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-6176
WARWICK SCHOOL COMMITTEE	:	

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 Warwick School Committee (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated December 2, 2015, and filed December 7, 2015 by the Warwick Teachers Union, AFT, Local 915 (hereinafter "Union").

The Charge alleged:

> Violations of 28-7-13 (7) and (10).The Collective Bargaining Agreement for the period September 1, 2014 through August 31, 2015 expired on August 31, 2015. In an attempt to reach an Agreement with respect to the Collective Bargaining Agreement for the period September 1, 2015 through August 31, 2016, the Warwick Teachers Union and the Warwick School Committee engaged in the collective bargaining process pursuant to the Certified School Teachers' Arbitration Act (Title 28, Chapter 9.3) Despite multiple negotiation sessions and multiple mediation sessions, the parties were unable to come to a final resolution with respect to that 2015-2016 Collective Bargaining Agreement and as a result, the Warwick School Committee requested statutory interest arbitration pursuant to R.I.G.L. 28-9.3-10. The parties have each appointed their arbitrator, pursuant to R.I.G.L. 28-9.3-10(a), but a neutral arbitrator has not, as of this time, been appointed. However, on September 14, 2015 and October 6, 2015, the Warwick Teacher Union filed grievances pursuant to Article III, Grievance Procedure, under the Collective Bargaining Agreement. Grievances hearings were held under the procedures of Article 3-2.1 and 3-2.2 (the Level/Step procedures) of the Collective Bargaining Agreement, but the grievances were not resolved. Thereafter, the Union timely filed for arbitration in accordance with Article 3-2.3. Notwithstanding the fact that the Collective Bargaining Agreement allows for arbitration when a grievance cannot be resolved informally under the Level/Step procedures, the Warwick School Committee unilaterally has determined not to participate in grievance arbitration, claiming the Collective Bargaining Agreement has expired and that the Warwick School Committee has no obligation to submit the issues grieved by the Union to arbitration. This unilateral decision of the Warwick School Committee is in violation of R.I.G.L. 28-7-13, subsections (7) and (10). Moreover, the Warwick School Committee's action is in direct contravention of this Board's decisions in Rhode Island State Labor Relations Board and Warwick School Committee, Case No. ULP 4647 (decided November 10, 1992) and Rhode Island State Labor Relations Board and City of Pawtucket, Case No. ULP–6142 (decided March 30, 2015.)

Following the filing of the Charge, the parties each submitted a written position statement as part of the Board's informal hearing process. On January 9, 2016, the Board issued a Complaint alleging: (1) That the Employer violated R.I.G.L. 28-7-13 (3) (6) (7) and (10) when it

refused to arbitrate disputes after the expiration of a Collective Bargaining Agreement and during the ongoing statutory interest arbitration for a successor Collective Bargaining Agreement, and therefore, unilaterally violated the status quo.

The Employer filed its Answer on January 22, 2016, and on January 26, 2016 it filed a Motion to Dismiss and a Memorandum in Support. The Union filed an objection and memorandum on January 28, 2016. On February 2, 2016, the parties filed a joint document entitled "Consent Order" in which they agreed to waive their rights to formal evidentiary hearing and agreed to submit legal memoranda in lieu thereof. On February 9, 2016, the Board denied the Employer's Motion to Dismiss and granted the parties joint motion for a Consent Order. On February 24, 2016, the Board issued its order accepting the waiver of formal hearing and established a briefing schedule. The parties each filed briefs in accordance with the Board's order and on May 10, 2016, the Board voted to uphold the charge of unfair labor practice and referred the matter to its legal counsel for drafting a decision & order consistent with its determination.

SUMMARY OF FACTS

In accordance with Section 7.01.10 of the Board's Rules and Regulations, the parties submitted a Stipulated Statement of Facts as follows:

1. The Warwick School Committee (Committee) and the Warwick Teachers Union (Union) were parties to a Collective Bargaining Agreement for the period September 1, 2012 through August 31, 2014. This Agreement expired on August 31, 2014.

2. The Committee and the Union entered into an Agreement for the period of September 1, 2014 through August 31, 2015. The Agreement expired on August 31, 2015.

3. The September 1, 2014 through August 31, 2015 Agreement contains, at Article III, a provision entitled Grievance Procedure. Section 3-1, titled Definition, which sets forth at 3-1.1, the definition of a grievance. Section 3-2, titled Procedures, sets forth a process for the filing of grievances and different Levels or steps of progression from principal through Administrator and Superintendent at which grievances are heard and decisions rendered. Section 3-2.3, titled Arbitration, sets forth the process for proceeding to binding arbitration should a grievance not have been settled under the Level or Step Procedures identified in Section 3-2.

4. In an attempt to reach an agreement with respect to a Collective Bargaining Agreement for the period September 1, 2015 through August 31, 2016, the Union and the Committee engaged in the collective bargaining process pursuant to the Certified School Teachers' Arbitration Act (Title 28, Chapter 9.3)

5. The parties conducted multiple negotiation sessions, but were unable to reach a resolution with respect to a 2015-2016 Collective Bargaining Agreement.

