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-6276
STATE OF RHODE ISLAND DEPARTMENT OF HEALTH	:	

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 Rhode Island Department of Health (hereinafter "Employer" or "DOH") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated June 10, 2020 and filed on the same date by Rhode Island Council 94, AFSCME, AFL-CIO (hereinafter "Union"). The charge was amended on June 24, 2020.

The original Charge alleged as follows:

> RIDOH Management employee, Carol Hall Walker, informed a member of Local 2870 that she was getting permanently reassigned to a COVID-19 Hotline position effective immediately. In addition, member was informed that she needed to clear out of her desk so another employee could take it and that RIDOH would desk audit her into a new position. RIDOH direct dealed [sic] with the member, did not negotiate with the Union, and discouraged membership in the Union by offering a desk audit to a different job title outside of the Union's bargaining unit.

The amended Charge added the following information:

> After the original reassignment, RIDOH again unilaterally changed Ms. Santos' job, reporting structure and other terms and conditions of employment when RIDOH moved her from the COVID-19 Hotline position to the COVID-19 Letters team.

Following the filing of the original Charge and amendment, each party submitted written position statements and responses as part of the Board's informal hearing process. On October 20, 2020, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (3), (5), (6) and (10) when, through its representative, the Employer (1) unilaterally changed terms and conditions of employment by assigning bargaining unit member to a new job with different duties that was not consistent or compliant with the terms of the existing Collective Bargaining Agreement; (2) attempted to discourage membership in the Union by encouraging and offering bargaining unit member a desk audit to a position outside the bargaining unit; and (3) failed to bargain in

good faith with the Union regarding the unilateral change in position and duties of bargaining unit members implemented by the Employer. The Board held a remote formal hearing for this matter on December 1, 2020. Post-hearing briefs were filed by the Employer and the Union on January 5, 2021. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and exhibits submitted at the hearing 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 a bargaining unit member without engaging in prior negotiations with the Union over the changes. The current dispute involves the Employer's decision to unilaterally reassign bargaining unit member Ramona Santos to the COVID-19 Hotline in June 2020 and, subsequently, to the COVID-19 Letters team in September 2020 without first engaging in any negotiations with the Union over either of the assignments. In addition, the Union has alleged that the Employer has engaged in illegal direct dealing through certain conversations that DOH management personnel had with bargaining unit member Santos.

The facts in this matter are basically not in dispute between the parties. The Employer 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, 2017 through June 30, 2020. (Joint Exhibit 1). What is important to the instant dispute is that in March 2020, the State was in the beginning stages of the COVID-19 pandemic. The COVID-19 pandemic generated numerous Executive Orders issued by the Governor of Rhode Island (Respondent Exhibits 1 – 6) and included one in which the Governor declared a Disaster Emergency (Joint Exhibit 6). These various Executive Orders prompted the need for emergency action from DOH (Transcript, pages 40 – 42). The existence of the pandemic and the emergency declarations from the State necessitated, among other things, changes in staffing by DOH. These staffing changes related to the COVID-19 pandemic were consistent with DOH's discharge of its statutory responsibilities during a pandemic, (Joint Exhibit 2 at page 1) but were contrary to the terms of the Collective Bargaining Agreement the State had with the Union. As a result, the Union filed an unfair labor practice charge with this Board (ULP-6271) and a declaratory Judgment action in Superior Court (see Joint Exhibit 2 at page 2). Instead of engaging in protracted litigation, the State and the Union negotiated a Settlement Agreement regarding, among other things, the activation of bargaining unit employees from their regular positions to COVID team positions. (Joint Exhibit 2; Transcript, pages 58 – 59). The Settlement Agreement provides specifics for how bargaining unit employees could be assigned or activated to COVID teams by DOH through notice to the Union and the employee.[1]

[1] The Settlement Agreement also resolved the pending litigation in Superior Court and the Union withdrew its unfair labor practice charge in ULP-6271.

(Joint Exhibit 2, paragraphs 4, 7, 8, 9, 15 and 17). The Settlement Agreement also set forth a process for the State to determine if additional COVID teams were necessary (Joint Exhibit 2, paragraphs 14 and 15) and a procedure if employees wished to request an adjustment to their work schedule due to a hardship. (Joint Exhibit 2, paragraph 9; See also Joint Exhibit 2, paragraph 21; Transcript, page 58). The Settlement Agreement also allowed for the Union to withdraw from the Agreement upon notice to the State. (Joint Exhibit 2, paragraph 35).

