STATE OF RHODE ISLAND
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD	:	
-AND-	:	CASE NO. ULP-6256
STATE OF RHODE ISLAND – DEPARTMENT OF CORRECTIONS	:	

DECISION AND ORDER

TRAVEL OF CASE

The above-captioned 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 State of Rhode Island - Department of Corrections (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated August 27, 2019 and filed on the same date by the Rhode Island Brotherhood of Correctional Officers (hereinafter "Union").

The Charge alleged as follows:

> On July 29, 2019, The Rhode Island Department of Corrections announced changes to its current absenteeism policy, to take effect September 1, 2019. On August 16, 2019, the Rhode Island Brotherhood of Correctional Officers sent a letter to the Director of Corrections indicating that such issues were mandatory subjects of bargaining and requesting immediate bargaining. The Department responded that it had no obligation to bargain such issues.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. On October 11, 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) announced unilateral changes to its existing absenteeism policy without bargaining with the Union and (2) failed and refused to bargain with the Union over the unilateral changes to the policy. The Board held formal hearings on December 3, 2019 and February 25, 2021 at which times all parties were given the opportunity to present and cross-examine witnesses and submit exhibits. Post-hearing briefs were filed by the Employer and the Union on April 12, 2021. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and exhibits submitted at the hearings 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 for alleged unilateral changes in the Employer's Absenteeism Management Program ("AMP") and the Employer's refusal to bargain with the Union over the alleged changes to the AMP. The Union has alleged, as will be discussed in more detail below, that the Employer made changes to the AMP (also referred to as the Sick Leave Program) in several identifiable ways: first, changes were made to the disciplinary process associated with the AMP whereby multiple discipline tracks were reduced to two (2) (one for absenteeism and tardiness and another for all other types of discipline) and several steps in the progressive discipline chain were removed when looking at absenteeism; second, several changes were made to sick notes, including requiring specific information to be included in sick leave notes provided by employees absent for more than three (3) days and so-called eight-hour work day notes previously accepted by the Employer would now be subject to approval under the FMLA system; and finally, the Employer would look more closely at sick leave abuse and, in particular, sick leave patterns. (See Joint Exhibit #1). The Union alleges that upon notification to the Employer of the Union's desire to bargain over these identified changes to the AMP, the Employer refused claiming that it did not consider the AMP to be a mandatory subject of bargaining. (TR., Vol. I, pg. 18). The Employer has denied the Union's allegations of unfair labor practices, asserting that its conduct was authorized by the provisions of the parties' Collective Bargaining Agreement and, more specifically, the management rights clause and under the Director's non-delegable statutory authority.

The parties are subject to a Collective Bargaining Agreement. (Respondent's Exhibit #12). The AMP has been in effect since approximately 1993 with little to no change in its contents prior to the instant dispute. (TR., Vol. I, pg. 38; pg. 46; Vol. II, pg. 32; pgs. 43 – 44; pg. 76). At its core, the AMP addresses absenteeism issues and sick leave of bargaining unit members in a variety of ways with the ultimate purpose being the elimination of excessive absenteeism and abuse of sick leave, to improve employee performance and to improve the efficiency of the organization by eliminating unnecessary absences. (TR., Vol. II, pg. 32).

The instant dispute revolves around a memorandum sent by the Director of Corrections (hereinafter "Director"), Patricia Coyne Fague, titled "New Absenteeism Management Initiative." (Joint Exhibit #1). The memorandum identifies as a notice "of upcoming changes to the Department's absenteeism management program." (Joint Exhibit #1, pg. 1). The memorandum outlines the importance of sick leave as a benefit but notes that the amount of sick time being used by a large proportion of the workforce during each trimester indicates that "there is clearly some abuse taking place." (Joint Exhibit #1, pg. 1). The memorandum notes the "extraordinary amount of time and effort" that the Employer invests in trying to remedy absenteeism in the workplace and the costs in man-hours and dollars that are being spent on sick leave. The memorandum concludes:

> "that the system in use at the DOC for addressing sick time abuse is simply not working. There is little to no deterrent value in the way absenteeism has been handled and the problem has not only persisted, it's gotten worse. Because we are a 24/7 operation, the price tag for sick time abuse is high and continues to climb. Something has to change." (Joint Exhibit #1, pg. 1).

The Director's memorandum then announces, "what we're doing isn't working, it's costing far too much money, and it's time to try something else." (Joint Exhibit #1, pg. 1).

