

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 - 6150
	:	
TOWN OF NORTH KINGSTOWN	:	
	:	

DECISION AND ORDER OF DISMISSAL

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 Kingstown (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated September 4, 2014, and filed on September 5, 2014 by the International Brotherhood of Police Officers, Local 473 (hereinafter "Union").

The Charge alleged:

"That the Employer has violated the Act by engaging in acts of discipline, discrimination, harassment, and retaliation against the President of Local 473 motivated by Union animus and/or for having prevailed in a grievance arbitration matter regarding 'mutual exchanges'. Alternatively, the Employer violated the act when it made unilateral changes pertaining to the use of paid sick leave without first bargaining with the exclusive bargaining representative."

Both the Union and the Employer submitted written position statements in September 2014. On November 10, 2014, the Board issued a Complaint against the Employer and the Employer filed its answer and affirmative defenses on November 17, 2014. The Board conducted formal hearings on January 15, 2015, February 19, 2015, February 26, 2015 and March 3, 2015. Post hearing briefs were filed by both parties on May 14, 2015 and reply briefs were filed in late May 2015.

RELEVANT FACTS

The factual backdrop of this matter appears to be largely undisputed. It is the legal effect of these facts that the parties dispute. Thomas Menec has been employed by the Town of North Kingstown as a Police Officer since August, 2002. In addition to

his employment as a Police Officer, Mr. Menec also owns and operates his own landscaping business. Officer Menec is a member of the Union and since 2011 has been serving as its President. In January 2015, Officer Menec filed a grievance on behalf of a fellow officer concerning the Police Chief Thomas Mulligan's denial of that Officer's request to "swap" work shifts with another Officer. The first step of the grievance process requires the grievance to be submitted to the Chief. At the first step meeting, in denying the grievance, Chief Mulligan stated that he considered himself to be "old school" and that he had strict guidelines as to how swaps ought to work and when they should and should not be permitted. The grievance proceeded to the second step with the Town Manager, who also denied the grievance. In March, the grievance was submitted to arbitration in accordance with the parties' Collective Bargaining Agreement. On July 8, 2014, the day before the scheduled hearing, the parties (without the input of Chief Mulligan) settled the grievance. A few weeks later, on July 22, 2014, the parties signed a Memorandum of Agreement, which provided in pertinent part: "The Town agrees that, commencing upon the date of execution of this Agreement, it shall no longer require an officer requesting an exchange to provide a reason for the exchange, and further, said requests shall be granted unless to do so would unduly disrupt the operations of the North Kingstown Police Department." (See Union Exhibit #6) On July 23, 2014, Officer Menec sent an email to the Union members advising them of the settlement of the "swaps" grievance. In that email, he credited Paul Saccoccia and Gary Gentile and stated: "even with the arbitrator ruling in our favor, we could not have achieved this more narrowly defined right to an exchange and without having to divulge the reason."

A few weeks later, Officer Menec called out sick from work for two (2) days (August 14th & 15th) in a row. When Chief Mulligan learned of Officer Menec's absence on the second sick day, he suspected that Officer Menec was abusing sick time and decided to investigate. Mulligan went to Officer Menec's home and found no one there. Chief Mulligan then called the police station and directed the duty Sergeant to call Officer Menec's cell phone to see if he was home. When reached, Officer Menec stated he was not at home and the duty Sergeant relayed that information to the Chief. The Chief then instructed the duty Sergeant to call Officer Menec back to find out where he

was. Officer Menec told the Sergeant, who in turn told the Chief, that Menec was in Warwick, with his wife. Chief Mulligan then ordered the Sergeant to tell Officer Menec that he is being ordered by the Chief to report to the Warwick Police Department and to have the officer-in-charge in Warwick call the North Kingstown duty Sergeant, to verify Officer Menec's presence in Warwick. Chief Mulligan also told the duty Sergeant to tell Officer Menec that he is to produce a fitness for duty note from a doctor when returning to work.

In addition to the series of calls made to ascertain Officer Menec's location, the Chief ran the license plate of one of Menec's employees to obtain his residence. The Chief then drove to this private residence and interrogated a person there concerning Menec's landscaping business. The Chief then stopped a vehicle being driven by the employee and interrogated him as well.