In June 2020, DOH sent an activation notification to Chief Clerk Ramona Santos reassigning her to the COVID hotline. (Joint Exhibit 4; Transcript, pages 15 – 17). The activation notice was copied to the Union President, Stephanie Pontes. (Joint Exhibit 4; Transcript, pages 69 – 70). Because the activation of Ms. Santos was to be for an indefinite period of time (Transcript, page 62), she was asked to remove her personal items from her desk (Transcript, page 17; pages 88 – 89).

Within a couple of days of receiving the email activation notification, a remote meeting was scheduled that included Ms. Santos and Carol Hall Walker, the Associate Director at DOH. (Transcript, pages 16 – 17; pages 85 – 86). During the course of this meeting, Ms. Santos and two (2) of her co-workers were provided information by Ms. Hall Walker about their changing roles as a result of activation to the COVID teams, to whom they would be reporting and that "all three of us would be desk audits because Kristen will be taking over my line centers and she will also be taking over my desk, … and she did say that all three of us would be getting desk audits." (Transcript, page 17 at lines 12 – 19). As a result of the activation notice from DOH to Ms. Santos and the remote conversation held between Ms. Santos, two (2) of her co-workers and Ms. Hall Walker, the Union filed the instant unfair labor practice charge.

On July 15, 2020, the Union sent an email to representatives of the State and DOH indicating that the Union was opting out of the Settlement Agreement. (Joint Exhibit 3). The effective date of the Union's exit from the Settlement Agreement was July 31, 2020. (Joint Exhibit 2, paragraph 35).

In July and August 2020, Ms. Santos requested that her assignment (COVID Hotline) be changed due to her daughter starting remote learning and Ms. Santos needing to telework to be able to be with her daughter. (Transcript, pages 18 – 20). Ms. Santos made this request to telework directly to DOH management, specifically Jacqueline Kelley, DOH Co-Chief of Logistics within the Incident Command System (Transcript, page 57). At the time of her request, Ms. Santos was still working on the COVID hotline. (Transcript, pages 19 – 20; pages 63 – 64; Respondent Exhibit 7). Ms. Santos did not notify the Union of her request to be reassigned, nor did she seek the Union's assistance with her request. (Transcript, page 20). After several email communications between Ms. Santos and Ms. Kelley (Respondent Exhibit 7), Ms. Santos's request to telework with a COVID team was approved and she was transferred to the COVID letters team in September 2020. (Transcript, pages 21 – 22; Respondent Exhibit 7; Transcript, pages 63 – 64). DOH did not engage the Union in

discussions regarding Ms. Santos's request in August 2020 to telework on a COVID team. (Transcript, pages 70 – 71).

POSITION OF THE PARTIES

Union:

The Union asserts that the Employer engaged in unfair labor practices when it unilaterally assigned a bargaining unit member, Ramona Santos, to the COVID hotline team and, later, to the COVID letters team without first negotiating with the Union over each of these reassignments. In support of its position, the Union contends that the Settlement Agreement (Joint Exhibit 2) was not applicable to either of the reassignments received by Ms. Santos and, therefore, the Employer was required to bargain with the Union before unilaterally reassigning Ms. Santos. The Union further claims that the Employer violated the Rhode Island State Labor Relations Act (hereinafter "Act") when it engaged in direct dealing with bargaining unit members by discussing a desk audit with bargaining unit members without the Union being present and/or without first discussing the issue with the Union.

In defense of its position, the Union argues, as noted above, that the Settlement Agreement (Joint Exhibit 2) was not applicable to the instant set of facts and that the management rights clause of the Collective Bargaining Agreement did not authorize DOH to unilaterally act as it did nor did it relieve DOH of its obligation to bargain with the Union prior to making the reassignments/transfers that it did.

Employer:

In its memorandum of law to the Board, the Employer contends that it did not violate the Act by not bargaining with the Union over its activation of Ms. Santos to the COVID hotline team and subsequent transfer of Ms. Santos to the COVID letters team. DOH argues that its actions were authorized by the language of the Settlement Agreement (Joint Exhibit 2), the management rights clause of the Collective Bargaining Agreement and its authority under state law to act with regard to the health and safety of its constituency in accordance with the determinations of the Rhode Island Supreme Court in *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913 (R.I. 1991) and *Department of Mental Health, Retardation and Hospitals v. Rhode Island Council 94*, 692 A.2d 318 (R.I. 1997). DOH also asserts that the conversation Ms. Hall Walker had with bargaining unit members regarding desk audits was appropriate and does not amount to direct dealing as that term is commonly interpreted in labor law. DOH defends its actions as being necessary and appropriate to respond to an emergency situation, which was caused by the COVID-19 pandemic.

