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- MIDDLETOWN SCHOOL DEPARTMENT	CASE NO. ULP-6257A

AMENDED
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 Middletown School Department (hereinafter "Employer" or "School Department") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated September 3, 2019 and filed on the same date by the Rhode Island Council 94, AFSCME, AFL-CIO (hereinafter "Union").

The Charge alleged as follows:

> On August 21, 2019, Superintendent Rosemarie Kraeger sent a letter to the Union solidifying [sic] that Management was unilaterally implementing a series of material changes to the working conditions of a group of Local 1823 members without negotiating with the Union. These changes include but are not limited to: changing the shift of members, changing the primary job duties of members and disregarding the seniority of members. Based on Middletown Public Schools' actions, they have committed Unfair Labor Practices in violation of R.I. General Laws Sections 28-7-13 (3), (6) and (10).

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 (3), (6) and (10) when, through its representative, the Employer (1) unilaterally implemented changes to certain terms and conditions of employment of bargaining unit members, including but not limited to, changes to the work shifts and primary job duties of bargaining unit members, all without engaging in negotiations over the changes with the Union and (2) failed and/or refused to bargain with the Union over the unilateral and material changes to working conditions of bargaining unit members. The Board held formal hearings for this matter on November 19, 2019 and January 30, 2020. Post-hearing briefs were filed by the Employer and the Union on March 11, 2020. 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 due to the Employer's unilateral change in certain terms and conditions of employment for Union officers and bargaining unit members without engaging in prior negotiations with the Union over the changes. The current dispute involves the School Department's decision to change the working conditions of the Union's President, David Rodrigues, and Vice-President, Bob Marshall, and to alter the work shifts and/or working conditions of other bargaining unit members without first engaging in negotiations with the Union over the proposed unilateral changes.

The Town and the Union have a long bargaining relationship. At the time of the instant dispute, the parties were subject to a Collective Bargaining Agreement dated July 1, 2018 through June 30, 2021. (Joint Exhibit #1).

The particular conflagration that erupted between the parties appears to have its flashpoint at a Middletown Town Council meeting in May 2019. On May 6, 2019, the Town Council held a meeting with the Middletown School Committee and members of the School Department to discuss the School Department's budget for the 2020 fiscal year. During the course of the meeting, the Town Council learned that the School Committee had been giving bonuses to School Department officials and administrative personnel during the prior six (6) years while at the same time telling the Council that the School Department would have to cut programs if the Council did not meet its request for funding increases. (Petitioner Exhibit #14). The verbal exchanges between Town Council members and School Committee members became quite heated. (Petitioner Exhibit #14). During the meeting, there was a sharp exchange between Town Council Vice-President, Paul Rodrigues and the School Committee Vice-Chairwoman, Theresa Silveira Spengler. (Petitioner Exhibit #14). The Town Council Vice-President, Paul Rodrigues, is the brother of the Local Union President, David Rodrigues.

On May 22, 2019, a second meeting was held between the Town Council and the School Committee at which the School Committee "apologized for providing inaccurate information" to the Town Council "that district leaders, principals and clerical staff had not received raises over the last six years." (Petitioner Exhibit #13). According to reports of the meeting, the apology by the School Committee did not assuage the anger of the Town Council. Among the angry comments from Town Council members after learning that the School Committee had provided raises to certain district leaders and administrators, even while previously denying that such salary increases had occurred, Town Council Vice-President Rodrigues stated as follows:

> "I'm truly upset by this," Rodrigues said. "You can call it a mistake. There are five School Committee members, there is how many people in administration? You all nodded your heads [when asked about raises].
>
> "When I asked you got very upset with me," he said to Spengler. "Your words were exactly, "What, do I have to say it seven times?

You don't believe us." Well, guess what? I don't. It's not a mistake. You flat out lied to us."

(Petitioner Exhibit #13).

At a later point in the meeting when discussing the School Department's proposed operating budget and its request for an increase to its appropriation from the Town Council, Council Vice-President Rodrigues stated, "My vote to give you anything is zero." (Petitioner Exhibit #13). In fact, at its meeting on May 29, 2019, the Middletown Town Council voted to level fund the School Department, rejecting the School Committee's requested 4% increase in funding. (Petitioner Exhibit #15).

As a result of the Town Council's action, the School Committee was forced to revise its budget in order to not have a deficit. (Tr. Vol. II, pg. 95; pg. 96).[1] According to the testimony of the School Department's Director of Finance and Administration, Cynthia Brown, the School Committee "had to cut" just over a million dollars from its proposed budget. (Tr. Vol. II, pg. 96).

