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-6206
PROVIDENCE SCHOOL DEPARTMENT	:	

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 Providence School Department (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated and filed on July 14, 2017 by RI Council 94, AFSCME, AFL-CIO (hereinafter "Union"). The Charge alleged:

> On June 19, 2003, a Certification of Representation, was issued to RI Council 94, AFSCME, AFL-CIO for the Substitute Clerks of the Providence School Department who have worked more than sixteen (16) weeks for the academic school year, as their sole representative for the purpose of collective bargaining. RI Council 94 has attempted with the Providence School Department on a number of occasions to negotiation a contract without avail. Negotiations took place in 2003-2004 without an agreement and the Union requested to negotiate in December 2014. Most recently, the Union contacted the Employer on March 31, 2017 to negotiate for the employees, on April 5, 2017, and on April 25, 2017. The Union and Providence School Department met briefly on May 4, 2017. Attorney Charles Ruggerio and Chief of Capital, Jennifer Lepre, for the Employer were present at that meeting. During that meeting, the Union indicated that it wanted to negotiate for the Substitute Clerks, who have worked more than sixteen (16) weeks and requested a list of the employees. Attorney Ruggerio indicated that the Employer would provide a list of the employees to the Union, but were not sure if they were going to contest negotiation. The Union followed up on May 12, 2017 and July 6, 2017 with the Employer and has not received the list of employees or a response form the Providence School Department regarding negotiations. Additionally, RI Council 94 attempted on numerous occasions from March 2017-June 2017 to discuss a Substitute Clerk (more than 16 weeks) employment and issues regarding her not being permanently hired with the Providence School Department; and was informed that the school was not going to discuss the matter with the Council since we didn't represent her, although the Council does have the exclusive representation of her pursuant to the previous Certification of Representation. These actions are also in violation of RIGL 28-7-14 and 28-7-12.

Following the filing of the Charge, the parties each submitted written position statements on July 26, 2017, as part of the Board's informal hearing process. On August 25, 2017, the Board issued its Complaint, alleging: "The Employer violated R.I.G.L. 28-7-13 (3) (6) (7) and (10) when, beginning in March 2017, it refused to bargain collectively with the representatives of

the Substitute Clerks of the Providence School Department and it refused to meet and/or to discuss issues regarding bargaining unit members."

The Employer filed it Answer denying the charges on August 31, 2017. The Board conducted formal hearings on September 19, 2017 and December 14, 2017. 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. The parties filed post-hearing briefs on February 7, 2018. In arriving at the Decision and Order herein, the Board reviewed and considered the testimony, evidence, oral arguments, and written Briefs submitted by the parties.

SUMMARY OF FACTS AND TESTIMONY

On June 19, 2003, the Board certified RI Council 94, AFSCME, AFL-CIO as the bargaining representative of the Substitute Clerks of the Providence School Department who have worked more than sixteen (16) or more weeks for the academic school year. (Certification of Representatives EE-3660, Joint Exhibit "JT" 1) (The Substitute Clerks of the Providence School Department who have worked more than sixteen (16) or more weeks shall be referred to herein as the "long-term substitute clerks"). Following the certification, in December 2003, the Union and the City of Providence, on behalf of the School Department, commenced negotiations. (Transcript "TR." pg. 74). Attorney Jeffrey Kasle, lead negotiator for the School Board, and Mr. John Burns, Senior Staff Representative for the Union, conducted a series of negotiation sessions, with the last being held in June 2004. (TR. pgs. 15, 76). These negotiations did not lead to a Collective Bargaining Agreement. (TR. pg. 29).

Mr. Burns testified that following the last negotiation session in June 2004, the Union did not file for mediation, arbitration or file an unfair labor practice. (TR. pg. 29). Other than the 2003-2004 negotiation sessions, there have been no additional negotiation sessions for this bargaining unit. (TR. pg. 31) Sometime after June 2004, the Union worked with the long-term substitute clerks lobbying unsuccessfully with the Providence City Council trying "to pass a living wage in Providence." (TR. pg. 18).

Lexi Lyman, Council 94 Senior Staff Representative, testified that in 2014, she was contacted by long-term substitute clerk Lita King, who wanted to talk about a contract. (TR. pg. 35). Ms. Lyman met with 15-20 long-term substitute clerks and in December 2014 sent a letter to Keith Oliveira, Providence School Board President, requesting contract negotiations. (TR. pg. 36, 137; Pet. #4). Following that request, Ms. Lyman was injured and out of the office during different periods in 2015. Upon her return to work in February 2016, she was no longer

assigned to represent the long-term substitute clerks but was aware they were still looking for a contract. (TR. pgs. 40-41)[1].

