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-6249
TOWN OF WEST WARWICK	:	

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 Town of West Warwick, (hereinafter "Town" or "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated May 31, 2019 and filed on the same date by RI Council 94, Local 2045, AFSCME, AFL-CIO (hereinafter "Union").

The charge alleged as follows:

> During a fiscal year 2019 Budget Workshop meeting, the Town Council members agreed to have the Town resume bulk pickup. The Union and the Town entered into an Agreement (Exhibit #1) on June 13, 2018, defining the terms and conditions for bargaining unit members to perform "bulk pickup" effective July 1, 2018. "Bulk pickup" was to occur on the first and third Saturday of each month with two (2) drivers and two (2) laborers to perform said work on overtime. On or about May 28, 2019, current DPW Director Picozzi ordered the secretary at DPW to cancel "bulk pickup" for Saturday, June 1, 2019 and reschedule it for Friday, May 31, 2019. On Friday, May 31, 2019, DPW bargaining members unit were ordered to perform "bulk pickup." This is a unilateral change to the June 13, 2018 Agreement and bad faith bargaining in violation of R.I.G.L. §28-7-13 (6) and (10). The Union and the Town are currently in negotiations for a successor Agreement to the 2014-2019 Collective Bargaining Agreement ("CBA"). As part of negotiations, the Town proposed that past practices and Agreements be reviewed by the parties and if still applicable, incorporated into the successor CBA. The Union proposed that the "bulk pickup" Agreement be incorporated as an attachment to the CBA.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. On September 12, 2019 the Board issued its Complaint, alleging the Employer violated R.I.G.L. §28-7-13 (6) and (10) when, through its representative, the Employer, (1) it unilaterally changed certain terms and conditions of employment associated with bargaining unit members performing "bulk pickup" work and (2) failed and refused to bargain with the Union over the unilateral change. The Board scheduled a formal hearing for this matter, which was held on October 3, 2019, at which time both parties were afforded the opportunity to submit evidence and present and cross examine witnesses. Post-hearing briefs were scheduled to be due and were submitted by both parties on November 5, 2019. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony of the witnesses, the exhibits, and the arguments contained within the post-hearing briefs submitted by the parties.

FACTUAL SUMMARY

The matter before the Board is the Union's claim of an unfair labor practice against the Employer due to the Employer's unilateral change in certain terms and conditions of employment set forth in a written and signed Agreement. (see Joint Exhibit #1) The current dispute involves (1) the Town's decision to change how it performed "bulk pickup" work; and (2) approximately eleven (11) months after implementing the change, the Town's unilateral decision to alter the working conditions it had previously established for "bulk pickup" collections by bargaining unit members without negotiating with the Union over the unilateral change.

The Town and the Union have a long bargaining relationship. At the time of the instant dispute, the parties were subject to a CBA dated July 1, 2014 through June 30, 2019. (Petitioner Exhibit #4)

The Town privatized sanitation collection in the Town in 2010. (Tr. pg. 8; pg. 18)[1] At some point after the Town privatized sanitation pickup, it also privatized recycling and "bulk pickup" work. (Tr. pg. 18) In the spring of 2018, at a Budget Workshop, the Town Council discussed and proposed that "bulk pickup" collections should no longer be done by the private company performing sanitation pickup but, instead, should be handled by bargaining unit personnel at the Department of Public Works (DPW). (Tr. pgs. 34 – 35) This decision by the Council was driven, at least in part, by its belief that it could save money if "bulk pickup" was performed by the DPW instead of the private contractor. (Tr. pgs. 34 – 35) Based on information it received from its DPW Director, Fred Gil, the Council believed that it could save money by having the "bulk pickup" brought back in-house. (Tr. pg. 35, line 19) The Council collected information and performed its due diligence regarding the proposed change in how "bulk pickup" would be performed. (Tr. pgs. 36 – 41) At a second Budget Workshop meeting on April 23, 2018, the Council approved the change. (Tr. pg. 42; pg. 46) The Council's approval to have "bulk pickup"

[1] All citations to the Transcript of the hearing will be represented by the abbreviation "Tr."

performed by bargaining unit members instead of the outside contractor was to begin effective July 1, 2018. (Tr. pg. 42, lines 12 – 14) The Council's approval of the change allowed for "bulk pickup" to be performed on the first and third Saturday of each month, by two (2) laborers and two (2) drivers in two (2) trucks working sixteen (16) hours per week on overtime (Respondent Exhibit #1 and #2; Joint Exhibit #1 and #2; Tr. pgs. 58 – 59).

After the Council's approval on April 23, 2018 to have bargaining unit personnel perform "bulk pickup," Union representatives met with the DPW Director to discuss how the "bulk pickup" would be performed (Tr. pg. 18). As a result of the discussions, a policy was drafted and signed by the representatives of the Union and the DPW Director at the time, Fred Gil. (Tr. pgs. 17-18; Joint Exhibit #1) After signing, the Agreement was posted in the break room at DPW for all employees and management to view. (Tr. pg. 24) However, the June 13, 2018 memorandum was never presented to the Council. (Tr. pg. 43)

The parties worked under the June 13, 2018 "bulk pickup" DPW policy (Joint Exhibit #1) from July 1, 2018 until on or about May 24, 2019 when the Town Manager, Ernest Zmyslinski, issued an administrative budget directive that, among other things, noticed all Department Directors to "effective immediately and until further notice ... eliminate all ... overtime ..." (Respondent Exhibit #5) As a result of the Town Manager's directive, the "bulk pickup" scheduled for Saturday June 1, 2019 was rescheduled to Friday, May 31, 2019. (Tr. pg. 25) Based on the Town's unilateral action, the Union filed an unfair labor practice charge claiming the Town had unilaterally changed the terms and conditions of employment and refused to bargain with the Union over said unilateral change.