On or about July 9, 2019, the School Department informed Local Union President, Dave Rodrigues that it was "immediately" going to make changes in his job duties and working conditions. (Tr. Vol. I, pgs. 20-21; Joint Exhibit #2). According to Mr. Rodrigues' testimony, he attended a meeting at which he was informed that he was being shifted to "Grounds" and he had to turn in his vehicle (Tr. Vol. I, pg. 20). In addition, according to Mr. Rodrigues, he was also told he would have to "immediately" vacate the office he had been provided for many years (Tr. Vol. I, pg. 21). According to Mr. Rodrigues, this action by the School Department "stripped" him of his "supervisory responsibilities." (Tr. Vol. I, pg. 22). A letter dated July 10, 2019 (Joint Exhibit #2) was a review of the meeting held on July 9, 2019 between School Superintendent Rosemarie Kraeger, Cindy Brown, and the School Department Facilities Manager, Dave Fontes, and Local Union President Rodrigues, Local Union Vice-President Robert Marshall, and Derek Gosselin. According to the letter, at the meeting on July 9, 2019, the School Department presented its Facilities Management restructuring plan. The letter also detailed an array of changes to working conditions for bargaining unit personnel, including the Local Union President and Vice-President, that had been discussed at the meeting and were being implemented by the School Department. (Joint Exhibit #2). According to the testimony before the Board, the School Department's reorganization plan for the Facilities and Maintenance area was

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[1] R.I.G.L. 16-2-9(d) provides as follows:

> (d) Notwithstanding any provisions of the general laws to the contrary, the requirement defined in subsections (d) through (f) of this section shall apply. The school committee of each school district shall be responsible for maintaining a school budget which does not result in a debt.

In *East Providence School Committee v. East Providence Ed. Assoc.*, PB 09-1421 (Superior Court of RI, March 15, 2010), the Superior Court recognized the intent of R.I.G.L. 16-2-9 (i.e. that "each school district shall be responsible for maintaining a school budget which does not result in a debt." See *East Providence School Committee v. East Providence Education Association*, at p. 4) and acknowledged that the Rhode Island Supreme Court had determined that based on the language of Chapter 2 of Title 16, "it is clear that the General Assembly intended school committees to amend their budgets, request waivers, and request additional appropriations from their host municipalities at the first indication of a possible or actual deficit." See *Id.* at p. 5; *School Committee of City of Cranston v. Bergin-Andrews*, 984 A.2 629, 643-44 (R.I. 2009)).

immediately implemented after the initial July 9, 2019 meeting and conversation. (Tr. Vol. I, pgs. 21 – 22; pgs. 28 – 29; pg. 60; pgs. 66 – 67; See Email dated July 15, 2019 and attached to Joint Exhibit #3).

As the testimony before the Board demonstrates, the parties had three (3) additional meetings after the initial July 9, 2019 meeting at which the School Department's reorganization plan for the facilities and maintenance area was explained. (Tr. Vol. II, pgs. 127 – 130; See also Joint Exhibit #3). One of the meetings was held with the entire bargaining unit to go "through the reorganization plan,..." (Tr. Vol. II, pg. 129). The final meeting between the parties included each party's legal representatives. (Tr. Vol. II, pg. 131). Based on the testimony of School Superintendent Kraeger, each of the meetings was apparently an explanation (July 9, 2019 meeting and meeting with entire bargaining unit) or a "discussion" of the reorganization plan. (Tr. Vol. II, pgs. 127 – 131). However, the unilateral changes that were made by the School Department in the working conditions of Local Union President Rodrigues, Union Vice-President Marshall and other bargaining unit members were implemented and unchanged notwithstanding the four (4) meetings. (Tr. Vol. I, pgs. 21 – 22; Tr. Vol. II, pgs. 127 – 131).

After the final meeting between the parties, which occurred on August 14, 2019 and involved the School Department's attorney and the Union's business representative/attorney (Joint Exhibit #3), the Union filed the Charge on September 3, 2019 claiming the Town had unilaterally changed the terms and conditions of employment and refused to bargain with the Union over said unilateral changes.

POSITION OF THE PARTIES

Union:

The Union asserts that the Employer engaged in unfair labor practices when it unilaterally changed the terms and conditions of employment of the Local Union President and Vice-President and other bargaining unit members; and when the Employer also failed to bargain with the Union over the unilateral changes. In support of its position, the Union contends that the School Department announced changes to the terms and working conditions of the Local Union President and Vice-President in early July 2019 and "immediately" implemented those changes without having any discussion or negotiation with the Union. (Tr. Vol. I, pgs. 20 – 22; pg. 29). The Union also asserts that the School Department made unilateral changes to the work shifts and terms and conditions of employment of other bargaining unit members without bargaining with the Union. (Tr. Vol. I, pgs. 43 – 44). The Union further claims that the School Department's unilateral action was in retaliation for comments made by Town Council Vice President Paul Rodrigues at a Council meeting in May 2019 regarding the School Department budget. Councilman Rodrigues is the brother of the Local Union President. (Tr. Vol. I, pgs. 23 – 24; pgs. 28 – 29; pgs. 32 – 34).

In defense of its position, the Union argues that the Management rights clause of the CBA does not authorize the School Department to unilaterally act nor does it relieve the School Department of its obligation to bargain with the Union prior to making unilateral changes in terms and conditions of employment.

Employer:

In its memorandum of law to the Board, the Employer contends that it did not fail to bargain in good faith with the Union over its proposed changes to the Facilities and Maintenance Department. Initially, the School Department argues that its actions were authorized by the language of the CBA's Management Rights clause. Essentially, the School Department claims that through the negotiation of the Collective Bargaining Agreement, the Union gave up or waived its right to engage in further bargaining about issues within the School Department's sole purview as identified in the Management Rights provision. The School Department also argues that it did bargain with the Union, claiming that it met four (4) times with Union leaders and/or the Union membership to "discuss" its facilities management restructuring plan and asked the Union for "feedback" but never received any response from the Union (Tr. Vol. II, pgs. 127 – 131).