The memorandum then identifies four (4) areas, i.e. discipline tracks, sanctions for absenteeism, sick notes and pattern abuse, and sets forth what the Employer currently does in these areas and what the "new system" will be on a going-forward basis. (Joint Exhibit #1; TR., Vol. II, pgs. 87 – 88). The memorandum modifies the "discipline tracks" to go from multiple separate "tracks" to "two discipline tracks: absenteeism/tardiness/IMOT on one track, and every other kind of discipline on the other." (Joint Exhibit #1, pg. 1; TR., Vol. II, pgs. 88 – 89). Under sanctions for absenteeism, the memorandum basically reduces the levels of progressive discipline that had previously been applied to instances of absenteeism (where more than 40 hours of unexcused sick time occurred in a trimester). (Joint Exhibit #1, pg. 2; TR., Vol. II, pg. 89). For "sick notes", the memorandum indicates that such notes "are not informative" and do not allow the Employer to "effectively respond to sick leave abuse." (Joint Exhibit #1, pg. 2). Under the new system, sick notes must be presented after three consecutive days of absence; must provide the note to the Employer within 15 days from the first day of absence; and must provide the dates an employee will be out of work and an anticipated return to work date. (Joint Exhibit #1, pg. 2; TR., Vol. II, pgs. 89 – 90). In addition, so-called eight-hour restriction notes would no longer be automatically accepted by the Employer and, instead, such individuals would have to apply for and be approved for FMLA leave. (TR., Vol. II, pgs. 91 – 92). Finally, under "pattern abuse", the memorandum indicates that "pattern sick time use will be more closely scrutinized, and abuse will be referred for discipline, even if prior to a trimester review." (Joint Exhibit #1, pg. 2; TR., Vol. II, pg. 92).

On August 16, 2019, counsel for the Union sent the DOC a letter indicating the Union had received the Employer's "proposed changes to the current absenteeism policy . . . ." (Joint Exhibit #2). The letter went on to note the Union's position "that issues of this nature are mandatory subjects of bargaining, and it is therefore requested that an immediate bargaining session be scheduled for this purpose." (Joint Exhibit #2). In response, the Employer indicated that it did not believe it was obligated to bargain over the changes to the AMP and that it was not going to negotiate with the Union over this matter. (TR., Vol. I, pg. 18; Vol. II, pgs. 125 – 126). Upon receiving the Employer's notice that it would not engage in collective bargaining with the Union over the proposed changes to the AMP, the Union on August 27, 2019 filed an Unfair Labor Practice Charge with this Board.

POSITIONS OF THE PARTIES

UNION:

As previously indicated, the Union claims that the Employer's unilateral changes to the Absenteeism Management Program was a material and substantial change in working conditions, was a mandatory subject of bargaining and obligated the Employer to bargain with the Union over said changes. The Employer's unilateral action and its failure to engage in good-faith negotiations with the Union constitute a violation of the Act.

EMPLOYER:

In contrast to the Union, the Employer argues that the Director's July 29, 2019 memorandum regarding the Absenteeism Management Program did not make changes to the sick leave policy that altered working terms and conditions of employment for bargaining unit members. The Employer further asserts that any changes to the AMP were insignificant and neither material nor substantial changes to the policy. The Employer also argues that even if changes to the AMP were material and substantial changes to working conditions, the Employer was authorized to make such changes under the Management Rights Clause of the Collective Bargaining Agreement. The Employer, in essence, argues that the Union has waived its right to negotiate over these changes as the terms of the Management Rights Clause give the Employer the authority to make such changes. Finally, the Employer asserts that sick leave and changes to the AMP are part of the Director's non-delegable authority under R.I.G.L. §42-56-10. (Respondent Exhibit #1).

DISCUSSION

The issue before the Board is relatively simple and straightforward, i.e. did the memorandum dated July 29, 2019 from the Director make unilateral changes to the Absenteeism Management Program and, if so, were those changes material and substantial such that the Employer was obligated to bargain with the Union over said changes? The Board will also address whether a sick leave policy such as the AMP constitutes a mandatory subject of bargaining. Finally, the Board will discuss the various defenses raised by the Employer to its conduct in this case.