6. The parties also engaged in multiple mediation sessions without successfully agreeing to a new contract.

7. On November 12, 2015 the Committee requested statutory interest arbitration pursuant to R.I.G.L. 28-9.3-10.

8. The parties have each appointed their arbitrator pursuant to R.I.G.L. 28-9.3-10 (a) and a neutral arbitrator has been appointed. The interest arbitration process commenced on December 16, 2015. The interest arbitration process has not yet concluded. The interest arbitration process will not be concluded for several more months.

9. On September 14, 2015 and October 6, 2015, the Union filed two (2) grievances, which it alleges that it filed pursuant to Article III, Grievance Procedure, under the September 1, 2014 through August 31, 2015 Collective Bargaining Agreement.

10. Grievance hearings were held, but the grievances were not resolved.

11. The School Committee acknowledges that the grievances were filed and that grievance hearings were held, but alleges that the Collective Bargaining Agreement had expired and that the arbitration provisions were no linger binding on the parties.

12. The grievances filed on September 14, 2015 involves the assignment of duties to homeroom teachers during the 2015-2016 school year.

13. The grievance filed on October 6, 2015 involves the suspension of a teacher for an action that took place on September 12, 2015.

14. After the denial of the grievances at the Superintendent of Schools level, the Union alleges that it timely filed for arbitration in accordance with Article 3-2.3 of the September 1, 2014 through August 31, 2015 Collective Bargaining Agreement.

15. The School Committee acknowledges that the Union filed for arbitration, but alleges that the Collective Bargaining Agreement had expired and that the arbitration provisions were no longer binding on the parties.

16. The Warwick School Committee unilaterally determined not to participate in the grievance arbitration, claiming that the Collective Bargaining Agreement has expired; and that the Warwick School Committee has no obligation to submit the issues grieved by the Union to arbitration.

17. On or about January 19, 2016, the Warwick Superintendent of Schools sent out, online, a document titled "A Blueprint for a More Efficient & Effective School System." The document outlines, in relevant part, layoffs/reductions of force of teachers that exceeds the number of layoffs/reductions in force, set forth in and allowed by Appendix D of the September 1, 2014 through August 31, 2015 Collective Bargaining Agreement.

18. While the School Committee acknowledges the Superintendent sent out the document alluded to in paragraph 17, no action has been taken with respect to layoffs in violation of the September 1, 2014 through August 31, 2015 Agreement, and therefore, the School Committee alleges that the fact contained in paragraph 17 is both irrelevant and not ripe for controversy. The School Committee does not waive its right to argue that the fact contained in paragraph 17 is both irrelevant and not ripe for controversy.

POSITION OF THE PARTIES

The Union argues that the issue before the Board is not novel or new and that it is nearly identical to the facts set forth in Case No. ULP-4647, Rhode Island State Labor Relations Board and Warwick School Committee, where the Board found that this same Committee had committed an unfair labor practice. In ULP-4647, decided in 1992, the Board held that a departure from the terms of an expired contract, prior to the exhaustion of all statutory dispute mechanism procedures, violates the Labor Relations Act. The Union argues that the ruling in ULP-4647 is still good law and was recently cited by the Board in ULP 6088, Rhode Island State Labor Relations Board and Town of North Kingstown and ULP 6142, Rhode Island State Labor Relations Board and City of Pawtucket. The Union seeks a ruling that that September 2, 2014 through August 31, 2015 Collective Bargaining Agreement is applicable to the parties; and that the School Committee committed an unfair labor practice by refusing to participate in grievance arbitration. As a remedy, the Union seeks a variety of corrective measures and punishments, including an order for the School Committee to participate in grievance arbitration and an award of its attorney's fees.

The School Committee argues that it simply has no obligation, under settled law, to submit to grievance arbitration when the last Collective Bargaining Agreement between the parties has passed its stated expiration date. The Committee cites both federal and state case law in support of its position.

DISCUSSION

We begin our discussion on this issue by recognizing that *contractual* rights and obligations under the expired Agreement dated September 1, 2014 through August 31, 2015 no longer exist. The issue here is whether or not the terms of that expired contract, more specifically, the duty to process grievances through arbitration, is otherwise enforceable through *statutory* measures under the State Labor Relations Act.

The Board's long-established position concerning the requirement to maintain the status quo of terms and conditions of employment for public sector employees, after the expiration of a prior Collective Bargaining Agreement, began with Case No ULP-4647, SLRB v Warwick School

Committee. That case examined the issue of unilateral implementation of terms and conditions of employment imposed by a School Committee, during the negotiations of a successor CBA.[1] This Board held: "We conclude that unilateral departure from the terms of an expired contract, prior to the exhaustion of all available statutory dispute resolution procedures, violates the obligation under R.I.G.L. 28-7-13 to bargain collectively. (ULP-4647 Decision pg. 10) In that case, this Board discussed the significant differences between private sector disputes and public sector disputes. We noted that the School Committee had urged the Board to adopt the federal model for dealing with *private sector disputes,* which would allow the Employer to unilaterally impose terms upon the reaching of an impasse in negotiations for a successor CBA, without regard to the distinct character of *public sector* bargaining. We declined to do so and instead joined with other jurisdictions - notably New York, Triborough Bridge & Tunnel Authority, 5 PERB 4505, Aff'd 5 PERB 3037 (1972); California, Moreno Valley United School District v PERB, 142 Cal. App. 3rd, 1991 Cal. Rptr. 60 (1983); and Oregon, Wasco County v AFSCME Local No 2752, 30 Oregon App. 863, 569 P.2d 15 (1977), opinion following remand, 46 Ore. App. 859, 613 P.2d 1067 (1980), that had rejected the same approach. (ULP-5647 Decision pg. 11)

In our discussion in ULP-4647, we noted that the private sector model of collective bargaining contemplated the use of economic warfare.