DISCUSSION

The issue before the Board is whether the actions of the Employer in making unilateral changes to working terms and conditions of employment of certain bargaining unit members, including the Local Union President and Vice-President, and allegedly failing to bargain with the Union over the claimed unilateral changes is a violation of the State Labor Relations Act (hereinafter "Act").

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").[2]

[2] 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 Firefighters, 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)).

A. **Unilateral Action by the School Department.**

In the present case, there appears to be little dispute between the parties that the School Department unilaterally acted in changing certain working terms and conditions of employment of bargaining unit members. Instead, the central dispute is the disagreement over whether the School Department engaged in good faith bargaining with the Union regarding the changes to employees' working terms and conditions of employment.

The facts of this case are straightforward and generally not in dispute. The Middletown School Committee developed a budget, which it initially presented to the Middletown Town Council in early May of 2019. At that meeting, there was discussion about whether school administration leaders and other district personnel had received raises or bonuses in prior years, even while the School Committee was claiming that programs would have to be eliminated unless the School Committee received an increase in funds from the Town Council. (Petitioner Exhibit #14). At the time of the meeting in early May, the School Committee denied that raises had been given to administrative personnel. At a later meeting in May, before the Town Council regarding its budget, the School Committee was forced to acknowledge that its original denials about giving raises/bonuses to administrative personnel were not accurate. This information caused significant tension between the School Committee and the Town Council and harsh words were exchanged between the two (2) bodies. (Petitioner Exhibit #13). Thereafter, the Town Council voted to level fund the School Committee's appropriation forcing the School Committee to re-do its budget projections and eliminate a threatened deficit of just over $1,000,000. (Tr. Vol. II, pg. 96). As a result of the budget being recalibrated, the School Department developed and implemented a reorganization of its Facilities Division, which impacted several Union members, including the Local Union President and Vice-President, by significantly changing aspects of their job responsibilities and terms and conditions of employment. These changes were noticed to the Union initially on or about July 9, 2019 and were "immediately" implemented by the School Department. (Joint Exhibit #2; Email attachment to Joint Exhibit #3; Tr. Vol. I, pg. 21).

According to the parties, the School Department and Union representatives discussed the changes implemented by the School Department on four (4) occasions in July and August 2019. (Tr. Vol. I, pg. 30; Tr. Vol. II, pgs. 127-129).[3] However, there is no evidence to suggest that the original implementation of the Facilities Management reorganization plan was changed or significantly modified in any meaningful or material way, by the School Department, or that the School Department had a legitimate desire to make any material changes to the plan, after its meetings with the Union representatives were held.

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[3] There is no evidentiary dispute that representatives of the School Department, including the Superintendent, Chief Financial Officer and Facilities Manager, met with representatives of the Union, including the Local Union President and Vice-President, to "discuss" the unilateral changes announced by the School Department on or about July 9, 2019. (Joint Exhibits #2 and #3; Tr. Vol. II, pg. 127). The issue to be resolved by the Board is whether these meetings constituted good-faith negotiations and/or bargaining by the School Department with the Union as is required under the Act. (See R.I.G.L. § 28-7-13(6)).

The Board need not spend extensive time on this particular issue as there appears to be no dispute, based on the evidence, that the School Department unilaterally decided and implemented changes to the terms and working conditions of the Local Union President and Vice-President and at least three (3) other bargaining unit members. (Tr. Vol. I, pgs. 20-22; pgs. 60-62; Joint Exhibit #2). While the School Department has asserted that the changes to the working conditions of bargaining unit personnel were necessary to save money due to the Town Council only level funding the School Department for fiscal year 2020, the fact that the School Department puts forth a plausible reason for its action does not obviate the situation; nor does it change the fact that the School Department acted unilaterally in deciding on the changes, announcing the changes and implementing the changes prior to providing the Union with an opportunity to engage in any meaningful or good-faith negotiation. As previously mentioned, the Board has long held that an Employer violates the terms of the Act, when it unilaterally changes terms and conditions of employment without first engaging in bargaining with the exclusive representative of the employees. (See *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)). Further, there is no dispute that the actions taken by the School Department, i.e. changing the working terms and conditions of employment of bargaining unit personnel, including the Local Union President and Vice-President, are mandatory subjects of bargaining, which require the School Department to bargain with the employees' exclusive bargaining representative. (See R.I.G.L. § 28-9.4-1; *Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO,* 107 A.3d 304, 313 (R.I. 2015).[4]

While the School Department makes arguments, See discussion *infra*, that its actions were authorized, justified and allowed under the existing Collective Bargaining Agreement, even if such arguments were found to be valid, it would not alter the fact that the School Department, in the instant case, took unilateral action in changing the working terms and conditions of employment of the bargaining unit personnel. Because the justification put forth by the School Department neither supports nor legally authorizes the School Department's unilateral action, the Board finds that the School Department acted in violation of the Act.

