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-6284
RHODE ISLAND DEPARTMENT OF ELEMENTARY and SECONDARY EDUCATION	:	

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 Elementary and Secondary Education (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated August 21, 2020 and filed on the same date by the RIDE Professional Employees Union, Local 2012, AFT (hereinafter "Union").

The Charge alleged as follows:

> On June 25, July 16, July 28, August 1 and August 19, 2020, AFT Local 2012, by and through RIFTHP Field Representative Michael Mullane, requested that RIDE bargain with the Union over RIDE's reopening plan. Most Union members are currently working remotely. The Union seeks to bargain over, inter alia, the terms and conditions under which members may continue to work remotely/telecommute, the standards for returning to work at the Shepard Building, and the policies and procedures that would minimize the transmission of Covid-19 for those members who do report back to work in-person. RIDE, through its representatives, including Tom McCarthy, the Commissioner of Education's Chief of Staff, and Anthony Cottone, RIDE's Chief Legal Counsel, has refused to bargain with the Union on the plan or any aspect of the plan. In addition, RIDE has drafted policies changing terms and conditions of employment for bargaining unit members that it intends to implement without bargaining with the Union. Finally, RIDE has ordered bargaining unit members who are working remotely to report back to work at the Shepard Building by September 14, 2020 without addressing long-running structural issues with the building and without developing effective policies to ensure member safety in light of Covid-19. RIDE has refused to provide the Union with information, or even a legitimate reason, for requiring members to report back to the Shepard Building before the parties can negotiate to establish safeguards to minimize the risk of transmission of the coronavirus. By these actions, RIDE has violated, and continues to violate, R.I.G.L. 28-7-13 (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 20, 2020, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (6) and (10) when, through its representative, the Employer (1) unilaterally implemented terms and conditions of employment for returning bargaining unit members working remotely to on site work without discussing implementation of the return to work plan with the Union; (2) failed to provide the Union with

requested information relevant to the Union's administration of the collective bargaining agreement and ability to determine the health and safety of Union members under the Employer's return to work plan; (3) failed to bargain in good faith with the Union regarding the Employer's return to work plan; (4) failed to bargain in good faith with the Union regarding the health and safety of bargaining unit members working remotely who were designated to return to work; and (5)) failed to bargain in good faith with the Union regarding the reopening of the Shepard Building, the effects of reopening the building on bargaining unit members and the various health and safety plans associated with reopening the building to bargaining unit personnel.

The Board initially scheduled a formal hearing, but at the request of the parties the formal hearing was postponed and the matter was placed in abeyance on November 23, 2020. The matter was removed from abeyance on August 30, 2021 and formal hearings were held on December 2 and 9, 2021 and February 3 and 15, 2022. A post-hearing brief was filed by the Union on March 15, 2022 and the Employer filed its brief on March 16, 2022. The Employer submitted a request on March 17, 2022 to file a rebuttal brief to which the Union objected. After consideration of the Employer's motion, the Board denied the request to file a rebuttal brief. The Employer then filed on April 21, 2022 a motion to have the Board reconsider its denial of the request to file a rebuttal brief. After appropriate consideration, the Board denied the Employer's motion to reconsider. 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 alleged failure and/or refusal to bargain with the Union and its refusal to provide certain requested information to the Union. Specifically, the Union claims that the Employer has failed to bargain in good faith with the Union over working remotely, the Employer's plans to return bargaining unit members to the Shepard Building, the reopening of the Shepard Building and the effects of the reopening on the health and safety of bargaining unit members and also the Employer's failure to provide or produce certain documents and information which the Union had requested as necessary and relevant to its administration of the contract and attempt to negotiate with the Employer over claimed mandatory subjects of bargaining.

