takes far more time than simply writing scores in a paper Gradebook.



The notification to the teachers of the implementation of the electronic recording occurred on the last day of school in June 2013. (See Joint Exhibit #2) That memo did not provide any details on how this would occur or when training would take place. On both July 9, 2013 and July 20, 2013, the Employer issued "robo-calls" directing teachers to log onto the district's website to access training, including videos, documents and quick reference guides. (Union Exhibit #1) The July 9, 2013 robo-call stated in pertinent part:

"There are four links: Video Series, Quick Reference Cards, Summary Documents and Lesson Plans. Here you will find detailed instructions, support and examples for many ASPEN functions. Finally, we will provide and update an FAQ page on the webpage, on the website again, under the ASPEN Gradebook Tutorials. After you review the tutorials, follow the directions on the E-Learning page at the bottom and select "Click Here" to submit your questions to a specific email address. The email will be monitored with updates appearing on the FAQ page periodically as we can provide answers and/or solutions. Please check out the district website and got to "ASPEN Gradebook Tutorials" to view tutorials, training information and answers to questions."

Eleven (11) days later, the District issued another robo-call, containing the same information as the July 9, 2013 call, but also included a notification that on July 3, 2013 a live link to a training base would open on the system. This call also outlined how the teachers would find user names and passwords. The call also indicated that access to the live database would not be available until August 19, 2013 and highlighted the fact that the parent portal will open at the start of the school year; and that parents will be particularly interested in viewing student assignments and grades. The call also directed teachers to test and try out the functions in the test database.

While the Employer argues that it did not require teachers to engage in any off-duty training, we believe that the Employer's issuance of the June 24, 2013 memo, later followed by the two (2) robo-calls (and the specific directives therein) was clearly intended to require teachers to engage in on-line training and preparation during the summer months, so as to be "ready" for the opening of school. These directives, which clearly pertain to the terms and conditions of employment, were all done unilaterally. The Employer claims that all the required training for implementation was actually performed during one the scheduled professional days at the commencement of the 2013-2014 school year. However, as stated *supra*, the memo and robo-calls clearly directed teachers to undertake tasks to be ready for the school year. Moreover, Mr. Costello testified that the training provided during the professional day was inadequate for his needs and that he has had to spend many, many hours learning the system on his own. Additionally, the Employer's own witnesses and the evidence submitted (Employer's Exhibits #4, #5 and #6) establish that the training was not as "limited" as has been suggested.

As noted by the Union: (Union's Brief pg. 24)

"The Department will argue that there was in fact no change to the teacher's terms and conditions of employment. For example, the School Committee argued in its Statement of Facts and at the hearing that teachers have an obligation to record grades- and therefore, the method is irrelevant. This argument was totally contradicted by the evidence presented by even the Department's own witnesses and documents, which show this was a material and substantial change. For example, Respondent's Exhibit #5 is an ASPEN 'beginning of the year Gradebook checklist.' The document contains 11 pages of steps that teachers must follow once a teacher's classes appear on the computer in order to perform different tasks associated with the grading of each class's assignments. For example, in order to setup classes, there are six steps:

1. Define the details for each class section;
2. Link class sections on the Details page;
3. Import class assignment categories from last year, and create any new categories you might want to use;
4. Import assignments from classes from last year;
5. Check your Gradebook preferences; and
6. Make sure any special codes are ready to go on your Tools tab;

In order to view class details, there are another ten steps. In order to create assignments, there are another ten steps. In order to import assignments from another class or year, there are another eight steps. In order to set user preferences, there are more steps. These are just some, but definitely not all, of the tasks on the beginning of the year setup list. RX5. These are all new tasks to perform in conjunction with the new grading system that teachers did not have to perform when using a paper mark book. These are all things that the teachers had to learn and/or be trained to perform, which clearly impact the conditions of employment."

Based upon all of the foregoing, we agree with the Union's argument that the implementation of the electronic posting of grades was in fact a material and substantial change to the terms and condition of the teachers' professional employment. As such, we also find that the methodology of recording those grades and the sanctity of that process is, therefore, a mandatory issue for bargaining. There is no question that the employer did not engage in bargaining; indeed the Employer has argued that it had no duty to bargain. We will now address those proffered defenses.