POSITION OF THE PARTIES

Union:

It is the Union's position that the Employer unilaterally changed wages, hours and terms and conditions of employment for bargaining unit members when its Town Manager notified all Department Directors to eliminate all overtime. (Respondent Exhibit #5) This directive by the Town Manager effectively negated action taken by the Town Council in April 2018 to provide for bargaining unit personnel to perform "bulk pickup" duties on Saturdays, on overtime. The directive by the Town Manager also violated a written DPW policy that was negotiated and signed by Union representatives and the DPW Director, Fred Gil. (Joint Exhibit #1)

In addition to the Town unilaterally changing wages, hours and terms and conditions of bargaining unit personnel, the Town, according to the Union, also failed to notify the Union of the change in "bulk pickup" and refused to bargain with the Union over its unilateral change in the performance of "bulk pickup" work. According to the Union, it was not notified of the change to "bulk pickup" work by bargaining unit personnel until the DPW Director at the time, Doreen Picozzi, notified the DPW secretary that a schedule change was to be made so that "bulk pickup" would occur on Friday, May 31, 2019 instead of Saturday, June 1, 2019. The Union asserts that the Town's unilateral action and its

failure to negotiate with the Union over the change in wages, hours and working conditions is a violation of the Rhode Island State Labor Relations Act ("Act").

Employer:

The Employer claims that its actions were not in violation of the Act but, instead, were justified because the planned savings associated with returning "bulk pickup" to Town employees never materialized. (Tr. pgs. 42 – 43; pgs. 66 – 69; Respondent Exhibit #7) The Employer further asserts that its actions were justified under the Management Rights clause of the CBA and Article 45, the entire Agreement provision of the CBA. The Town claims that the Management Rights clause of the CBA authorizes it to take any and all appropriate operational actions that are not contrary to the terms of the CBA. The Employer asserts that its changes to the "bulk pickup" policy, as approved by the Town Council in April 2018, were consistent with its management rights authority and did not contradict any existing contractual terms or provisions.

Further, the Town asserts that the June 13, 2018 written policy (Joint Exhibit #1) was never submitted to the Town Council for its approval pursuant to the language in Article 45 of the CBA. As such, according to the Town, the June 13, 2018, Agreement is not a properly authorized document and must be considered null and void by the Board.

In addition, the Town also asserts that the performance of the "bulk pickup" duties by bargaining unit personnel did not create a past practice that would bind the Town to continue to honor the collection of "bulk pickup" work as approved by the Town Council in April 2018.

For all the above reasons, the Employer claims that its actions were authorized and justified and did not violate any of the provisions of the Act.

DISCUSSION

The issue before the Board is whether the action of the Employer in unilaterally changing during the mid-term of an existing Collective Bargaining Agreement the manner by which so-called "bulk pickup" work was performed by DPW employees constituted a unilateral change in wages, hours, terms and conditions of employment, which would require the Employer to bargain with the Union prior to making such a change. A failure to bargain with the exclusive representative of the employees over a mandatory subject of bargaining is a violation of the Act.

It has long been the position of this Board that when an Employer unilaterally changes terms and conditions of employment without first engaging in bargaining with the bargaining unit's exclusive representative, the Employer commits a violation of the State Labor Relations Act (see R.I.G.L. §28-9.3-2(a); R.I.G.L. §28-9.3-4; *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an Employer is in violation of a governing Collective Bargaining Statute

"when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the Union"). In the present case and as will be discussed in more detail below, the evidence before the Board demonstrates that the Employer, in the Spring of 2018, approved a change to the manner and method of the Town conducting "bulk pickup" collection work at the Department of Public Works (DPW) to be effective July 1, 2018. The change to "bulk pickup" went into effect on July 1, 2018 and continued uninterrupted until the Town Manager made a unilateral decision in May 2019 to change how "bulk pickup" was performed. This unilateral decision by the Town Manager significantly, substantially, and materially changed the wages, hours, terms and conditions of employment of bargaining unit members at DPW. Further, the Town refused and failed to engage in bargaining with the Union over its unilateral decision. As such, the Town's actions are in violation of R.I.G.L. §28-7-13 (6) and (10) of the Act.

As noted above, the evidence is undisputed that on March 19, 2018 the Town Council held a Budget Workshop. (Respondent Exhibit #1) At that time the then Assistant Director of DPW, Fred Gil, came before the Council and suggested that the Town could save money if it changed the method by which it performed "bulk pickup" work.[2] At the time Mr. Gil made this suggestion, "bulk pickup" was being performed by a private contractor, MEGA. (Tr. pg. 34) When "bulk pickup" was required, MEGA was called and the pickup would occur usually within about "seven to ten days" after the call. (Tr. pgs. 34 – 35) Council members were concerned about how this looked, especially as they had received numerous complaints from landlords and other Town residents about this issue. (Tr. pg. 35) The Council asked Mr. Gil to provide it with proposals regarding the possible savings of having "bulk pickup" performed by DPW employees. (Tr. pg. 36) A second Budget Workshop was held on April 23, 2018. At that time, Mr. Gil presented the Council with four (4) different scenarios regarding potential savings to be achieved if the "bulk pickup" work was performed by the Town, by members of DPW, instead of the outside contractor. (Respondent Exhibits #2 and #3; Tr. pgs. 36 - 39) Ultimately, the Council approved one of the proposals submitted by Mr. Gil. (Respondent Exhibit #2; Tr. pgs. 39 – 40).