> "In the private sector, unlike the public sector, it is anticipated, in fact, customary- that a Union will exercise its right to strike for the purpose of obtaining leverage at the bargaining table. The threat of a strike, and the strike itself, are legitimate economic weapons. Section 13 of the National Labor Relations Act, 29 U.S.C. 163 provides, in relevant part, that the NLRA shall not 'be construed so as to interfere with or impede or diminish in any way, the right to strike.' Private sector theory embraces the position that the strike weapon 'supports the principles of the collective bargaining system' by balancing the power of labor and management. *NLRB v Erie Resistor Corp*, 373 U.S. 221, 235 (1963)." (ULP-5647 Decision pg. 12)

In ULP-4647, we went on to discuss the fact that Rhode Island, to the contrary, adopts a different model for public sector bargaining, within the context of collective bargaining for teachers. In Rhode Island, our legislative leaders have determined that strikes by public employees, in this case, teacher, are quite simply unacceptable. R.I.G.L. 28-9.3-1 (b) provides: "It is declared to be the public policy of this state to accord to certified public school teachers the right to organize, to be represented, to negotiate professionally, and to bargain on a collective basis with School Committees covering hours, salary, working conditions, and other terms of professional employment; provided that nothing contained in this chapter shall be construed to accord to certified public school teachers the right to strike." That prohibition derives in part from

[1] Prior ULP-4518, which found the Warwick School Committee had committed an unfair labor practice by refusing to execute a negotiated Agreement, was overturned by the Superior Court on the basis that the negotiators for the school committee lacked actual authority to bind the committee.

the findings set forth in the State Labor Relations Act that strikes, lockouts, and other forms of industrial strife and unrest are inimical to the public safety and welfare, and frequently endanger the public health. R.I.G.L. 28-7-2 (b).

We wrote in ULP-4647 that "among commentators," there is a unanimity of opinion that the private sector model is not transferable to public sector. This Board continues to embrace and appreciate the wisdom of those who realized this factor early on and who did not attempt to include private sector elements of "warfare" into the public sector collective bargaining model. The continuing prohibition of teacher strikes, which makes sense, must be counter-balanced for the employees who do not have the right to strike. The "legislative denial of the right to strike should not be allowed to reduce collective bargaining to collective begging." (ULP-4647, Decision pg. 16) The Employer's counterbalancing prohibited activity is "self-help" in the form of unilaterally imposing terms and conditions of employment. As stated by the Court in Moreno Valley United School District v PERB, 142 Cal. App. 3rd, 1991 Cal. Rptr. 60 (1983): "Unilateral imposition of terms by an Employer signals an end to the mutual dispute resolution process regarding those terms. The Employer loses any incentive to participate in the dispute resolution process because it has imposed terms it deems satisfactory." Id. In deciding ULP-4647, we wrote:

> "We join those jurisdictions which hold that an Employer's implementation of bargaining proposals is per se an unfair labor practice. In *Wasco County,* 569 P.2d 15, aff'd, 613 P.2d 1067, the Court of Appeals of Oregon approved a SLRB decision squarely on point. There, the Employer implemented the Union's wage proposal prior to exhaustion of dispute resolution procedures. Citing the SLRB decision, the Court acknowledged the dichotomy between federal and state impasse resolution procedures, even though Oregon employees have a limited right to strike. It seems to us the case is even more compelling when public employees have no right to strike whatsoever. See also, *Gresham Grade Teachers v Gresham Grade School*, 630 P.2d 1304 (Ore. 1981).
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> We observe that this rule will likely have a stabilizing impact on labor relations. Neither party will be subject to a term or condition of employment that it had not previously agreed to. We believe that this will contribute to the maintenance of good relations...between teaching personnel and School Committees. R IG.L. 28-9.3-1."[2]

Also, see Public Sector Impasse Resolution Procedures, Charles B. Craver, 60 Chi.-Kent L. Rev. 779 (1984) We have re-affirmed the position we took in Warwick School Committee in ULP 6088, SLRB v Town of North Kingstown, 2013 and ULP 6071, SLRB v Town of North Kingstown,2014, and ULP 6142, SLRB v City of Pawtucket. [3]

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[2] In order to avoid continuously repeating specific pieces of our decision in ULP-4647, we are specifically incorporating pages 10 through 17 of that decision here in this decision; and we specifically re-affirm the rationale for that decision herein. A copy of those pages are attached hereto as Appendix A to this decision.
[3] ULP-6088 and ULP-6071 have now been vacated by the Board at the joint request of the Employer and the Union to effectuate a global settlement.

