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-6258
STATE OF RHODE ISLAND DEPARTMENT OF LABOR & TRAINING	:	

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 State of Rhode Island Department of Labor & Training (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated September 11, 2019 and filed on the same date by the Rhode Island Employment Security Alliance, SEIU, Local 401 (hereinafter "Union").

The charge alleged as follows:

> An arbitration award was rendered, which ordered the State to reinstate a member with a make whole remedy. On April 2, 2019, the State informed the Union and member that it would not reinstate her to her employment and that it would only make her whole through the date of the award, August 2018. In addition, the State has not made the grievant whole through August 2018. The State has ignored the Union's efforts to resolve this issue.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. On November 13, 2019, the Board issued its Complaint, alleging the Employer violated R.I.G.L. §28-7-13(6), (10) and (11) when, through its representative, the Employer (1) failed to comply with and implement the terms of an arbitrator's award and (2) failed and/or refused to bargain with the Union regarding implementation of the arbitrator's award. The Board scheduled a formal hearing for this matter, but the hearing dates were cancelled and the parties, instead, waived their respective rights to a formal hearing and entered into a Consent Order stipulating to the facts in this matter. The parties' Consent Order was entered on January 14, 2020. Post-hearing briefs were scheduled to be due on February 13, 2020 and, after a requested extension by the Union was granted by the Board, the Employer and the Union filed their respective post-hearing briefs on February 19, 2020. In arriving at the Decision and Order herein, the Board has reviewed and considered the Consent Order, exhibits and the arguments contained within the post-hearing briefs submitted by the parties.

FACTUAL SUMMARY

By agreement of the parties, the facts of this matter were stipulated to and entered as a Consent Order by the Board on January 14, 2020. The facts are as follows:

By agreement of the parties, the R.I. State Labor Relations Board ("SLRB") makes the following findings of facts:

1. Tanya Signore ("Ms. Signore") is a former employee of the State of Rhode Island, Department of Labor & Training ("DLT" or "the Respondent").

2. Ms. Signore worked at the Unemployment Insurance Call Center, where she held a position with the job title, "Senior Employment and Training Interviewer".

3. The Rhode Island Employment Security Alliance, Local 401 ("the Union") is the certified collective bargaining representative for employees in Ms. Signore's job title at DLT.

4. There was at all times relevant to this case a valid Collective Bargaining Agreement in effect between the Respondent and the Union.

5. The Respondent terminated Ms. Signore's employment effective May 6, 2016.

6. The Union filed two grievances concerning the termination of Ms. Signore's employment: one grievance alleged discrimination and failure to accommodate Ms. Signore's disability as required by the Americans with Disabilities Act ("ADA") and the other grievance alleged that Ms. Signore was dismissed without just cause.

7. The two grievances proceeded to and were consolidated for arbitration.

8. On August 17, 2018, the arbitrator issued her award.

9. The underlying facts concerning the termination of Ms. Signore's employment are set forth in the arbitration award.

10. The arbitrator ruled that Ms. Signore's discharge was not for just cause because the Respondent did not provide a job coach who was experienced in working with obsessive compulsive disorder ("OCD") and thereby failed to reasonably accommodate Ms. Signore's disability.

11. The arbitrator ordered the Respondent to reinstate Ms. Signore to her former position at DLT, with back pay, and to "engage an OCD-experienced job coach to work with [Ms. Signore] for a reasonable period of time with the goal of helping her to be able to perform the essential functions of the unemployment insurance call center position."

12. The arbitrator retained jurisdiction for 90 days in order to resolve any disputes relating to the implementation of the award.

13. Upon receipt of the arbitration award, the Respondent began to search for "an OCD-experienced job coach" to work with Ms. Signore upon her reinstatement to the DLT job, as ordered by the arbitrator.

14. The Respondent contacted the State Office of Rehabilitative Services, the Providence Center (the community mental health center serving the Providence area), Thrive (the community mental health center serving Kent County), the OCD Program at Butler Hospital, the Seven Hills Foundation (which had previously provided a job coach for another State employee), and the Hollowell Center for Cognitive and Emotional Health in Sudbury, Massachusetts (to which DLT sometimes refers clients for assistance with employment issues).

15. None of the agencies contacted by the Respondent acknowledged that they would be able to provide an "OCD-experienced" job coach to work with Ms. Signore.

16. The Seven Hills Foundation advised that it served only clients with developmental disabilities (not mental health issues such as OCD), and the "Career Counseling Specialist" on the staff of the Hollowell Center in Massachusetts indicated that she had no experience working with clients with OCD.

17. Both Thrive (the mental health center serving Kent County) and the OCD Program at Butler Hospital advised that they require Ms. Signore to enroll as a client so that their clinical staff could assess her to determine whether job coaching was appropriate.

18. The Respondent also attempted on its own to recruit an OCD-experienced job coach by advertising through Adil Business Systems, a private vendor under contract with the State to provide specialized temporary employees to the State, but the Respondent did not receive applications from any qualified applicants.