On cross examination, Ms. Lyman testified that she did not receive a response to her December 2014 letter to the Providence School Board, but this was not unusual. (TR. pg. 41, "[i]t's typical.... It takes months for the communities or the School Department to get back to me.") Ms. Lyman explained that, when requesting negotiations on behalf of the Union's other Providence School Department bargaining unit, it was her usual procedure to send a letter to the Providence School Board, not the Mayor's office or City Council. (TR. pg. 137). Neither Ms. Lyman nor Mr. Burns filed an unfair labor practice regarding the lack of response by the School Department to this 2014 request for bargaining. (TR. pgs. 19, 30, 42).

Similarly, neither Mr. Burns nor Ms. Lyman has ever filed a grievance on behalf of a long-term substitute clerk or entered into a Memorandum of Agreement regarding a long-term substitute clerk or requested Union dues deduction. (TR. pgs. 31, 42-43).[2]

Union witness Dezirae Hall, a full-time substitute clerk for the Providence School Department, testified that in March 2017, she contacted Attorney Alexis Santoro about Union representation for the long-term substitute clerks and met with Ms. Santoro, John Burns and some of the substitute clerks. (TR. pg. 52). She recollected that she had emailed or spoken with nearly all of the substitute clerks about the Union meeting. (TR. pg. 53-54). She relayed that the clerks she spoke to personally were interested, but hesitant and were concerned about possible repercussions by the Providence School Department. (TR. pg. 55). Ms. Hall expressed her desire for a contract with the School Department. (TR. pg. 56).

The Union's next witness, Cristiana Catullo, testified that in 2016, she was a long-term substitute clerk and applied for a permanent clerk position. Ms. Catullo claimed that the hiring committee recommended her to be hired for the position, but she was not actually hired. (TR. pgs. 66 - 67, Pet. #5). In March 2017, she met with Attorney Santoro and approximately five or six other clerks and brought her employment concerns to Ms. Santoro's attention. (TR. pg. 70). At the September 28, 2017 hearing, Ms. Catullo expressed her interest in a Union for the long-term substitute clerks. (TR. pgs. 69 - 70). Between the September and December 2017 formal hearings, Ms. Catullo was hired into a permanent clerk position. (TR. pg. 128).

On March 31, 2017, after meeting with Ms. Catullo and other clerks, the Union requested that the School Department resume contract negotiations for the long-term substitute clerks bargaining unit. (TR. pgs. 21, 30; Pet. # 8). Mr. Burns testified that the Union and School

[1] John Burns was then assigned as representative for this bargaining unit.
[2] Both Ms. Lyman and Mr. Burns testified that dues are not deducted until negotiations result in a Collective Bargaining Agreement.

Department met and the School Department raised the issue of majority status. (TR. pg. 22). In addition, at that meeting the Union sought to discuss an employment issue concerning the hiring of long-term substitute clerk Cristiana Catullo for a permanent clerk position and the School Department refused asserting that the Union didn't represent her. (TR pg. 22-23, 26, Pet. #9).

School Department witness, Attorney Jeffrey Kasle, testified regarding the 2003-2005 time frame during which he represented and negotiated all of the labor contracts for the City of Providence and the Providence School Department. (TR. pg. 72). He recollected that beginning in mid-December 2003, the School Department began negotiating with the Union regarding the long-term substitute clerks. (TR. pg. 74). Joe Peckham served as lead negotiator for Council 94 and Mr. Kasle served as lead negotiator for the School Department. (TR. pgs. 74-75). Mr. Kasle recollected six or seven negotiating sessions with the last occurring in June 2004. After June 2004, there were no further negotiations and the parties did not ever execute a Collective Bargaining Agreement. (TR. pgs. 76, 79). Mr. Kasle testified that during the period of negotiations, some substitute clerks were offered permanent clerk positions and Mr. Peckham said that people were losing interest in the bargaining unit because they were getting full-time jobs, which was what they really wanted. (TR. pgs. 77-78, 79, 87). Mr. Kasle testified further that during the 2004-2005 time frame, he understood from Mr. Peckham that the Union's "majority status" might be in question, although Mr. Peckham didn't use those exact words. (TR. pgs. 79, 85).