In Warwick School Committee v Warwick Teacher's Union, Local 915, 613 A.2d 1273, 1276 (R.I.1992), the Rhode Island Supreme Court stated:

> "If a dispute should arise between the parties concerning the effect of the failure to enter into a new Agreement and whether or not the terms and conditions of an expired Agreement should be controlling pending the negotiation and execution of a new Agreement, the tribunal to make such a determination is the State Labor Relations Board pursuant to G.L.1956 (1986 Reenactment) chapter 7 of title 28 as specifically required by § 28-9.3-4. If the Union should contend that the terms of an expired Agreement should apply until a new Agreement should be reached, its remedy would be to file an unfair labor practice complaint with the State Labor Relations Board pursuant to the terms of § 28-7-13. The Superior Court would have jurisdiction only to review the decision of the State Labor Relations Board pursuant to § 42-35-15".

The Rhode Island Supreme Court recently reaffirmed in Town of North Kingstown v International Association of Fire Fighters, 107 A.3d 304, 320 (R.I. 2015), that the Labor Board is the appropriate body to ascertain what terms and conditions of employment are in effect after the expiration of a Collective Bargaining Agreement.

> "In the abstract, we do not disagree with the hearing justice's reading of Warwick School Committee; [15] however, based on our application of our other precedent to the facts of this case, there is nothing for the SLRB to determine with respect to the relationship between the parties, at least as far as the July 1, 2011 through June 30, 2012 period. Had the same series and confluence of events[16] not occurred, the town may not have been justified in implementing the three-platoon structure and there may have been something for the SLRB to determine."[4]

During the years between the Rhode Island Supreme Court's decision in Warwick School Committee v Warwick Teacher's Union, Local 915, 613 A.2d 1273, (R.I.1992) and its decision in Town of North Kingstown v International Association of Fire Fighters, 107 A.3d 304, 320 (R.I. 2015), the Court issued its decision in Providence Teachers Union v Providence School Bd., 689 A.2d 388 (R.I. 1997), which the Employer has cited as controlling case law on the issue presented herein.

In Providence Teachers Union, the issue presented to the Court was whether not a CBA for the years 1992 through 1995 was valid and enforceable. This case was in essence a companion case to Providence Teachers Union v Providence School Board 689 A.2d 384 (R.I. 1996) decided by the Court a few weeks earlier (hereinafter "Providence Teachers I") In Providence Teachers I, the Court held that a Collective Bargaining Agreement, which had not been ratified by the Providence City Council was void and unenforceable. So, in Providence Teachers II, the Court stated that it was, of course, bound by that earlier decision. However, the Court addressed additional issues in Providence Teachers II including the Union's theory that the last valid and operative contract controls. However, the Court found that nothing in the Agreement

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[4] In North Kingstown, the Court determined that because there had not been a timely demand to engage in interest arbitration, the Union waived its rights and protections under the Fire Fighters Arbitration Act, as it pertained to one calendar year.

revealed a contractual intent to extend the viability of the arbitration clause beyond the life of the contract. In its decision, the Court also said:

> "Moreover, we reject the proposition that a general arbitration clause in an expired contract represents a valid mechanism for resolving a dispute that neither arose during the term of the contract nor involved a right that accrued or vested under the contract." Providence Teachers Union v Providence School Bd., 689 A.2d 388, 393 (R.I. 1997)

The Court went on to review and cite a series of cases decided under federal law. The Court further stated:

> "There is no basis, however, and the "Union has cited none, for the proposition that arbitration may be compelled pursuant to a general arbitration clause in an expired contract in the event, as here, the dispute arose after the expiration of the contract and did not involve a right accrued or vested under the contract." Id

The Employer argues that the forgoing case establishes conclusively that an Employer may lawfully refuse to submit a grievance to arbitration after the expiration of a Collective Bargaining Agreement. To be sure, the language in Providence Teachers II is compelling and, if read in a vacuum, provides caution under the Board's deliberations. However, both the factual scenario and the procedural posture of the two (2) cases are widely different.

In the present case, the parties have submitted and the Board has accepted a statement of stipulated facts, as outlined above. Those facts make it clear that the parties were *deep* into the statutorily required collective bargaining process for a successor Agreement when the Employer unilaterally imposed a change to a long-enjoyed condition of employment; which provided an extra-judicial remedy to resolving employment disputes. In this case, the CBA expired on August 31, 2015. The Union filed its grievances in September and October, 2015, after the expiration of the Collective Bargaining Agreement. The School Committee filed for interest arbitration in November 2015. The parties stipulated that they had been through months and months of negotiation and mediation, without success, when the School Committee filed its demand for interest arbitration. Furthermore, the parties also stipulated that the grievances were processed through the Superintendent level, as required under the expired CBA. Only then did the School Committee unilaterally decide to stop following the grievance procedure, and allege that it had no duty to process grievances. This is a very different factual scenario from Providence Teacher II. There, the parties were ***not*** involved in the statutorily mandated process for a successor Collective Bargaining Agreement. The Court ruled that their last CBA had expired several years earlier and no negotiations were taking place at all. The Union in Providence Teacher II was trying to find a "contractual" remedy, since no statutory remedy was available under those facts. The Court rightfully rejected the contract theory.