19. On September 10, 2018, the Respondent wrote to Ms. Signore's therapist, Dr. Julie Lucier (Dr. Lucier) to ask whether Dr. Lucier knew of any OCD-experienced job coach.

20. Dr. Lucier did not respond to the Respondent's letter of September 10, 2018.

21. On September 27, 2018, the Respondent wrote to Ms. Signore to request that she and Dr. Lucier assist the Respondent to identify and select a qualified job coach.

22. On October 3, 2018, Dr. Lucier wrote to the Respondent "It is my clinical opinion that it is in Tanya's best interest to not return to her position at the unemployment insurance call center "

23. On October 30, 2018, the Respondent requested that the arbitrator amend her award to excuse the Respondent from the remedy which the arbitrator had ordered.

24. On October 30, 2018, the Union submitted to the arbitrator its objection to the Respondent's request for relief from the arbitration award.

25. On November 5, 2018, Dr. Lucier notified the Employer that Ms. Signore was "able and available for full-time work."

26. On November 18, 2018, the arbitrator issued a second award in which she denied the Respondent's request to amend her award and/or to grant the Respondent any relief from the remedy which she had previously ordered.

27. On November 30, 2018, the Respondent directed Ms. Signore to report to work on December 10, 2018 and on that same date to submit a medical release from Dr. Lucier clearing Ms. Signore to return to work in her job at DLT.

28. On December 10, 2018, Ms. Signore and her Union representatives met with Respondent's representatives. At that time, Ms. Signore did not provide a release for her return to work from Dr. Lucier, although Ms. Signore indicated that she had an upcoming appointment with Dr. Lucier.

29. At the conclusion of the December 10, 2018 meeting, the Respondent sent Ms. Signore a follow-up letter, which summarized the discussions, which took place at that meeting.

30. On January 29, 2019, Dr. Lucier cleared Ms. Signore to return to her job at DLT, although Dr. Lucier also opined that it was not in Ms. Signore's "best interest" to return to that position.

31. On March 6, 2019, the Respondent requested that Ms. Signore or the Union notify the Respondent by March 15 whether Dr. Lucier would refer Ms. Signore to a clinical program for assessment of possible job coaching.

32. On March 14, 2019, the Union's Attorney forwarded to the Respondent a message from Ms. Signore, which said that neither Ms. Signore nor Dr. Lucier were "interested" in a job coach.

33. On April 2, 2019, the Respondent notified Ms. Signore (1) that it would make no further attempt to find a job coach or to reinstate Ms. Signore to her former position at DLT; and (2) that it would pay Ms. Signore back pay from the date of termination (May 6, 2016) to the date of the arbitration award (August 17, 2018).

34. By April 30, 2019, the Respondent had paid Ms. Signore a total of $91,2543.11 [sic] (gross) in back pay, less deductions for state and federal taxes and the employee's share of the retirement contribution.

35. On August 2, 2019, the Union's Attorney advised that the Union did not take issue with the Respondent's decision not to reinstate Ms. Signore to her former position at DLT.

36. In her August 2, 2019 letter, the Union's Attorney identified two outstanding issues related to the implementation of the arbitration award: (1) reimbursement to Ms. Signore for vacation leave, which accrued following the termination of her employment, and (2) the Respondent's "failure to-pay [Ms. Signore] through the date when Dr. Lucier indicated that she was not capable of returning to work".

37. On April 4 and 5, 2019, the Union Attorney and the Respondent's Attorney exchanged emails concerning the deduction of Union dues from Ms. Signore's back-pay.

38. On April 10, 2019, the Respondent's Attorney advised the Union's Attorney that it was not the State's practice to deduct Union dues from back-pay.

39. By April 10, 2019, Ms. Signore had submitted to the Respondent documents related to the expenses, which she incurred for healthcare following the termination of her employment in May of 2016.

40. On November 7, 2019, the Union's Attorney sent to the Respondent's Attorney an email in which she cited Article 3.1a of the parties' Collective Bargaining Agreement, which requires the deduction of Union dues or agency service fees from back-pay, which is awarded when an employee is reinstated upon successful appeal of a dismissal.

41. The Respondent has not reimbursed Ms. Signore for any vacation leave, which accrued following her dismissal in May of 2016.

42. The Respondent has not reimbursed Ms. Signore for any health-care expenses, which she incurred following the termination of her employment in May of 2016.

43. The Union has not been reimbursed for dues or agency service fees which accrued following the termination of Ms. Signore's employment in May of 2016.

44. Ms. Signore is responsible to pay the Union dues out of any subsequent payment, which she receives from the Respondent in relation to this matter. If the amount owed to her, if any, is insufficient to satisfy the total amount of the Union dues or agency service fee, which she owes to the Union, the Respondent shall be responsible to pay the difference.

45. There being no material dispute off acts, the parties have agreed to waive a formal hearing in this matter scheduled for December 12, 2019.