As part of the Council's deliberations of Mr. Gil's proposal to change how "bulk pickup" would be made, the Council approved that the new in-house arrangement for "bulk pickup" would occur on the first and third Saturday of each month and the "bulk pickup" would be performed by two (2) laborers and two (2) drivers working on overtime for a total of sixteen (16) hours per month. (Respondent Exhibit #1 and #2; Joint Exhibit #1 and #2, Tr. pgs. 58 – 59).

After the Council approved moving the "bulk pickup" away from the private contractor and assigning it to DPW employees, according to Union President, Ann Marie Petrozzi, members of the Union met with Mr. Gil and discussed putting together a document so that they "would be following it [the Council's approval to move

[2] "Bulk pickup" was explained as the collecting of large items, "such as furniture, appliances, mattresses, anything to that effect", that had been left by residents of the Town on the sidewalk as unwanted refuse or garbage after they would move out of their residence in Town, generally an apartment. (Tr. pgs. 33, 35).

"bulk pickup" back to DPW] correctly and doing the Agreement the right way." (Tr. pg. 18). The discussions between the Union and Mr. Gil resulted in a typed document that was signed by both parties. (Joint Exhibit #1; Tr. pgs. 28 – 29)

As discussed above, the Town, on April 23, 2018 at a Budget Workshop, agreed to bring "bulk pickup" work in-house to be performed by DPW bargaining unit members. The "bulk pickup" work was performed by DPW employees from July 1, 2018 through May 2019 without incident. However, on May 23, 2019, the Town's proposed budget was not approved by the voters. (Tr. pgs. 75 – 76) The next day, May 24, 2019, the Town Manager directed all departments and divisions of the Town "to eliminate all unnecessary spending, including but not limited to commodities, services and all overtime; ..." (Respondent Exhibit #5; Tr. pg. 76). As a result of the Town Manager's directive, "bulk pickup" work that was scheduled to be performed on Saturday, June 1, 2019 on overtime by DPW employees was, instead, performed on Friday, May 31, 2019 during regular business hours, thereby depriving bargaining unit employees of the Saturday overtime work, which they had been performing since July 1, 2018. (Tr. pgs. 29 – 30) This unilateral action by the Town substantially and materially changed the wages, hours and terms and conditions of employment of bargaining unit personnel at DPW. (see *NLRB v. Katz*, 369 U.S. 736 (1962); *Rhode Island State Labor Relations Board and Town of North Kingstown*, ULP-5485)

In addition to unilaterally changing wages, hours and terms and conditions of employment for bargaining unit members, the Town failed to bargain with the Union over the unilateral change implemented based on the Town Manager's May 24, 2019 memorandum to Department and Division Directors. As the case law of this Board and the statutory law makes clear, an Employer is required to negotiate with the exclusive representative of its employees over mandatory subjects of bargaining. (See *Barrington School Committee v. Rhode Island State Labor Relations Board,* 388 A.2d 1369, 1374-75 (R.I. 1978); *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930*, 390 A.2d 386, 389 (R.I. 1978); *Town of Narragansett v. International Association of Firefighters, Local 1589*, 380 A.2d 521, 522 (R.I. 1977); *Belanger v. Matteson*, 346 A.2d 124, 136 (R.I. 1975)) As R.I.G.L. §28-7-2(c) makes clear, it is the policy of the State to allow and encourage bargaining over wages, hours and other working conditions between employees and Employers. (See also R.I.G.L. §28-7-14; R.I.G.L. §28-9.4-3(a)) In the instant case, the Union was afforded no opportunity to bargain over the Town Manager's directive effectuating a change in the "bulk pickup" procedures, as no advance notice was provided to the Union. In addition, while the parties were engaged in contract negotiations at the time of the Town Manager's May 24, 2019 memorandum, the evidence demonstrates that the Town had refused to discuss adding the contents of the June 13, 2018 memorandum of Agreement (Joint Exhibit #1) to the Collective Bargaining Agreement. (Tr. pgs. 81 – 82) As this Board and the Courts have made clear, a failure to bargain over a mandatory subject of bargaining constitutes an unfair labor practice and a violation of the Act. (See *Barrington School Committee, supra; School Committee of the City of Pawtucket v.*

Pawtucket Teachers Alliance AFT Local 930, supra; and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra)*

A. <u>The Town's Arguments Fail to Mitigate Against its Unilateral Action and Failure to Bargain with the Union.</u>

During the presentation of its witnesses and in its memorandum of law, the Town has presented to the Board several arguments and explanations to attempt to justify and/or support its action in unilaterally changing how "bulk pickup" work was performed. As will be discussed below, the Board has reviewed these various arguments and explanations and, in the Board's view, does not believe that they offer sufficient grounds to mitigate against the Town's unilateral action nor its failure to bargain with the Union over mandatory subjects of bargaining.

1. <u>Scheduling "bulk pickup" work is a management prerogative and not a negotiable issue.</u>

The Town argues that the scheduling of "bulk pickup" work is a management right under the parties' Collective Bargaining Agreement and is, therefore, not something over which the Town is required to negotiate with the Union. The Town cites cases to support its theory that the management rights clause in the CBA gives it the authority to unilaterally make changes in the operational aspects of the workplace. In the Board's view, the Town too broadly interprets the provisions of the contractual management rights clause, misinterprets or ignores the applicable case law and has failed to consider the circumstances surrounding its unilateral action as a factor in this matter.