B. <u>The School Department Failed to Bargain in Good Faith with the Union in Violation of the Act.</u>

As with the School Department's unilateral conduct in changing working terms and conditions of bargaining unit personnel, the parties do not dispute that they met on four (4) occasions regarding the School Department's plan to reorganize the Facilities Division.[5] The dispute between the parties and the issue before this Board, is whether the

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[4] As R.I.G.L. 28-9.4-1 makes clear, the right "to bargain on a collective basis with municipal Employers, covering hours, ... working conditions and other terms of employment;" is part of the panoply of rights given to municipal employees by the statute. These rights are further enunciated within R.I.G.L. 28-9.4-3(a). As the statutory language establishes, these are mandatory rights over which an Employer has an obligation to bargain before it unilaterally makes changes in these areas. See *Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 107 A.3d 304 (R.I. 2015);

[5] As the testimony and exhibits reflect, the Superintendent, Finance Director and Facilities Director representing the School Department met with the Local Union President and Vice-President and another

four (4) meetings constituted the type of good-faith negotiations mandated by the Act. It is apparent from a review of the testimony and the reliable and probative evidence submitted by the parties that the School Department failed to bargain in good faith with the Union over its unilateral changes to working terms and conditions of bargaining unit personnel. As such, the School Department has violated the Act.

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, while Union representatives were able to meet with representatives of the School Department, the discussions regarding the School Department's unilateral action did not afford the Union an opportunity to engage in meaningful bargaining over the School Department's decision to reorganize the Facilities Division. Instead, the School Department simply notified the Union of the changes it was making and refused to alter or modify its position. Not only did the Union recognize that there were no negotiations taking place between the parties (see Tr. Vol I, pg. 29; pg. 64), even the School Department's Facilities Manager, David Fontes, made clear in response to questions on cross-examination that the School Department did not negotiate with the Union about changes in the terms and working conditions of bargaining unit personnel. (Tr. Vol. II, pgs. 123-124; See also Vol. I, pg. 29). Further, when questioned about the meetings between the School Department and the Union, the Superintendent attempted to, in the Board's view, evade a direct answer to the question of whether negotiations had occurred between the parties. Instead, the Superintendent stated that on several occasions the School Department asked for "input" or "feedback" from the Union during the parties' meetings, but none was received. (Tr. Vol II, pg. 129; pgs. 135 – 136). Notwithstanding the Superintendent's assertion that she was waiting for "feedback" from the Union, when asked if she knew that the Union's "feedback was that we did not agree with those changes," the Superintendent answered in the affirmative. (Tr. Vol. II, pg. 135, lines 10-12).

In short, as the evidence before the Board makes clear, the School Department presented its reorganization plan to the Union as a *fait accompli,* something which was inevitable. The School Department argues that it had a legitimate reason to make the

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Union officer on July 9, 2019 to initially notify the Union of its unilateral action. (Joint Exhibit #2). Representatives of the School Department had a second meeting with the Local Union President and Vice-President; and also met with the entire bargaining unit to discuss the unilateral changes announced in early July. (Joint Exhibit #2; Tr. Vol. II, pgs. 128-129). Finally, a fourth meeting was held between representatives of the School Department, including the School Department's attorney, and representatives of the Union, including the Union's business representative/attorney to once again discuss the changes brought by the School Department. (Joint Exhibit #3; Tr. Vol. II, pgs. 130-131)

changes, i.e. it had to cut its budget due to the Town Council's decision of level funding, but it also made clear in its July 10, 2019 letter that no bargaining unit members pay would be effected and no bargaining unit personnel were laid off (Joint Exhibit #2).[6] In fact, some of the changes made in the reorganization plan did not even occur (See Tr. Vol. I, pg. 40 – the closing of the Little Oliphant school building, where the Local Union President had his office that he was required to vacate, did not occur), produced no savings (Tr. Vol. I, pgs. 41 – 42; pgs. 73 – 74) or what can only be described as minimal savings, considering the budget hole that needed to be filled (Tr. Vol. II, pg. 98). Thus, the evidence reveals that the juxtaposition of the School Committee's confrontation with the Town Council and, specifically, Councilman Rodrigues, the Local Union President's brother, provides a far more substantive basis for the School Department's creation and implementation of its reorganization plan. Its reorganization plan struck at the heart of the Local Union President's working conditions and produced no discernible savings. The Facilities Management reorganization plan implemented by the School Department appeared to save little money; but did direct damage to the working conditions of Union officials with close ties to Councilman Rodrigues, the person who appeared to lead the charge to level fund the School Department budget. In reviewing the evidence presented to the Board, there appears to be more than sufficient credible evidence to support the claim of retaliation in the instant case.

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 noted, working conditions and terms of employment are clearly mandatory subjects of bargaining in Rhode Island. (See R.I.G.L. 28-9.4-3). In the present case, the School Department unilaterally changed the working conditions and terms of employment of bargaining unit members and Union officials without bargaining with the Union prior to implementation. Such conduct is a clear violation of the Act.

C. <u>The School Department'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 School Department has presented to the Board several arguments and explanations to attempt to justify and/or support its action in unilaterally changing the working terms and conditions of employment of bargaining unit personnel. As is discussed below, the Board

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[6] Mr. Fontes testified that the School Department was considering a Facilities reorganization in March 2019. (Tr. Vol. II, pg. 117) This testimony was an attempt to show that the reorganization plan had been in the works long before the harsh words between Councilman Rodrigues and the School Committee were spoken and long before the Town Council decided to level fund the School Department. (Tr. Vol. II, pg. 118) However, a review of the proposed budget for the Facilities, Safety and Transportation department does not appear to list or identify any of the changes that the School Department brought forward in July 2019 (Respondent Exhibit #1; Respondent Exhibit #2) While Mr. Fontes testified about "lean initiatives" and attempted to link this concept to the reorganization plan that was presented in July 2019, the Board's review has not discovered any relevant or material evidence in the proposed budget document to verify this assertion (Respondent Exhibit #2 at pg. 17).

has reviewed these arguments and explanations and, in the Board's view, does not believe that they offer sufficient grounds to mitigate against the School Department's unilateral action nor its failure to bargain with the Union over mandatory subjects of bargaining.