The genesis of the dispute now before the Board was the declaration by the Governor of Rhode Island in early March 2020 of a state of emergency created by the COVID-19 pandemic (Joint Exhibit 43). As a result of the pandemic, the Employer halted the overwhelming majority of its in-person operations at the Shepard Building and allowed bargaining unit members to work remotely. (Transcript, Vol. I at pages 25 – 26).[1] (Joint Exhibit 5). As part of the remote work being performed by bargaining unit personnel, the Employer created a Working From Home Policy (also referred to as "WFH") that established certain criteria for the Employer to determine the "applicability/suitability" of employees working from home. (Joint Exhibit 5). On March 18, 2020, the Union's Field Representative, Mike Mullane, sent correspondence to Deputy Commissioner Ana Riley regarding the Working From Home Policy. (Joint Exhibit 6). While Mr. Mullane was

[1] In this decision, the Board will refer to the transcripts as follows: Volume I refers to the hearing before the Board on December 2, 2021; Volume II references the hearing before the Board on December 9, 2021; Volume III references the hearing before the Board on February 3, 2022; and Volume IV references the hearing before the Board on February 15, 2022.

complimentary of the Employer's quick response to the "pressing demands" created by the pandemic, Mr. Mullane raised questions regarding how the Working From Home Policy impacted bargaining unit members regarding mandatory subjects of bargaining surrounding the health and safety of said members. Because of these concerns, Mr. Mullane requested a "telephone meeting" to "begin the necessary negotiations" over the issues raised in his letter. (Joint Exhibit 6).

On March 19, 2020, Deputy Commissioner Riley responded to Mr. Mullane's correspondence. (Joint Exhibit 7). In her response, the Deputy Commissioner asserted, in relevant part, that the "adoption of the WFH (Working From Home) Policy does not constitute a unilateral change in any working condition, nor does it conflict in any way with Union members' rights under Article 6.1 of the CBA." (Joint Exhibit 7). The Deputy Commissioner went on to assert that the Working From Home Policy was not a mandatory subject of bargaining and that the Employer had "no duty to bargain under the present state of emergency with respect to the WFH Policy presently in effect, which contains ample flexibility to address any specific hardship that any member of the Union may face." (Joint Exhibit 7).[2] In response to the Deputy Commissioner's apparent unambiguous refusal to accede to the Union's request for bargaining regarding the Working From Home Policy, Mr. Mullane wrote back to the Deputy Commissioner expressing his disagreement with her position and reiterating the Union's request "to meet with you to discuss concerns of the membership that include the implementation of the teleworking policy, but also include health and safety concerns of our members that exist due to the coronavirus pandemic." (Joint Exhibit 8). As part of this correspondence, Mr. Mullane also proposed that any meeting between the parties regarding the Union's request would not be viewed as an admission by the Employer that "the issue of teleworking is a mandatory subject of bargaining." (Joint Exhibit 8). Mr. Mullane's idea appeared to express an "agree to disagree" position without either party being harmed by meeting and discussing the Working From Home Policy. Mr. Mullane reiterated this neutrality proposal in his testimony before the Board when he indicated that the Union was not intending to waive any of its rights to assert that the Working From Home Policy was a mandatory subject of bargaining where the health and safety of bargaining unit members was involved. (Transcript, Vol. I at pages 28 – 29). Instead, according to Mr. Mullane's testimony, meeting with the Employer over these important issues was the best way to represent the bargaining unit. (Transcript, Vol. I at page 28).

Thereafter, the parties had periodic discussions regarding the Working From Home Policy and issues involved in keeping workers safe, but it was clear from the testimony that no negotiations occurred between the parties regarding the Employer's Working From Home Policy. (Joint Exhibits 9 and 10; Transcript, Vol. IV at page 120). The parties did agree to form a Health and Safety Committee to discuss concerns related to the then-raging pandemic. (Transcript, Vol. I at pages 40 – 41). Mr. Mullane testified that although he believed no bargaining occurred between the parties regarding the Employer's Working From Home Policy, there was no need to take the issue any further as all Union members were working from home and there were no complaints from the Employer regarding problems with bargaining unit members working from home. (Transcript, Vol. I at page 38).