August 16th and 17th were Officer Menec's regularly scheduled days off. On Monday August 18th, Menec secured a fitness-for-duty doctor's note, as directed by the Chief. On August 20th, Mulligan issued Menec a two (2) work day unpaid suspension. (See Union Exhibit #9).

POSITIONS OF THE PARTIES

The Union argues that Mulligan's treatment of Officer Menec was motivated in part by Union animus and was retaliation for Menec's July 23rd email concerning the settlement of the "swap" grievance. The Union submits that the evidence in the record supports a prima facie showing of Union animus and that as a result, the Employer failed to meet its burden to show that it would have taken the same action in the absence of any Union protected activity.

The Employer argues that the Board does not have jurisdiction to hear this complaint, claiming that matter should be resolved via the grievance process. In addition, the Employer argues that the Doctrine of Election-Of-Remedies bars the Board from considering this matter because the Union has filed a grievance. Substantively, the Employer argues that Chief Mulligan's investigation of Officer Menec was both lawful and reasonable under the circumstances; and that it was not based on Union animus. Finally, the Town argues that it did not make unilateral changes to the use of sick leave, as charged.

DISCUSSION

The first issues that we will address are the Employer's claims that the Board lacks jurisdiction. In its brief, the Employer argues that the Collective Bargaining Agreement ("CBA") and the Town's Rules and Regulations govern this dispute exclusively. The Employer cites Article II, Section 2.1 of the Collective Bargaining Agreement - Grievance Procedures and argues that Officer Menec did not follow the procedures therein, concerning the processing of grievances and appeals therefrom. The Union argues that the grievance procedure in the CBA is meant to deal with disputes between the parties arising out of the interpretation of the CBA and that at no time in this proceeding has the Union complained of a grievance to the Board. The Union further argues that the State Labor Relations Act vests this Board with sole authority to adjudicate unfair labor practices. The charge, as filed with the Board clearly sets forth a claim that the Employer has engaged in retaliation against Officer Menec for the exercise of protected rights. The charge does not allege that Officer Menec's discipline violates the contract. Therefore, the Board finds that the Employer's argument as to jurisdiction has no merit.

The Employer also argues that the Board has no jurisdiction due to the Doctrine of Election-of-Remedies, claiming that the Union had filed a grievance seeking essentially the same remedy sought before this Board. In the charge to this Board, Officer Menec seeks: "That the Employer be directed to rescind the disciplinary action taken against the President of Local 473, compensate him for all monetary losses suffered as a result of the Employer's lawful acts and to be otherwise made whole, and to cease and desist, and to bargain with the exclusive bargaining representative." In his grievance, Officer Menec sought to have his sick leave account credited with four (4) hours and that he also be paid four (4) hours overtime pay for going to a mandated doctor's appointment on his day off.

The Employer argues that the "make whole" relief request contained in the charge encompasses the same relief sought in Officer Menec's grievance where he sought four (4) hours of "call-back" pay and four (4) hours of sick time. The Union argues that the Doctrine of Election-of-Remedies is grounded in equity and is designed to mitigate unfairness to both parties by preventing double redress for a single wrong.

State Department of Environmental Management v State Labor Relations Board, 799 A.2d 274 (R.I. 2002) citing Am. Jur. 2d Election of Remedies. As set forth in the Union's brief, the Doctrine is designed to prohibit a litigant who exercises his right to redress in one forum and loses, from obtaining a second bite at the apple by taking the same dispute to another forum.

We do not agree with the Employer's interpretation of these two (2) very different requests for relief. We believe that it is quite clear that the grievance only addressed the very narrow issue of the Chief's alleged impingement of Officer Menec's sick leave by requiring him to report to the Warwick Police station while on sick leave on August 15th and by requiring him to secure a doctor's note on a day off on August 17th. To the extent that monetary losses were included as one element of the charge to the Board, we have the discretion and ability to parse that request out without wholesale dismissal of the charge. The inclusion of this phrase does not render us jurisdiction-less as to the balance of the charges. As such, we will now turn to the merits of the dispute.

