STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLANDSTATE LABOR RELATIONS BOARD

IN THE MATTER OF	:	
	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD	:	
	:	
-and-	:	Case No. ULP-6240
	:	
TIVERTON SCHOOL DEPARTMENT	:	

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") on an Unfair Labor Practice Complaint (hereinafter "Complaint"), issued by the Board against the Tiverton School Department (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated April 10, 2019 and filed by the NEA Tiverton, Local 833/NEARI/NE (hereinafter "Union").

The Charge alleged as follows:

> On 3/13/19, the School Committee violated the Act when the superintendent, Peter Sanchioni, put the NEA Tiverton president out on paid administrative leave and directed her to have no contact with staff.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. On July 10, 2019, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (3), (5) and (10) when, on or about March 13, 2019, the School Superintendent placed the Union's President on administrative leave and directed the Union's President not to contact staff. The Board scheduled a formal hearing for this matter, but the hearing dates were cancelled and the parties, instead, waived their respective rights to a formal hearing and entered into a Consent Order stipulating to the facts in this matter. The parties' Consent Order was entered on May 19, 2020. Post-hearing Briefs were scheduled to be due on June 18, 2020 and, after a requested extension was granted by the Board, the Employer and the Union filed their respective post-hearing Briefs on July 2, 2020. A request to submit reply Briefs was approved on July 8, 2020. The Employer's reply Brief was received July 16, 2020 and the Union's reply Brief was received July 23, 2020. In arriving at the Decision and Order herein, the Board has reviewed and considered the Consent Order, exhibits and the arguments contained within the post-hearing Briefs submitted by the parties.

FACTUAL SUMMARY

By agreement of the parties, the facts of this matter were stipulated to and entered as a Consent Order by the Board on May 19, 2020. The facts are as follows:

1. NEA Tiverton, Local 833/NEARI/NE (hereinafter "Union") is the exclusive collective bargaining representative for teachers of the Tiverton School Department (hereinafter "Employer", "Respondent", or "Tiverton").
2. There was at all times relevant to this case a valid Collective Bargaining Agreement in effect between Respondent and the Union.
3. Amy Mullen (hereinafter "Mullen") is employed by the Respondent as a Special Education Teacher.
4. At the time of the suspension, Mullen served, and continues to serve, as the president of the local Union (NEA Tiverton).
5. Peter Sanchioni (hereinafter "Sanchioni") is employed by the Respondent as the Superintendent of Schools.
6. On March 13, 2019, Sanchioni placed Mullen on administrative leave with pay pending investigation of allegations of misconduct.
7. In his letter of March 13, 2019, Sanchioni explicitly directed Mullen to "not to contact any staff…" during the period of administrative leave.
8. On March 22, 2019, the Union attorney wrote to Sanchioni requesting clarification of his directive; asking, "Are you telling NEA Tiverton President Mullen that she cannot communicate with the members of her Union?"
9. On March 26, 2019, the Attorney for the Respondent answered the Union's question, stating: "By way of response, the directive was that Ms. Mullen refrain from contracting [sic] '…any staff or students.' While we understand that Ms. Mullen is the Union President, we do not believe that this directive unduly interferes with Union operations. We note that the Union has other local representatives, as well as a state-level representative, Linda LaClair. They will be able to deal with any needs that Union members may have in Ms. Mullen's absence, as they likely already have done other leaves of absence that Ms. Mullen has taken over the years. Accordingly, Tiverton's directive stands."
10. Tiverton instructed Mullen not to speak to staff members during her investigative leave, in order to protect the integrity of the investigation, and also to protect Mullen from accusations of improperly influencing staff members.
11. The Union acknowledges Tiverton's rationale (No. 10, above) and without accepting it as true will address its relevance in the Brief.
12. When Tiverton put a staff member on administrative leave pending investigation of misconduct, Tiverton instructed that staff member not to speak to staff members as a standard practice.
13. The Union has no knowledge of the occasion referred to in No. 12 (above) nor any reason to dispute it occurred and will address its relevance in the Brief.