Initially, the Board need not spend a great deal of time on whether a unilateral change by an Employer to terms and conditions of employment represents a mandatory subject of bargaining. This Board's decisions as well as the overwhelming number of decisions from Rhode Island Courts, the National Labor Relations Board and the Federal Courts all support the notion that wages, hours and terms and conditions of employment represent mandatory subjects of bargaining and changes in these areas by an Employer obligates the Employer to bargain with the Union representing the employees before making any changes. (See *NLRB v. Katz; Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006) *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012)) Thus, the United States Supreme Court made clear in *Litton Financial* that "[n]umerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA." *Id.* at 198.

In Rhode Island, a similar prohibition exists.[3] R.I.G.L. 28-7-13(6) makes it an unfair labor practice for an Employer to "refuse to bargain collectively" with its employees' representative. Generally, an Employer violates its bargaining obligation when it refuses to bargain with its employees' representative concerning wages, hours and other terms and conditions of employment, so-called mandatory subjects of bargaining. Much has been written on the subject of what constitutes a mandatory subject for bargaining. Mandatory subjects of bargaining are those subjects that address wages, hours and other terms and conditions of employment. The determination of whether an item is to be considered a mandatory bargaining subject has been discussed by the NLRB and the United States Supreme Court on numerous occasions. Thus, for example, in *Ford Motor Company v. NLRB*, 441 U.S. 488 (1979), the Supreme Court described mandatory bargaining subjects as those subjects that are "plainly germane to the 'working environment'..." Similarly, our Supreme Court has recognized that items, which are considered mandatory subjects of bargaining are subject to both negotiation and/or arbitration. (See *Town of North Kingstown v. International Association of Firefighters, Local sixteen (16)51, AFL-CIO*, 107 A.3d 304, 313 (R.I. 2015); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342, 349 (1958); *Barrington School Committee v. Rhode Island State Labor Relations Board, supra*; *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, supra*; and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra*)

The evidence before this Board makes clear that the changes made by the Town in May 2019 to the "bulk pickup" collection work effected wages, hours and terms and conditions of employment, which are mandatory subjects of bargaining.

The Town does not dispute before this Board that it did not act in a unilateral manner when it changed how "bulk pickup" collection would be performed in May 2019. Instead, the Town asserts that it had the right to do so under the management rights provisions of the then existing CBA.[4] Specifically, the Town argues that it had the right, under the management rights clause of the CBA, to make changes in "policy" without having to consult with the Union. (Town's Brief at pg. 5) The Town's argument essentially equates its action with establishing procedures for how employee leaves of absence will be granted (citing *Franke's Inc.*, 142 NLRB 551) or the decision to eliminate driving

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[3] In Rhode Island, the SLRB has previously ruled, in a manner similar to the NLRB and the Supreme Court decision in *NLRB v. Katz*, that a public Employer's unilateral implementation of bargaining proposals prior to the exhaustion of the statutory dispute resolution procedures is a per se unfair labor practice (see *Rhode Island State Labor Relations Board and Warwick School Committee*, ULP-4647 at p. 17; see also *RISLRB v. City of Pawtucket,* ULP-6142) While the SLRB has rejected the private sector impasse concept in public sector bargaining, its rulings that an Employer's unilateral change in terms and conditions of employment prior to the completion of the statutory dispute resolution process constitutes an unfair labor practice under R.I.G.L. 28-7-13 similarly track the NLRB's prohibition against unilateral changes by an Employer during bargaining.

[4] There is no dispute that the original change in the collection of "bulk pickup" occurred mid-term of the Collective Bargaining Agreement and the CBA was still in effect; and that the parties were engaged in negotiations for a replacement contract at the time the Town Manager directed the elimination of all non-emergency overtime (Petitioner Exhibit #4; Respondent Exhibit #7)

operations at one (1) of two (2) company locations. (citing Consolidated Foods Corp., 183 NLRB 832) The Board finds this argument unpersuasive.

The Council's decision to stop contracting out the "bulk pickup" collection work to MEGA and to start performing the work with DPW employees was not simply a "change-of-policy" as the Town contends, but a significant modification of the CBA. The Town attempts to cast its decision as simply operational in nature when, in fact, it was a major change to one (1) aspect of its entire refuse collection operation. With the Council's approval, four (4) employees, two (2) laborers and two (2) drivers, would use two (2) trucks on the first and third Saturday of each month for a total of sixteen (16) hours each Saturday to collect bulk items. Not only was this new work for the four (4) DPW employees who had not previously been performing this work and, as such, not been receiving the overtime pay, but the decision was supposedly intended to both save money and alleviate complaints that councilmen had been receiving from residents. To borrow a phrase, it was a classic win-win. However, as this evidence makes clear to this Board, the Council's decision was not a mere "change-of-policy".

To be more precise, the Council's decision to stop contracting out the "bulk pickup" collection and assign it to DPW employees was certainly an operational decision that the Town was authorized to make under both its Charter and the Management Rights Clause of the CBA. However, once the Council approved the particulars of the change in wages, hours and working conditions, that modification of the CBA became enshrined as part of the terms and conditions of employment for the DPW employees that could not be altered, modified or changed without notice to the Union and an opportunity to bargain.