As noted in the Consent Order, the parties stipulated that the long and involved factual history underlying this matter was set forth by the arbitrator in her award. (Consent Order at #9). While the Board does not believe that a recitation of the factual history as contained in the arbitration award (Joint Exhibit #2, pgs. 7 – 40) is required to be set forth again in this Decision, the Board has reviewed the arbitrator's award with

great care and, as necessary to this Decision and Order, will reference it where appropriate.

POSITION OF THE PARTIES

Union:

The Union's central argument in the instant matter is that the Employer, upon issuance of the arbitration award, was required to implement the terms of the award. The Union claims the Employer did not implement the award as issued by the arbitrator and, therefore, the Employer has violated the Act. In addition, the Union contends that the Employer, in failing to implement the terms of the award, has also failed to comply with the "make whole" remedy issued by the arbitrator as part of her award. (Joint Exhibit #2 at p. 108). Further, the Union asserts that the date the Board should use in calculating the back-pay award is the end of March 2019 (Union Memorandum of Law at pg. 13). The Union also claims the Employer has failed to bargain with the Union regarding the appropriate amount of back pay due to Ms. Signore as part of the make whole remedy.

Employer:

In its memorandum of law to the Board, the Employer contends that it did not fail to comply with the arbitration award. Instead, the Employer claims that it made an extensive good-faith attempt to comply with the terms of the award, but that compliance was not possible, as there was no "OCD-experienced job coach" available; thereby, making reinstatement effectively impractical if not impossible. Further, the Employer argues that the appropriate back-pay date is August 17, 2018, the date of the arbitrator's award.

DISCUSSION

The issue before the Board, simply stated, is the Union's claim that the Employer failed to comply with the arbitrator's award. There were three (3) main aspects to the arbitration award: reinstatement of Ms. Signore to her former position, the engagement of an "OCD-experienced job coach" and a make whole remedy (Joint Exhibit #2). There is little legitimate argument to be made that the Employer did not make a sufficient attempt to comply with the provision of the arbitrator's award requiring the Employer to engage an "OCD-experienced job coach" to work with Ms. Signore. Similarly, it is also not in dispute that despite its efforts the Employer was unable to locate or hire an "OCD-experienced job coach" as mandated by the Arbitrator's award. (Joint Exhibit #2 at p. 108 at award #5). As to reinstatement, it is clear the Employer did not reinstate Ms. Signore to her position. Regarding the make whole remedy, there is a difference of opinion between the parties as to whether the Employer has complied with that portion of the award. The Board will address each of these items separately.

As the Rhode Island State Labor Relations Act (Act) states at R.I.G.L. 28-7-13(11), it shall be an unfair labor practice for an Employer to:

> Fail to implement an Arbitrator's award unless there is a stay of its implementation by a court of competent jurisdiction or upon the removal of the stay.

In the Board's view, the language of the statute is clear and unambiguous. An Employer must implement the award of an arbitrator unless such award is subject to a stay issued by a court. In the instant case, the arbitrator issued an award dated August 17, 2018. The arbitrator had jurisdiction to issue her award under the parties' Collective Bargaining Agreement (Joint Exhibit #1, Article XXVI) and the joint submission by the parties of a Union grievance to arbitration. (Joint Exhibit #2 at p. 3; See Consent Order #s 6 and 7). While the parties could not agree on the submission of an issue to the arbitrator, the Union essentially grieved the termination of Ms. Signore's employment and the Employer's alleged "failure to accommodate Ms. Signore's disability." (Consent Order at #6). After an extensive review of the history of Ms. Signore's employment, including her performance related issues, her disability and the relevant statutory law, the arbitrator made the following award:

AWARD

> 1. The State properly engaged in the interactive process in every respect except one, the job coach, before discharging Ms. X;[1]
>
> 2. The State failed to reasonably accommodate Ms. X's disability by not engaging a job coach experienced in OCD;
>
> 3. The discharge of Ms. X was not for just cause;
>
> 4. The Grievant shall be reinstated to her Unemployment Insurance Call Center position and made whole for her losses. If she received unemployment compensation or other such financial benefits or had earnings after her discharge, those sums shall be subtracted from her damages;
>
> 5. The State shall engage an OCD-experienced job coach to work with the Grievant for a reasonable period of time with the goal of helping her to be able to perform the essential functions of her UI Call Center position. If she is unable to do so at the end of the job coach assistance period, the State may reconsider her employment status.
>
> 6. The arbitrator will retain jurisdiction of this case for ninety (90) days from today in order to resolve any disputes relating to the remedy.

(Joint Exhibit #2 at p. 108).

According to the Union, the State has failed to implement the arbitrator's award because it did not (1) reinstate Ms. Signore to her Unemployment Insurance Call Center position; (2) engage an "OCD-experienced job coach" or (3) make Ms. Signore whole for her losses as required by the award. The Employer does not directly dispute these assertions by the Union. Instead, the Employer asserts that it tried to find an "OCD-experienced job coach," but despite its best efforts it was unable to do so. The Employer further asserts that it failed to reinstate Ms. Signore because she did not want to return to her UI Call Center position even though the Employer offered her the

[1] The arbitrator referred to Ms. Signore as "Ms. X" throughout the Award.

opportunity to do so. Finally, the Employer claims that it has made Ms. Signore whole as required by the arbitrator's award and based on the monies it has paid her. (Consent Order at #34).