14. On May 2, 2019, Sanchioni issued a written reprimand for Mullen's conduct on two (2) occasions.
15. Sanchioni also informed Mullen that she will be returned to work upon her acknowledging receipt of Sanchioni's written reprimand, which Mullen was directed to do by no later than May 10, 2019.
16. The Union filed a grievance on or about May 6, 2019, appealing Sanchioni's written reprimand of Mullen through the grievance/arbitration process.
17. The grievance has been filed for arbitration, but no hearing date has been scheduled.
18. On May 17, 2019, the Union filed an Unfair Labor Practice Charge against the Employer in which the Union alleged that the Employer:
    a. Violated the Act by prohibiting Mullen from communicating with her members, thereby denying them her assistance and impeding the local from carrying out its statutory responsibilities.
    b. Violated the Act by prohibiting Mullen from communicating with her members, thereby denying Mullen the ability to effectively defend herself against charges of misconduct.
19. On July 10, 2019, the SLRB issued a Complaint on the Union's Unfair Labor Practice Charge, Case No. ULP 6240.
20. There being no material dispute of facts, the parties have agreed to waive a formal hearing in this matter scheduled for March 17, 2020.
21. The parties have agreed upon the exhibits, which will be submitted without objection by either party, when the parties file their Briefs.

In addition to the Stipulated Facts as set forth above, there was correspondence referenced in the Stipulated Facts between the parties that is not only significant to, but at the crux of, the instant dispute. Because the interpretation and understanding of this series of communications between the parties is necessary to the Board's decision-making process, the Board has decided to set forth in full the referenced communications.

The initial communication dated March 13, 2019 (See Stipulated Facts #s 6 and #7) was sent from Superintendent Peter Sanchioni to Union President Amy Mullen and states as follows:

> Dear Ms. Mullen:
>
> Please be advised that I am placing you on administrative leave with pay, effective immediately. The purpose of this administrative leave is to investigate charges of misfeasance and malfeasance in your employment over the past week.
>
> Specifically, it is alleged that you had asked for and was [sic] denied a personal day to attend an event on Monday. It is further alleged that you called in sick, took ½ of a sick day, and then attended the event, nevertheless. It is further alleged that you posted pictures of yourself at the event on social media.

Furthermore, it is alleged today that you behaved in a highly disruptive and unprofessional manner during a meeting of the kindergarten teachers and a trainer regarding our new iPad initiative.

During the administrative leave, I am directing you not to be on school grounds and not to contact any staff or students. I am also directing you to turn in any Tiverton School Department property that you may have in your possession. Your access to School Department data bases is suspended and you are directed not to attempt to access School Department data bases by any other means. Failure to comply with this directive will be construed as insubordination and may result in disciplinary action up to and including termination.

Sincerely,

Peter Sanchioni, Ph.D.
Superintendent

The second communication was dated March 22, 2019 and was between John Leidecker, Deputy Executive Director of NEARI, and the Superintendent, Peter Sanchioni, and was in reference to the Superintendent's March 13, 2019 correspondence to Amy Mullen and is set forth below:

Dear Mr. Sanchioni,

In your above-referenced letter you direct Ms. Mullen to "not contact any staff …."

Please clarify. Are you telling NEA Tiverton President Mullen that she cannot communicate with the members of her Union?

Sincerely,

John Leidecker
Deputy Executive Director NEARI

The final communication in this series was sent to Mr. Leidecker by the Employer's attorney, Steve Robinson, on March 26, 2019. Mr. Robinson's correspondence, which responded to Mr. Leidecker's question to the Superintendent, states as follows:

Dear Attorney Leidecker:

We are in receipt of your March 22, 2019 correspondence to Superintendent Sanchioni. The correspondence inquired as to the scope of the directive given to Tiverton teacher Amy Mullen by correspondence of March 13, 2019 placing her on administrative leave with pay. You inquired as to whether or not that directive extended to Union members.

By way of response, the directive was that Ms. Mullen refrain from contacting "… any staff or students." That directive included any Tiverton School Department employee.

While we understand that Ms. Mullen is the Union President, we do not believe that this directive unduly interferes with Union operations. We note that the Union has other local representatives, as well as a state-level representative, Linda LaClair. They will be

able to deal with any needs that Union members may have in Ms. Mullen's absence - as they likely already have done during other leaves of absence that Ms. Mullen has taken over the years.

Accordingly, Tiverton's directive stands.

Please do not hesitate to contact me to discuss this matter in greater detail.

Very truly yours,

Stephen M. Robinson

POSITION OF THE PARTIES

Union:

The Union raises several claims of unfair labor practices against the Employer, but central to its argument is that the Superintendent's directive to Ms. Mullen "not to contact any staff or students" acted as a "gag order" and impermissibly interfered with Ms. Mullen's exercise of her rights under R.I.G.L. § 28-7-12. In support of its central thesis, the Union asserts that the Employer's imposition of the "gag order" on Ms. Mullen resulted in numerous unfair labor practices by (1) prohibiting Ms. Mullen from communicating with her local Union under threat of termination; (2) interfering with the Union's efforts to render assistance to Ms. Mullen; (3) interfering with the Union's efforts to render mutual aid or protection to other bargaining unit members; (4) silencing Ms. Mullen was calculated to cause fear and intimidate the membership of the Union; and (5) interfering with the Union's right to select a "representative of their own choosing." In addition, the Union argues that the action of the Superintendent in issuing a "gag order" upon Ms. Mullen was, by its very nature, "inherently destructive of employee rights" and reveals an anti-Union animus by the Employer in the instant case.