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 (hereinafter "Act"). (See R.I.G.L. §28-7-12; §28-7-14; §28-9.7-4; R.I.G.L. §28-9.7-6; *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5799 (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 Fire Fighters, AFL-CIO v. The Town of North Providence*, PC-13-5202 (September 26, 2014); and *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.")). As noted above, the

issue facing the Board is whether the implementation of purported changes to the AMP constitutes a mandatory subject of bargaining. The Board need not spend a significant amount of time on this particular issue. The AMP is, in essence, part of the rules and regulations devised by the Employer for the operation of the facility. Plant rules have long been held to be mandatory subjects of bargaining by the National Labor Relations Board (NLRB).[1] Thus, an Employer is generally prohibited from unilaterally implementing or changing such rules. *Schraffts Candy Co*. 244 NLRB 1274 (1979); *Dynatron/Bondo Corp.,* 324 NLRB 572 (1997); *Goya Foods of Florida*, 347 NLRB 1118 (2006). Rhode Island has also adhered to the idea that sick time or sick policies are part of terms and conditions of employment and, therefore, mandatory subjects of bargaining. See *Belanger v. Matteson*, 346 A.2d 124, 129 (R.I. 1975). In addition, where a rule effects or implicates an employee's continuation of employment, such as through a disciplinary system, it will be a mandatory subject of bargaining regardless of an Employer's legitimate reason for its promulgation. See *BHP (USA) Inc. dba BHP Coal New Mexico*, 341 NLRB 1316 (2004). In the instant matter, the Employer has been clear that it was making changes to the AMP that impacted aspects of how a bargaining unit member could access sick leave benefits. In addition, a review of the July 29, 2019 memorandum from the Director made apparent that the Employer was changing the manner in which it was able to effectuate discipline. Thus, by the Employer's own admission, the introduction of the changes to the AMP as applied to bargaining unit employees constitute mandatory subjects of bargaining.

A. The Employer Engaged in Improper Unilateral Action.

In the present case, there appears to be little dispute between the parties that the Employer unilaterally acted in implementing changes to the AMP to cover bargaining unit members. (See TR., Vol. I, pgs. 19 – 20; pgs. 29 – 32; Vol. II, pgs. 99 – 100) Instead, the central issue is whether the changes to the AMP resulted in material and substantial changes to the employees' working conditions.

The facts in this matter are generally straightforward and not in dispute, though the Board acknowledges that each party's interpretation of those facts is diametrically opposed. As previously noted, the AMP has been in place since the early 1990s. (TR., Vol. I, pg. 38; pg. 46; Vol. II, pg. 76). This policy or program provided a structure for the use and submission of sick notes, for tracking absenteeism and abuse of sick time and potentially disciplining employees for use of sick time beyond forty (40) hours during a trimester. While acknowledging the benefits of this system to the employees, the Director in her July 29, 2019 memorandum made clear that the current system "for addressing sick time abuse is simply not working." (Joint Exhibit #1). Because, according to the Director, what the Employer was doing with regard to sick leave wasn't working, the Director implemented "a new system to try to bring absenteeism under control . . . ." (Joint Exhibit #1). According to the July 29, 2019 memorandum, this "new system" made

[1] This Board and the courts of this State have, with respect to labor law issues, consistently looked to federal labor law for guidance. *See Town of North Kingstown v. International Association of Fire Fighters, Local 1651, AFL-CIO*, 107 A.3d 304 (R.I. 2015); and *Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d 113, 120 (R.I. 2007)).

four (4) changes to the then current contents of the AMP. As will be discussed below, it is the Board's determination that the July 29, 2019 memorandum made significant, substantial and material changes to the existing AMP sufficient to obligate the Employer to bargain over these unilateral changes before implementation.

(i) DISCIPLINE TRACKS

According to the July 29, 2019 memorandum and as confirmed by the witness testimony, prior to the changes implemented by the Director, the AMP addressed discipline on separate "tracks". (TR. Vol I, pg. 29; pgs. 30 – 31; pgs. 32 – 33). Thus, as explained in the July 29, 2019 memorandum, "conduct unbecoming" offenses are on one track, Absenteeism and Tardiness is on another track, dereliction of duty a third track, and so on." (Joint Exhibit #1, pg. 1; see also TR. Vol. I, pg. 32). The downside of this particular system, as indicated by the Director in her memorandum, was that employees "with large amounts of discipline" could avoid significant disciplinary consequences because the tracks were not interrelated or connected. (TR., Vol. II, pgs. 107 – 108). Under the "new system,"[2] there would only be two (2) discipline tracks, one for absenteeism's/tardiness/IMOT and a second for all other types of discipline. (Joint Exhibit #1; TR., Vol. II, pgs. 88 – 89). In the Board's view, this is a significant, substantial and material change to the AMP and presents a significant, substantial and material change in the working terms and conditions of employment for bargaining unit members. As written, the July 29, 2019 memorandum compresses discipline tracks and, in essence, makes it easier for the Employer to discipline employees through this consolidation. As the Director noted in the memorandum, under the old system, there appeared to be a separate progressive discipline process for each discipline track. Thus, an employee could have significant disciplinary problems on one track, but that track would not be integrated with different disciplinary problems that were located in a separately defined discipline track. (TR., Vol. II, pg. 108). In short, under the AMP existing at the time the memorandum was written, it was difficult for the Employer to attempt to legitimately discipline bargaining unit members who had large amounts of discipline segregated to different tracks. The new system would make disciplining employees easier because there would be fewer tracks and an employee's potential discipline problems would be lumped together as opposed to separated, as had occurred under the prior system.[3]