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[2] Mr. Mullane testified that his view of the Deputy Commissioner's March 19 response was a refusal to bargain. (Transcript, Vol. II at pages 34 – 35). His position was further emphasized by a letter sent to the Deputy Commissioner on March 19 in which Mr. Mullane, on behalf of the Union, specifically disagreed with the Deputy Commissioner's position that the Employer had no obligation to bargain with the Union. (Joint Exhibit 8).

In late March 2020, the Employer noticed the Union of a working from home document that "Directors will be sharing with their teams-this will provide a tool for consistency across all offices." (Joint Exhibit 11). Upon receiving this notification, the Union responded that the form violated the collective bargaining agreement. (Joint Exhibit 13). However, before this dispute could blossom into a conflagration, the Union President and the Employer's Chief Legal Counsel communicated regarding the work from home form and certain revisions proposed by the Union were adopted by the Employer. (Transcript, Vol. I at page 35 – 37; Transcript, Vol. IV at pages 13 – 17).

From March until the end of June 2020, all Union members were working remotely and no real issues surfaced between the parties.[3] In May 2020, the Employer agreed to create a Health and Safety Committee. The committee's membership was comprised of individuals from management, the Union (Local 2012) and members of Council 94 (another Union representing a portion of the Employer's workforce). (Transcript, Vol. III at pages 6 – 7). The purpose of the Committee was to share information and apparently it worked relatively well for most of the spring and into the summer. (Transcript, Vol. III at pages 7 – 8). Mr. Mullane testified that the Health and Safety Committee was not a negotiating committee, nor was it a substitute for negotiations. (Transcript, Vol. I at page 41).

However, the tranquility that seemed to exist with remote work through the spring and into the early summer of 2020 was ruptured in late June when the Employer sent a notice to all employees indicating that there would be a change in the in-person screening procedures previously in place. (Joint Exhibit 21). Some of the changes being identified were specific to members of the Union. These proposed changes had been proposed by the Employer without any discussion or input from the Union. (Transcript, Vol. III at page 10). The Union expressed its concerns regarding the unilateral change to the in-person screening process and the lack of communication with the Union by the Employer (see Joint Exhibit 23, pages 2 – 4), which was acknowledged by the Employer in a communication with the Union (see Joint Exhibit 23 at page1). Once again, the Union made a request of the Employer to negotiate with the Union, this time over the reopening plan and the in-person screening process. (Joint Exhibit 28 at page 6). In addition, Mr. Mullane requested that the Employer suspend implementation of the new screening process until negotiations between the parties were completed. (Joint Exhibit 28 at page 6). In response, the Employer rejected Mr. Mullane's request and made clear its skepticism over any bargaining obligation. (Joint Exhibit 28 at page 5). In response, Mr. Mullane emailed the Employer's Chief of Staff indicating that the screening process created "a number of implications for members' rights and interests, as well as terms and conditions of employment, included in RIDE's plan for reopening, and its announced new screening process policy." (Joint Exhibit 28 at page 5). Mr. Mullane concluded by asserting, once again, that the actions of the Employer "trigger bargaining obligations that we're seeking to address in our request to bargain." (Joint Exhibit 28 at page 5). In response, on June 27, the Employer's Chief of Staff sought specificity as to the Union's concerns and the "implications for members' rights and interests." (Joint Exhibit 28 at page 4). On July 16, Mr. Mullane responded to this request with a list of seven "specific areas of concern of the Union and its members related to these negotiations . . . ." (Joint Exhibit 28 at

[3] During this period, the newly-created Health and Safety Committee, which was comprised of management personnel as well as members of both unions representing the employees employed by the Employer (i.e. Local 2012 and Council 94), met regularly and shared information regarding issues surrounding working from home and the pandemic. (Transcript, Vol. III at pages 6 – 9; pages 44 – 50).

pages 3 – 4).[4] Despite the back and forth between the parties without any apparent agreement between them regarding bargaining obligations, the parties did agree to meet on August 5, 2020. At this meeting, the Employer's Chief of Staff, Tom McCarthy, informed the Union that the Employer was in the process of drafting reopening plans. The Union requested copies of the plans that were being developed. (Transcript, Vol. I at pages 57 – 58).