In sifting through the stipulated facts, exhibits and memoranda of law submitted by the parties, the Board has concluded, as will be discussed in greater detail below, that the Employer violated the Act by failing to implement the award of the arbitrator as issued on August 17, 2018.

A. <u>The Employer Failed to Implement the Arbitrator's Award</u>

As previously noted, the arbitrator's award required the Employer to reinstate Ms. Signore to her Unemployment Insurance Call Center position, make her whole for her losses, and "engage an OCD-experienced job coach" to work with Ms. Signore. (Joint Exhibit #2). While the stipulated facts, exhibits and memoranda submitted by the parties make clear that the Employer did not engage an "OCD-experienced job coach" or reinstate Ms. Signore to her Unemployment Insurance Call Center position, the Employer argues that mitigating factors should relieve it from its compliance obligation. The Board has considered the Employer's arguments and, as discussed in greater detail below, must reject them as being insufficient to abrogate the Employer's responsibility to comply with R.I.G.L. 28-7-13(11) of the Act.

1. <u>Engagement of an OCD-Experienced Job Coach</u>

The arbitrator's lengthy and detailed analysis of Ms. Signore's performance-related issues, her disability, and the Employer's engagement in the interactive process of determining whether an appropriate reasonable accommodation was available to assist Ms. Signore in performing the essential functions of her Call Center position was, essentially, complimentary of the Employer's patience and conduct toward Ms. Signore. The arbitrator, in fact, noted only a single deficiency in the Employer's actions, that being the Employer's failure to engage a job coach experienced in working with OCD as a reasonable accommodation for Ms. Signore prior to her being discharged. In making this finding, the arbitrator directed the Employer to "engage an OCD-experienced job coach to work with [Ms. Signore] for a reasonable period of time with the goal of helping her to be able to perform the essential functions of her UI Call Center position. If she is unable to do so at the end of the job coach assistance period, the State may reconsider her employment status." (Joint Exhibit #2 at Award #5).

According to the stipulated facts submitted in the Consent Order, the Employer, upon receipt of the arbitration award, "began to search for "an OCD-experienced job coach" to work with Ms. Signore upon her reinstatement to the DLT job, ..." (Consent Order at #13). The Employer contacted several different organizations in an attempt to locate an "OCD-experienced job coach" as required by the award. (Consent Order at #14). Unfortunately, none of the organizations contacted by the Employer were able to provide the type of job coach needed for the Employer to comply with the arbitrator's award. (Consent Order at #s 15-17). In addition to its efforts in contacting outside organizations, the Employer also attempted to recruit an OCD-

experienced job coach by advertising through a private vendor that already had a contract with the Employer and that specialized in providing temporary employees to the Employer. (Consent Order at #18). However, the Employer received no applications through this process. The Employer also contacted Ms. Signore's therapist seeking the therapist's assistance in locating an OCD-experienced job coach. Ms. Signore's therapist was less than helpful to the Employer's efforts. (Consent Order at #s 19-22).

When all of these efforts failed, the Employer turned back to the arbitrator (who had retained jurisdiction of the case for 90 days "in order to resolve any disputes relating to the remedy" – Joint Exhibit #2 at Award #6), in an attempt to gain relief from the award. The Employer detailed for the arbitrator its efforts in attempting to obtain the services of an "OCD-experienced job coach" without success. (Joint Exhibit #4). The Employer also detailed for the arbitrator Ms. Signore's therapist's response to the Employer's request for assistance in locating a job coach. The Employer further petitioned the arbitrator to "reconsider the back-pay portion of the award." (Joint Exhibit #4 at pg. 2). The Employer argued to the arbitrator that given the Employer's lack of success in finding a job coach and Ms. Signore's apparent rejection of reinstatement, a make whole remedy, in the Employer's view, was wholly inappropriate. As the Employer noted to the arbitrator in its petition, it had "made a good faith effort to comply with the terms of the reinstatement as ordered by the arbitrator." (Joint Exhibit #4 at pg. 3).

The Union objected to the Employer's request for relief. (Joint Exhibit #5). The Union argued, in essence, that the arbitrator's "authority, post award, is extremely limited." (Joint Exhibit #5 at pg. 1). Basically, the Union argued that the arbitrator did not have the authority to act in the manner requested by the Employer, contending that the original award was appropriate and should not be altered or amended by the arbitrator. (Joint Exhibit #5 at pgs. 2-3).