To put it another way, the Board has concluded that the language of the Management Rights Clause in the Collective Bargaining Agreement, (Petitioner Exhibit #4, Article 33.1) is not as expansive as the Town would have the Board believe. The operative language reads as follows:

> 33.1 The Employer retains the right to carry out its statutory mandate and assign goals utilizing personnel, methods and means in the most appropriate and efficient manner possible. Except as expressly modified or restricted by provisions of this Agreement, all statutory or managerial rights are retained and vested exclusively in the Town. The Town may, at its discretion, take whatever actions necessary to determine, manage and fulfill the mission of the Town and direct the Town employees, not in conflict with this Agreement. Failure to exercise particular rights shall not be considered a waiver of that right. (Petitioner Exhibit #4)

While the above language certainly allows or authorizes the Town to exercise traditional management rights regarding "the mission of the Town", it does not provide the Town with the right to unilaterally change the working conditions of employees once those conditions have been legitimately established.[5] (See *Litton Financial Printing Division,*

[5] Section 33.2 gives the Town authority to manage the workforce and "establish reasonable work rules," not contrary to this contract. Section 33.3 allows the Town to exercise traditional discipline over employees,

A Division of Litton Business Systems, Inc. v. National Labor Relations Board, 501 U.S. 190, 198 (1991)) where the Supreme Court noted that "an Employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." (See also *Rhode Island State Labor Relations Board v. Warwick School Committee,* ULP-4647 (1992)) As the evidence shows and as the Board has previously indicated, the action of the Town in unilaterally changing the terms and conditions of employment by changing the scheduled time of "bulk pickup" collection, the hours of work and the wages associated with the work, constitutes a change in mandatory subjects of bargaining. Such a change, when done unilaterally and without notice to the Union and without providing the Union with an opportunity to bargain over the change, is a violation of the Act.

The Town, as noted above, has argued that its conduct in this matter is more consistent with the conduct described in *Franke's* and *Consolidated Foods Corp.* The Board believes such an analysis is misplaced. In *Franke's,* the Employer operated four (4) cafeterias that the Union struck after the Union was certified and demanded bargaining and the Employer refused. As relevant to the instant case, prior to the strike, a female employee had requested and received permission to go on maternity leave. However, ten (10) days after the employee's request was sent to personnel a new personnel manager changed the process for how leave requests were approved. When the employee's request was denied the Union claimed an unfair labor practice. The Administrative Law Judge determined that the Employer had not violated the Section 8(A)(5) of the National Labor Relations Act when it unilaterally changed the procedure for granting leaves of absence because the employees "had an interest in the leave but not the procedure for granting it." (See *Franke's* at pg. 3) Unlike *Franke's*, the DPW employees who had their scheduled work hours changed and wages reduced were deprived of real benefits without the opportunity to bargain over the change. The action of the Town was substantial and material to the employees' terms and conditions of employment, unlike in the *Franke's* case where the decision of the Employer was simply to change the level of supervisor who would be reviewing and approving leaves of absence. It is the difference between a purely procedural matter and a significant and material change in an employee's terms and conditions of employment.

In the *Consolidated Foods* case, as part of an acquisition the Employer operated two (2) plants approximately sixteen (16) miles apart represented by different Unions. At one of the plants the new Employer assumed a 3-year contract that, among other things, gave the Employer the "exclusive right" to change, modify or cease operations. Due to economic reasons, the Employer decided to eliminate driving operations at the second plant and have drivers from the other plant transfer to the second plant to perform their driving duties. The Employer notified the drivers at the first plant of the change and offered them a choice of work at either plant. The drivers chose to stay where they were and not

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as well as to retire someone due to disability or lay off employees due to lack of work or funds, as long as such action is "not contrary to this contract." (Petitioner Exhibit #4)

accept the transfer and, thereafter, were assigned different jobs in a lower classification with a reduced rate of pay. The Union filed an unfair labor practice claiming a failure to bargain on the part of the Employer. The NLRB determined that no violation of the NLRA had occurred because the Union "had bargaining about the manner in which such decisions were to be subsequently made." *Id.* at pg. 2. In the present case, while it is true that the parties negotiated a management rights clause that outlined the managerial rights of the Town, that agreed upon language was negotiated as part of a CBA that began on July 1, 2014. (Petitioner Exhibit #4) At the time the management right language was placed in the CBA and the document was ratified, the "bulk pickup" collection work was being performed by an outside contractor and not DPW employees.[6] In other words, at the time the parties settled on their existing Collective Bargaining Agreement, the "bulk pickup" collection work was already being performed by the outside contractor MEGA. Thus, at the time the Union negotiated the language in the management rights clause, it had no idea that the Council would decide almost four (4) years later to return "bulk pickup" duties to DPW employees. In other words, the Union cannot be expected to have negotiated away a right that it did not have (the "bulk pickup" work) nor a claim to work that it did not anticipate it might receive back at some unknown future date. Therefore, the "bulk pickup" change was not covered as part of the language that is contained in the existing management rights clause.

In addition, and perhaps more simply put, there is no legitimate argument that as part of the management rights clause the Union waived its right to negotiate over any proposed change to employee schedules, hours of work or wages. Yet that is precisely, in this Board's view, what the Town is attempting to argue. The Town is claiming that it can, mid-term of a Collective Bargaining Agreement, assign new work to employees, set the schedule, the hours and the rate of pay, have those employees work the newly established schedule and hours and receive the higher pay for eleven (11) months and then decide unilaterally to change the previously set schedule, hours and pay without notifying or bargaining with the Union. Such a scenario clearly does not align with this Board's past decisions regarding the prohibition against unilateral changes by Employers. (See *Rhode Island State Labor Relations Board v. Warwick School Committee,* ULP-4647 (1992); *RISLRB v. City of Pawtucket,* ULP-6142))