Additionally, the Employer has completely ignored a significant relevant footnote in the Providence Teachers II decision, which the Board believes confirms its position that parties to an

expired Collective Bargaining Agreement are protected from unilateral changes; and which distinguishes the facts in Providence Teachers from the facts in this case. Footnote number 2, which was inserted in Providence Teachers II at p 393 provides:

> "The contractual rights concerning safety, equipment, and supplies on which the Union's grievance was based cannot be said to have 'accrued' or 'vested' under the expired 1991-92 contract. [A]n expired contract has by its own terms released all parties from their respective obligations, except obligations already fixed under the contract but as yet unsatisfied. Litton Financial Printing Division v NLRB, 501 U.S. 190, 206, 111 S. Ct. 2215, 2225, 115 L.Ed. 2d 177,197 (1991). **Although terms and conditions of employment may be insulated from post expiration unilateral change in order to protect the statutory right to bargain, see G.L. 1956 §28-9.3-2 and § 28-9.3-4, such terms and conditions no longer have force by reason of the expired contract.** Litton, 501 U.S. at 206, 111 S.Ct. at 2225, 115 L.Ed. at 197. (Bold emphasis added herein)

The Court in Providence Teachers II was determining whether an arbitration award was valid when the contract under which it was referred to arbitration was never ratified by the City Council. Since the contract was not ratified, the contract was void and unenforceable and the court upheld the Superior court's vacation of the award.

The School Committee has also argued that the within matter is governed by the U.S. Supreme Court's holding in Litton Financial Printing Division v NLRB, 501 US 190, 206, 111 S. Ct, 2215, 2225. The Litton case is a federal case that dealt with the NLRB's *federal* labor *policy*, established in *Hilton-Davis Chemical Co.,* 185 N.L.R.B. 241, of not including arbitration clauses in the general prohibition against unilateral changes as set forth in NLRB v Katz, 368 U.S. 736 (1962).

> "In *Hilton-Davis Chemical Co.,* 185 N.L.R.B. 241 (1970), the Board determined that arbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties. . . . [A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." *Id.* at 242. The Board further relied upon our statements acknowledging the basic federal labor policy that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). *See also* 29 U.S.C. § 173(d) (phrased in terms of parties' agreed upon method of dispute resolution under an existing bargaining Agreement). Since *Hilton-Davis,* the Board has adhered to the view that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz,* continue in effect after expiration of a Collective Bargaining Agreement. Litton Financial Printing Division v NLRB, 501 US 190, 199-200, 111 S. Ct, 2215, 2225.

Thus, in Litton, the Supreme Court upheld the NLRB's refusal to require the Employer to arbitrate post expiration grievances under a policy the NLRB adopted in Hilton Davis; to exclude arbitration clauses from the prohibition against unilateral changes under Katz. In upholding the NLRB, the Court said: "We think the Board's decision in *Hilton-Davis Chemical Co.* is both rational and consistent with the Act. The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory, arbitration." Litton at 200.

So, while there is indeed a significant difference between the NLRB's policy and the Rhode Island State Labor Relations Board's policy when it comes to prohibiting unilateral changes after the expiration of a Collective Bargaining Agreement, the difference is due to the fact that private sector parties have economic weapons or tools (ie, the right to strike, lockouts, etc.) that public sector parties do not have. Moreover, the collective bargaining process for public sector is highly constrained and regulated by state statutes. The Certified Teachers Arbitration Act provides a detailed process by which unresolved issues are to be resolved, including mediation and arbitration. R.I.G.L. 28-9.3-9.

Our prior rulings in ULP-4647 and ULP-6142 illustrate the requirement to maintain the status quo between collective bargaining partners when they are in between executed Collective Bargaining Agreements and are involved in negotiations for a successor Agreement. Under federal law, a private Employer may only unilaterally impose terms when the negotiating parties have reached impasse. NLRB v Katz, 368 U.S. 736 (1962). Under public sector law, the rules vary from state to state. However, this Board has been on record since 1992 that we interpret the State Labor Relations Act and the Certified Teachers Arbitration Act as not permitting public sector Employers and more specifically, School Committees to depart from the terms of an expired Agreement, prior to the exhaustion of all available statutory dispute resolution procedures. Warwick School Committee v Warwick Teacher's Union, Local 915, 613 A.2d 1273, (R.I.1992) We explicitly reaffirm that position here and will adopt a term employed by the state of Maine for this position, requiring the parties to maintain a "static status quo" by "freezing conditions." The word "static" is added to the phrase status quo to differentiate from a "dynamic status quo." Under a dynamic status quo theory, regular changes that occurred under an expired Collective Bargaining Agreement, such as wage increases, would occur under the same schedule as under the expired Agreement. This dynamic status quo theory has been adopted in New Jersey, (*See In re Piscataway Twp. Bd. of Educ*, PERC No. 91, 1 N.J.P.E.R. 49, 50 (1975).

The School Committee has argued that ULP-6142 has no relationship to the facts in this case because, there, the City unilaterally imposed a term (change to pensions) that it had unsuccessfully tried to secure during negotiations. The School Committee argues that it did not seek a change to the grievance arbitration procedure in its negotiations and that, therefore, ULP-6142 has no precedential value in this case. We do not agree. We see no significant difference between the unlawful unilateral imposition of a contract proposal and the unlawful unilateral departure from the status quo required during statutorily required collective bargaining procedures laid out in the Certified Teachers Arbitration Act. In each case, the Employer, by its

act, tips the bargaining scale so that it is "on top" rather than an equal bargaining partner, in complete contravention of the public polices of the Acts.