DISCUSSION

The issue before the Board is whether the actions of the Employer in unilaterally changing terms and conditions of employment by assigning a bargaining unit member to a COVID team position with different job duties on two (2) separate occasions and allegedly failing to bargain with the Union regarding either of the unilateral changes is a violation of the Act. In addition, the Board is also confronted with a claim that DOH

attempted to discourage membership in the Union by encouraging and offering a bargaining unit member a desk audit to a position outside the bargaining unit.

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 Act. (See R.I.G.L. § 36-11-6 and R.I.G.L. 36-11-7; *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]

A. Unilateral Action by DOH

In the present case, there appears to be little dispute between the parties that DOH acted unilaterally in activating and reassigning Ms. Santos to the COVID-19 hotline team and, later, transferring Ms. Santos to the COVID letters team. (Transcript, pages 15 – 16; 18 – 19; 59 – 60; 63 – 64; Joint Exhibits 4 and 5). Instead, the central dispute is the disagreement over whether DOH had the right to act in the manner it did based on the terms of a Settlement Agreement between the parties (Joint Exhibit 2) or whether, as the Union contends, the Settlement Agreement had no applicability to the actions taken by DOH.

As previously noted, there is no dispute that DOH sent an activation notice to Ms. Santos on June 18, 2020 indicating that it was reassigning her from the Chief Clerk's position to the COVID hotline team (Joint Exhibit 4). As the testimony before the Board revealed, the primary reason for this reassignment was DOH's need to staff the COVID hotline with individuals who were bilingual. (Transcript, pages 61 – 62). It is also without dispute that at the time DOH notified Ms. Santos of her activation to the COVID hotline, except for notice to the Union President that the activation decision had been made (Joint Exhibit 4), no negotiations with the Union were commenced, held or requested. (Transcript, pages 69 – 70). Instead, DOH argues that it had no obligation to engage with the Union because the terms of the Settlement Agreement (Joint Exhibit 2) allowed it to take the action that it did. In reviewing the testimony and evidence before it, the Board tends to agree that the conduct of DOH with regard to the activation of Ms. Santos to the COVID hotline team did not constitute an unfair labor practice under the Act.

[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)).

According to the evidence before the Board, the parties spent a significant amount of time engaged in negotiating the terms of the Settlement Agreement. (Joint Exhibit 2; Transcript, pages 58 – 59). A review of the Settlement Agreement by the Board indicates that it is both detailed and comprehensive in its attempt to cover the various concerns of DOH and the Union with regard to the COVID emergency, DOH's need to act quickly in staffing COVID positions, and the Union's desire to protect the rights of bargaining unit members concerning, among other items, assignment to the COVID teams. The Settlement Agreement was entered into on May 15, 2020 and was in place on June 18, 2020, the date DOH sent notification to Ms. Santos that she was being activated to the COVID hotline team. The Settlement Agreement specifically provides to DOH the right to assign Union members to COVID teams with only a limited amount of involvement in the process with the Union. (Joint Exhibit 2, paragraphs 4 – 8; paragraph 15; paragraph 24). DOH, of course, asserts that its actions in activating and reassigning Ms. Santos were consistent with its rights under the existing Settlement Agreement. (Joint Exhibit 2, paragraph 4). The Board believes, based on the evidence before it, that the activation by DOH of Ms. Santos to the COVID hotline team was not a violation of the Settlement Agreement or the Collective Bargaining Agreement and, therefore, DOH did not have an obligation to bargain with the Union over the activation of Ms. Santos to the COVID hotline team. As such, the Board finds that DOH's actions in this instance do not constitute an unfair labor practice in violation of the Act.