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[2] While the Employer argued that it made no changes to the AMP with the implementation of the July 29, 2019 memorandum (see TR., Vol. II, pgs. 43 – 44), the language and descriptions used in the memorandum by the Director contradict, in the Board's view, this argument. For example, the memorandum makes a distinction between what is "currently" occurring under the AMP and what the "new system" will be upon the effective date of the policy implementation. (Joint Exhibit #1). In addition, the language of the July 29, 2019 memorandum describes clear changes in how the AMP has been applied and will be applied commencing with the effective date. Thus, the Board has determined, based on the plain language of the July 29, 2019 memorandum, that changes were unilaterally made by the Employer to the AMP.

[3] The Board acknowledges the testimony by the Employer's witnesses of its willingness to work with the Union on disciplinary issues and how the Employer has often reduced certain disciplinary penalties after discussion with the Union. (TR. Vol. I, pg. 40 – 41; Vol. II, pg. 63 – 64). However, while admirable this past conduct does not eliminate the likelihood or possibility that the new system as implemented by the Employer will lead to an increased amount of discipline for certain bargaining unit members.

While the Board notes that the Employer provided testimony that it works well with the Union and discusses discipline with the Union and often reduces disciplinary penalties after discussions with the Union (TR., Vol. II, pg. 63 – 64), this willingness to work with the Union does not obviate the clear problems associated with the Employer unilaterally changing the disciplinary system. The impact on employees of this change cannot be overstated. Going from a non-integrated, multi-track discipline system to a two-track, more highly integrated system clearly impacts bargaining unit members and has the potential to lead to significant discipline of bargaining unit members. (See TR., Vol. II, pgs. 107 – 108). Under these circumstances, the Board finds that the unilateral change in the discipline track system by the Employer is a violation of the Act.

(ii) SANCTIONS FOR ABSENTEEISM

As with the change in the discipline tracks, the Employer's unilateral change in the sanctions for absenteeism that it previously employed raises the specter of employees being subject to discipline at a faster pace than previously allowed. While again the Board notes the Employer's stated willingness to work with the Union on discipline, the changes to the sanctions is a substantial and material change to the working conditions of employees. In essence, what is occurring is that the Employer is potentially speeding up the disciplinary process to allow it to quickly uncover policy violations and take disciplinary action to the detriment of bargaining unit members.

In the July 29, 2019 memorandum, the Employer notes that it uses a progressive disciplinary system but that the number of levels used within the progressive disciplinary system poses "no real threat of serious consequences" to bargaining unit members who become entrapped within the discipline system. (Joint Exhibit #1, pg. 2; TR., Vol. I, pg. 39). The new system limits the number of progressive disciplinary sanctions that the Employer needs to meet and, in essence, allows the Employer to more severely discipline employees more quickly for violations which, prior to the July 29, 2019 memorandum, would likely have resulted in lesser discipline. The testimony of both Union and Employer witnesses during the hearings before the Board confirm this conclusion. (TR., Vol. I, pg. 29; pgs. 32 – 33; and pg. 39; Vol. II, pgs. 88 – 89; pgs. 109 – 110). As with the discussion regarding the change in discipline tracks, a unilateral change to progressive disciplinary sanctions which allows the Employer to more rapidly increase the severity of disciplinary penalties significantly and materially impacts bargaining unit members. Thus, the actions of the Employer in unilaterally changing the sanctions for absenteeism constitutes a violation of the Act.

(iii) SICK NOTES

The changes implemented by the Employer to the content of sick notes and how certain eight-hour restriction notes are handled is, in the Board's view, a much closer question than was addressed with respect to discipline tracks and sanctions for absenteeism. As the testimony demonstrated, the purpose in identifying sick notes in the memorandum was intended to actually reinforce rights the Employer apparently had concerning the receipt and content of sick notes but had not been strictly enforcing over time. (TR., Vol. II, pgs. 36 – 37; pgs. 40 – 42; pgs. 43 – 44; pgs. 102 – 104).