The Union argues that the record evidence supports a finding that Chief Mulligan harbored anti-Union animus, which, in part, motivated the actions he took on August 15th, (locating Menec and requiring him to report to the Warwick Police station) as well as the two (2) work day suspension he imposed in August 20, 2014. The evidence of anti-Union animus cited by the Union is the Chief's statement at the step one "swap" grievance hearing earlier in the year, where he said that mutual exchanges or "swaps" of work shifts were just "another form of free time" of which he did not approve. From this one statement, the Union *infers* that the Chief must have been upset when the grievance was settled by the Town Manager, because the Chief's ability to deny mutual exchanges was taken away. The Union further argues that the July 23rd email Menec sent to the Department credited Menec for the successful grievance settlement and further infers from this that the Chief harbored anti-Union animus.

The problem with the Union's argument is that it is based on supposition and speculation. The Union was not able to present any testimony or evidence supporting this suspicion or claim. The Union's reliance on the July 23rd email for evidence of anti-Union animus is, in this Board's opinion, misplaced. That email gave a summary of the settlement of the grievance and while a bit "victorious" in tone, gave all the credit for

the victory to two (2) other men, Paul Saccoccia and Gary Gentile. In his email, Menec did not take credit for this himself for this victory. (See Union Exhibit #7) Thus, if there was going to be anti-Union animus as a result of this email, one would surmise it would not be directed at Menec, but rather at either Saccoccia or Gentile.¹

The evidence also established that Chief Mulligan has been a member of the North Kingstown Police Department for his entire career, starting as Patrol Officer and working his way through the ranks, holding positions in the Uniformed Division, Detective Division, and Internal Affairs. (TR. 2/26/15, pg. 208) He served as an administrative Captain and at the time of the hearings had been Chief for four (4) years. All the Chief's prior positions in the Department were bargaining unit positions and Mulligan was in fact a dues-paying member. Indeed, in addition to being a Union member, Mulligan was active in the Union, serving as secretary, vice president and president for a few years. With the Chief's Union membership history as a backdrop to the current dispute, we would expect to see much stronger evidence that the Chief's disposition towards Union membership had changed dramatically when he became Chief of the Department. However, there is simply no evidence of such a change of heart or demeanor. In fact, there is evidence in the record that Chief Mulligan continued to support his Union-member subordinates. He testified that he contributes time to the sick leave pool that benefits Union members only. (TR. 2/26/15, pg. 279) Respondent's Exhibit #16 demonstrates that since 2011, Chief Mulligan has contributed fifteen (15) days of his sick time to the Union member sick leave pool. The testimony also established that Chief Mulligan would not be able to borrow or access this sick leave pool if he became ill. Id.

The Chief's alleged comments while settling the "swap" grievance do not, in our opinion, give rise to any anti-Union animus. In fact, the Chief testified that when he was in the Union, he benefited from the use of swaps himself. He also testified that he believed that the original intent of the use of swaps was to benefit officers who were attending school and that the use of swaps over the years had morphed into a much more frequent and perhaps excessive use. (TR. 2/26/15, pgs. 286, 288, 289)

¹ This record reflects that Gary Gentile is the Union attorney. The Board does not know who Paul Saccoccia is and whether he is a Union staffer or a Police Officer.

Furthermore, the Chief testified in a straightforward, non-evasive manner through-out his witness testimony. He made it clear that he did not believe that the swap grievance was settled in a manner that was “directed” at him and that he had no problem with it. When asked if his decision to investigate Officer Menec was based on his Union affiliation in any way, Chief Mulligan repeatedly answered “no” and that it was simply based upon his belief that Menec was abusing sick time. (TR. 2/26/15, pgs. 214-215)