Approximately a week after the August 5 meeting, on August 13, 2020, the Union President sent an email to the Employer inquiring as to whether it was going to receive the documents that it had requested at the August 5 meeting. (Joint Exhibit 36). The Union President's message also inquired as to whether the next meeting would be a "negotiations kick off." (Joint Exhibit 36). The Employer responded that the Union should receive the documents it requested before the next meeting but made no mention of whether the meeting would be negotiations. (Joint Exhibit 36). On August 14, 2020, one day after the Employer assured the Union President he would receive the documents the Union had requested prior to the next meeting, the Commissioner of Education sent an email to all employees with a subject line "RIDE Reopening Updates." (Joint Exhibit 37). The email discussed a number of health and safety issues, including an updated Working From Home Policy, a COVID-19 control plan and a timeline for the Employer resuming in-person operations. (Joint Exhibit 37). Four days later and one day before a scheduled August 19, 2020 meeting between the parties, the Employer's Director of Human Resources sent a draft Working From Home Policy to the Union President and Mr. Mullane. (Joint Exhibit 39). The new policy, which replaced the Working From Home Policy implemented by the Employer in March 2020, dealt with the process of working from home, the process for securing permission to work from home and the criteria that would have to be followed, contents of a form that would have to be filled out for those individuals wanting to work from home and the process if someone was denied such a request. (Joint Exhibit 39). The next day, August 19, 2020, Union representatives met with Employer representatives. (Transcript, Vol. I at page 61 – 69). At this meeting, Mr. Mullane was singularly focused on whether the meeting was a bargaining session consistent with the Union's request for bargaining over mandatory subjects. (Transcript, Vol. I at page 64). In response, the Employer indicated that it would not negotiate over health and safety, the return to work of bargaining unit members or any matters upon which the Union had requested bargaining. (Transcript, Vol. I at page 64; Vol. III at pages 16 – 19).[5]

During the August 19 meeting, the Union pursued with the Employer the reason why the Employer believed it was necessary for the Employer to require bargaining unit members to report back to work with the pandemic still raging. (Transcript, Vol. I at pages 64 – 66). Mr. Mullane testified that he pointed out to the Employer that bargaining unit members were working from home, were working efficiently from home and considered themselves to be working as

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[4] The response from Mullane to the Employer prompted a back and forth with the Employer seeking more specifics from the Union and the Union indicating that the Employer had an obligation to bargain and that the Union had no obligation to provide any further specificity regarding its concerns. (Joint Exhibit 28 at pages 1 – 3). As will be discussed later in this decision, this small snippet of email correspondence demonstrated the Union's near constant request for bargaining over claimed mandatory subjects of bargaining such as health and safety and the Employer's intransigence and recalcitrance to agreeing that it had an obligation to bargain over issues such as its reopening of the workplace and other potential changes to terms and conditions of employment.

[5] According to Mr. Cottone's testimony regarding the August 19 meeting, he was waiting for a proposal from the Union hoping to find out what their specific concerns were. (Transcript, Vol. IV at page 82). In addition, Mr. Cottone specifically denied that the Employer refused to bargain with the Union and instead attempted to clarify that there were aspects of the health and safety protocols that the Employer could not bargain over while admitting that he recognized health and safety practices were mandatory subjects of bargaining. (Transcript, Vol. IV at pages 55 – 56).

productively as ever. (Transcript, Vol. I at page 65). Mr. Mullane then asked the Employer for information that would show the Union that it was impossible for bargaining unit members to work from home when they had been working from home since March and were doing so efficiently. (Transcript, Vol. I at page 65). According to Mr. Mullane's testimony, the Employer's response was that it would not tell the Union what jobs could only be performed in person, nor would they tell the Union what parts of jobs could only be performed in person and that it felt it had no obligation to bargain with the Union over that issue. (Transcript, Vol. I at pages 66 – 67). Despite the Union's request for information regarding the allegation about employees not working efficiently and issues raised by Council 94 concerning Local 2012 members not working efficiently, the Employer refused to provide any information on this issue to the Union. (Transcript, Vol. I at pages 67 – 68). The meeting concluded with no resolution to the Union's concerns.