In its reply memorandum, the Union expanded on the themes argued in its original memorandum and attempted to reinforce its position that the Employer's "gag order" interfered with "core" employee rights by prohibiting and restricting Ms. Mullen from engaging in concerted activity as protected for under R.I.G.L. § 28-7-12. Finally, the Union argued in its reply memorandum that the Superintendent's directive to Ms. Mullen was overbroad, "misdirected" and devoid of justification.

Employer:

For its part, the Employer vigorously argues that the Superintendent's directive to Ms. Mullen did not constitute an unfair labor practice and was not a violation of the Act. In its defense, the Employer puts forth several factors that it claims defeat the Union's allegations in the instant matter. Chief among those factors is the Employer's assertion that (1) the Union has failed to present any evidence of anti-Union animus conduct committed by the Employer and (2) the Union failed to present any evidence or factual basis to show that the Employer's conduct dominated or interfered with "the development, existence or administration of the Union itself." See R.I.G.L. § 28-7-13(3). The Employer

asserts that because the Union has failed to present evidence in these two (2) areas, its claims cannot support an unfair labor practice determination by this Board.

In its reply memorandum, the Employer further elaborates on its claim that the Union has failed to present evidence to support its allegations that the Employer engaged in unfair labor practices by preventing Ms. Mullen from contacting "staff or students" during her administrative leave. The Employer also posits that the Union, in agreeing to the terms of the Consent Order, agreed to certain factual stipulations that support the Employer's stated defenses and undermines the sufficiency of the Union's allegations, thereby requiring the Board to dismiss the Complaint.

DISCUSSION

The issue before the Board is whether the Employer committed unfair labor practices when it directed[1] the Union President, Ms. Mullen, "not to contact any staff or students" while she was on paid administrative leave as the Employer conducted an investigation into her alleged wrongful conduct.

As was noted above, the Union asserts that the Employer's "gag order" against Ms. Mullen deprived her of her statutory right to engage in "mutual aid or protection" as provided for in R.I.G.L. § 28-7-12, prohibited her from engaging in concerted activity as is her statutory right, dominated and interfered with the Union's administration and organization and discouraged other bargaining unit members from both engaging in their statutorily protected rights and from participating in the Union process. The Employer, not surprisingly, contends that its action toward Ms. Mullen neither interfered with her protected statutory rights nor deprived other Union members of their ability to engage with the Union or act in a manner consistent with the tenets of R.I.G.L. § 28-7-12. As will be discussed in greater detail below, the Board has considered the various arguments of both parties and has concluded that the breadth and scope of the Employer's directive to Ms. Mullen "not to contact any staff or students" went well beyond the scope of the Employer's authority and did illegally prevent Ms. Mullen from engaging "in concerted activities, for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion" by the Employer. See R.I.G.L. 28-7-12.

[1] The statement made by the Superintendent to Ms. Mullen "not to contact any staff or students" was set forth in the letter in which the Superintendent placed Ms. Mullen on paid administrative leave while he was investigating alleged wrongdoing by Ms. Mullen. The letter did not refer to or identify any written policy, rule or regulation that the Employer had in place at the time this directive or "gag order" was announced. Further, there was no evidence presented by either party in this proceeding to support the idea that the Employer's actions were consistent with a written or long-standing policy, rule or regulation. Therefore, the Board in this Decision is only addressing the statement or so-called "gag order" as it was communicated in the Superintendent's March 13, 2019 correspondence to Ms. Mullen. The Board takes no position at this time as to whether a "gag order" if in the form of a written policy, rule or regulation would be within the bounds of the State Labor Relations Act. Similarly, the Board takes no position in this Decision as to whether it will find recent National Labor Relations Board (NLRB) decisions in *Boeing Co.*, 365 NLRB No. 154 (2017) and *Apogee Retail, LLC*, 368 NLRB No. 144 (2019) applicable to its interpretation of the provisions of the State Labor Relations Act in future matters that may come before the Board.