The Union also claimed, upon information and belief, that the Chief’s visit to Menec’s home on August 15, 2014, to verify his illness, was the first time that the Chief had even undertaken such an action. However, the Chief testified that that was, in fact, not the first time that he has taken such an action. In addition, the Chief testified he had personal knowledge of Officer Menec’s absences over the years. Indeed, in 2005, when the Chief was still a Captain, he issued Menec a letter of reprimand for failure to report to duty. (TR 2/26/2015, pgs. 215-216) (See Employer’s Exhibit #10) In connection with this incident, a Police Officer was dispatched to Menec’s home to ascertain his whereabouts. (TR 2/26/2015, pg. 217)

We believe that the evidence in this case supports the affirmative defense preferred by the Employer that Chief Mulligan’s investigation of Menec’s absence and subsequent discipline was based solely upon Mulligan’s belief that Menec was abusing sick time. We specifically note the following: (1) Chief Mulligan did not initiate his investigation on the August 14th, but rather on August 15th, Menec’s second consecutive day out. If anti-Union animus was the basis for the investigation, then we would have expected the action to have occurred immediately upon the first call-out. (2) The Chief was not “on it” at the beginning of the shift. In fact, he did not head out to Menec’s house until early afternoon, on the *second* day of Menec’s absence. If the Chief had really been out to get Menec because of the settlement of the swap grievance a few weeks earlier, we would expect the Chief to have acted adversely (and without justification) mat the first opportunity. (3) The Chief had ample reason and authority (indeed, one could argue there was a duty under the Department’s regulations) to investigate whether Officer Menec’s absences were truly due to illness or injury or

whether he was abusing sick time.² (4) Officer Menec's personnel files (both electronic and paper) indicate a series of problems over the years with absences from duty or failures to report for duty in a timely manner. In fact, when Chief Mulligan was still a Captain, he issued a letter of reprimand against Officer Menec for a failure to report to duty. (See Employer's Exhibits #2, 5, 6, 7, 10, 11, 13)

For all of the foregoing reasons, we find that Chief Mulligan's investigation and disciplinary action against Officer Menec was not due, in any part, to anti-Union animus. As such, we hereby dismiss the compliant and charge on that count.

This brings us to the final charge that the Employer made unilateral changes pertaining to the use of paid sick leave without first bargaining with the exclusive bargaining representative. The Union's basis for this charge is that the CBA permits Officers to return to work from a two (2) day or less illness without a doctor's note; and that Chief Mulligan required Officer Menec to secure a doctor's note prior to returning to duty on August 18, 2014.

The Union submitted the parties' CBA into evidence. Sections 3.14 and 3.14.1 deal with the *accrual* of sick leave and *not* the expenditure thereof. Thus the CBA is silent on the issue of the issue of doctors' notes for return to duty. Section 6.4 of the CBA states that, "it is understood and agreed that all matters subject to collective bargaining between the parties have been covered herein." Thus, the Union has waived its right to require bargaining over the requirement to produce doctors' notes after illness or injury.

The Department's Rules and Regulations (Respondent's Exhibit #9) do address this issue in Part IV, Section B (5) on page 31. However, in the Introduction Section on page 8, the Department has reserved the right to adopt changes as may be necessary from time-to-time. Therefore, since the issue of doctors' notes is not part of the CBA and the Department has reserved the right to adopt and change policies from time-to-time, the Chief's decision to require Officer Menec to produce a doctor's note, even if it occasioned by a change in policy, does not constitute an illegal unilateral change of a

² This Board does not sit to judge whether all of the Chief's investigative techniques (going to private residences, stopping motor vehicles, ordering Officer Menec to report to another police station) were appropriate or necessary under the circumstances presented. We need only be convinced that the actions were based upon some motive other than anti-Union animus. We are so convinced.

negotiated term of condition of employment. As such, the unfair labor practice charge and complaint on this issue are also hereby dismissed.