The Employer's second witness was Attorney Charles Ruggerio, Labor Employment Counsel to the Providence School Department and Deputy City Solicitor for the City of Providence. Although he began working at the School Department in November 2012, he was unaware that Council 94 was certified to represent long-term substitute clerks until 2017. (TR. pgs. 93, 99). He testified that prior to 2017, he had not been asked to negotiate a Collective Bargaining Agreement for the long-term substitute clerks. Additionally, no long-term substitute clerks had ever filed a grievance, requested to meet with him or inform him that they were represented by a Union. (TR. pgs. 93, 94, 98).

In the spring of 2017, Attorney Santoro notified Attorney Ruggerio of the certification for the long-term substitute clerks and requested negotiations on their behalf. (TR. pgs. 94, 102-103). It is undisputed that in response to the Union's request, the School Department refused to negotiate. Attorney Ruggerio testified, "I spoke to Ms. Santoro. I indicated that it was my experience that there was a significant change in the construct of the substitute clerk population, and that I did not believe that there was still a majority status." (TR. pg. 97). On further examination, Attorney Ruggiero said, "without that [majority status], I

didn't think there was anything to actually negotiate on behalf of Council 94 regarding that substitute population." (TR. pg. 99). On cross-examination, Mr. Ruggerio confirmed his position on the Union's lack of majority status. (TR. pg. 106). With regard to Ms. Catullo's employment issue, Mr. Ruggerio could not recall whether during the spring 2017 he discussed that with the Union. (TR. pgs. 104, 108).

Attorney Ruggerio testified that he compared the list of substitute clerical employees from 2003 (Respondent's Exhibit 1) to the current list of substitute clerks (Respondent's Exhibit 2) and found only a very few employees have been retained since the initial date of certification. (TR. pg. 96). However, on cross-examination, Attorney Ruggerio could not attest to the authenticity of either employee list. (TR. pgs. 100, 110-111).

Attorney Ruggerio testified that he was not aware that the Union had issued a certified letter in 2014 to the School Board requesting negotiations on behalf of the bargaining unit. (TR. pg. 101). He further testified that the Union had sent the request for negotiations to the wrong person. (TR. pg. 112).

Employer witness, John D'Antuono, Certified Public Accountant and The Business Manager for the Providence School District, runs the payroll office. (TR. pg. 121). Mr. D'Antouono explained that Respondent's Exhibit 1 was a list run by Mr. Kasle and it is the most accurate 2003 substitute clerk list, of which Mr. D'Antuono is aware, although he cannot verify its accuracy. (TR. pgs. 122-123, 127). With regard to Respondent's Exhibit 2, Mr. D'Antuono testified it is a current list of the temporary clerks as of September 2017. (TR. pg. 123). He explained that the list is not dated but is a list run routinely by human resources and it looks accurate. (TR. pg. 127-128.) He spot-checked the list and determined that in October, Cristiana Catullo and one other substitute clerk were hired into full-time district positions and are no longer long-term substitute clerks. (TR. pgs. 124, 128). He testified that comparing Respondent's Exhibits 1 and 2, only two (2) of the thirty-six (36) names from the original list are on the current list. (TR. pg. 125).

POSITION OF THE PARTIES

The Union argues that, pursuant to the certification issued in 2003, the Union is the certified bargaining representative of the substitute clerks of the Providence School Department who have worked for sixteen (16) or more weeks for the academic school year and the Employer's refusal to bargain collectively and/or meet and/or discuss issues regarding bargaining unit members constitutes a violation of the State Labor Relations Act.

The Employer argues that it has a good faith doubt, founded on a sufficient objective basis, that the Union currently enjoys majority support of the long-term substitute clerks; and therefore, the Employer has no statutory duty to bargain with the Union.

DISCUSSION

With respect to labor law, this Board and our courts have consistently looked to federal law for guidance. See e.g. Lime Rock Fire District, Inc. v. IAFF, Local 3023, AFL-CIO, C.A. No. PC 05-4149 (R.I. Super. 2007). Prior to 2001, the National Labor Relations Board long held that an Employer may withdraw recognition by showing either that the Union has actually lost the support of a majority of the bargaining unit employees or that the Employer has a good-faith doubt, based on objective considerations, of the Union's continued majority status. Celanese Corp., 95 NLRB 664 (1951).