A. The Superintendent's "Gag Order" Constitutes a Violation of the Act

It has long been recognized as a bedrock principle and policy of the Act "to protect employees in the exercise of full freedom of association, self-organization, and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint, or coercion of their Employers." See R.I.G.L. § 28-7-2(d). Similarly, this Board has long recognized that interference by an Employer with an employee's right to engage in "concerted activities" is an unfair labor practice. See *Rhode Island State Labor Relations Board and Burrillville School Committee*, ULP-5894 (2009); *Rhode Island State Labor Relations Board and Town of Middletown*, ULP-5770 (2006); *In the matter of Rhode Island State Labor Relations Board and West Warwick Housing Authority*, ULP-6159 (2015). This prohibition against Employer interference with an employee's right to engage in protected concerted activity is also well imbedded in NLRB case law (e.g. *Akal Security, Inc.*, 554 NLRB No. 11 (2009); *Meyers Industries* (*Meyers II*), 281 NLRB 882 (1986); *Caesar's Palace*, 336 NLRB 271 (2001).[2] The NLRB has consistently noted that Section 7 of the National Labor Relations Act grants to employees the right to act together for their "mutual aid or protection" and that these rights include the employees' right to communicate with one another regarding their terms and conditions of employment. (See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)). Yet, despite this long history of statutory and case law support for an employee's ability to exercise her protected concerted activity, the Employer in the instant case issued a directive to an employee ("not to contact any staff or students") that not only was sweeping in its breadth and coverage, it had no boundaries regarding how far it reached or into what areas it landed. As the evidence before the Board demonstrates, the Superintendent's order to Ms. Mullen was all encompassing in preventing her from having any discussion or contact with any "staff or students." As will be discussed in greater detail below, this lack of definition and failure to set reasonable and appropriate parameters around the "gag order" dooms the legitimacy of the Employer's actions.

1. <u>The Superintendent's "Gag Order" was too broad.</u>

As has been noted above, the evidence before the Board makes it clear that the Superintendent's "gag order" to Ms. Mullen was not only extremely broad but, in fact, appeared to have no outer boundaries or parameters at all. This was confirmed by communication between the Union's attorney and the School Department's attorney. When the Union's attorney wrote to the Superintendent asking, in the words of the School Department's attorney, "as to the scope of the directive given to Tiverton teacher Amy Mullen …", the School Department's response was, in relevant part, as follows:

[2] The Rhode Island Supreme Court has previously stated, in *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board*, 694 A.2d 1185, 1189 (R.I. 1997), that it will "look to federal labor law for guidance in resolving labor questions" that come before it.

> We do not believe that this directive unduly interferes with Union operations. We note that the Union has other local representatives, as well as a state-level representative, Linda LaClair. They will be able to deal with any needs the Union members may have in Ms. Mullen's absence, as they likely already have done during other leaves of absence that Ms. Mullen has taken over the years.
>
> Accordingly, Tiverton's directive stands.

This response by the School Department's attorney was both narrow, in that it focused primarily on Ms. Mullen's Union duties and how they would be completed, and also unlimited in not acknowledging or proposing any restrictions to the expansive coverage of the directive. In the Board's view, the School Department's response to an inquiry as to the scope of the Superintendent's directive to Ms. Mullen missed or intentionally ignored the opportunity to place some limits on the breadth of the directive. While the Union was seeking to clarify how far a reach that directive actually had, it was also giving the Employer the opportunity to scale back the "scope" of the "gag order" and limit its coverage to items related to the pending investigation. However, the Employer, as noted, ignored this possible exit ramp and, instead, doubled down on its view of the directive ignoring in the process the legitimate and obvious impact the directive had on Ms. Mullen's right to engage in protected concerted activity; as well as her right to engage in "other mutual aid or protection" activities on behalf of herself and other Union members that had absolutely no relationship to the ongoing investigation.

Recently, the NLRB was faced with an issue involving an Employer's policy requiring employees to maintain confidentiality and prohibiting unauthorized discussions regarding workplace investigations into illegal or unethical conduct. See *Apogee Retail, LLC*, 368 NLRB No. 144 at page 1 (2019).[3] In considering whether the Employer's rules were lawful, the NLRB determined that the appropriate standard would be the one set forth by the NLRB in *Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the Board determined that:

> When analyzing a facially neutral rule that would potentially interfere with the exercise of employee Section 7 rights, the Board evaluates (1) the nature and extent of the potential impact of the rule on NLRA rights, and (2) legitimate justifications associated with the rule.
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> *Apogee Retail, LLC*, *supra* at page 9, citing *Boeing*, *supra* at page 3-4.