After the August 19 meeting, Mullane sent an email to the Commissioner of Education outlining the substance of the August 19 meeting, the Employer's refusal to negotiate over mandatory subjects of bargaining such as health and safety interests of bargaining unit members and the reopening of in-person work and urged the Employer to negotiate in good faith over these mandatory subjects. (Joint Exhibit 41). Mr. Mullane's email to the Commissioner of Education also included an attachment that specified the Union's concerns regarding reopening. (Joint Exhibit 41, pages 3 – 6). Notwithstanding the numerous requests for bargaining made by the Union, on August 20, 2020, the Employer unilaterally implemented its Working From Home Policy replacing the March Working From Home Policy. (Joint Exhibit 42; Transcript, Vol. I at page 72). With regard to the newly implemented form, Mr. Mullane testified as to significant differences between the new form and the Working From Home Policy form used in March 2020. (Transcript, Vol. I at pages 72 – 73). He also testified about the Union's health and safety concerns regarding the new form. (Transcript, Vol. I at pages 73 – 76).

On August 21, 2020, after receiving the Working From Home Policy and unsuccessfully attempting to get the Employer to engage in negotiations over the Policy, the Union filed the instant unfair labor practice charge.

The Union continued to communicate with the Employer regarding its concerns and its requests for bargaining over the Employer's actions even after having filed the unfair labor practice with this Board. (Petitioner Exhibit 1; Transcript, Vol. I at pages 77 – 79). Unfortunately, the Union received no response from the Employer to its bargaining request. Even after the filing of the unfair labor practice, there was evidence submitted by the Union that the Employer continued to unilaterally change and revise the work from home form. (Petitioner Exhibit 3).

POSITION OF THE PARTIES

Union:

The Union claims that the Employer has refused to bargain with it over mandatory subjects of bargaining, has made unilateral changes to terms and conditions of employment and has failed to bargain in good faith with the Union over the Employer's return to work plans, the health and safety of Union members returning to work or working remotely and the reopening of the Shepard Building and the effects of reopening the building on bargaining unit members who may return to work in the building. In addition, the Union claims that the Employer has failed to provide it with certain information the Union requested as relevant to its request to bargain regarding the

Employer's return to work plans. The Union asserts that these actions by the Employer were in violation of the Rhode Island State Labor Relations Act (hereinafter "Act").

Employer:

In contrast to the Union's position, the Employer asserts that it has not violated the Act with respect to its reopening plans, remote work plans or the reopening of the Shepard Building. It also denies that it failed or inappropriately withheld information that the Union requested asserting instead that the information the Union sought did not exist and was not in the Employer's possession. The Employer's position is that it met with the Union and/or kept the Union informed throughout the process of implementing its remote work plans and, later, its return to work and reopening plans involving both the Shepard Building and bargaining unit members returning to work. The Employer further claims that its unilateral implementation of remote work plans and other coronavirus related actions did not violate the Act as the Union waived its right to bargain over these actions and other health and safety related acts. The Employer also asserts that it had no obligation to bargain with the Union over certain aspects of its plans as it was required to act under State statute, regulation and/or Executive Order.