The arbitrator rejected the Employer's request for reconsideration finding that the Employer's request for action by the arbitrator was "beyond the scope of the original submission." (Joint Exhibit #6 at pg. 5). In short, the arbitrator was, in her view, presented with the same issue that is now before the Board, i.e. whether implementation of the award has occurred or should be mitigated due to post-award circumstances. Finding that such a question "would constitute a new dispute ... which would require the submission of a new framed issue for an arbitration proceeding, a new hearing, and new evidence ...," the arbitrator declined to alter the original award. (Joint Exhibit #6 at pg. 5).[2]

[2] Interestingly, the Union raised in its objection to the Employer's request for reconsideration the idea that the Employer "should simply send grievant a letter informing her when to return to work. If the employee does not return to work, then the state has options that may or may not lead to a future grievance." (Joint Exhibit #5 at pg. 2). The arbitrator also commented on this notion stating that Ms. Signore's therapist's letter of October 3, 2018 that it was not in her patient's "best interest" to return to her Call Center position, was "essentially meaningless" because it was Ms. Signore and not her therapist who must determine whether or not she would return to her job. (Joint Exhibit #6 at pg. 6). Notwithstanding both these statements, the Employer did not direct Ms. Signore to return to work until December 10, 2018 and, even at that point, apparently did not require her to actually return to work (See Joint Exhibit #8).

It is apparent to this Board that the Employer made a good-faith effort to attempt to comply with the portion of the arbitrator's award that required the engagement of an OCD-experienced job coach. However, the Employer's good-faith attempts do not and cannot mitigate against its obligation to comply with the arbitrator's award.[3] While the Employer attempted to get the arbitrator to reconsider her award, this attempt was doomed from the start based on the limited jurisdiction that the arbitrator retained post-award.[4] While the Board can sympathize with the Employer's predicament, its hands are tied based on the clear and unambiguous language contained in R.I.G.L. 28-7-13(11) and the undisputed evidence before it. All the evidence in the present case before the Board points to the fact that the Employer did not comply with that portion of the arbitration award that required it to engage an "OCD-experienced job coach" as part of the implementation of the award. The Employer's failure to comply with this portion of the Award, or to have the award modified or to have the award vacated by a court, leaves the Board with no alternative but to find the Employer has violated the Act by failing to comply with the arbitration award.

2. <u>Reinstatement of Ms. Signore</u>

Another aspect of the Arbitrator's award was the requirement that Ms. Signore "shall be reinstated to her Unemployment Insurance Call Center position ...." (Joint Exhibit #2 at Award #4). As noted in Section A. 1. above, when the Employer received the Arbitrator's award, it immediately began a search for an OCD-experienced job coach. The Employer did not, however, simultaneously offer reinstatement to Ms. Signore to her Unemployment Insurance Call Center position. Whether this sequence of events was a good idea or not is clearly not before the Board. Instead, compliance with the arbitration award is the issue to be determined by the Board and that requires the Board to decide whether the Employer reinstated Ms. Signore as the award required or, in the alternative, the Employer attempted to reinstate Ms. Signore, but she refused the offer of reinstatement, which would legitimately absolve the Employer of further compliance with that aspect of the award.

As noted in the stipulated facts and exhibits, it was not until after the arbitrator rejected the Employer's request to reconsider the award that the Employer first contacted Ms. Signore and directed her to report to work.[5] This contact occurred on November 30, 2018. The Employer "directed Ms. Signore to report to work on December 10, 2018" with "a medical release from Dr. Lucier clearing Ms. Signore to return

---

[3] The Employer also argued to the arbitrator in its motion to reconsider that it was "impossible" to comply with the arbitrator's award (Joint Exhibit #6 at pg. 4). The arbitrator, however, rejected this argument (See Joint Exhibit #6).

[4] The Employer also had the option under R.I.G.L. 28-9-18 to move to vacate the arbitrator's award, but for reasons that are not explained or provided in the evidence before the Board, such action was not taken.

[5] In September 2018 the Employer had contacted Ms. Signore's therapist to Seek help in finding an "OCD-experienced job coach" without success (Consent Order at #s 19 – 21). On October 3, 2018 Ms. Signore's therapist wrote to the Employer "It is my clinical opinion that it is in Tanya's best interest to not return to her position at the unemployment insurance call center." (Consent Order at #22). There is no evidence before the Board that the Employer responded to this communication. There is evidence that on October 30, 2018 the Employer asked the arbitrator to reconsider her original award (Consent Order at #23).

to work in her job at DLT." (Consent Order at #27).[6] On December 10, 2018, Ms. Signore met with representatives of the Employer but did not provide a release from Dr. Lucier allowing for her return to work. (Consent Order at #28).[7] As a result of that meeting and Ms. Signore's failure to provide a note from Dr. Lucier releasing her to return to work, the Employer would not reinstate Ms. Signore to her Call Center position. (Joint Exhibit #8).