According to the NLRB in *Boeing*, after conducting the above analysis, the rule in question will fall into one of three categories:

> Category 1 will include rules that the Board designates as lawful to maintain either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by

[3] An Employer's attempt at maintaining confidentiality during an investigation and the Union's attempt to limit prohibitions on employees' ability to discuss discipline or other items with their co-workers is not a new issue for the NLRB. See *Independent Stations Co.*, 284 NLRB 394 (1987); *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015).

> justifications associated with the rule;
>
> Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
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> Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with each other.
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> *Apogee Retail, LLC* at page 9 citing *Boeing*, *supra* at pages 3-4.

In applying the *Boeing* test, the NLRB in *Apogee Retail* found that the rules implemented by the Employer did not violate the National Labor Relations Act (NLRA). Critical to the NLRB's conclusion was that the Employer's rules were limited to open investigations and "**[did] not broadly prohibit employees** from discussing either discipline or incidents that could result in discipline. Rather, they narrowly require that employees not discuss *investigations* of such incidents or *interviews* conducted in the course of an investigation. Employees not involved in an investigation are free to discuss such incidents without limitation, and **employees who are involved may also discuss them, provided they do not discuss information they either learned or provided in the course of the investigation**. (*pogee Retail* at page #11) (italics in original; emphasis in bold added). In short, the NLRB found that the limited in scope nature of the Employer's rule and how it was applied did not interfere with or prohibit employees from engaging in protected concerted activity. As is clear from the evidence before this Board, the instant case presents quite a different set of factual circumstances from the case brought before the NLRB in *Apogee Retail*.

Unlike the *Apogee Retail* rule, the Superintendent's directive to Ms. Mullen was without boundaries, limitations or parameters. Unlike the *Apogee Retail* rules, which were focused on open investigations and limited to what was prohibited to be discussed about the open investigation, the evidence before the Board demonstrates that there were no limitations placed on the scope of the restriction regarding Ms. Mullen's ability to speak to "staff or students" in the instant case. Ms. Mullen, according to the Superintendent's original directive and the School Board attorney's clarification, could not speak to any staff person regarding any issue whether related or unrelated to Union activity during her administrative leave. Not only was Ms. Mullen prevented from discussing mundane areas with her colleagues, she was also prevented from discussing teacher terminations, wages, benefits, grievances of other bargaining unit members or other Union-related activity that had no relationship or relevance to the issue underpinning the investigation or reason for her being placed on administrative leave. Had the Employer narrowed the scope of its directive to focus on prohibiting discussions surrounding the reason for its investigation of Ms. Mullen, perhaps it might have avoided this Board's finding that it has engaged in action in violation of the Act. However, and as noted earlier, there is no

evidence before this Board that the Employer's "gag order" was limited in any manner or respect. It was, in short, not unreasonable for Ms. Mullen to believe that should she have any discussion with any of her colleagues regarding any subject (related or unrelated to the Employer's investigation) while she was on paid administrative leave, she could be subject to additional discipline up to and including termination.3 This case, as noted above, is not factually similar or even closely related to the NLRB's recent decision in *Apogee Retail.* In this Board's view and based on the evidence presented, the Employer's action is clearly and unambiguously in violation of the Act.

2. <u>The Union's additional claims of unfair labor practices.</u>

As previously noted, the Union not only claimed that the Employer's "gag order" toward Ms. Mullen interfered with her engaging in protected concerted activity, but also interfered with the Union's efforts to render assistance to Ms. Mullen, interfered with the Union's efforts to render mutual aid or protection to other employees, was calculated to cause fear and to intimidate the membership of the Union and to interfere with the Union's right to select a representative of their own choosing. Essentially, these additional unfair labor practice claims by the Union radiate from the Employer's "gag order" that allegedly caused harm to the Union and to bargaining unit members. While the Board agrees that the reliable and probative evidence before it supported the contention that the Employer's "gag order" of Ms. Mullen interfered with her ability to engage in protected concerted activity and mutual aid or protection with or on behalf of Union members, the Board was struck by the paucity of evidence before it to support the Union's additional allegations of domination and interference with the existence or administration of the Union or the discouragement of Union membership.