1. **The Management Rights Clause Does Not Shield the School Department's Conduct from Being Violative of the Act.**

The School Department argues, in attempting to justify its conduct in this matter, that nothing in the parties' Collective Bargaining Agreement protected employees against the changes the School Department made with its Facilities restructuring program. The School Department argues that it had justifiable reasons for reorganizing the Facilities and Maintenance Department, that its decision was within the scope of its managerial authority; and that the management rights clause of the Collective Bargaining Agreement prohibited or prevented the Union from exercising its right to bargain over the changes, because such negotiation had previously occurred between the parties. (See School Department Memorandum of Law at pgs. 7-8). There are several reasons why the School Department's defenses must fail. First, the assertion by the School Department that the reorganization of the Facilities and Maintenance Department was a decision within the sole entrepreneurial purview of the School Department is, at best, a close question. As will be discussed below and as previously noted, the type of reorganization engaged in by the School Department significantly impacted the terms and working conditions of bargaining unit members. These decisions do not appear to be at the core of the School Department's entrepreneurial mission, as was the thrust of the decision by the Rhode Island Supreme Court in *Town of North Kingstown v. International Association of Firefighters, Local 1651 AFL-CIO,* 107 A.3d 304 (R.I. 2015). Second, even if the School Department were correct in its assertion that its reorganization plan was within its managerial authority, such authority is not without limits as the Supreme Court pointed out in *Town of North Kingstown*. Specifically, at a minimum, the School Department was obligated to bargain with the Union over the effects of its decision to unilaterally change terms and working conditions of Union members. Finally, it is, in the Board's view, highly questionable as to whether the Union waived its right to bargain with the School Department over the changes in terms and working conditions as the School Department has argued. Even under recent NLRB case law, the language of the management rights clause in the Collective Bargaining Agreement does not support the School Department's waiver argument. The Board will address each of these arguments separately.

(i) The Reorganization Plan

The School Department's Facilities Management restructuring plan is not, in the Board's view, part of the core mission of the School Department such that it would bring the action outside the bargaining obligation required by the Act. The School Department has attempted to support its conduct by citing the Rhode Island Supreme Court's decision in *Town of North Kingstown v. International Association of Firefighters, Local 1651 AFL-CIO,* 107 A.3d 304 (R.I. 2015) for the proposition that "an Employer's decision to

restructure or reorganize its employees or departments" is a management right. It is the Board's view that the School Department's reliance on the *Town of North Kingstown* case is misplaced in the present situation.

The School Department's cursory review and application of the *Town of North Kingstown* case provides little support, in the Board's view, for its argument that it has not violated the Act. In the *Town of North Kingstown* case, the Employer and the Union were locked in a collective bargaining battle over the Employer's desire to change the structure of the fire department from four (4) platoons to three (3) platoons. In recognizing a Union's right to bargain collectively with regard to wages, hours, working conditions and all other terms and conditions of employment, the Court also noted that there were "certain matters that may not be bargained away by a public Employer." (*Town of North Kingstown, Id.* at pg. 313). The Court noted "it is well established that there are certain "managerial decisions, which lie at the core of entrepreneurial control" over an organization." (See *Town of North Kingstown, Id.* at 313; *Ford Motor Co. v. National Labor Relations Board,* 441 U.S. 488, 498 (1979) (quoting *Fibreboard Paper Products Corp.,* 379 U.S. at 223)). Regarding these types of decisions, the Court noted that a "Union should [not] be able to dictate to the [Employer]" because such "matters [are] strictly within the province of management." Citing *Barrington School Committee,* 388 A.2d at 1375; *Town of North Kingstown, Id.* at 314. However, the Court also noted that the Employer's right to act upon these described management rights is not unlimited. Specifically, the Court noted that "when, as here, the problem involved concerns both a question of management and a term or condition of employment, it is the duty of the (Employer) to negotiate with the [individuals] involved." *Barrington School Committee,* 388 A.2d at 1375; *Town of North Kingstown, Id.* at 314. The Court explained its reasoning further by citing the First Circuit in *Providence Hospital v. National Labor Relations Board,* 93 F.3d 1012, 1018 (1st Cir. 1996) as follows:

> There is an important distinction between the right to bargain about a core entrepreneurial business decision (a right which a Union does not possess) and the right to bargain about the effects of that decision on employees within a bargaining unit (a right which, depending upon the overall circumstances, a Union may possess). [Put another way], even when a particular managerial decision is not itself a mandatory subject of bargaining, the decision's forecasted impact on ... terms and conditions of employment may constitute a mandatory subject of collective bargaining.