### **THE EMPLOYER'S DEFENSES**

#### **A) NON-DELEGABLE DUTY**

The next issue to address is whether the District is excused from bargaining on the basis that this particular issue is one that sounds exclusive in "educational policy" or is one that is contractually reserved to the Employer under the Management Rights Clause of the CBA. The Employer first argues that, pursuant to R.I.G.L. 16-2-9 (a) and the Rhode Island Supreme Court's decision in North Providence School Committee v North Providence Fed'n of Teachers, Local 920, 945 A.2d 339, 347 (R.I. 2008) it has "expansive powers over education," which permits it to enact the electronic grading without bargaining. The Employer argues that the electronic Gradebook was but one piece of a "comprehensive educational management system;" and that the Superintendent decided to implement the Gradebook in order to improve

communication with parents, as part of the educational mission. The Employer argues that the Superintendent had the authority to implement the ASPEN electronic Gradebook, which he believed would “improve the quality and efficiency of the WPS.” (Employer’s Brief, pg. 13) The Employer summarizes this issue by arguing that the Superintendent “properly responded to demands from Warwick parents to increase access to more information regarding their students through the Aspen system by implementing the electronic Gradebook component of that system.”

The problem that we have with this argument is that it seems contrived after-the-fact to disguise the fact that the June 24, 2013 memo sent to the teachers is completely and utterly devoid of mention of either educational policy or the quality and efficiency of the WPS; and that it appears to seek refuge in a suggested “safe harbor” set forth in the Rhode Island Supreme Court’s decision in North Providence School Committee v North Providence Fed’n of Teachers, Local 920, 945 A.2d 339, 347 (R.I. 2008). There, after upholding an arbitrator’s decision in favor of the Union, the Court stated:

“It is because the school committee in this case opted to ground the abolition of the composition period primarily on a fiscal rationale that we have come to conclude that the arbitral decision need not be vacated. If the school committee had justified the elimination of the composition period on the primary basis that said elimination was undertaken for the purpose of improving the education of North Providence High School students in English and if the school committee had explained its thinking in that regard in a cogent manner, it is entirely possible that we would have considered the administrative decision to be non-arbitrable.”  
Id at 346-347.

Indeed, the reference line of the June 24, 2013 memo states: “WPS Cost Savings.” The memo begins by talking about financial shortfalls and steps that must be taken to save money. The memo highlights that the change is anticipated to save \$5,000.00 annually. The memo also states that the administration is looking into other cost savings measures and invites teachers to make suggestions in this regard. The memo makes passing reference to increased communication.<sup>3</sup> The mention of student progress is in connection with another of the “modules” of the ASPEN system. It is not until the Union filed the instant matter in mid-August that any writings of the School Department even remotely suggest that the subject is a “non-delegable right” of the School Department. (See Union Exhibit #8) Superintendent’s letter dated August 30, 2013.) We believe that the best evidence of the school department’s motives is in fact the June 24, 2013 memo to the teachers, which outlines a fiscal rationale for the basis of the decision to implement electronic grading as being the true basis. As such, the School Committee cannot now ground its decision in the cloak and mantra of educational policy to

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<sup>3</sup> Ironically, at the time of the formal hearing in this matter, the parent portal for grades was still not available.

protect itself. (See also ULP 5996, R.I.S.L.R.B. and Portsmouth School Committee, Nov 20, 2012)

### **B) MANAGEMENT RIGHTS**

The Employer argues that it has the right, pursuant to the Management Rights Clause of the CBA to introduce new or improved methods or facilities. The Employer also argues that the CBA does not address the recording of grades or the form in which they shall be recorded. Finally, the Employer argues that Article 18-3, of the Collective Bargaining Agreement, provides that all negotiable items have been discussed and that the Agreement will not be re-opened on any items whether or not they are contained in the Agreement. According to the Employer, somehow all of these claims together support a conclusion that the CBA permitted the Employer to make a unilateral change to the teacher's terms and conditions of professional employment. This argument simply does not make any sense to the Board.