Here, the School Committee decided to process the grievances, but only to a point where it unilaterally decided to process them. If such unilateral actions are permitted left to stand, what stops the School Committee from other unilateral actions? How does this make the Union an equal in the bargaining relationship? Permitting the School Committee to undertake whatever unilateral actions it sees fit because the prior CBA has expired is antithetical to the public policies of the Rhode Island State Labor Relations Act, to promote and maintain equal bargaining power between Employers and employees, set forth in R.I.G.L. 28-7-2 (a) and defeats the purpose of the Certified Teachers Arbitration Act to maintain good relations between teaching personnel and School Committees, as set forth at R.I.G.L. 28-9.3-1 (a).

We find, therefore, that when the School Committee refused to arbitrate disputes after the expiration of a Collective Bargaining Agreement and during the ongoing statutory interest arbitration for a successor Collective Bargaining Agreement, it unilaterally violated the required status quo, in violation of R.I.G.L. 28-7-13 (6) and (10).

FINDINGS OF FACT

1) The Warwick School 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) The Warwick Teachers' Union has been the collective bargaining agent for teachers employed by the Warwick School Department since at least 1970.

4) The Warwick School Committee and the Warwick Teacher Union were parties to a Collective Bargaining Agreement for the period September 1, 2012 through August 31, 2014. This Agreement expired on August 31, 2014.

5) The Committee and the Union entered into an Agreement for the period of September 1, 2014 through August 31, 2015. The Agreement expired on August 31, 2015.

6) The September 1, 2014 through August 31, 2015 Agreement contains, at Article III, a provision entitled Grievance Procedure, Section 3-1, titled Definition, sets forth at 3-1.1, the definition of a grievance. Section 3-2, titled Procedures, sets forth a process for the filing of grievances and different levels or steps of progression from principal through Administrator and Superintendent at which grievances are heard and decisions rendered. Section 3-2.3, titled Arbitration, sets forth

the process for proceeding to binding arbitration should a grievance not have been settled under the Level or step procedures identified in Section 3-2.

7) In an attempt to reach an Agreement with respect to a Collective Bargaining Agreement for the period September 1, 2015 through August 31, 2016, the Union and the Committee engaged in the collective bargaining process pursuant to the Certified Teachers' Arbitration Act (Title 28,Chapter 9.3)

8) The parties conducted multiple negotiation session, but were unable to reach a resolution with respect to a 2015-2016 Collective Bargaining Agreement.

9) The parties also engaged in multiple mediation sessions without successfully agreeing to a new contract.

10) On November 12, 2015 the Committee requested statutory interest arbitration pursuant to R.I.G.L. 28-9.3-10.

11) The parties have each appointed their arbitrator pursuant to R.I.G.L. 28-9.3-10 (a) and a neutral arbitrator has been appointed. The interest arbitration process commenced on December 16, 2015.

12) At the time the matter was heard by the Board, the interest arbitration process had not yet concluded.

13) On September 14, 2015 and October 6, 2015, the Union filed two (2) grievances, which it alleges that it filed pursuant to Article III, Grievance Procedure, under the September 1, 2014 through August 31, 2015 Collective Bargaining Agreement.

14) Grievance hearings were held but the grievances were not resolved.

15) The School Committee acknowledged that the grievances were filed and that grievance hearings were held, but alleged that the Collective Bargaining Agreement had expired and that the arbitration provisions were no longer binding on the parties.

16) The grievances filed on September 14, 2015 involves the assignment of duties to homeroom teachers during the 2015-2016 school year.

17) The grievance filed on October 6, 2015 involves the suspension of a teacher for an action that took place on September 12, 2015.

18) After the denial of the grievances at the Superintendent of Schools level, the Union timely filed for arbitration in accordance with Article 3-2.3 of the September 1, 2014 through August 31, 2015 Collective Bargaining Agreement.

19) The School Committee refused to arbitrate on the basis that the Collective Bargaining Agreement had expired and that the arbitration provisions were, therefore, no longer binding on the parties.

20) The Union did not amend its charge to incorporate any prohibited acts other than the Committee's unilateral change in refusing to process grievances.

CONCLUSIONS OF LAW

1) Unilateral departure from the terms of an expired Collective Bargaining Agreement, prior to the exhaustion of all available statutory dispute resolution procedures violates the duty under R.I.G.L. 28-7-13 (6) and (10) to bargain in good faith.

2) The Union has proven by a fair preponderance of the credible evidence in this case that the Employer has committed a violation of R.I.G.L. 28-7-13 (6) and (10).

ORDER

1) The Employer is hereby ordered to cease and desist from refusing to participate in the processing of grievances, including proceeding to arbitration.

2) The Employer is hereby ordered to pay the Union's reasonable attorney's fees and costs associated with the prosecution of this ULP.