In essence, the Employer was notifying employees that the method and manner for submission of sick notes and the composition of the sick notes would be enforced to standards that had previously been identified and in place either through statute or memo for some time. (Respondent Exhibit #6; TR., Vol. II, pgs. 40 – 41). In addition, even the language of the July 29, 2019 memorandum makes clear that the "new system" for sick notes will be "the requirements set out in the attached memo." (Joint Exhibit #1, pg. 2).[4] While the Board recognizes the Union's assertion that the Employer changed what it would accept for a sick note (see TR., Vol. I, pgs. 29 – 30), in the Board's view this is not a material and substantial distinction from what the Employer had said it would do for many years. (Respondent Exhibit #6).

From the documentation submitted by the parties and the testimony before the Board, it appears to the Board that regarding sick notes, the Employer did not make any material or substantial changes to the current AMP process. Instead, as noted above, the Employer was merely reemphasizing that the process that has been in place since at least 2014 (Respondent Exhibit #6) was the process that the Employer would follow regarding accepting sick notes. The testimony before the Board indicated that when the 2014 memorandum regarding acceptance of sick notes was published, the Union filed a grievance which was denied and a subsequent demand for arbitration was withdrawn with prejudice. (TR., Vol. II, pgs. 41 - 42). The fact that the Employer may not have stringently observed the parameters of the 2014 memo for purposes of accepting sick notes does not create, in the Board's view, a violation of the Act when the Employer notices the Union that it intends to follow the procedure that has been in effect since at least 2014. Thus, the Board will not find a violation of the Act regarding the Employer's notification of the acceptance of sick notes as indicated in the July 29, 2019 memorandum.

The Employer also accepts sick notes with an "eight-hour restriction." As the Board understands it, this particular type of sick note has been accepted to allow employees who submit such a note to be restricted to working only eight hours per day. (TR., Vol. II, pgs. 91 – 92). Based on a review of the testimony, it does not appear that the Employer had placed any conditions on its acceptance of these so-called eight-hour restriction notes prior to the publishing of the July 29, 2019 memorandum. (TR., Vol. I, pg. 30; Vol. II, pgs. 104 – 107). However, with the publication of the July 29, 2019 memorandum, the Employer is now requiring employees to apply for and be approved for family medical leave (FMLA) before such an eight-hour restriction note will be accepted. (See Joint Exhibit #1, pg. 2; TR., Vol. I, pg. 30; Vol. II, pgs. 105 – 107). It is the Board's understanding that should an employee submit such a note but fail to be approved for FMLA, then the eight-hour restriction note would not be accepted by the Employer and sick leave benefits would be denied. (TR., Vol. I, pg. 60; Vol. II, pgs. 106 – 107). This is a potentially significant and material change in the procedures

[4] The "attached memo" referenced in the July 29, 2019 memorandum was a memorandum written in March 2019 regarding "Sick Leave & Medical Notes" that substantially followed language that was in an earlier "Sick Leave/Medical Notes" memorandum sent to employees in December 2014. (See Joint Exhibit #1 and compare with Respondent Exhibit #6).

the Employer has applied in the past and could have a deleterious effect on members of the bargaining unit who submit such eight-hour restriction notes. The impact of this change cannot, in the Board's view, be seen as merely diminimis or of little consequence since an employee who submits an eight-hour restriction note that is not accepted would be required potentially to work well beyond the eight-hour restriction listed in the submitted note. Such a situation could obviously impact an employee's health and well-being. Therefore, the Board finds that this change in the procedure for accepting eight-hour restriction notes is substantial and material and the unilateral change by the Employer is a violation of the Act.

(iv) PATTERN ABUSE

The final alteration to the AMP as included in the July 29, 2019 memorandum addresses what is termed "pattern abuse." As described in the July 29, 2019 memorandum, this conduct is evidenced by employees who "burn up sick time" just prior to retirement or employees who call out "every Monday, Tuesday, Thursday and Friday (thereby avoiding a three-days-in a row situation where a note would be required)…" (Joint Exhibit #1, pg. 2; TR., Vol. II, pg. 46; pgs. 92 – 94). The Employer's stated solution to this issue is to more closely scrutinize the sick time taken by employees and to refer "abuse" determined by the Employer "for discipline, even if prior to the trimester review." (Joint Exhibit #1, pg. 2; TR., Vol. II, pgs. 92 – 94).