First, a fair reading of the totality of exhibits before the Board, demonstrate that the issue of recording grades is in fact covered by the contract under Section 12-15 entitled " Pupils' Report Card Marks." (See Joint Exhibit # 1, pg. 28) While there is not a great amount of detail under this section, there is in fact reference to paper record cards. Furthermore, Union Exhibits #9 and #10 demonstrate that the Employer sought changes to this section, to include a requirement for teachers to enter data in the Student Information System, which was identified by all the witnesses as being the ASPEN program. These proposed changes were not incorporated into the recent contracts, but that does not eliminate the fact that the changes were sought at the bargaining table. The Employer now claims that the very change it twice sought at the bargaining table (implementation of the Student information System for grades) is one that is now inherently a management right that requires no negotiation. This very sort of tactic was recently rejected by the Board in ULP 6071 R.I.S.L.R.B. v Town of North Kingstown, decided on May 7, 2014, as an unfair labor practice. Accordingly this defense is rejected here as well.

### **C) WAIVER OF THE RIGHT TO BARGAIN**

The Employer here also defends its action by claiming that the Union waived its right to bargain over the use of the electronic grades "module" of the Aspen system, because the Union never objected to the implementation of other modules as they were brought on line. A Union is not required to object to issues it does not find objectionable, in order to validly preserve a future objection to a tangentially related issue. The Employer argues that since the Union did not complain about the use of electronic recording of attendance in 2011 that it has waived its right to complain about the mandated use of another electronic module concerning the recording of students' grades. The Employer also claims that waiver occurred because

secondary teachers were required to post 4<sup>th</sup> quarter report cards and they did not object to the same. As partial support for its position, the Employer cites, this Board's decision in ULP 5867, R.I.S.L.R.B. v Middletown School Committee, decided February 6, 2009. In that case, we dismissed a complaint against the School Committee, finding that the Union had failed to follow up and request bargaining after the Superintendent had agreed to delay the implementation of an electronic application requirement, for one year, at the Union's request. The Union simply failed to pursue the issue in that case and waived its right to further contest the issue or request additional bargaining. Here, the facts are completely opposite. The Union has requested, in writing, that the Employer engage in bargaining. The Employer has refused, claiming that it does not have to bargain. Moreover, here the Union did request the Employer to delay implementation of the electronic Gradebook and the Employer refused. These cases are polar opposites. Additionally, there is a big difference between having secondary teachers posting 4<sup>th</sup> quarter final grades and having all teachers, at all levels, posting every grade especially in light of the discussions contained herein.

#### **D) FULFILLMENT OF BARGAINING OBLIGATION**

The Employer also argues that even though it did not have any obligation to bargain, it did so through its Attorney's meeting with the Union representatives in July 2013. The Employer claims that this meeting constituted effects bargaining and that further efforts to engage in the same were thwarted by the Union. The Employer claims that the effort at effects bargaining was initiated by the Employer's Attorney immediately upon learning of the Superintendent's decision to implement the electronic Gradebook module.

As we have already highlighted in this writing, the decision to implement the electronic grading impacted terms and conditions of the teachers' professional employment. As such, the decision to undertake implementation of the electronic Gradebook itself should have been negotiated, not just the effects of that decision.

#### **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) The Warwick Teachers' Union has been the Collective Bargaining Agent for teachers employed by the Warwick School Department since at least 1970. (See EE 1929) As of

March 2011, the parties' collective bargaining agreement ("CBA") contained an Article 12-15 entitled "Pupils' Report Card Marks." This article provided in pertinent parts: Section 12-15.2 - Grade reporting sheets in the secondary schools shall be made available to teachers two (2) school days prior to the close of each marking period and shall be due in the main office of each school on the third (3<sup>rd</sup>) school day after marks close. Section 12-15.3 - A report card of the carbon type shall be used in the elementary schools. The original shall be sent home and other copies retained for office use. Such forms shall be made available to the teachers five (5) days before they are due.

4) In 2010, the Warwick School Department purchased the "Aspen Student Information System", an electronic program used to record student demographic data and other information. Teacher and administrator training for using this new system commenced in early 2011 and after the initial training, the system went "live" in April 2011 for purposing of recording daily student attendance. (TR 5/13/14, pg. 17)

5) At that time, teachers were also permitted voluntary access to the Gradebook portion of the program, if they so elected. Use of the electronic Gradebook by teachers was optional and voluntary.

6) During contract negotiations in both 2011 and 2012, the Employer sought to make the use of the electronic Gradebook by teachers a mandatory requirement. (See Union Exhibits #9 and #10)

7) Specifically, the language proposed by the School Committee would have eliminated Section 12-15.2 of the contract, as set forth above and replaced it with the following: "Grades shall be due in the main office of each school of the third (3<sup>rd</sup>) school day after marks close in accordance with district schedules and requirements. All teachers will enter Student Information System (SIS) related information (as required by the district and in accordance with the calendars established by the district.)"