In addition to the above referenced arguments, the Town attempts to justify its unilateral action by claiming, (1) that it did not save the amount of money it thought it was going to when it first approved moving "bulk pickup" to DPW; and (2) that the removal of "bulk pickup" collections from the outside contractor and assigning it to DPW employees was only done on a "temporary" basis and was only supposed to be in for "about a year." (Tr. pgs. 42; 65). These attempts by the Town to end run its bargaining obligations are

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[6] The record does not reflect how long the outside contractor had been performing "bulk pickup" or garbage collection duties prior to the Council's change of the "bulk pickup" portion of the contract in April 2018, other than an assertion by the Union's representative in her opening remarks that it occurred in 2010. (Tr. pg. 8). Further, there appears to be nothing in the CBA and the parties have not pointed to any language in the CBA that would indicate DPW was performing any "bulk pickup" collection work as of the beginning of the current CBA in July 2014. (Petitioner Exhibit #4)

without merit in the Board's view. While the Board is sympathetic to the idea that there was a monetary miscalculation or that the savings anticipated by the Council did not materialize, once the Council established the terms and conditions of employment for the employees to perform "bulk pickup" collections, it could not simply decide at a later point that it wanted to change those same terms and conditions of employment without first notifying and bargaining with the Union. In this Board's view, to find otherwise would authorize any Employer, at any point in time, the opportunity to unilaterally change terms and conditions of employment simply by claiming it miscalculated on presumed savings. Such a position, if it were allowed or acknowledged as legitimate by this Board, would create chaos in Employer/Union relations.[7]

Similarly, the idea that the Council only intended this change in how "bulk pickup" was collected to be "temporary" is simply not supported by the evidence before this Board. Initially and perhaps most persuasively, during the course of the two (2) Budget Workshops conducted by the Council, there was not any discussion about limiting the "bulk pickup" collections or having the change from MEGA to DPW employees be on a trial basis or temporary in nature or scope. (Respondent Exhibit #1; Joint Exhibit #3; videos of the relevant portions of each Budget Workshop session submitted as evidence to the Board) Regarding this particular point, the Board specifically does not credit the testimony of Mr. Zmyslinski. When asked on direct examination about whether the Council, at its April 23, 2018 Budget Workshop, gave any direction that the change in "bulk pickup" collections would be "permanent", the witness claimed that "it was the exact opposite." (Tr. pg. 64, lines 19 – 23) He testified he remembered the Council President saying, "let's try it" and that his (Mr. Zmyslinski's) "take-away" …was we're going to try this program on a temporary basis, a trial basis and determine if it does, in fact, meet the objectives that were discussed at that meeting." (Tr. pg. 65, lines 2 – 6) However, Mr. Zmyslinski appeared to contradict his own impression of the Council's action when questioned by the Union on cross-examination. Mr. Zmyslinski was specifically asked:

> Q. Was the word, trial period ever stated at the April 23, 2018 Budget Workshop?
>
> A. No.
>
> Q. Okay. Would it surprise you there was nothing said during that meeting that said this was going to be a limited or trial Agreement about "bulk pickup" being picked up on overtime?
>
> A. There was no word for trial or – what was the other word you used? I'm sorry.
>
> Q. Or temporary or –
>
> A. No. No words used
>
> (Tr. pg. 77, lines 5 – 15)

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[7] It should also be noted that while the Town contended that the original analysis of potential savings did not include a number of items and that the number of hours worked by DPW employees had exceeded the number of hours originally proposed, on both of these points management had the opportunity control the outcome and did not or failed to exercise its control in an appropriate manner. (Tr. pgs. 78 – 79).

In addition, Mr. Zmylinski's testimony of a "trial period" is, simply stated, and not supported by the video evidence. (Respondent Exhibit #1; Joint Exhibit #3) Further, it is not consistent with the minutes from the April 23, 2018 Budget Workshop. To the Board, this testimony, quite frankly, came across as somewhat contrived and convenient given the framework of the Town's argument. This is, as noted, further substantiated by a review of the Budget Workshop minutes from the Budget Workshop on April 23, 2018 when the Council approved the change. (Joint Exhibit #2) These minutes do not reflect at all that the Council put any limitation on the length of time DPW employees would perform the "bulk pickup" collections or that there was any restriction voiced among Council members that this change should be temporary. (Joint Exhibit #2)

In short, after review of all the evidence, the Board finds that the Town's unilateral change of the "bulk pickup" collections and its failure to bargain with the Union over the change was a violation of the Act.

2. <u>The June 13, 2018 Memorandum</u>

The Union has claimed that the Town violated the terms of the June 13, 2018, "Bulk Pick Up DPW Policy between Union and Management," ("June 13, 2018 memorandum") (Joint Exhibit #1) when the Town Manager unilaterally directed changes to the "bulk pickup" collection program in May 2019. The Union asserts that the terms of the memorandum track what was approved by the Council and that the memorandum was the product of negotiations between the Union and the DPW director and both parties signed the document. The Town, on the other hand, has claimed that the June 13, 2018 memorandum is invalid, because it was never presented to the Council, never signed or otherwise authorized by the Council, and the terms of the memorandum are not consistent with what the Council approved at its April 23, 2018 Budget Workshop.