This change in the process for determining patterns of abuse of sick time represents a close question for the Board. The Board anticipates that all Employers want to avoid sick leave abuse and will attempt to correct such patterns of abuse when it is discovered. In the present case, it appears that this is what the Employer is attempting to achieve by its statement in the July 29, 2019 memorandum. (Joint Exhibit #1, pg. 2; TR., Vol. II, pgs. 94 – 96). However, by referencing possible discipline of the employee "prior to the trimester review period," the Employer seems to be implying that it will scrutinize this conduct more closely (as indicated in the memorandum) and will take action that it has not previously engaged in or taken. As such, this represents a significant and material change, as far as the Board can ascertain, to what the Employer previously did in similar sick leave pattern abuse cases. Such a change, in the Board's view, represents a substantial and material change in working conditions for employees and, therefore, is a violation of the Act.

B. The Employer Failed to Bargain with the Union

In addition to unilaterally changing terms and conditions of employment for bargaining unit members, the Employer failed to bargain with the Union over the unilateral change it implemented when it distributed the July 29 memorandum (see Joint Exhibit #1). 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. §28-9.7-4).

As noted above, 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 NLRB 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,* 369 U.S. 736 (1962)*; 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 Printing Division, A Division of Litton Business Systems, Inc. v. National Labor Relations Board*, 501 U.S. 190, 198 (1991) that "[n]umerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA."

In Rhode Island, 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 1651, 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*.

In the instant case, the Union was afforded no legitimate opportunity to bargain over the directive effectuating a change in the terms of the AMP. (TR., Vol. I, pg. 18; Vol. II, pgs. 99 – 100; pgs. 125 – 126). The unilateral change in procedures, i.e. the "new system" of discipline tracks, sanctions for absenteeism, sick notes and pattern abuse (see Joint Exhibit #1) was implemented by the Employer under the position that the Employer had no "obligation" to bargain with the Union. (TR., Vol. II, pg. 99). In other words, the evidence before this Board indicates that while advance notice was provided to the Union regarding the implementation of the policy changes, the Employer categorically refused to negotiate with the Union over the AMP modifications it implemented. (TR., Vol. I, pgs. 67 – 68; Vol. II, pgs. 125 – 126). 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)*.

As previously indicated, unilateral changes to plant rules where the rules effect terms and conditions of employment represent mandatory subjects of bargaining. In the instant case, it is apparent from the evidence presented to the Board that there were unilateral changes to the AMP, that the changes impacted access to sick time benefits and disciplinary sanctions and, therefore, the changes had a significant, substantial and material effect on the working terms and conditions of employment of bargaining unit members. The testimony before the Board confirmed this conclusion. (TR., Vol. I, pgs. 29 – 30; pgs. 32 – 34; pg. 39; pg. 42; pgs. 44 – 45; pg. 48; Vol. II, pgs. 47 – 49; pgs. 51 – 53; pgs. 88 – 92). There is no serious argument to be made that sick time benefits and issues effecting discipline are not part of employee terms and conditions of employment and, therefore, mandatory subjects of bargaining. See *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940; *NLRB v. Katz*, 369 U.S. 736 (1962); *Southern California Edison Co*., 284 NLRB 1205, *enforced* 852 F.2d 572 (9th Cir. 1988).

The evidence before the Board makes clear that the unilateral changes made by the Employer to the AMP impacted terms and conditions of employment which are mandatory subjects of bargaining. The Employer made changes to these mandatory areas of bargaining without bargaining with the Union. (TR., Vol. I, pg. 18; Vol. II, pgs. 124 – 128). The Employer does not dispute before this Board that it did not act in a unilateral manner when it instituted the new search policy. Instead, the Employer asserts that it had the right to do so under the management rights provisions of the then existing CBA and under its statutory authority. However, the Board has carefully reviewed the hearing testimony, exhibits and memorandum submitted by counsel in this matter and has been unable to locate any evidence to support these arguments. Thus, in the Board's view, the Employer's failure to negotiate with the Union over the changes to the AMP violates the Act.

C. The Employer's Defenses

The Employer has put forth two (2) main defenses to its action in the matter before the Board.[5] One of the Employer's main arguments centers on its claim that it was authorized to make the changes to the AMP under the management rights clause of the Collective Bargaining Agreement. It further argues that any changes it made to the AMP were authorized pursuant to R.I.G.L. §42-56-10 claiming that its actions constitute non-delegable duties under the referenced statute. As will be discussed in more detail below, the Board rejects these arguments by the Employer as insufficient and inapplicable to justify its actions in violation of the Act.