The parties agreed to Stipulated Facts and submitted these facts to the Board as a Consent Order, which the Board approved. Other than exhibits in the form of the relevant communication between the parties on the issue of the "gag order," no testimony, affidavits or other evidentiary material was submitted to the Board. Argument by counsel in memorandum to the Board is not evidence. To state it simply, the Board was unable to discern any evidence to support the contentions of domination or interference with the Union or discouragement of Union membership or a chill being placed on bargaining unit members as a result of the "gag order" placed on Ms. Mullen. For example, there was no evidence before the Board that any employee other than Ms. Mullen was aware of the "gag order." The Union insists the Board can infer simply from the delivery of the Superintendent's communication to Ms. Mullen that other employees learned of the "gag order" and were intimidated or had their protected activity altered as a result of their alleged knowledge of the existence of the "gag order." The problem with the Union's argument is that there is no record evidence to support such an inference. The Board will not shy from making proper inferences where the evidence before it may not be direct with respect to the particular issue being raised. However, there must be some evidence upon which the Board can base an inference. See *Guarino v. Department of Social Welfare*, 410 A.2d 425, 428 (R.I. 1980); *Hardman v. Personnel Appeal Board*, 211 A.2d

660, 664 (R.I. 1965). As the Union references in its Memorandum (See Union Memorandum of Law at page #7), in the private sector there is a concept called the "small plant" doctrine which holds that it is reasonable to infer that evidence of Union activity brought to the attention of a subordinate management official will be passed along to higher level management officials. See *In the Matter of Rhode Island State Labor Relations Board and Town of Narragansett*, ULP-4621 (1995) citing to *National Labor Relations Board v. Abbott Worsted Mills*, 127 F.2d 438 (1st Cir. 1948) and *NLRB v. Joseph Antell, Inc.,* 358 F.2d 880 (1st Cir. 1966) In other words, even the cases brought to the Board's attention by the Union in its memorandum offered some scintilla of evidence before the Board (or the NLRB) to allow those bodies to draw a proper inference.[4] However, this Board will not draw an inference of wrongdoing against a party based solely on the argument of counsel without some independent and verifiable evidence having been submitted to it to support the assertion.

Similarly, while the Board has already found that the Employer's "gag order" violated the Act because it prevented Ms. Mullen from engaging in her statutorily protected rights, both as an individual employee and as the President of the local Union, that finding does not automatically support the Union's contention that the Employer either dominated or interfered with the existence or administration of the Union or that it discouraged Union membership. While the Union forcefully argues that the Employer's conduct created these violations, there is no evidence in the Stipulated Facts or exhibits to bolster these arguments. There is no question that the Union has a right to consult with grievants or bargaining unit members in the administration of the Collective Bargaining Agreement. As the local Union President, Ms. Mullen was clearly prevented, by the Employer's "gag order," from engaging with other local Union members (i.e. "staff"), but this prohibition does not inexorably lead to a finding that the Employer's actions sought to dominate or interfere with the existence or administration of the Union or to discourage Union membership. It is not enough, in the Board's view, for the Union to simply make the claim of wrongdoing; it must also present some evidence that the alleged wrongdoing occurred or that there was a perceived threatened negative impact on the bargaining unit or the Union as a result of the Employer's conduct. In the instant case, that evidence simply was not presented to the Board for review.[5]

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[4] In urging the Board to find a violation of the Act, the Union argues that Tiverton is a small school district and that members of the bargaining unit would have known of the Employer's "gag order" even if not told directly of its existence. See Union Memorandum of Law at pages 7 – 8. Citing the *Town of Narragansett,* case, the Union asserts bargaining unit members were "intimidated" by the "gag order" and questioned the utility of Union representation. The Union, however, points to no evidence in the record to even imply this was the case. In the *Town of Narragansett* case, there was ample evidence before the Board that certain staff working in town hall knew information about Union organizing that was likely passed on to town council members because of the close working relationship between the council members and the staff. *Id*. at pgs. #17 – #18. In the instant matter, there is no evidence before the Board that anyone other than Ms. Mullen and State Union officials were aware of the "gag order". Since Ms. Mullen was prohibited from speaking with "staff" and was fearful of being terminated if she spoke to her colleagues (as argued by the Union) there appears to be no avenue by which bargaining unit members would have learned of what was occurring. While there certainly may have been rumors, the Board needs some credible evidence before it upon which to draw inferences of wrongdoing. In this case, that evidence simply does not exist.

[5] The Union argues that the "gag order" was imposed approximately 12 days after the deadline by which teachers must receive written notification from the School Committee if they are to be non-renewed or dismissed. (See Union Memorandum of Law at pages 5-6). The Union then argues that Ms. Mullen's