In 2001, the NLRB, in what has become its seminal case on this issue, decided Levitz Furniture Co. of the Pacific, 333 N.L.R.B. 717 (2001) and specifically overruled Celenese and its progeny insofar as they permit withdrawal of recognition on the basis of good-faith doubt (uncertainty or disbelief) as to the Union's continued majority status. In Levitz, the NLRB reconsidered and rejected its long-standing rule and held that a Employer may rebut the continuing presumption of an incumbent Union's majority status, and unilaterally withdraw recognition, only on a showing that the Union has, in fact, lost the support of a majority of the employees in the bargaining unit. Levitz, 333 N.L.R.B. at 725. *See also* Pacific Coast Supply, LLC v. National Labor Relations Board, 801 F.3d 321 (D.C. Cir. 2015) citing Levitz at 725. The NLRB reasoned:

> [T]here is no basis in either law or policy for allowing an Employer to withdraw recognition from an incumbent Union that retains the support of a majority of the its employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an Employer to withdraw recognition unless it can prove that an incumbent Union has, in fact, lost majority support.

Levitz, 333 N.L.R.B. at 723.

However, the NLRB retained the more lenient standard for an Employer to obtain a decertification election:

> While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM [decertification] elections. Thus, we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for Unions... [W]e shall allow Employers to obtain RM elections by demonstrating reasonable good-faith uncertainty as to incumbent Unions' continued majority status.

Id. (citations omitted).

Therefore, since 2001, the NLRB has applied the Levitz standard in cases in which an Employer has refused to bargain on the basis of a Union's alleged loss of majority support.

Pursuant to Levitz, "[i]f a majority of the unit employees present evidence that they no longer support their Union, their Employer may lawfully withdraw recognition. . . . And, . . . , an Employer who has evidence creating an uncertainty whether his employees still support an incumbent Union can now obtain an RM [decertification] election in which the Union's support will be tested." Levitz, N.L.R.B at 724. Under Levitz, an Employer may withdraw Union recognition unilaterally only by showing that a Union has actually, in fact, lost majority support. Id. at 725, 729. "An Employer with withdraws recognition from an incumbent Union, in the honest but mistaken belief that the Union has lost majority support, should be found to violate the [NLRA]." Id. at 724.

In Levitz, the NLRB is clear:

> An Employer with objective evidence that the Union has lost majority support - for example, a petition signed by a majority of the employees in the bargaining unit - withdraws recognition at its peril. If the Union contests the withdrawal of recognition in an unfair labor practice proceeding, the Employer will have to prove by a preponderance of the evidence that the Union had, in fact, lost majority support at the time the Employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will [be an unfair labor practice].

Id. at 725.

Using Federal law as guidance, the Board now turns to consider the facts in the present matter in light of the standard set forth in Levitz. In the present case, the Employer purports to have *good faith doubt*, founded on a sufficient objective basis, of the Union's majority support. While, prior to Levitz, such doubt may have been sufficient to withdraw recognition of an incumbent Union, under Levitz, this is no longer the case. Instead, the Employer must show that at the time of the withdrawal, the Union had in fact lost majority support. In the present case, the Employer has failed to do so.

It is uncontroverted that beginning in the Spring of 2017, the Union requested that the Employer negotiate with respect to the long-term substitute clerks. By its own admission, the Employer refused to do so, asserting a lack of majority support. In its defense, the Employer relies on the alleged 2004 statements of Union representative Joe Peckham, Union inactivity, and the alleged substantial change in the construct of the long-term substitute clerk bargaining unit. The Board will address each affirmative defense, seriatim.

The evidence presented by the Employer is that in 2004, shortly after the conclusion of the failed attempt to negotiate a first contract, Union representative Joe Peckham told the Employer Representative, Jeff Kasle, that the Union members were losing interest. Based on this and other similar statements, Mr. Kasle concluded that as of the 2004 time frame, the Union's majority status was in question. Under Levitz, the relevant time frame is the time of the withdrawal of recognition, which in this case, is 2017. So, statements which may or may not

have been made in 2004 are of little relevance to the Board's inquiry with respect to the Employer's withdrawal of recognition in 2017.

Next, the Board considers the Union inactivity. It is undisputed that there has never been a Collective Bargaining Agreement between the Union and the Employer for the bargaining unit of the long-term substitute clerks. Further, between 2004 and December 2014, the Union made no bargaining demands with the Employer. The Union asserts that in December 2014 it requested negotiations and this request went unanswered. It was not until the spring of 2017 that the Union resumed its attempts to negotiate and the Employer refused. While the hiatus between 2004 and 2014 is undeniably a long period of inactivity, the Board does not agree it necessarily reflects a loss of majority support of the bargaining unit members. The Board will not presume nor conclude that inactivity alone reflects a loss of majority support. See Lime Rock Fire District v. IAFF, C.A. No.: PC 05-4148 citing Community Health Services, Inc., N.L.R.B. cases 28-CA-16762, 28-CA-17278 and 28-CA-17390 (June 30, 2004) (stating use of Union inactivity as basis for withdrawal "unfounded in Board law.")