In other words, even a decision that constitutes a "core entrepreneurial business decision" will trigger an effects bargaining obligation where the decision touches on mandatory bargaining rights. Clearly, as in the instant case, changing the terms and working conditions of employees by deciding to reorganize the Facilities and Maintenance Department, as the School Department did in the instant case, touches on mandatory rights and triggers, at a minimum, an effects bargaining obligation on the part of the School Department.

While the above, in the Board's view, recognizes, at a minimum, that the School Department had an obligation to bargain over the effects of its restructuring plan

on the impacted employees, it does not answer the question as to whether or not the reorganization of the Facilities and Maintenance Department is a decision that can be labeled a "core entrepreneurial business decision" that goes to the very essence of the School Department's mission and business. This determination is relevant to the instant case because if the School Department's Facilities Management restructuring plan is not a "core entrepreneurial business decision" then the School Department would have been required to bargain with the Union prior to unilaterally implementing the plan. In the instant case and based on the particular facts of this matter, it is the Board's determination that the attempt to reorganize the Facilities Department was not a "core entrepreneurial business decision" of the School Department.

While it is true that the *Town of North Kingstown* decision, as well as other decisions cited by the our Supreme Court note that a "reorganization of organizational structures" is a management right, that analysis alone does not mean that the School Department's attempt to reorganize the Facilities and Maintenance Department falls into that category of entrepreneurial business decisions. In fact, this Board finds that the School Department's attempt to reorganize the Facilities and Maintenance Department was not a "core entrepreneurial business decision" that was inherently within the management rights of the School Department and beyond the reach of bargaining. Instead, the Board believes a decision of the Rhode Island Supreme Court in *North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers,* 945 A.2d 339 (2008) is more applicable to the instant situation.

In the *North Providence School Committee* case, the issue revolved around the School Committee's elimination of the composition period for English teachers. The school superintendent notified the Union that she was recommending, for "budgetary reasons," that the composition period be discontinued. (*North Providence School Committee,* 945 A.2d at 341). A grievance was filed by the Union when it could not convince the superintendent to abandon her recommendation and, at arbitration, the arbitrator ruled in the Union's favor; finding that the elimination of the composition period violated the Collective Bargaining Agreement. Specifically, the arbitrator found that the composition period amounted to a past practice and by eliminating that practice the School Committee violated the CBA. (*North Providence School Committee,* 945 A.2d at 345). In refusing to overturn the arbitrator's award, the Supreme Court made clear that it was not "endorsing any sort of radical departure from the stark and clear language of Title 16." (*North Providence School Committee,* 945 A.2d at 346). Title 16 vests in the school committees of the cities and towns the entire care, control, and management of all public-school interests. (See R.I.G.L. § 16-2-9(a)). The Court noted the wide latitude and expansive power over education that Title 16 delegated to a School Committee even as it recognized that Title 16 "must be read in harmony with the provisions of the Michaelson Act; ...." (*North Providence School Committee,* 945 A.2d at 347). In short, the Court sided with the Union in upholding the arbitrator's award, because the School Committee opted to base the elimination of the composition period "primarily on

a fiscal rationale" instead of basing the decision on "improving the education of North Providence High School students in English …." (*North Providence School Committee,* 945 A.2d at 347). Thus, because the decision was financial as opposed to educational, the Supreme Court found that the elimination of the composition period was not solely within the management rights of the North Providence School Committee.

In a similar though clearly not identical vein, the decision by the School Board to reorganize the Facilities and Maintenance Department was not an education-based decision or related to the educational mission of the School Department. Instead, the decision was solely a financial decision, as its witnesses have openly admitted. (Tr. Vol. II, pgs. 96 – 98). This decision, in the Board's view, did not go to the "core entrepreneurial business" of the School Department, but instead was a financial decision made in response to the Town Council giving only a level funded appropriation to the School Committee for fiscal year 2020. As a solely financial decision that resulted in the unilateral change of terms and working conditions of bargaining unit members, the School Department had an obligation to first bargain with the exclusive representative of the employees before making any unilateral changes. The School Department's failure to bargain in this matter is a violation of the Act.

(ii) Effects Bargaining

Even if the Board were to agree with the School Department's argument that the restructuring of the Facilities and Maintenance Department was a decision within the scope of its management rights, there is little question that the School Department had an obligation to bargain over the effects of its decision to reorganize the Facilities and Maintenance Department with the Union. As discussed in detail above, the School Department's failure to bargain with the Union over the effects of its decision constitutes a violation of the Act.

The Board need not spend significant time explaining the concept of effects bargaining and its clear application in the instant matter. The Supreme Court's decision in *Town of North Kingstown* clearly describes how and when an employer's effects bargaining obligation arises. (See *Town of North Kingstown,* 107 A.3d at 314 – 315; *Providence Hospital,* 93 F.3d at 1018). In the instant case, there is little question that the School Department's decision to reorganize the Facilities and Maintenance Department had a direct and lasting impact on the terms and working conditions of bargaining unit members. The changes to the terms and working conditions of the Local Union President and Vice-President, as well as three (3) other bargaining unit members, all touched on mandatory subjects of bargaining.[7] As previously discussed, in this Board's view, the School Department had an obligation to bargain over the effects of its decision. The School Department's failure to do so is a violation of the Act.