The Union argues that the reassignment of Ms. Santos was improper because the COVID hotline team was not identified as part of the Settlement Agreement and that it was not a new team added by DOH in accordance with the Agreement. (Joint Exhibit 2, paragraph 14; Transcript, pages 68 – 69). However, as the testimony indicated, the COVID hotline was originally staffed by the National Guard, not members of DOH. (Transcript, page 86). According to the undisputed testimony, when the National Guard deactivated from the COVID hotline team, DOH "scrambled to really have the representation that we needed, especially bilingual representation to really talk with the families directly, calm their fears and give them the correct information that they need to quarantine and isolate." (Transcript, page 86 at line 21 through page 87 at line 2). Thus, in the Board's view, this change falls within the terms of the Settlement Agreement and, specifically, paragraphs 14 and 15 of that Agreement. Under these provisions, the reassignment of Ms. Santos and a notice to the Union pursuant to the email activation sent to Ms. Santos (Joint Exhibit 4) was an appropriate exercise of DOH's authority and not an illegal unilateral move or failure to bargain pursuant to the Act.

DOH also unilaterally acted when it agreed to transfer Ms. Santos to the COVID letters team allowing her to telework. While this unilateral action was prompted by a request from Ms. Santos (Transcript, pages 19 – 20; 25 – 26; 63 – 64), it is undisputed that the Union was not engaged in any discussions with DOH regarding Ms. Santos's transfer to the COVID letters team. (Transcript, page 20 – 21; 30 – 31; 70 – 71). Further, it is undisputed that Ms. Santos's transfer to the COVID letters team occurred in September 2020 due to her request that she initiated in July and August.

(Transcript pages 19 – 20). However, as the evidence before the Board clearly demonstrates, at the time the August request to telework was made by Ms. Santos and when her request was ultimately granted, the Union had already notified the State and DOH of its opt-out from the Settlement Agreement (Joint Exhibit 3). Thus, in contrast to DOH's activation of Ms. Santos to the COVID hotline in June 2020, at the time of Ms. Santos's request to telework and the subsequent agreement by DOH to grant her transfer request, the Settlement Agreement no longer applied to the Union because it had already opted out from the Agreement. In other words, any of the protections set forth in the Settlement Agreement for DOH to act were no longer in force and effect with regard to the Union (Council 94) as applied to movements, assignments, and transfers to COVID teams of bargaining unit members. By August 1, 2020, DOH had an obligation to follow the terms of its Collective Bargaining Agreement with the Union (Joint Exhibit 1) and had a bargaining obligation to meet and confer in good faith with the Union prior to unilaterally transferring Ms. Santos. This was so even though it was Ms. Santos's request to telework, which initiated and prompted the action by DOH.[3]

In the instant case, DOH's unilateral transfer of Ms. Santos to the COVID letters team without first engaging in bargaining with the Union was, based on the undisputed testimony and evidence before the Board, a violation of the Act.

In short, as the evidence before the Board makes clear, DOH bargained directly with bargaining unit employee Santos without engaging the Union; and unilaterally transferred Ms. Santos without negotiating with or including the Union in any discussions regarding the transfer. 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); *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). There can be no serious disagreement or dispute that the transfer of a bargaining unit member from one job to a different job is a change in terms and conditions of employment and, therefore, a mandatory subject of bargaining. In the instant case, the testimony and evidence before the Board, as previously noted, makes clear that no negotiation or bargaining between DOH and the Union took place prior to DOH unilaterally transferring Ms. Santos to the COVID letters team. As such, DOH's conduct is in violation of the Act notwithstanding the fact that the employee requested and wanted the transfer.

[3] As noted in the testimony before the Board, DOH was aware that it was not supposed to deal directly with employees without having the Union involved. (Transcript, pages 70 – 71).

B. Direct Dealing

The Union has also charged that the Employer engaged in illegal direct dealing with bargaining unit members when it discussed with Ms. Santos, after the latter had been notified of her reassignment to the COVID hotline team, that she "would be able to desk audit [sic] into a new position." (Union Memorandum of Law, page 8).