8) During both of the 2011 and 2012 contract negotiations, the foregoing language was rejected by the Union and the pre-existing contract language in section 12-15 remained intact. The parties entered into a two-year agreement extension for the period September 1, 2012 to August 31, 2014.

9) In the spring of 2013, the Superintendent decided, notwithstanding the School Committee's prior unsuccessful bargaining of the mandatory use of the Gradebook, that the topic no longer required bargaining and that a unilateral implementation of its mandatory use by teachers was a permissible exercise of the Employer's "management rights" and also constituted a non-delegable administrative decision pertaining to educational policy. As such, on the last day

of school in the 2012-2013 school year, Superintendent Richard D'Agostino issued a memorandum entitled: "Re: WPS Cost Savings."

10) The memo stated in pertinent part: "As a result, the use of the ASPEN Gradebook will be required of all teachers for the 2013-2014 school year. "

11) The memo also mentioned that the switch to ASPEN would result in saving of \$5,000.00 annually.

12) On July 9, 2013, the Warwick School District sent out a "robo-call" to all Warwick Teachers. (A transcript of that call was submitted as Union Exhibit #1) In that message, the District directed teachers to access training videos for the ASPEN Gradebook on the District's website. A second robo-call went out to teachers on July 20, 2013. (The transcript to this call is also part of Union Exhibit #1) This particular call notified the teachers of a live training to be conducted on July 31, 2013, as well as repeating some of the information provided in the prior call.

13) As a result of numerous calls from teachers concerning this issue, Union President, James Ginolfi, contacted Rosemary Healey, the Director of Human Resources & Compliance, Department Attorney and Labor Relations Chief Negotiator, and they scheduled a meeting for July 24, 2013.

14) On August 8, 2013, Mr. Ginolfi wrote to the School Department to reiterate the request for bargaining in writing and to request a delay of the implementation of the ASPEN Gradebook.

15) On August 30, 2013, after the start of the 2013-2014 school year, the School Committee responded that its decision to unilaterally implement the ASPEN Gradebook was a management right under the contract, as well as a non-delegable right of the School Committee and that it would neither negotiate the same or delay its implementation.

#### **CONCLUSIONS OF LAW**

1) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (6) and (10) by refusing to bargain over a mandatory subject for bargaining, the implementation of electronic posting of grades, which required advanced teacher training, when bargaining was requested by the Union.


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 (6) and (10) when it unilaterally implemented a change to the terms and conditions of employment, mandatory posting of grades electronically, a requirement that the Employer had unsuccessfully sought during prior negotiations.


## ORDER


- 1) The Employer is hereby ordered to cease and desist from requiring teachers to post grades via the Aspen Gradebook.
- 2) The Employer is hereby ordered to bargain with the Union over the implementation of the ASPEN Gradebook.
- 3) The Employer is hereby ordered to publish this Decision and Order on its website. The Employer shall effect such publication within five (5) days of receipt of this Decision and Order and shall allow the same to remain on the website for a period of no less than thirty (30) days.



RHODE ISLAND STATE LABOR RELATIONS BOARD

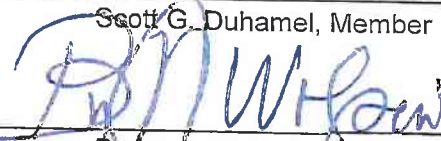
  
Walter J. Lanni, Chairman

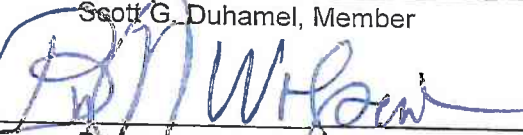
  
Frank J. Montanaro, Member

  
Elizabeth S. Dolan, Member (Dissent)

  
Marcia B. Reback, Member

Board Member Duhamel was absent for signature

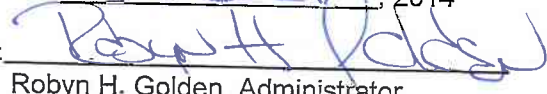
  
Scott G. Duhamel, Member

  
Bruce A. Wolpert, Member

NOTE: Board Member Peder A. Schaefer did not participate in this matter.

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

Dated: NOVEMBER 12, 2014

By:   
Robyn H. Golden, Administrator