[7] While not a point that either party focused on during the submission of testimonial or documentary evidence, it is apparent to the Board that there is more than some evidence that the School Department's Facilities Management restructuring plan eliminated long standing past practices between the parties (Tr. Vol. I, pg. 20; pg. 22; R.I.G.L. 28-9-27). In the Board's view, the School Department's action in unilaterally changing working terms and conditions of employment also worked to unilaterally eliminate certain past practices, i.e. the Local Union President having a vehicle and an office in the Little Oliphant building, without bargaining over these changes.

(iii) <u>The Union Waived its Rights to Bargain</u>

The School Department also argues that the Union has waived its right to bargain over the changes to the Facilities and Maintenance Department because the language in the management rights clause of the Collective Bargaining Agreement gives the School Department "sole control over the management of its facilities, including but not limited to the work to be performed, the establishment and changing of scheduled shifts and hours of work, methods of operations, and the right to enforce reasonable rules around policy relating to duties and responsibilities of employees as long as such activity is not inconsistent with the specific provisions of the CBA." (See School Department Memorandum of Law at pg. 8). The School Department's theory behind this argument is that because the Union negotiated with the School Department to include language in the management rights clause that gave the School Department the rights listed in the management rights clause (Joint Exhibit #1), the Union has waived its right to now seek bargaining when the School Department exercises those rights. While the School Department has accurately cited the legal concept in support of its position, in the Board's view, the waiver theory as put forth by the School Department is without merit in the instant matter.

In *MV Transportation, Inc.,* 368 NLRB No. 66 (September 10, 2019), the NLRB determined that when considering whether an Employer's unilateral action is permitted by the Collective Bargaining Agreement, a so-called contract coverage standard should be applied. The "contract coverage" standard basically allows an Employer's unilateral change in a term or condition of employment to stand if the change is "within the compass" or "scope" of a contract provision that grants the Employer the right to act unilaterally. (See *MV Transportation,* 368 NLRB at pg. 1). While this Board acknowledges the NLRB's recent change in this area as outlined in *MV Transportation,* in the instant case the Board believes, based on its review of the operative contract language, that the Union did not waive its right to negotiate over the School Department's unilateral change in terms and working conditions in its Facilities and Maintenance Department.

While the School Department takes an expansive view of its management rights, a review of the management rights clause in the Collective Bargaining Agreement does not, in the Board's view, support the School Department's argument. The language of the management rights clause exclusively reserves to the Committee "all responsibilities, powers, rights and authority expressed or inherently vested in it by the law in the Constitution of Rhode Island and the United States, and by the Charter of the Town of Middletown," and, further, provides the Committee with "sole jurisdiction over the management of the operations of its plant, including, but not limited to, the work to be performed, the scheduling of work and vacations, the establishment and changing of scheduled shifts and hours of work, the promotion of employees, fixing and maintaining standards of quality of work, methods of operations, ..." However, these rights are "**expressly and in specific terms limited by the provisions of this agreement**." (Joint Exhibit #1, Emphasis supplied). In other words, the School Department's actions cannot be viewed in a vacuum but must be looked at in terms of whether there is/was

existing collective bargaining language that limits or restricts the actions taken by the School Committee. In the instant case, the evidence before the Board demonstrates that such limitations exist.

Initially, it is undisputed that the CBA contains a seniority provision. (Joint Exhibit #1 at pgs. 6-8). The seniority provision contains a clause that states as follows:

> Whenever any choice of benefit or assignment exists between or among employees covered by this agreement, then the employee or employees with greater seniority shall be given preference for the benefit or assignment, unless otherwise stated to the contrary. ... Said preference shall be at the option of the employee with the greater seniority.

(Joint Exhibit #1 at pg. 7).

It is uncontested that Local Union President Rodrigues and Union Vice-President Marshall were number 4 and number 7 on the Local Union seniority list. (Petitioner Exhibit #10). According to the testimony, there were individuals with less seniority than both Local Union President Rodrigues and Vice-President Marshall who could have been assigned to the duties they were unilaterally given by the School Department. (Tr. Vol. I, pgs. 30 – 32; pgs. 33 – 34; pgs. 40 – 41; pgs. 65 - 67). The language in Section 4.4 of the seniority clause clearly limits the School Department's ability to reassign personnel, schedule work or change the method of operations without first complying with the contractual seniority provision. This limiting language restricts the breadth and scope of the management rights language in the contract. Consequently, these limitations and restrictions cannot be ignored by the School Department in making changes to the work assignments of bargaining unit members. Thus, by making the shift and work assignment changes to bargaining unit personnel without affording those impacted bargaining unit members the right to exercise their seniority preference, the School Department violated the terms of the CBA.[8] As such, the Union was well within its rights to not only protest these actions by the School Department, but to demand a right to bargain over the unilateral changes implemented by the School Department. The School Department's failure to acknowledge the Union's bargaining rights is a violation of the Act.

The School Department also raised a more traditional waiver argument, claiming that because the Union did not do enough at meetings with the School Department to challenge the School Department's position, the Union has waived its right to bargain over the unilaterally implemented changes. The School Department cites the *Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d 113 (R.I. 2007) in support of this proposition (See School Department Memorandum at pg. 10). The School Department's waiver argument is completely without merit.