The term "direct dealing" is used to describe practices that constitute violations of Sections 8(a)(1) and (a)(5) of the National Labor Relations Act and, correspondingly, R.I.G.L. § 28-7-13(3), (6) and (10) of the State Labor Relations Act. The National Labor Relations Board (NLRB) and federal courts have unanimously recognized (as have numerous state courts) that an Employer violates Sections 8(a)(1) and (a)(5) if it engages in direct dealing with employees and, thereby, interferes in the collective bargaining process and in the Union's role as the exclusive bargaining representative. See *American Pine Lodge Nursing & Rehabilitation Center v. NLRB*, 164 F.3d 867 (4th Cir. 1999); see also *Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission*, 729 N.E. 2.d 1100 (2000); *Board of Education of Region 16 v. State Board of Labor Relations*, 7 A.3d 371 (Conn. 2010); *NLRB v. Pratt & Whitney Aircraft Division*, 789 F.2d 121, 134 – 35 (2nd Cir. 1986). Improper direct dealing is characterized by actions that persuade employees to believe that they can achieve their objectives by dealing directly through the Employer and, thus, erode the Union's position as the exclusive bargaining representative. See *American Pine Lodge Nursing & Rehabilitation Center,* 164 F.3d at 875; see also *NLRB v. Pratt & Whitney Aircraft Division*, 789 F.2d at 134. Another way to frame the question of direct dealing is "whether the Employer has chosen "to deal with the Union through the employees, rather than with the employees through the Union."" *American Pine Lodge Nursing & Rehabilitation Center,* 164 F.3d at 875, citing *NLRB v. General Electric Co.*, 418 F.2d 736, 759 (2nd Cir. 1969).

Of course, counterbalancing the prohibition against direct dealing is an Employer's strong interest in preserving its right to free speech. In other words, an Employer is free to communicate its views to its employees "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co., Inc.* 395 US 575, 618 (1969); see also *In the matter of Rhode Island State Labor Relations Board and State of Rhode Island Department of Corrections*, ULP-5251 (May 2001).

Drawing the line between an Employer's legitimate right of freedom of speech and illegal direct dealing with employees produces a relatively straight forward standard of permissible conduct. An Employer may speak freely to its employees about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position and objectively supportable, reasonable beliefs concerning future events. See *American Pine Lodge Nursing & Rehabilitation Center*, 164 F.3d at 875; *In the Matter of Rhode Island State Labor Relations Board and State of Rhode Island Department of Corrections*, ULP-5251 (2001). But, under Section 8(c) of the National Labor Relations

Act and, correspondingly, R.I.G.L. § 28-7-12 and 13(10),[4] an Employer cannot act in a coercive manner by making separate promises of benefits or threatening employees. Thus, an Employer may freely communicate with employees in non-coercive terms, provided those communications do not contain some sort of express or implied quid pro quo offer that is not before the Union. This standard recognizes the right of represented employees to negotiate exclusively through their Union, while protecting the right of Employers to tell their side of the story. *Id.*

However, communications by an Employer that may undermine a Union's authority as the bargaining representative by encouraging employees to deal directly with the Employer or to abandon the Union are clearly impermissible. See *American Pine Lodge Nursing & Rehabilitation Center*, 164 F.3d at 879 - 880. In other words, even when an Employer may not have made threats or promises in its direct communications, it still may violate the law where it attempts to bypass the Union in negotiations. Thus, Employer communications directed to employees that, for example, solicit employee sentiment or disparage the Union are likely to erode or undermine the Union's position as the exclusive bargaining representative of the employees. See *American Pine Lodge Nursing & Rehabilitation Center*, 164 F.3d at 885; see also *N.L.R.B. v. Wallkill Valley General Hospital*, 886 F.2d 632 (3rd Cir. 1989); *Rhode Island State Labor Relations Board and Town of North Providence*, ULP-6221 (2019).

In the present case, the Union has alleged the Employer engaged in illegal direct dealing based on a conversation a DOH management employee, Carol Hall Walker, had with Ms. Santos and two (2) of her co-workers. (Transcript, page 17). According to the testimony before the Board, it is alleged that during a zoom meeting to discuss the activation to the COVID hotline, Ms. Hall Walker told Ms. Santos and two (2) of her co-workers that they "would be getting desk audits because Kristen will be taking over my line centers and she will also be taking over my desk, so I had to move myself, and then Jillian was going to take over some of Donna Soprano's work, and she did say that all three of us would be getting desk audits." (Transcript, page 17 at lines 12 – 19). The Union further alleged that the mention of a desk audit was an attempt by DOH to discourage membership in the Union since, according to the testimony from the Union President, positions that receive desk audits "usually get moved to an NEA position." (Transcript, page 33 at lines 3 – 4).

For its part, DOH submitted evidence before the Board that a desk audit is a process that is contractual in nature and must be initiated by the employee. (Transcript, page 75). Specifically, Ms. Walker testified before the Board that she did discuss a desk audit with Ms. Santos and her colleagues, indicating that the move to the

[4] Section 8(c) of the National Labor Relations Act provides that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of the subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Though the State Labor Relations Act does not contain an identical provision, both R.I.G.L. § 28-7-12 and 28-7-13(10) prohibit an Employer from, among other things, coercing employees in the exercise of their rights under the Act. See *In the Matter of Rhode Island State Labor Relations Board and State of Rhode Island Department of Corrections,* ULP-5251 (2001).