DISCUSSION

The issues before the Board encompass alleged unilateral action by the Employer in the development and implementation of a working from home policy, a failure to bargain with the Union over mandatory subjects of bargaining, a failure to bargain in good faith with the Union regarding return to work plans, the health and safety of bargaining unit members designated to return to in-person work and the reopening of the Shepard Building and the impact of the reopening on the health and safety of bargaining unit members. In addition, the Union has alleged that the Employer has failed to provide the Union with documents and information it requested as relevant to its ability to bargain with the Employer over claimed mandatory subjects of bargaining. As will be discussed in greater detail below, the Board has reviewed the documentary and testimonial evidence presented to it along with the memoranda of law submitted by the parties. Based on all the evidence, it is apparent that the Employer violated the Act by unilaterally changing terms and conditions of employment, by failing to bargain with the Union over mandatory subjects of bargaining, by failing to bargain in good faith with the Union and by not appropriately responding to the Union's legitimate request for information.

A. The Employer Unilaterally Changed Terms and Conditions of Employment in 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. §28-7-12; §28-7-14; §36-11-7; *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5799 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Fire Fighters, AFL-CIO v. The Town of North Providence*, PC-13-5202 (September 26, 2014); and *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an employer

is in violation of a governing collective bargaining statute "when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the union.")).[6]

In the present case, there is little dispute that the Employer, on several separate occasions, introduced materials and forms regarding the working from home process that were not negotiated with the Union (Transcript, Vol. I at pages 26 – 29; pages 71 – 75; Joint Exhibits 5, 11, 21, 39 and 42). This unilateral action by the Employer clearly had an impact on the working terms and conditions of employment of bargaining unit members as one policy changed the nature of the work environment for employees (from working in an office at the Shepard Building to working from home) and how they would report and interact on a daily basis with co-workers and their supervisors (Joint Exhibits 5 and 11) and a subsequent policy sought to reverse that process by returning employees to an office environment while, arguably, the pandemic (the reason for the work from home rule in the first place) was still raging (Joint Exhibit 39). As Mr. Mullane testified, the Union believed the changes to be both substantive and significant:

> Q. And how does this form differ, just generally, and you don't need to be specific, but generally, from the form that was in place in March of 2020?
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> A. Well, in March of 2020 essentially all of our members were working from home and, ultimately, there was a form that they had to fill out that -- while they may have had to fill out the form to satisfy the procedure of requesting to work from home, they were all working from home. This form is significantly different in that it comes from the perspective of you're going to work at the Department unless you fall into certain of these categories in No. 1, you know. You have to -- if you're going to work from home, you need to tell us which of these categories you fall under, and so that was significantly, very significantly different from what had been the case at the beginning of the pandemic in March of 2020.
> (Transcript, Vol I at pages 72 – 73)

There can be little argument that changing an employee's working environment impacts the employee's terms and conditions of employment. (See *Rhode Island State Labor Relations Board v. Middletown School Department,* ULP-6257, June 30, 2020). 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 little dispute that the actions taken by the Employer, i.e., changing the working terms and conditions of employment of bargaining unit personnel, are mandatory subjects of bargaining which require the Employer to bargain with the employees' exclusive bargaining representative. (See R.I.G.L. § 36-11-7; *Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO,* 107 A.3d 304, 313 (R.I. 2015).[7]

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

[7] As R.I.G.L. 36-11-1 makes clear, the right to bargain on a collective basis with respect to wages, hours, and other conditions of employment;" is part of the panoply of rights given to State employees by the statute. These rights are further enunciated within R.I.G.L. 36-11-7. 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).

Even actions taken by the Employer for the benefit of the bargaining unit (removing employees from in person office work and allowing/directing them to work from home in order to avoid the potential of contracting or spreading COVID-19) does not mitigate or eliminate the Employer's obligation to bargain over how the work from home process will be conducted or how it will proceed.[8] The evidence before the Board demonstrates that the actions taken by the Employer in announcing that working from home would occur and, later, announcing that employees would be returning to the office except under conditions established by the Employer without consulting with the Union is the definition of a unilateral change (see *Rhode Island State Labor Relations Board v. State of Rhode Island Department of Labor & Training,* ULP-6280, March 8, 2022). In this case, the unilateral action also directly impacted the working conditions of bargaining unit members (Transcript, Vol. I at pages 71 – 75; Transcript, Vol. III at pages 11 – 14; Joint Exhibit 33). As this Board has previously noted, such conduct violates the Act.