The Employer further contends that the significant change in construct of the bargaining unit supports its position that the Union no longer enjoys majority support of its members. Specifically, the Employer relies on the employee lists submitted as Respondent's Exhibits 1 and 2 to establish that the employees included within the bargaining unit at the time of the Certification are no longer the same employees whom are included in the bargaining unit. The Board finds that these employee lists are of little probative value to the Board's inquiry. The NLRB has long presumed that new employees hired in non-strike circumstances support the incumbent Union in the same proportion as the employees they replace. See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 779 (1990) citing National Plastic Products Co., 78 N.L.R.B. 699, 706 (1948). The Board agrees and will not presume otherwise.

To be clear, even if the Board were to consider the evidence as presented by the Employer to be objective evidence that the Union has lost majority support, under Levitz, once the Union contests the withdrawal of recognition at a ULP proceeding, the Employer must prove by a preponderance of evidence that the Union has in fact, lost majority support at the time of the withdrawal of the recognition. Such proof may be shown through a vote, petition, correspondence or otherwise showing that an actual majority of employees rejects the Union. *See* Lime Rock Fire District, Inc. v. IAFF, C.A. No.: PC 05-4149, (RI Super. January 26, 2007) The Employer here has failed to provide any such evidence.

Therefore, because the Employer failed to offer objective evidence that at the time of the withdrawal of recognition, the Union had, in fact, lost the support of the majority of the

employees in the bargaining unit, the Board finds that the Employer's refusal to negotiate with the Union, the certified bargaining representative of the long-term substitute clerks, violates the State Labor Relations Act, R.I.G.L. § 28-7-13 (3)(6)(7) and (10).

FINDINGS OF FACT

1. The Providence School Department 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 State Labor Relations Act.

3. The Union was certified as the sole and exclusive representative of the long-term substitute clerks on June 19, 2003.

4. After the Union was certified, it engaged in collective bargaining with the Employer over the course of approximately one (1) year. The parties did not successfully conclude these negotiations with a Collective Bargaining Agreement.

5. Between 2004 and 2014, the Union did not file any grievances on behalf of bargaining unit members, resume contract negotiations or reach out to the Employer regarding any issue pertaining to the bargaining unit employees.

6. In December 2014, members of the bargaining unit sought assistance from the Union to secure a Collective Bargaining Agreement. In December 2014, Union Representative, Lexi Lyman, sent a written request to bargain to the Providence School Board. Ms. Lyman did not receive a response to her request, which she testified was not unusual. Thereafter, Ms. Lyman was on medical leave from her position and upon her return, she was not reassigned as representative to the bargaining unit.

7. In March 2017, the Union again requested negotiations for a Collective Bargaining Agreement.

8. Although Union Representatives, Mr. John Burns and Attorney Alexis Santoro, were successful in meeting with Employer Representatives, Attorney Charles Ruggerio and Jennifer Lepre, they refused to negotiate with the Union, claiming that the Union did not enjoy a majority status.

9. The Employer admitted that it refused to negotiate and asserted that it had no legal obligation to negotiate because the Employer did not believe that there was still a majority status, due to a significant change in the makeup of the employee population since 2004.

10. Between March 2017 and July 2017 the Union made additional requests to negotiate and the Employer refused.

CONCLUSION OF LAW

1. Petitioner has proven by a fair preponderance of the credible evidence that the Employer, beginning in March 2017, refused to bargain collectively with the representatives of the long-term substitute clerks and therefore committed a violation of R.I.G.L. §28-7-13 (3) (6) (7) and (10).

ORDER

1. The Employer is hereby ordered to cease and desist from refusing to bargain collectively with the Union.

2. The Employer is hereby ordered to post a copy of this Decision and Order on all common area bulletin boards within the Providence School buildings and its website for a period of no less than 60 days.

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

MARCIA B. REBACK, MEMBER

SCOTT G. DUHAMEL, MEMBER

ARONDA R. KIRBY, MEMBER

ALBERTO APONTE CARDONA, MEMBER

DEREK M. SILVA, MEMBER

BOARD MEMBER, KENNETH B. CHIAVARINI, IS RECUSED FROM PARTICIPATION IN THIS MATTER.

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

Dated: MAY 22, 2018

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 6206

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-6206
PROVIDENCE SCHOOL DEPARTMENT	:	

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-6206, dated May 22, 2018, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **May 22, 2018**

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

Dated: May 22, 2018

By: _____
Robyn H. Golden, Administrator