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[8] The undisputed testimony of Local Union President Rodrigues was that the vehicle the School Department had provided to him for over twenty (20) years, the office he had in the Little Oliphant building for an equally long period of time and his supervisory responsibilities were all removed from him and assigned to more junior employees (Tr. Vol. I, pg. 21 – 22; pg. 32; pg. 40 – 41). In addition to an apparent violation of the past practices recognized between the parties, such a change neither appeared to save money or comply with the terms of the contractual seniority provision. This is, in the Board's view, additional competent and relevant evidence of the School Department's violation of the Act.

As discussed in the *Town of Burrillville* case, a Union waives its right to bargain over changes made by an Employer when the Union receives notice of the changes, but fails to notify the Employer within a reasonable period of time that it objects to the changes and wants to bargain. *Id.* at pg. 120. In the *Town of Burrillville* case, the police chief issued a general order regarding the processing of injured on duty claims. Prior to implementing the order, the police chief met with the Union to discuss the order. At no time did the Union express to the police chief the desire to bargain over the contents of the general order. When the general order was implemented, the Union filed an unfair labor practice charge claiming failure to bargain by the Employer. When the case reached the Supreme Court, the Court found, as relevant to the instant matter, that "a Union with sufficient notice of a contemplated change waives its bargaining rights if it fails to request bargaining prior to the implementation of that change." (*Town of Burrillville,* at pg. 120).

Here, as previously discussed, the Union was told about the Facilities Management restructuring plan on July 9, 2019 and that the plan was to be implemented "immediately" (See email dated July 15, 2019 attached to Joint Exhibit #3; Tr. Vol. I, pgs. 21 – 22; pgs. 28; pgs. 66 – 67). The Union did request a meeting with the School Department subsequent to the meeting held on July 9, 2019; (Tr. Vol. II, pg. 128) and also requested another meeting in August to further discuss the issue of the School Department's restructuring plan. (Tr. Vol. II, pg. 131). While neither party submitted evidence as to the contents or substance of the Union's request to meet, it is clear to this Board that the object of the meetings from the Union's perspective would be to bargain over the contents of the restructuring plan. Yet the School Department wants this Board to believe that the School Department met four (4) times with the Union to discuss the restructuring plan; but the Union either didn't want to bargain about the plan or was too indefinite about what it wanted for it to count as a bargaining request. This argument by the School Department simply doesn't square with the substantial and reliable evidence before this Board.

Finally, while not raised specifically by the Union, it appears clear from the evidence that at least with respect to Local Union President Rodrigues's ability to have a vehicle and an office in the Little Oliphant building these particular work benefits would be considered past practices in accordance with R.I.G.L. § 28-9-27. The unilateral removal of these work benefits from the Local Union President would also appear to violate the aforementioned statute. The existence of this statute is another limitation placed on the School Department's claimed right to make changes in operations free of restrictions.

In short, the waiver argument raised by the School Department is without merit and is rejected by the Board.

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 are subject to a Collective Bargaining Agreement dated July 1, 2018 through June 30, 2021.

4. The Employer presented to the Middletown Town Council its proposed budget in May 2019. At those budget hearings a contentious verbal confrontation occurred between Councilman Paul Rodrigues and members of the School Committee. Councilman Rodrigues is the brother of the Local Union President, David Rodrigues.

5. The Town Council ultimately voted to level fund the School Department for fiscal year 2020. As a result of being level funded, the School Department had to revise its budget and reduce costs by approximately one million dollars.

6. On July 9, 2019, representatives of the School Department met with representatives of the Union to explain the School Department's Facilities Management restructuring plan.

7. The Facilities Management restructuring plan, among other things, unilaterally changed the working terms and conditions of employment for several bargaining unit members, including the Local Union President and Vice-President. The School Department's plan was to be implemented immediately.

8. Representatives of the School Department and the Union met on four (4) occasions regarding the restructuring plan, but no changes were made to the plan by the School Department.

9. The School Department unilaterally changed the working terms and conditions of employment of bargaining unit members, including the Local Union President and Vice-President.

10. The unilateral changes to the working terms and conditions of employment of bargaining unit members, including the Local Union President and Vice-President, made by the School Department were, in part, in retaliation for conduct and action taken by Councilman Paul Rodrigues, the brother of the Local Union President, against the School Department.

11. The School Department unilaterally changed the working terms and conditions of employment of bargaining unit members, including the Local Union President and Vice-President 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, including the Local Union President and Vice-President.

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, including the Local Union President and Vice-President.

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 reverse the unilateral changes to the working terms and conditions of employment it made to Local Union President Rodrigues and Union Vice-President Marshall and to other impacted bargaining unit members in the Facilities Division; to make whole, where appropriate, for any wage and/or benefit losses to any and all bargaining unit members who may have been effected by the School Department's unilateral changes; and, if the School Department determines that it wants to implement said changes in the future, it must first engage in good faith bargaining with the Union.

3. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than 60 days in each building where bargaining unit personnel work, said posting to be in a location where other materials designed to be Seen, read and reviewed by bargaining unit personnel are posted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

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

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

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

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

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

/s/ Stan Israel
Stan Israel, Member

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

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

Dated: September 9, 2020

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

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

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- MIDDLETOWN SCHOOL DEPARTMENT	CASE NO. ULP-6257

NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within amended decision of the RI State Labor Relations Board, in the matter of Case No. ULP-6257, dated September 9, 2020, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 9, 2020.**

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

Dated: September 9, 2020

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