3. The Employer's defenses.

The Employer's defense to its conduct was an attempt, in the Board's view, to narrow the Board's focus to only portions or segments of the Act that the Employer claimed it did not violate by its issuance of the "gag order" to Ms. Mullen. These arguments, of course, miss the larger picture, as discussed above, regarding the nature and unlimited scope of the Employer's "gag order" on Ms. Mullen. Nonetheless and as discussed above, the Board does not believe that the evidence supports a finding that the Employer either dominated or interfered with the Union's administration or discouraged Union membership by its conduct of issuing a "gag order" to Ms. Mullen while it investigated her alleged wrongdoing. As argued in its reply Brief, the lack of evidence presented in this case regarding either domination or interference with the administration of the Union or discouragement of Union membership leaves the Board with little alternative but to find no violation of the Act in those areas. However, the Employer's attempt to defend its conduct by limiting or narrowing the focus to only a portion of the alleged violation does not save it from this Board finding a violation of the Act. The Employer's arguments attempt to misdirect the Board's focus by claiming, among other things, that there were other means for Ms. Mullen to communicate or obtain representation during the investigation. (See Employer Reply Brief at page #4). Such arguments, in the Board's view, completely miss the point or are intended to obfuscate the real issue. Here Ms. Mullen was prevented from speaking with any of her colleagues (i.e. "staff") about any subject during the entire period of her paid administrative leave. As noted earlier, this means that Ms. Mullen could not talk to any bargaining unit members about a Union-related issue that had absolutely nothing to do with the Employer's investigation of Ms. Mullen's alleged wrongdoing. Such a prohibition is simply untenable and, in this Board's view, a clear violation of the Act.[6]

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inability to speak with the affected teachers prior to the last day to file an appeal of the School Committee's notice (within 15 days of the notice) demonstrates the Employer's domination or interference with the administration of the Union. (See R.I.G.L. § 28-7-13(3)). The Union, however, did not present a single teacher witness or affidavit of a teacher indicating the teacher was actually or potentially harmed due to his/her inability to speak to Ms. Mullen while she was under the "gag order." It is simply not enough that the Union expects the Board to find a violation based on pure inference without some modicum of evidence upon which to base its ruling. Similarly, there was no evidence that Ms. Mullen was prohibited from speaking with Union officials who were not bargaining unit members regarding her case or the Employer's investigation into her alleged wrongdoing as Union officials were not a part of the Employer's "gag order." Further, Ms. Mullen did not testify nor was any evidence submitted (apart from argument by Union counsel in its memorandum) that she was harmed by not being able to consult with local Union officials (as opposed to state Union officials for whom no gag existed) or that the Employer had such an intent in imposing its "gag order" on Ms. Mullen. As such, the Board can simply not find the violation based on a lack of evidence regarding allegations of violations of R.I.G.L. § 28-7-13(3) and (5).

[6] Both in its response to the Union's initial inquiry as to the scope of the "gag order" and in its memoranda, the Employer continually insisted that Ms. Mullen had other avenues or that Union members had other ways of communicating with Union officials regarding any questions or issues that might arise. In the Board's view, this argument carries no weight and, in fact, is antithetical to the purpose of the Act. Every employee has a right to communicate with other employees regarding their terms and conditions of employment. As the NLRB has noted, such communication is often preliminary to action for mutual aid or protection and "lie at the heart of protected Section 7 activity." *Apogee Retail, LLC*, 368 NLRB No. 144 at page 12, citing *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007). Thus, the right of employees to discuss terms and conditions of employment is broad. It is, therefore, inappropriate for an Employer to assert that it does not commit a violation of the Act when it shuts off one avenue of communication by claiming that another avenue might exist. Such a reading or interpretation of the Act is both faulty and misplaced.

The Employer also attempts to assert that its business justification for issuing the "gag order" was legitimate and without anti-Union animus thereby insulating it from a finding that its conduct violated the Act. This argument, in the Board's view, has already been discussed and shown to be unpersuasive. (See discussion in Section A (1) above). The issuance of a broad "gag order" with an unlimited scope and no set of boundaries is "inherently destructive of employee rights." (See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Apogee Retail, LLC*, *supra* at page 9)). In the Board's view, the unlimited nature of the Employer's "gag order" is the very definition of an act that is "inherently destructive of employee interests." As this Board has stated in this Decision, it is the breadth of the Employer's "gag order" and its failure to be more focused and limited in the application of the "gag order" that signals its "inherently destructive" nature. Thus, there is no basis for the Employer's argument that the Union needed to show the Employer's anti-Union animus in order to demonstrate a violation of the Act.

Finally, while the Board does agree, as indicated in this Decision, that there was a lack of evidence to hold the Employer to account for certain violations of the Act, it is nonetheless important for the Board to note that the Employer's so-called business justification for imposing the "gag order" (as set forth in Stipulated Facts #s 10-13) were not items that the Union did not contest as asserted by the Employer. (See Employer Reply Brief at page #4). Instead, the Union neither acknowledged the Employer's stated rationale or claimed to have no knowledge of the Employer's assertion which, in the Board's view, is clearly not the same thing as not contesting or agreeing with Employer assertions. While it might have been wise for the Union to put evidence on the record with regard to the Employer's assertions in Stipulated Facts #10 and #12, as already discussed, the import of these justifications by the Employer do not rescue it from having engaged in conduct that is in violation of the Act.