(i) THE MANAGEMENT RIGHTS CLAUSE

The management rights clause of the Collective Bargaining Agreement, Article IV, Section 4.1 (Respondent Exhibits #2 and #12) provides the Employer with a fairly standard set of rights and responsibilities that it may exercise "except as limited, abridged, or relinquished by the terms and provisions of this Agreement, . . . and consistent with applicable laws and regulations . . . ." (Respondent Exhibit #2). While the CBA, as noted, provides the rights enumerated therein to the Employer, the setting forth of these rights does not absolve the Employer of its obligation to bargain over mandatory subjects of employment nor does it authorize the Employer to unilaterally change the terms and conditions of employment of bargaining unit members.

The management rights clause makes clear that the rights set forth in Section 4.1 cannot be inconsistent with the provisions set forth in other parts of the CBA nor can it use its management rights to violate "applicable laws and regulations." (Respondent Exhibit #2). In the Board's view, the changes instituted by the July 29, 2019 memorandum, with the specific exception of the sick notes section, made changes to the sick leave process/procedure (Article XII) and (Article XVI), discharges, as contained in the CBA. As discussed in more detail above, the July 29, 2019 memorandum has unilaterally altered the process of discipline for bargaining unit members when attempting to use their sick leave, a right granted under the Collective Bargaining Agreement. There was no evidence presented to the Board that the Union contemplated the Employer making unilateral changes to the disciplinary process/procedure when it negotiated the management rights language nor is there any evidence to suggest that the management rights clause allows the Employer to make such unilateral changes to the disciplinary process/procedure. (Respondent Exhibit #2). While the rights granted under the management rights clause can be described as extensive, nowhere within the terms of Section 4.1 does it allow the Employer, in the Board's view, to make the unilateral changes it instituted as set forth in the July 29, 2019 memorandum. While the Employer argues that it expends an "extraordinary amount of time and effort" in addressing and

[5] The Board recognizes that the Employer has claimed that the changes to the Absenteeism Management Program were, in fact, not changes at all and, further, argues that any changes to the AMP were minimal and not significant, substantial or material. The Board has previously addressed these concerns in this Decision, finding that there were, in fact, changes made by the Employer to the AMP and the changes were significant, substantial and material to the working conditions of bargaining unit members. As such, the Board will not repeat those arguments or its rulings in this Section.

remedying absenteeism issues, none of the evidence before the Board including the July 29, 2019 memorandum substantiate an operational need to enforce the unilateral changes envisioned by the Employer in its July 29, 2019 memorandum. Further, there was no evidence presented to the Board that the changes proposed in the July 29, 2019 memorandum were the result of an emergency situation. Section 4.1F authorizes the Employer to "take whatever actions may be necessary to carry out its mission in emergency situations…" (Respondent Exhibits #2 and #12). In the instant case, there was simply no evidence submitted to the Board to indicate this was an emergency situation covered by Section 4.1F. In fact, the timing of the July 29, 2019 memorandum (dated July 29, 2019 to be effective September 1, 2019) belies the notion that an emergency existed around changing the terms of the AMP.

(ii) STATUTORY AUTHORITY

The Employer also argues that its changes to the AMP are covered as part of the non-delegable authority it has granted to it under R.I.G.L. §42-56-10. The Employer cites *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913 (R.I. 1991) in support of its argument. In *Vose* the Supreme Court was presented with a situation where the Director of the Department of Corrections had brought a declaratory judgment action asking the Court to determine whether the Director had the authority to institute a mandatory overtime policy in order to safely and appropriately staff the prison in light of an increasing population. The Union objected claiming that the new mandatory overtime policy was prohibited by the Collective Bargaining Agreement. The Court found that the limitations placed on the Director by the contract language interfered with his ability to provide safe and adequate security for the facility. *Vose* at page 915. In particular, the Court found that the contractual prohibition stripped the Director of his ability to implement rules "incidental to…his…powers [to provide for]…care, and custody for all persons committed to the correctional facility." *Vose* at page 915.

In the instant case and unlike *Vose*, no such similar evidence has been presented to this Board by the Employer. Instead, the Employer has said that the sick leave problem it has attempted to address is a monetary issue ("abuse of sick time costs the Department of Corrections literally millions of dollars per year.") (Joint Exhibit #1); see also TR., Vol. II, pgs. 98 – 101). The Employer has also alluded to morale problems created by employees who use excessive amounts of sick time and to the "time and effort" the Employer expends on this issue. (Joint Exhibit #1; TR., Vol. II, pg. 100). While these are certainly serious concerns, they do not, in the Board's view, go to the core mission of the Employer. That is a significant distinction between this case and *Vose* and one that the Employer has not, to the Board's satisfaction, been able to overcome.