On January 29, 2019, the Employer received another note from Dr. Lucier clearing Ms. Signore "to return to her job at DLT, although Dr. Lucier also opined that it was not in Ms. Signore's "best interest" to return to that position." (Consent Order at #30). Notwithstanding receipt of this communication from Dr. Lucier, there was no evidence in the record before the Board to indicate that Ms. Signore was reinstated to her Unemployment Insurance Call Center position. In fact, there appears to have been no communication between the Employer and Ms. Signore until March 6, 2019 when the Employer requested notification from either Ms. Signore or the Union's attorney as to whether Dr. Lucier would refer Ms. Signore "to a clinical program for assessment of possible job coaching." (Consent Order at #31). The Union's attorney responded on March 14, 2019 that "neither Ms. Signore nor Dr. Lucier were "interested" in a job coach." (Consent Order at #32). Even at that point, the Employer appeared to take no action to reinstate Ms. Signore to the Unemployment Insurance Call Center position as required by the Arbitrator's award. Instead, on April 2, 2019, the Employer made its position regarding a job coach and reinstatement crystal clear. On that date, it notified Ms. Signore that it would no longer look for a job coach or reinstate her to her former position at DLT. (Joint Exhibit #11; Consent Order at #33).

The arbitrator's award with regard to reinstatement of Ms. Signore was, in the Board's view, clear and unambiguous. The Employer was required to reinstate Ms. Signore to her Unemployment Insurance Call Center position. The award did not identify a date or time by when the reinstatement had to occur. The Employer had several opportunities to comply with this aspect of the Arbitrator's award from the date of the issuance of the original award through and until its notice to Ms. Signore on April 2, 2019 that it would not reinstate her, yet until the April 2, 2019 notice, the Employer at no point offered or required Ms. Signore a return to her former position as the arbitration award mandated. It is apparent that the Employer believed retaining an OCD-experienced job coach was a prerequisite to returning Ms. Signore to her Call Center position (Joint Exhibits #3 and #4). Whether or not that was a reasonable interpretation of the Arbitrator's award is debatable. It is apparent from a reading of the award that reinstatement and the engagement of a job coach were separate items of compliance

---

[6] As previously discussed, the arbitrator in her decision rejecting the Employer's request for reconsideration made clear that communication from Ms. Signore's therapist dated October 3, 2018 stating that it was her "clinical opinion that it is in Tonya's best interest to not return to her position at the unemployment insurance call center (Consent Order at #22; Joint Exhibit #7) was "essentially meaningless" because it was up to Ms. Signore to ultimately decide whether or not she was going to return to work. (Joint Exhibit #6 at pg. 6).

[7] There is evidence that previously, on November 5, 2018, the Employer had received a note from Dr. Lucier indicating that Ms. Signore was "able and available for full-time work." (Consent Order at #25). For reasons that are not explained, the Employer did not decide to use this "release" from Dr. Lucier when it directed Ms. Signore to report to work on November 30, 2018.

under the award. However, there is also a link between these two (2) components as the arbitrator made clear in her award that the goal of engaging an "OCD-experienced job coach" was helping Ms. Signore "be able to perform the essential functions of her UI Call Center position." (Joint Exhibit #2 at Award #5). Looking at the totality of facts before it, the Board concludes that reinstatement of Ms. Signore was separate and apart from the obligation of the Employer to secure an OCD-experienced job coach. While it was clear from the award that an OCD-experienced job coach would have to work with Ms. Signore and hopefully assist her in being successful at her UI Call Center position, obtaining the services of an OCD-experienced job coach was not, under the award, a prerequisite to reinstating Ms. Signore to her UI Call Center position. Therefore, the Employer's failure to reinstate Ms. Signore to her UI Call Center position as required by the Arbitrator's award represents a failure by the Employer to comply with the terms of the arbitration award and is a violation of the Act.[8]

3. <u>The Make Whole Remedy</u>

The last aspect of the Arbitrator's award that is part of the Complaint before the Board involves whether the Employer has made Ms. Signore whole for her losses as required by the Arbitrator's award (See Joint Exhibit #2 at Award #4). A make whole remedy is a tool often applied by an arbitrator in discharge cases where the issue before the arbitrator has involved employee wage and benefit losses. The idea, of course, is to place the parties in the position they would have been had there been no violation. (See *Cadillac Gage Co.*, 87 LA 853 (1986); *Prairie Farms Dairy*, 121 LA 1362, 1365 (2005). The NLRB takes a similar position with regard to make whole remedies (See *NLRB v. Coca-Cola Bottling Co.*, 191 F.3d 316, 325 (2d Cir. 1999) where the court noted that the gross backpay an employee who has been wrongfully discriminated against "is the amount that will "restore the situation as nearly as possible, to that which would have obtained but for the illegal discrimination.""") Most authorities believe that a make whole remedy requires an Employer to make the affected employee whole for all wage and benefit losses the employee suffered from the date of the injury through and until the employee is put back in the same position she was in prior to the Employer's act that caused the original wage and benefit losses. (See *Elkouri and Elkouri*, How Arbitration Works, 18-15 – 18-16 (7th Ed. 2012); *NLRB v. Coca-Cola Bottling Co., supra; Parkview Lounge, LLC v. National Labor Relations Board*, 790 Fed. Appx. 256 (2d Cir. 2019)). In short, a make whole remedy is not unusual as part of an arbitration award or an NLRB decision. In the present case, the Board is being asked to determine the date upon which the make whole remedy is tolled and whether Ms. Signore is entitled to receive additional compensation in the form of vacation time based on the Employer's failure to comply with the Arbitrator's award and violation of the Act.