3) The Employer is hereby ordered to post a copy of this Decision & Order on all common area bulletin boards, within its buildings and its website, for a period of no less than sixty (60) days; and to mail a copy of this decision to every member of the bargaining unit that retired since December 7, 2015.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Marcia B. Reback, Member

Scott G. Duhamel, Member

Aronda R. Kirby, Member (Dissent) **

Harry F. Winthrop, Member

Alberto Aponte Cardona, Esq., Member

**** BOARD MEMBER, ARONDA R. KIRBY, DISSENTS IN REFERENCE TO REMEDY #2 ONLY.**

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

Dated: June 21, 2016

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

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-6176
WARWICK SCHOOL COMMITTEE	:	

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-6176, dated June 21, 2016, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **June 21, 2016**.

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

Dated: June 21, 2016

By: _____
Robyn H. Golden, Administrator

one day provision of the 1988 CBA, rather than the three day provision of the 1991 tentative agreement. With regard to class size requirements, the School Committee eliminated the "weighting" aspect of the 1988 agreement, but adopted the increased class size of the 1991 tentative agreement, while eliminating completely the increased pay for extra students. With regard to the grievance procedure, the School Committee has ignored both agreements. Thus, when it suits the School Committee's purposes, unilateral change was rationalized by whatever contract or tentative agreement is most convenient.

There is no conclusive evidence that the School Committee implemented managed care of medical benefits or job fairs.

B. THE OBLIGATION TO MAINTAIN CONTRACT TERMS REGARDLESS OF IMPASSE

Having concluded that the School Committee altered terms and conditions of employment, we next address whether that alteration was unlawful. We conclude that unilateral departure from the terms of an expired contract, prior to exhaustion of all available statutory dispute resolution procedures, violates the obligation under G.L. §28-7-13 to bargain collectively.

At the threshold, we observe that the terms of a collective bargaining agreement survive expiration under certain circumstances. Those circumstances differ depending whether federal or state law is applied. In the private sector, the terms of a collective bargaining agreement between a union and employer continue beyond the expiration of the agreement, until a new agreement is reached or the parties bargain in good faith to

impasse. NLRB v. Katz, 369 U.S. 736 (1962). Conversely, Katz has generally been rejected in the public sector. Triborough Bridge & Tunnel Authority, 5 PERB, ¶4505, Aff'd, 5 PERB, ¶3037 (1972); Maureen O'Valley Unified School District v. Perb, 142 Cal. App. 3rd., 1991 Cal. Rptr. 60 (1983); Wasco County v. Afscme Local No. 2752, 30 Ore. App. 863, 569 P.2d 15 (1977), opinion following remand, 46 Ore. App. 859, 613 P.2d 1067 (1980). The School Committee urges that we adopt the federal sector line of cases without regard to the distinct character of public sector labor relations. We decline.

In the private sector, we observe two distinct differences in collective bargaining. First, private sector labor relations adopts an "economic warfare" model of labor relations, and second, federal law requires government neutrality in labor relations, while our statute requires a bargaining result consistent with public policy.

Private sector collective bargaining is a function of economic power:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that [federal laws] have recognized. Abstract logical analysis might find inconsistency between the command of the [NLRA] to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other, but the truth of the matter is that. . .two factors - necessity for good faith bargaining between parties, and the availability of economic pressure devices to

> make the other party incline to agree to one's terms - exist side by side.

NLRB v. Insurance Agents International Union, 361 U.S. 477, 488-489 (1960).

Thus, the federal law contemplates and authorizes the use of economic power to force an agreement, and, by its terms, condones long strikes, business shutdowns, and subjectively unfair agreements as a function of the private sector collective bargaining model. "[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." 361 U.S. at 495.

In the private sector, unlike the public sector, it is anticipated - in fact, customary - that a union will exercise its right to strike for the purpose of obtaining leverage at the bargaining table. The threat of a strike, and the strike itself, are legitimate economic weapons. Section 13 of the National Labor Relations Act, 29 U.S.C. §163 provides, in relevant part, that the NLRA shall not "be construed so as to either interfere with or impede or diminish in any way the right to strike." Private sector theory embraces the position that the strike weapon "supports the principles of the collective bargaining system" by balancing the power of labor and management. NLRB v. Erie Resistor Corp., 373 U.S. 221, 235 (1963).

Rhode Island, to the contrary, adopts a different model for public sector collective bargaining. See G.L. §28-9.3-1, et. seq. The policy of our teacher arbitration statute is to achieve "good

relations" between teachers and school committees. Specific time constraints govern the response to a request for bargaining and the reference of issues to mediation or arbitration. G.L. §§28-9.3-4, 9 and 10. The duration of teacher contracts is limited to three years. G.L. §28-9.3-4. A similar thesis drives our State Labor Relations Act, G.L. §28-7-1 et. seq. Our statute is designed to "encourage the practice and procedure of collective bargaining" and promote "equality of bargaining power," and requires that the Act be interpreted "liberally. . .for the accomplishment of this purpose."

Rhode Island's prohibition on teacher strikes is generally consistent with the collective bargaining system created by statute. Unlike private sector parties, teachers and school committees are obliged to meet and confer on a regular schedule, provide notice to funding sources, demand mediation and conciliation, or ultimately submit to binding arbitration concerning certain issues. See, G.L. §28-9.3-1 - 10, 12. This dichotomy of tactic is justified by Rhode Island's statute. Unlike the private sector, Rhode Island declares that "it is in the public interest that equality of bargaining power be established and maintained." G.L. §28-7-2.