FINDINGS OF FACT

- 1) The Town of North Kingstown Committee 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) Thomas Menec has been employed by the Town of North Kingstown as a Police Officer since August, 2002. In addition to his employment as a Police Officer, Mr. Menec also owns and operates his own landscaping business. Officer Menec is a member of the Union; and since 2011 has been serving as its President.
- 4) In January 2015, Officer Menec filed a grievance on behalf of a fellow officer concerning the Police Chief, Thomas Mulligan’s denial of that officer’s request to “swap” work shifts with another officer. The first step of the grievance process requires the grievance to be submitted to the Chief. At the first step meeting, in denying the grievance, Chief Mulligan stated that he considered himself to be “old school” and that he had strict guidelines as to how swaps-out are to work; and when they should and should not be permitted. The grievance proceeded to the second step with the Town Manager who also denied the grievance. In March, the grievance was submitted to arbitration in accordance with the parties’ Collective Bargaining Agreement.
- 5) On July 8, 2014, the day before the scheduled hearing, the parties (without the input of Chief Mulligan) settled the grievance.
- 6) On July 22, 2014, the parties signed a Memorandum of Agreement, which provided in pertinent part: “The Town agrees that, commencing upon the date of execution of this Agreement, it shall no longer require an officer requesting an exchange to provide a reason for the exchange, and further, said requests shall be granted unless to do so would unduly disrupt the operations of the North Kingstown Police Department.”

- 7) On July 23, 2014, Officer Menec sent an email to the Union members advising them of the settlement of the "swaps" grievance. In that email, he credited Paul Saccoccia and Gary Gentile and stated: "even with the arbitrator ruling in our favor, we could not have achieved this more narrowly defined right to an exchange and without having to divulge the reason."
- 8) In mid-August, 2014, Officer Menec called out sick from work for two (2) in a row.
- 9) When Chief Mulligan learned of Officer Menec's absence on the second sick day, he suspected that Officer Menec was abusing sick time and decided to investigate.
- 10) Mulligan went to Officer Menec's home and found no one there. Chief Mulligan then called the police station and directed the duty Sergeant to call Officer Menec's cell phone to see if he was home. When reached, Officer Menec stated he was not at home and the duty Sergeant relayed that information to the Chief. The Chief then instructed the duty Sergeant to call Officer Menec back to find out where he was. Officer Menec told the Sergeant, who in turn told the Chief, that Menec was in Warwick, with his wife.
- 11) Chief Mulligan then ordered the Sergeant to tell Officer Menec that he is being ordered by the Chief to report to the Warwick Police Department and to have the officer-in-charge in Warwick call the North Kingstown duty Sergeant, to verify Officer Menec's presence in Warwick. Chief Mulligan also told the duty Sergeant to tell Officer Menec that he is to produce a Fitness-for-Duty note from a doctor when returning to work.
- 12) In addition to the series of calls made to ascertain Officer Menec's location, the Chief ran the license plate of one of Menec's employees to obtain his residence. The Chief then drove to this private residence and interrogated a person there concerning Menec's landscaping business. The Chief then stopped a vehicle being driven by the employee and interrogated him as well.
- 13) August 16th and 17th were Officer Menec's regularly scheduled days off. On Monday August 18th, Menec secured a Fitness-for-Duty doctor's note, as directed by the Chief. On August 20th, Mulligan issued Menec a two (2) day unpaid suspension.

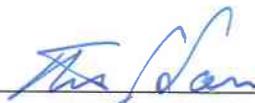
CONCLUSIONS OF LAW

- 1) The Board has subject matter jurisdiction to hear the within matter.
- 2) The reliable, probative evidence in the record does not support of finding of Union animus.
3. The reliable, probative evidence in the record does not support of a unilateral change to terms and conditions of employment.

ORDER

- 1) The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

RHODE ISLAND STATE LABOR RELATIONS BOARD



Walter J. Lanni, Chairman



Frank J. Montanaro, Member



Marcia B. Reback, Member



Harry F. Winthrop, Member



Aronda Kirby, Member

BOARD MEMBER, SCOTT G. DUHAMEL, WAS NOT PRESENT TO SIGN AS WRITTEN. SCOTT G. DUHAMEL VOTED IN OPPOSITION TO THE MOTION.

BOARD MEMBER, ALBERTO APONTE CARDONA, WAS NOT A PARTICIPATING MEMBER OF THE BOARD AT THE TIME OF VOTING; THUS, HE ABSTAINED FROM PARTICIPATION IN THE SIGNING OF THE DECISION AND ORDER.

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

Dated: September 24, 2015

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