---

[8] The Board recognizes that on August 2, 2019 the Union notified the Employer that the Union "did not take issue" with the Employer not reinstating Ms. Signore to her former position. (Consent Order at #35). While this action by the Union may have some significance concerning any future issues between the parties, the Board views it as of no significance to the issue that is before it for decision.

In the matter pending before the Board, the dispute encompasses both what is included within a make whole remedy and the date to which the make whole remedy should be applied.[9]

In the instant case, compliance with the arbitrator's make whole remedy demands that Ms. Signore be reimbursed for all wage and benefit losses that she suffered as a result of the Employer's wrongful discharge of her employment less any mitigation of damages that she has received (unemployment benefits or wages and benefits from work other than with the Employer and during the period from the date of her discharge through the end date of the make whole remedy). (See *NLRB v. Coca-Cola Bottling Co., supra; Parkview Lounge, LLC v. National Labor Relations Board, supra).* As an employee for more than one (1) year, any accrued vacation would be considered compensation for purposes of a make whole remedy. (See R.I.G.L. 28-14-4(b)). In addition, there can be little argument that out-of-pocket payments for health insurance benefits made by the wrongfully dismissed employee, while she was out of work, are reimbursable by the Employer as part of a make whole remedy. (*See Elkouri and Elkouri*, How Arbitration Works, 18-17 (7th Ed. 2012)). There should be little dispute that reimbursement of costs for health insurance expended by Ms. Signore during the period of her wrongful termination is the responsibility of the Employer.

Finally, the Union argues that the Employer has not deducted Union dues from any portion of the back pay provided to Ms. Signore to date and seeks to have those Union dues deducted from any further remedy this Board may issue. (Consent Order at #44). A review of the Collective Bargaining Agreement makes clear at Article III, Section 3.1(a) that the Employer "shall also deduct Union dues or agency service fee as the case may be from bargaining unit members who have been reinstated in accordance with Article 24.5." (Joint Exhibit #1). Article 24.5 under the disciplinary action section of the contract states as follows:

> 24.5. In the event that an employee is dismissed, demoted or suspended under this section and such employee appeals such action and his appeal is sustained, he shall be restored to his former position and compensated at his regular rate for any time lost during the period of such dismissal, demotion or suspension.

(Joint Exhibit #1).

In the present case, Ms. Signore was dismissed from her position. However, the arbitrator clearly noted in her summary of the case that it was "not a disciplinary discharge case."[10]

---

[9] The Union is requesting, in addition to the back payment already made by the Employer (See Consent Order at #34) that the Employer make Ms. Signore whole from August 17, 2018 through the end of March 2019 for back pay and all benefits including healthcare costs and vacation pay. Further, the Union argues the Employer should be required to withhold outstanding Union dues and to remit such dues to the Union. (Union Memorandum of Law at pg. 13). The Employer asserts that it has complied with its obligation to make the Employee whole and it has no further obligation to do so. (Consent Order at #34). There is no dispute between the parties that Ms. Signore need not be reinstated to her former UI Call Center position. (Consent Order at #35).

[10] Notwithstanding this designation, the parties submitted as one of the issues to be decided, whether the discharge of Ms. Signore was for just cause. (Joint Exhibit #2 at pg. 3). The parties' Collective Bargaining Agreement also notes at Section 24.1 that "disciplinary action may be imposed upon an employee only for just cause." (Joint Exhibit #2 at pg. 6; Joint Exhibit #1).

Because the arbitrator determined that the matter before her was not a disciplinary discharge, it is the Board's view that the language of Section 24.5 of the Collective Bargaining Agreement does not apply to the instant case as Ms. Signore's dismissal was not disciplinary as previously referenced. As such and as particular to the instant matter, the Employer is not required to deduct dues from any further back pay award that is issued by this Board in this matter.

The final determination required of this Board is the date upon which the make whole remedy ends. The Union, as previously noted, argues that the period ends at the end of March 2019, while the Employer argues that its payments to date (an apparent reference to August 17, 2018, the date of the issuance of the original arbitration award) satisfied the award. Based on all the evidence submitted in this case, it is the Board's view that the make whole remedy should run through March 14, 2019.[11] In the Board's view, this date coincides with the Union's notification to the Employer that Ms. Signore was not interested in having a job coach. (Consent Order at #32; Joint Exhibit #10). This notification by the Union to the Employer effectively signaled that Ms. Signore was not "interested" in returning to her former Unemployment Insurance Call Center position as she was not "interested" in receiving the accommodation which the arbitration award deemed appropriate for her to be reinstated to her former position.[12]

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 parties to a Collective Bargaining Agreement dated July 1, 2013 through June 30, 2017, which was operative for purposes of the instant dispute.
4. Tanya Signore was employed by the Employer in an Unemployment Insurance Call Center position until she was terminated from her position on May 6, 2016.