COVID hotline was a possible "career path" for Ms. Santos and "that it would probably be the desk audit process to get there." (Transcript, page 87 at lines 13 – 16). There was no indication in the testimony of Ms. Walker on direct or cross-examination that she mandated or required Ms. Santos and her colleagues to get a desk audit or that she promised that a desk audit would be a positive result for either Ms. Santos or her colleagues. (Transcript, pages 87 – 89).

Based on the Board's review of the evidence and exhibits presented in this matter, there is simply no credible evidence before the Board to suggest that DOH engaged in illegal direct dealing with bargaining unit members over the activation of bargaining unit members to the COVID hotline.[5] Even reviewing the evidence in a light most favorable to the Union, it is apparent that the discussion Ms. Walker had with Ms. Santos and her colleagues regarding a desk audit was designed to be informative and not coercive. As the Collective Bargaining Agreement demonstrates (Joint Exhibit 1, pages 78 – 80) and Dr. Mannock's testimony revealed, a desk audit is a process that is not only initiated by an employee, but is controlled by a set of factors that reveal the process to be an objective review of whether an employee is performing in a position or role that is above the employee's actual job title and pay level. (Transcript, pages 75 – 78). There was, in short, simply no credible evidence before the Board to suggest that DOH was in any way trying to coerce, nudge or even gently push Ms. Santos and/or her colleagues to abandon the Union through the desk audit process. In short, the evidence before the Board does not meet the standards set forth by the NLRB and previously applied by this Board to constitute a violation of the Act for engaging in illegal direct dealing (e.g. *Rhode Island State Labor Relations Board and Town of North Providence*, ULP-6221 (2019)).

Interestingly, the evidence before the Board did reveal that DOH management dealt directly with Ms. Santos regarding her request to telework. (Transcript, pages 63 – 64). While this interaction between DOH management and Ms. Santos was potentially much closer to a claim of inappropriate direct dealing, the Union never raised this interaction as a possible violation of the Act. Thus, the Board does not take a position on whether such conduct might rise to the level of illegal direct dealing.

C. Miscellaneous

As part of its defense, the Employer has asserted that its actions and conduct in this case were authorized/justified by the terms of the management rights clause of the

[5] Ms. Santos testified that during the discussion surrounding the desk audit, Ms. Walker told her "that all three of us would be getting desk audits." (Transcript, page 17, lines 18 – 19). Ms. Walker testified that her conversation with Ms. Santos was more indefinite and couched in language that implied the move to the COVID hotline "was a possible career path for her,…and if it worked out, that it would possibly be the desk audit process to get there." (Transcript, page 87, lines 9 – 16). She also testified that she told Ms. Santos "there was no guarantee but that I did see it as a career opportunity." (Transcript, page 88, lines 2 – 4). Dr. Mannock, the Human Resource Program Administrator with responsibility for, among other things, desk audits, summarized how the desk audit process works (Transcript, pages 76 – 77) and specifically testified without contradiction that while his office would "solicit feedback" from managers his office "exists as an independent body" responsible for the ultimate desk audit analysis and conclusions. (Transcript, page 78). Based on the record evidence as a whole, the Board believes that the conversation between Ms. Walker and Ms. Santos was more for information purposes and not designed to discourage Ms. Santos from remaining a Union member.

Collective Bargaining Agreement and, in particular, the emergency acts provision within that clause and its statutory authority under *Vose v. Rhode Island Brotherhood of Correctional Officers,* 587 A.2d 913 (R.I. 1991) and *Department of Mental Health, Retardation & Hospitals v. Rhode Island Council 94,* 692 A.2d 318 (R.I. 1997) to act to protect the health and safety of individuals in its charge notwithstanding existing contractual restrictions or guardrails. In the instant case, while the Board acknowledges that the Employer has raised these defenses, it is the Board's view that, based on the circumstances of this case, it is unnecessary for the Board to reach a conclusion as to whether or not these defenses apply. Specifically, regarding the activation of Ms. Santos to the COVID hotline, the Board has found no violation of the Act, therefore making the above-identified defenses unnecessary. With respect to the transfer of Ms. Santos to the COVID letters team, there is simply no basis in the Employer's argument to apply these defenses. While the Board acknowledges that the COVID pandemic has created an emergency health situation in Rhode Island, there was no evidence before the Board that the transfer of Ms. Santos to the COVID letters team, albeit at her request, constituted an emergency circumstance for which the above enunciated defenses might apply. Further and as previously discussed, there was ample evidence that the transfer requested by Ms. Santos was due to her personal situation, i.e. the need to be home with her daughter because of remote schooling, rather than an emergency circumstance as reflected in the management rights language. Therefore, as noted above, the Board takes no position on the applicability of the stated defenses for purposes of this case.