The evidence before the Board demonstrates that the validity of the June 13, 2018 memorandum is less than certain and the terms of the memorandum adds language that, at a minimum, was not mentioned or referenced or even considered by the Council during either of the Budget Workshops where the issue of "bulk pickup" was considered. Initially, the Town argues that the contents of the June 13, 2018 memorandum are inconsistent with what the Council approved at the April 23, 2018 Budget Workshop. (compare Joint Exhibit #1 with Respondent Exhibits #1 and #2 and Joint Exhibits #2 and #3) While it is uncontested that the Council approved provisions for "bulk pickup" collection that includes two (2) laborers and two (2) drivers, working the first and third Saturdays of each month, sixteen (16) hours per week paid on overtime (Respondent Exhibit #1 and #2 and Joint Exhibit #1 and #3; Tr. pgs. 58 – 59; pgs. 83 – 84) and that the June 13, 2018 memorandum contains statements consistent with what the Council approved, it is also obvious from reading the June 13, 2018 memorandum that certain aspects go well beyond what was stated by the Council at its budget workshop in April 2018. (Joint Exhibit #1) While some of the discrepancies may be simply procedural in nature or may not create additional costs to the Town, some of the differences could certainly be argued to be well beyond the scope of what the Council

intended when it changed the "bulk pickup" collection to have it done by DPW employees. (Tr. pgs. 44 – 45; pgs. 70 – 71) The point here, based on the evidence before the Board, is that the June 13, 2018 memorandum, signed by the Union and DPW director Gil, does appear to go beyond what was authorized by the Council at its April 2018 Budget Workshop.

Additionally, it appears to be without dispute that the June 13, 2018 memorandum was never presented to the Council, never reviewed by the Council, and never formally approved or signed by the Council (Tr. pg. 43; pgs. 69 – 70) Article 45 of the CBA provides:

> 45.1 This is the entire Agreement of the parties and cannot be added to, subtracted from or amended in any way except with the express approval of the Town Council as required by Charter. This provision is not intended to abolish "past practices," as that the [sic] Rhode Island Supreme Court has defined term, [sic] nor written Agreements executed between the parties hereafter with the approval of the Town Council.

The Board believes the above provision makes clear that the Town Council must approve written Agreements that seek to modify the terms of the existing CBA. As it is apparent that the Council did not approve the terms of the June 13, 2018 memorandum, the Town has a strong argument that the memorandum has no force and effect and cannot be viewed as part of the CBA.

The above exclusion of the June 13, 2018 memorandum from the CBA, however, does not change the conclusion of the Board regarding the Town's violation of the Act by unilaterally changing terms and conditions of employment without notifying and bargaining with the Union over those changes. This is because, in the Board's view and as the evidence supports, when the Council approved the change from the outside contractor to having DPW employees perform "bulk pickup" collection work it expressly did so in a manner required by the CBA and the Charter.[8] As Section 45.1 of the CBA states, "This is the entire Agreement of the parties and **cannot be added to, subtracted from or amended in any way except with the express approval of the Town Council as required by Charter."** (Emphasis supplied) Thus, when the Council approved the change during the April 23, 2018 Budget Workshop it expressly approved of an amendment and addition to the terms of the CBA. Whether the amendment and addition was attached to the CBA in writing or not, the action of the Council, in the Board's view and based on the evidence before it, leads to the inevitable conclusion that an appropriate and authorized change to the contract terms and conditions was made by the Council when it approved the change in "bulk pickup" collections at its April 23, 2018 Budget Workshop (Respondent Exhibits #1 and #2 and Joint Exhibits #2 and #3).

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[8] Neither party has submitted evidence to demonstrate that the action taken by the Council and the approvals given by the Council at its April 23, 2018 Budget Workshop were not conducted properly and in accordance with the authority of the Council under the Charter. As such, the Board has inferred that the Council's action in approving the change to "bulk pickup" collection from MEGA to DPW employees was in accordance with the Town Charter.

3. "Bulk Pickup" Was Not Part of the CBA and Does Not Constitute a Past Practice

The Town also argues that "bulk pickup" is not part of the parties CBA and cannot satisfy the definition of a past practice; thereby allowing the Town to be able to change the "bulk pickup" collection schedule, hours and wages without having to bargain with the Union. As has been discussed above, these arguments simply do not support the Town's position in this case.

The Board need not spend extensive time on these arguments as, in the Board's view, they do not change the outcome of the case. Frankly, each argument is demonstrably true. The existing CBA does not contain any references that have been pointed out to the Board or which the Board has been able to locate through its own review. However, the absence of specific language, in the instant case, does not lessen the Town's bargaining obligation because of the action the Town engaged in when it approved the change to "bulk pickup" collections at its April 23, 2018 Budget Workshop. As previously discussed, there is no dispute that the Council approved an amendment/addition to the CBA when it voted to bring "bulk pickup" collections back to the Town from an outside contractor and authorized DPW employees two (2) laborers and two (2) drivers to perform "bulk pickup" collections on the first and third Saturdays of the month for sixteen (16) hours per week with the work to be performed on overtime. (Respondent Exhibits #1 and #2 and Joint Exhibit #1 and #3; Tr. pgs. 58 – 59) This amendment went into effect on July 1, 2018 when DPW employees started working in accordance with the terms approved by the Council. (Respondent Exhibit #2) DPW employees worked in this manner until the end of May 2019, when the Town unilaterally changed the terms and conditions of the "bulk pickup" collections.

With regard to the past practice argument, again the evidence before the Board would tend to support the Town's contention that no practice existed or was created by DPW employees working the scheduled hours and receiving the overtime monies authorized by the Council at its April 23, 2018 Budget Workshop. However, the creation or existence or lack of existence of a past practice is not dispositive of the issue before the Board. Instead, the Council's action in changing from an outside contractor to authorizing DPW employees (specifically two (2) drivers and two (2) laborers) to perform "bulk pickup" collections on the first and third Saturdays of the month for sixteen (16) hours per week on overtime created terms and conditions of employment that could not be changed without bargaining with the Union. When the Town acted unilaterally to change the terms of the "bulk pickup" it made a substantial and material change in the terms and conditions of DPW employees.[9] Such conduct is a violation of the Act.