---

[11] In making this determination, the Board considered several other dates when the Employer had the opportunity to cut off further backpay liability to Ms. Signore. For example, there was the October 3, 2018 note from Dr. Lucier indicating it was not in Ms. Signore's interest to return to her former position (Consent Order at #22).The Employer, however, did not act on this information and, thereafter, the arbitrator ruled that Dr. Lucier's note was "essentially meaningless" because the decision to return to work or not was Ms. Signore's alone (Joint Exhibit #6 at pg. 6). Similarly, on November 5, 2018 the Employer received notification that Ms. Signore was "able and available" to return to work but took no action to bring her back (Consent Order at #25). Further, on January 29, 2019 the Employer received a note from Dr. Lucier that Ms. Signore could return to her position at DLT although the note also indicated that it was not in Ms. Signore's "best interest" to do so. (Consent Order at #30). Again, the Employer took no action after receiving this notice until March 6, 2019 (Consent Order at #31). It was this communication which prompted the March 14, 2019 "message" from the Union's attorney that Ms. Signore was not "interested" in a job coach (Consent Order at #32).

[12] This finding by the Board is also consistent with the Union's interpretation of the consequences of Ms. Signore telling the Employer she was not "interested" in a job coach. See Union Memorandum of Law at pg. 11, Footnote 3.

5. Following her termination, the Union filed two grievances on behalf of Ms. Signore, alleging in one grievance discrimination and a failure to reasonably accommodate Ms. Signore's disability and alleging in the other grievance that the termination of Ms. Signore was without just cause.

6. The two (2) grievances were consolidated for arbitration and, after several days of hearing, the arbitrator issued her award on August 17, 2018.

7. The arbitration award found that the Employer had "failed to reasonably accommodate" Ms. Signore and had discharged her "not for just cause;" the award mandated the Employer to "engage an OCD-experienced job coach" to work with Ms. Signore, to reinstate Ms. Signore to her Unemployment Insurance Call Center position, and to make Ms. Signore "whole for her losses."

8. Starting upon receipt of the arbitration award, the Employer began to conduct a search to locate an "OCD-experienced job coach" for Ms. Signore. The Employer, despite its efforts, was not successful in finding such a specialized job coach.

9. The Employer sought relief from compliance with the terms of the arbitration award by petitioning the arbitrator to reconsider her original award. The Union objected to the Employer's petition.

10. The arbitrator denied the Employer's request for relief from the original terms of the award.

11. The Employer did not engage an "OCD-experienced job coach" to work with Ms. Signore.

12. The Employer did not reinstate Ms. Signore to her Unemployment Insurance Call Center position.

13. The Employer made a partial back pay payment to Ms. Signore covering the period from May 6, 2016 through August 17, 2018.

14. The Employer did not make whole Ms. Signore for her losses.

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 (10) and (11) when it failed to implement the terms of the arbitration award issued on August 17, 2018.

2. The Union has proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. 28-7-13 (10) and (11) when it failed to (a) engage an "OCD-experienced job coach" to assist Ms. Signore; (b) reinstate Ms. Signore to her Unemployment Insurance Call Center position; and (c) make whole Ms. Signore for her losses as required by the Arbitrator's award.

ORDER

1. The Employer is hereby ordered to make Ms. Signore whole for all back pay and benefit losses, including any accrued vacation time, she may have incurred from the date of her discharge through and until March 14, 2019, less any mitigation of her damages, such as receipt of unemployment insurance or other earnings, compensation or financial benefit she may have received between her discharge and March 14, 2019, such sums to be deducted from the total owed.

2. The Employer is hereby ordered, as part of the above make whole award, to reimburse Ms. Signore for any and all out of pocket expenses she had from the date of her discharge through and until March 14, 2019 for health insurance that she otherwise would not have had to pay had she remained employed during the identified period of time. The Employer may request of Ms. Signore reasonable authentication and/or documentation of any expenses or payments Ms. Signore or the Union on her behalf claim she made toward health insurance costs during the relevant period of time and for which she is seeking reimbursement.

3. The Employer is not required to deduct from any back pay or benefit award contained in this Order any amount of Union dues Ms. Signore may owe or be responsible for paying to the Union.

4. 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 (Dissent)

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

BOARD MEMBER, KENNETH B. CHIAVARINI, WAS NOT PRESENT TO SIGN THE DECISION & ORDER AS WRITTEN. HOWEVER, KENNETH B. CHIAVARINI DID DISSENT AT THE TIME OF THE ORIGINAL VOTE TO UPHOLD THE MATTER.

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

Dated: June 30 2020

By: Robyn H Golden
Robyn H. Golden, Administrator

ULP- 6258

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-6258
STATE OF RHODE ISLAND DEPARTMENT OF LABOR & TRAINING	:	

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-6258, dated June 30, 2020, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **June 30, 2020.**

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

Dated: June 30, 2020

By: _____
Robyn H. Golden, Administrator