FINDINGS OF FACT

1. The Respondent 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 Union and the Employer were, at all times relevant to this case, parties to a Collective Bargaining Agreement.
4. Amy Mullen (hereinafter "Mullen") is employed by the Respondent as a Special Education Teacher.
5. At the time of the suspension, Mullen served, and continues to serve, as the president of the local Union (NEA Tiverton).

6. Peter Sanchioni (hereinafter “Sanchioni”) is employed by the Respondent as the Superintendent of Schools.
7. On March 13, 2019, Sanchioni placed Mullen on administrative leave with pay pending investigation of allegations of misconduct.
8. In his letter of March 13, 2019, Sanchioni explicitly directed Mullen “not to contact any staff…” during the period of administrative leave.
9. On March 22, 2019, the Union attorney wrote to Sanchioni requesting clarification of his directive; asking, “Are you telling NEA Tiverton President Mullen that she cannot communicate with the members of her Union?”
10. On March 26, 2019, the Attorney for the Respondent answered the Union’s question, stating: “By of response, the directive was that Ms. Mullen refrain from contacting ‘…any staff or students.’ While we understand that Ms. Mullen is the Union President, we do not believe that this directive unduly interferes with Union operations. We note that the Union has other local representatives, as well as a state-level representative, Linda LaClair. They will be able to deal with any needs that Union members may have in Ms. Mullen’s absence, as they likely already have done other leaves of absence that Ms. Mullen has taken over the years. Accordingly, Tiverton’s directive stands.”
11. Tiverton instructed Mullen not to speak to staff members during her investigative leave, in order to protect the integrity of the investigation, and also to protect Mullen from accusations of improperly influencing staff members.
12. The Union acknowledged the Employer’s rationale for the “gag order” without accepting it as true.
13. When Tiverton put a staff member on administrative leave pending investigation of misconduct, Tiverton instructed that staff member not to speak to staff members as a standard practice.
14. The Union had no knowledge of the conduct with regard to other staff members placed on administrative leave nor did it have any reason to dispute it.

CONCLUSIONS OF LAW

1. The Employer imposed an overly broad directive mandating Ms. Mullen “not to contact any staff or students” during her paid administrative leave and while the Employer investigated alleged wrongdoing by Ms. Mullen that was inherently destructive of rights guaranteed to employees under the State Labor Relations Act.
2. The Union has proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 (10) when it imposed an overly broad directive mandating Ms. Mullen “not to contact any staff or students” during her administrative leave and while the Employer investigated alleged wrongdoing by Ms. Mullen that interfered with the employee’s protected right to engage in concerted activity.

3. The Union has proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 (10) when it imposed an overly broad directive mandating Ms. Mullen "not to contact any staff or students" during her administrative leave and while the Employer investigated alleged wrongdoing by Ms. Mullen that interfered with the employee's right to engage in mutual aid or protection.

ORDER

1. The Employer is hereby ordered to cease and desist from implementing or imposing overly broad directives, policies, rules or regulations that interfere with, restrain or coerce employees from their right to engage in protected concerted activity or to engage in mutual aid or protection under the Act.
2. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than 60 days in each building where bargaining unit personnel work, said posting to be in a location where other materials designed to be seen, read and reviewed by bargaining unit personnel are posted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

/s/ Walter J. Lanni
Walter J. Lanni, Chairman

/s/ Scott G. Duhamel
Scott G. Duhamel, Member

/s/ Aronda R. Kirby
Aronda R. Kirby, Member

/s/ Kenneth B. Chiavarini
Kenneth B. Chiavarini, Member

/s/ Harry F. Winthrop
Harry F. Winthrop, Member

/s/ Stan Israel
Stan Israel, Member

BOARD MEMBER, DEREK M. SILVA, WAS NOT PRESENT TO SIGN THIS DECISION & ORDER AS WRITTEN.

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

Dated: September 11, 2020

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

ULP--6240

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-6240
TIVERTON 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 amended decision of the RI State Labor Relations Board, in the matter of Case No. ULP-6240, dated September 11, 2020, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 11, 2020.**

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

Dated: September 11, 2020

By: ___*/s/ Robyn H. Golden*_
Robyn H. Golden, Administrator