This sensible statement of legislative intent recognizes that where the public interest in safety or education is concerned, the public simply cannot tolerate an objectively bad agreement or absolute control of employment conditions by one party.

Neither can the public tolerate a bankrupt or broken down school system. While the private sector tolerates the extremes of collective bargaining, the public sector could not sustain them. Indeed, the legislature that wrote the Labor Relations Act specifically stated that "strikes, lock-outs, and other forms of industrial strife and unrest. . .are inimicable to the public safety and welfare, and frequently endanger the public health." G.L. 28-7-2. In the private sector, they are grist for the mill.

Among commentators, there is unanimity of opinion that the private sector collective bargaining model is not transferable to the public sector. Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich.L.Rev. 885, 923-927 (1973); Vause, Impasse Resolution in the Public Sector - Observations on the First Decade of Law and Practice under the Florida PERA, 37 U.Fla.L.Rev. 105, 133-137 (1985); Note, Developments - Public Employment, 97 Harv.L. Rev. 1611, 1712 (1984).

While we are cognizant that our Supreme Court finds federal law persuasive, Barrington School Committee v. RILRB, 388 A.2d 1369, 1374 (R.I. 1978), it is clearly not binding. McDonald v. Local 1033, 505 A.2d 1176 (R.I. 1986).

The disparity between the private and public sector conditions has been recognized by numerous courts. "It would be impractical to require that collective bargaining procedures. . .be identical in the public and private sectors. Myriad distinctions, not just those of procedures, exist between public and private collective bargaining, and have been noted by the highest courts of several

sister states. United Teachers of Dade v. Dade County School Board, 500 So.2d. 508 (Fla. 1986) (and cases cited therein). As the Pennsylvania Supreme Court recognized,

> Although [NLRB] decisions may provide some guidance, we are mindful of the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public sector employees. The distinction between the public and private sector cannot be minimized. Employers in the private sector are motivated by the profit to be returned from the enterprise, whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible. The employer in the private sector is constrained only by investors who are most concerned with the return for their investment, whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise. We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather, we are stressing that analogies have limited application and the experiences gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Pennsylvania Labor Relations Board v. State College Area School District, 337 A.2d 262 (Pa. 1975). We concur with the analysis of the Florida Second District Court of Appeal:

> We do not believe that the constitutional and legislative prohibitions against strikes by public employees were ever intended to give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circumvent the rights of public employees to meaningful collective bargaining with their employer.

School Board of Escambia County v. PERC, 350 F.S. 2nd 819 (Fl. 1977). Legislative denial of the right to strike should not be allowed to reduce collective bargaining to collective begging.

State courts have therefore approved various distinctions based on the unique character of public sector bargaining statutes. See e.g., City of Miami v. F.O.P. Miami Lodge 20, 571 So. 2d 1309 (Fla. 1989); School Committee of Boston v. Boston Teachers Union, Local 66, 389 N.E. 2d 970 (Mass. 1979); See generally, Wellington & Winter, The Unions and the Cities, (1971).

With these principles in mind, we now address whether the departure from existing terms and conditions of employment was unlawful. Put another way, were the unilateral changes discussed above implemented illegally? The School Committee concedes that an employer "must continue to observe the terms of [an expired] agreement" based on a "statutory rather than contractual" obligation. This statutory obligation, it urges, is the "duty to offer the union the opportunity to discuss, counter-propose, argue and dissuade" the employer until good faith bargaining is exhausted or abandoned. At that point, the employer may implement what it has proposed, but not more. Discussing federal law, the School Committee argues that the parties were at impasse from September 10, 1991 until at least August 18, 1992, reasoning that because the union believed it had an agreement, an impasse was created.

With regard to all implemented terms other than personal days, the School Committee's position would be incorrect even under federal law. This is because the School Committee, by its own

admission, did not bargain to impasse on proposals it implemented. The decision to eliminate the School Committee from the grievance procedure was never proposed at negotiations, or discussed with the Union. The decision to increase class size and eliminate weighting without payment for extra students was never proposed to the Union. Thus, the School Committee's conduct would not even satisfy the minimum requirements of federal law.

We do not, however, rest our decision on federal law. We join those jurisdictions which hold that an employer's implementation of bargaining proposals is per se an unfair labor practice. In Wasco County, 569 P.2d 15, aff'd, 613 P.2d 1067, the Court of Appeals of Oregon approved a SLRB decision squarely on point. There, the employer implemented the Union's wage proposal prior to exhaustion of dispute resolution procedures. Citing the SLRB decision, the Court acknowledged the dichotomy between federal and state impasse resolution procedures, even though Oregon public employees have a limited right to strike. It seems to us the case is even more compelling when public employees have no right to strike whatsoever. See also, Gresham Grade Teachers v. Gresham Grade School, 630 P.2d 1304 (Ore. 1981).

We observe that this rule will likely have a stabilizing impact on labor relations. Neither party will be subject to a term or condition of employment that it had not previously agreed to. We believe that this will contribute to the maintenance of "good relations. . .between teaching personnel and school committees." G.L. §28-9.3-1.