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[9] As the Board noted in *Rhode Island State Labor Relations Board and Town of North Kingstown*, ULP-5485, it is well settled that even when there exists a mandatory subject for bargaining, unilateral changes to such a term or condition of employment, to be illegal, must be measured against exiting rules to see whether there is a significant, substantial and material impact on employees' terms and conditions of employment. If changes by an Employer lack such an impact, then no bargaining is required. *Rust Craft Broadcasting*, 225 NLRB 327 1976, *United Technologies Corp*, 278 NLRB 306, 308 (1986), *Peerless Food Products*, 236 NLRB sixteen (16)1 (1978).

4. **The Impact of Contract Negotiations**

Both parties presented evidence of ongoing contract negotiations for a contract to replace the existing CBA which expired on June 30, 2019. Neither party, at least to the Board's satisfaction, made clear the purpose or import of the evidence it submitted on this point. As the Board understands it, the parties commenced bargaining for a new CBA in April 2019. (Tr. pg. 82; Respondent Exhibit #4) During negotiations, the Town asked the Union to provide all the past practices and, according to the Town, the Union either presented nothing or directed the Town to the so-called "blue book." (Tr. pg. 72; pg. 75; pg. 80) The Union for its part argued that it did provide the requested information and that it submitted a proposal to have the June 13, 2018 memorandum included as part of the contract, but the Town rejected the proposal.

In the Board's view these arguments do not add any new or crucial evidence to this matter. Whether the Union thought or didn't think the June 13, 2018 memorandum was a past practice, and whether the Town was attempting to keep the memorandum from being attached to any new CBA is, in the Board's view, not relevant to the issues pending before it. The Board will not repeat here what it has previously stated regarding the Town's violations of the Act but will simply refer the parties to its prior discussion set forth hereinabove.

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 and grievances and 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 Town were parties to a Collective Bargaining Agreement dated July 1, 2014 through June 30, 2019.
4. On March 19, 2018 the Town Council held a Budget Workshop at which the idea of removing "bulk pickup" collection from the outside contractor and having it performed by Town DPW employees as a possible way to save money was proposed.
5. On April 23, 2018 a second Budget Workshop was held by the Town Council. Proposals for bringing the "bulk pickup" collection work back to the Town from the outside contractor were discussed and reviewed.
6. At the April 23, 2018 Budget Workshop, the Town Council approved a proposal to have DPW employees perform "bulk pickup" collection work effective July 1, 2018. The proposal provided for two (2) laborers and two (2) drivers using two (2) trucks on the first and third Saturday of each month for sixteen (16) hours per week to perform "bulk pickup" collections. The employees would perform the work on overtime.
7. Shortly after the Town Council approved having DPW employees begin performing "bulk pickup" collections, Union representatives met with the Assistant Director of DPW

to discuss how "bulk pickup" work would be implemented. Based on these discussions, the Union and Assistant Director of DPW signed a written memorandum on June 13, 2018.

8. On July 1, 2018 the "bulk pickup" collection work approved by the Town Council went into effect for DPW employees.

9. DPW employees performed "bulk pickup" collections in accordance with the Town Council's April 23, 2018 approval and the terms of the June 13, 2018 memorandum from July 1, 2018 until on or about May 31, 2019.

10. On May 24, 2019 a referendum and budget proposal were defeated by Town residents.

11. On May 25, 2019 the Town Manager sent a memorandum to all Departments and Directors stating, among other things, that all overtime work must be cancelled except in an emergency. The Union was not notified before this memorandum was delivered.

12. As a result of the memorandum from the Town Manager, the "bulk pickup" collections scheduled for Saturday, June 1, 2019 were rescheduled to Friday, May 31, 2019. Thereafter, "bulk pickup" collections were performed during regular working hours and not on overtime.

CONCLUSIONS OF LAW

1. The evidence in the record demonstrates that the Employer unilaterally changed the wages, hours, terms and conditions of employment of DPW employees when it changed the method and manner of "bulk pickup" on or about May 31, 2019.

2. The evidence in the record demonstrates that the Employer made unilateral changes to employee wages, hours and terms and conditions of employment without notifying the Union or giving the Union the opportunity to bargain over changes to mandatory subjects of bargaining.

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(6) and (10) when it unilaterally changed employee wages, hours, terms and conditions of employment and failed and refused to negotiate with the Union before it changed the "bulk pickup" collections as the Town Council had approved on April 23, 2018.

ORDER

1. The Employer is hereby ordered to cease and desist from making unilateral changes to terms and conditions of employment, without first notifying and giving the Union the opportunity to bargain over any changes.

2. The Employer is hereby ordered to make whole those DPW employees who lost or were denied overtime wages from June 1, 2019 to the present as a result of the Employer unilaterally changing how "bulk pickup" collections were performed.

3. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than sixty (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

Walter J. Lanni, Chairman

Scott G. Duhamel, Member

Aronda R. Kirby, Member

Derek M. Silva, Member

BOARD MEMBER, KENNETH B. CHIAVARINI HAS ABSTAINED FROM PARTICIPATION IN THIS MATTER.

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

Dated: DECEMBER 16, 2019

By: _____
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-6249
TOWN OF WEST WARWICK	:	

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-6249, dated December 16, 2019, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 16, 2019.**

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

Dated: December 16, 2019

By: _____
Robyn H. Golden, Administrator