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 and protection and as such is a "labor organization" within the meaning of the Rhode Island State Labor Relations Act.

3. The Union and the Employer were subject to a Collective Bargaining Agreement dated July 1, 2017 through June 30, 2020.

4. Commencing in March 2020, the State of Rhode Island has been impacted by the COVID-19 pandemic. This has caused a series of Executive Orders from the Governor of Rhode Island declaring, among other things, a state of emergency within the State.

5. As a result of the COVID-19 pandemic and declaration of a state of emergency, the incident command system at the DOH was implemented.

6. As part of its response to the COVID-19 pandemic, DOH implemented certain working teams to address the pandemic and interactions with the public regarding the pandemic.

7. The Union objected to this exercise of authority by DOH and filed an unfair labor practice charge (ULP-6271) and a declaratory judgment action in Rhode Island Superior Court.

8. Rather than engage in protracted litigation, the Employer and the Union conducted settlement discussions, which resulted in a Settlement Agreement. The Settlement Agreement set forth the rights and responsibilities of the parties with regard to, among other things, the activation of Union members to COVID teams, scheduling issues and how the Employer could add employees to the working teams. The Settlement Agreement also contained an opt out provision which, if exercised, would allow the Union to exit the Settlement Agreement with fifteen (15) days advance notice to DOH.

9. On June 18, 2020, Ramona Santos, a bargaining unit member, was notified that she was being activated to the COVID hotline team. At the time of her activation, Ms. Santos was a Chief Clerk in Council 94's Local 2870 bargaining unit.

10. The activation notice was sent to Ms. Santos and was copied to the Local 2870 Union President.

11. At the time of the June 18, 2020 activation notice, DOH and the Union were parties to a Settlement Agreement. The terms of the Settlement Agreement covered, among other things, how DOH could assign bargaining unit members to COVID working teams.

12. The activation of Ms. Santos was accomplished in accordance with the terms of the Settlement Agreement as then in place.

13. The Union, on July 15, 2020, notified DOH that it was opting out of the Settlement Agreement. The effective date of the opt-out would be fifteen (15) days from the Union's notice to the Employer.

14. In August 2020, Ms. Santos requested directly of DOH that she be allowed to work remotely/telework due to her daughter having a remote school schedule.

15. In September 2020 DOH unilaterally agreed to transfer Ms. Santos to the COVID letters team without notifying the Union or engaging in bargaining with the Union.

16. Prior to Ms. Santos beginning work on the COVID hotline team, she held a zoom meeting with two (2) colleagues and a DOH management employee, Carol Hall Walker. During this zoom meeting, Ms. Hall Walker raised the possibility of Ms. Santos and her colleagues receiving desk audits.

CONCLUSIONS

1. The Union has proven by a fair 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 member Ramona Santos by transferring her to the COVID letters team.

2. The Union has proven by a fair 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 member Ramona Santos by transferring her to the COVID letters team.

ORDER

1. The Employer is hereby ordered to cease and desist from making unilateral changes to working terms and conditions of employment, as it did when it reassigned Ramona Santos to the COVID letters team, without first notifying the Union and giving it the opportunity to bargain over any proposed changes.

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

RHODE ISLAND STATE LABOR RELATIONS BOARD

/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/ Kenneth B. Chiavarini
Kenneth B. Chiavarini, Member (Dissent)

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

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

/s/ Stan Israel
Stan Israel, Member

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

Dated: **February 16, 2021**

By: *Robyn H. Golden*
Robyn H. Golden, Administrator

ULP- 6276

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-6276
STATE OF RHODE ISLAND DEPARTMENT OF HUMAN SERVICES	:	

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 February 16, 2021, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **February 16, 2021.**

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

Dated: February16, 2021

By: ___*/S/ Robyn H. Golden*
Robyn H. Golden, Administrator