B. The Employer Failed to Bargain with the Union.

In addition to unilaterally changing terms and conditions of employment for bargaining unit members, the Employer failed to bargain with the Union over the unilateral change it implemented when it distributed the Working From Home Policy in March 2020 and a revised version in June 2020 (Joint Exhibits 5, 11, 21, 39 and 42). 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. §36-11-7).

As noted above, the Board need not spend a great deal of time on whether a unilateral change by an employer to terms and conditions of employment represents a mandatory subject of bargaining. This Board's decisions as well as the overwhelming number of decisions from Rhode Island courts, the NLRB and the federal courts all support the notion that wages, hours and terms and conditions of employment represent mandatory subjects of bargaining and changes in these areas by an employer obligates the employer to bargain with the union representing the employees before making any changes. *See NLRB v. Katz,* 369 U.S. 736 (1962); *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012). Thus, the United States Supreme Court made clear in *Litton Financial Printing Division, A Division of Litton Business Systems, Inc. v. National Labor Relations Board*, 501 U.S. 190, 198 (1991) that "[n]umerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA."

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[8] As will be discussed later in this decision, this conclusion applies even where, as here, the Governor had issued an Executive Order directing employees to work from home because of the pandemic (Joint Exhibits 43 - 50).

In Rhode Island, R.I.G.L. §28-7-13 (6) makes it an unfair labor practice for an employer to "refuse to bargain collectively" with its employees' representative. Generally, an employer violates its bargaining obligation when it refuses to bargain with its employees' representative concerning wages, hours and other terms and conditions of employment, so-called mandatory subjects of bargaining. Much has been written on the subject of what constitutes a mandatory subject for bargaining. Mandatory subjects of bargaining are those subjects that address wages, hours and other terms and conditions of employment. The determination of whether an item is to be considered a mandatory bargaining subject has been discussed by the NLRB and the United States Supreme Court on numerous occasions. Thus, for example, in *Ford Motor Company v. NLRB*, 441 U.S. 488 (1979), the Supreme Court described mandatory bargaining subjects as those subjects that are "plainly germane to the 'working environment'..." Similarly, our Supreme Court has recognized that items which are considered mandatory subjects of bargaining are subject to both negotiation and/or arbitration. *See Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 107 A.3d 304, 313 (R.I. 2015); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342, 349 (1958); *Barrington School Committee v. Rhode Island State Labor Relations Board, supra*; *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, supra*; and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra.*

In the instant case, the Union was afforded no legitimate opportunity to bargain with the Employer over work from home forms implemented by the Employer, health and safety concerns of bargaining unit members working remotely who were designated or required to return to in-person work nor was it given any real ability to negotiate about the Employer's reopening and return to work plans despite numerous pleas for such engagement (Joint Exhibits 6, 8, 28, 36 and Petitioner 1). In fact, the Employer was quite vociferous in its contention that it had no obligation to bargain with the Union over its March 2020 Working From Home Policy or the unilateral revamping of that policy in June 2020. (See Joint Exhibits 7, 28, 36 and 41; Transcript, Vol. I at pages 25 – 27; pages 61 – 69; Vol. III at pages 15 – 19).