The Rhode Island Supreme Court addressed a similar situation to the present case *in North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers*, 945 A.2d 339 (R.I. 2008). In that case, an appeal from an arbitration award finding the School Committee's elimination of a composition period to have violated the Collective Bargaining Agreement, the School Committee argued, as relevant to the case before this Board, that its action was a

non-arbitrable/non-delegable duty authorized under the School Committee's authority pursuant to Title 16 covering matters of management and educational policy. *North Providence School Committee* at page 346. In ruling that the arbitrator's award should stand, the Court noted that the arbitrator had found that the School Committee had based its decision to eliminate the composition period on "budgetary and teaching load concerns" and not educational policy. *Id.* at page 346. In denying the School Committee's appeal, the Court was careful to note the broad sweep of Title 16. However, the Court also made clear that while "school committees have exclusive statutory authority pursuant to Title 16 over matters of management and educational policy, Unions representing teachers are statutorily entitled to negotiate over matters that directly affect the work and welfare of their members…" *North Providence School Committee* at page 346. In its ruling, the Court found against the School Committee because the School Committee relied on a "fiscal rationale" rather than "improving the education" of the students it had not acted under its statutory authority under Title 16. *Id.* at page 347. In the present case, a similar analysis is appropriate. Here, the Employer has relied upon fiscal concerns, the time and effort it spends administering the absenteeism program and employee morale as the main reasons for action it took in changing the AMP. (See Joint Exhibit #1; TR., Vol. II, pg. 94; pg. 100; pg. 107; pg. 130). While it did comment on safety issues (TR., Vol. II, pg. 129 – 130), in the Board's view and after carefully reviewing all the testimony and the contents of the July 29, 2019 memorandum, the security of the prison or the inmate population was not the primary reason for the Employer's actions in changing the absenteeism program. For these reasons, the Board finds that the Employer's reference to statutory authority has no application in the instant case.

The Employer's failure to negotiate with the Union regarding its implementation of the new system changes in the AMP represents a 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 subject to a Collective Bargaining Agreement dated July 1, 2015 through June 30, 2017.
4. On July 29, 2019 the Employer issued a memorandum regarding "New Absenteeism Management Initiatives".
5. The July 29, 2019 memorandum identified changes to the Employer's Absenteeism Management Program and stated reasons for the notified changes.

6. The July 29, 2019 memorandum specified four (4) areas, “Discipline Tracks”, “Sanctions for absenteeism”, “Sick Notes and “Pattern abuse”, and set forth what the Employer was “currently” doing and what the “New system” would be upon the effective date of September 1, 2019.

7. The Union, upon receipt of the July 29, 2019 memorandum, wrote to the Employer requesting bargaining over the changes to the absenteeism policy that the Employer was proposing to implement on September 1, 2019.

8. The Employer unilaterally changed the working terms and conditions of employment of bargaining unit members when it introduced the July 29, 2019 memorandum with changes to portions of the Absenteeism Management Program.

9. The Employer unilaterally changed the working terms and conditions of employment of bargaining unit members when it introduced the July 29, 2019 memorandum with changes to portions of the Absenteeism Management Program without engaging in good faith bargaining with the Union.

CONCLUSIONS OF LAW

1. 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 the working terms and conditions of employment of bargaining unit members when it introduced the July 29, 2019 memorandum with changes to portions of the Absenteeism Management Program.

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(6) and (10) when it failed and refused to negotiate with the Union before it unilaterally changed the working terms and conditions of employment of bargaining unit members.

ORDER

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

2. The Employer is hereby ordered to cease and desist from implementing changes to the Absenteeism Management Program, consistent with the terms of this Decision.

3. Should the Employer decide to implement changes to the Absenteeism Management Program, consistent with the terms of this Decision, the Employer must first engage in good faith negotiations with the Union.

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 (Dissent)

/s/ Derek M. Silva
Derek M. Silva, Member

/s/ Harry F. Winthrop
Harry F. Winthrop, Member (Dissent)

/s/ Stan Israel
Stan Israel, Member

BOARD MEMBER, KENNETH CHIAVARINI, WAS ABSENT FOR SIGNING OF THE DECISION & ORDER

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

Dated: May 24, 2021

By: /S/Lisa L. Ribezzo
Lisa L. Ribezzo, Agent

ULP- 6256

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-6256
STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS	:	

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-6256, dated May 24, 2021, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **May 24, 2021.**

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

Dated: May 24, 2021

By: ___*/S/ Lisa L. Ribezzo*
Lisa L. Ribezzo, Agent