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)*. In the instant case, the Board is presented with the question of whether health and safety concerns involving bargaining unit members working from home versus working in person in the Shepard Building constitute a mandatory subject of bargaining. Health and safety issues have long been considered mandatory subjects of bargaining by the NLRB and the courts. (See *NLRB v. Gulf Power Co.,* 384 F.2d 822 (5th Cir. 1967); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) in which the Supreme Court specifically identified "safety practices" as a condition of employment in defining the bargaining duty of an employer; *Armour Oil Co.*, 233 NLRB 1104 (1981)). The Union made clear in numerous communications to the Employer that it had concerns regarding the health and safety of bargaining unit members including the Employer's desire to return to in person work (see Joint Exhibits 6, 8, 22, 26, 28 and 41). While the Employer in its testimony seemed to want to have it both ways, arguing in one breath that it had no obligation to bargain over health and safety while, in the next breath conceding that health and safety issues were subject to bargaining (Transcript, Vol. IV at pages 28 – 33; pages 36 – 38; pages 40 – 44; 55 – 56), from the evidence before the Board it is clear that the

Employer's failure and refusal to bargain over the health and safety concerns of the Union was in violation of the Act.[9]

C. The Union's Request for Relevant Information Should Have Been Honored by the Employer.

The next issue before the Board is whether the actions of the Employer in failing and refusing to provide the Union with certain requested documents, materials and other information the Union claimed to be relevant to its request to bargain with the Employer over the latter's unilateral actions and plans impacting the health and safety of bargaining unit members constitutes a violation of the Act. As discussed in more detail below, it is the Board's view that the documents and information requested by the Union were relevant to the Union's administration of the contract and its ability to bargain with the Employer concerning the Employer's reopening plans and the impact of the reopening plans on the health and safety of bargaining unit members. As such, the Employer's refusal to produce the requested information constitutes a violation of the Act. In addition, in failing to provide those requested documents and/or other information requested by the Union, the Employer has also violated its bargaining obligation with the Union and, therefore, violated the Act.

As noted, this case involves whether the Employer is required to produce information that the Union requests and claims is relevant to its administration of the contract and its request to bargain with the Employer over mandatory subjects of bargaining and unilateral changes by the Employer to terms and conditions of employment. This is an issue that this Board, the National Labor Relations Board ("NLRB") and the United States Supreme Court have all previously addressed. *See City of Cranston,* ULP-5744*; Roseburg Forest Products Co.,* 331 NLRB 999 (2000); *National Labor Relations Board v. Acme Industrial Co.*, 385 US 432 (1967); *Detroit Edison v. NLRB*, 440 US 301 (1979). In each of these cases and many more cases decided by the NLRB and the courts, it is clear that an employer must provide "relevant information needed by a labor union for the proper performance of its duties as the employee's bargaining representative." *See Detroit Edison v. NLRB*, 440 US at 303.

In a recent decision addressing this issue, this Board, in the *City of Cranston* case, was presented with a situation involving the termination of a bargaining unit member and the Union's request for a copy of the terminated member's personnel file. The city, claiming that the personnel file was confidential, would not provide a copy to the Union unless and until the Union secured the written permission of the impacted member. In determining that the city's refusal to produce the personnel file as requested was a violation of the Act, the Board noted as follows:

> It is well established that an employer is obligated to supply requested information that is potentially relevant and will be of use to the Union in fulfilling its responsibilities as exclusive bargaining representative. *Roseburg Forest Products Co.*, 331 NLRB 999, 1000 (2000). The purpose of this rule is to enable the union to understand and intelligently discuss the issues raised in grievance handling and contract negotiations. *Rivera-Vega v. Conagra*, 70 F.3d 153, 158 (1st Cir. 1995). Information relating to wages, hours and other terms and conditions of employment is presumptively relevant and necessary for the Union to perform its obligations. *Roseburg*, supra. While the right to obtain relevant

[9] The Board acknowledges that the Employer relied upon its belief, based on an opinion from its chief legal counsel, that the Governor's Executive Orders prohibited or restricted the Employer's ability to negotiate about certain subjects. As will be discussed later in this decision, the Board rejects this reasoning as without merit or legal support.

> information is not unfettered, the party asserting confidentiality bears the burden of proof. *Roseburg*, supra.
>
> *City of Cranston*, ULP-5744, page 3.

The above language makes clear that a request for documents and/or other information that the Union claims is relevant to its processing and understanding a grievance or is necessary for it to engage in contract negotiations is material that an employer, upon receiving the request, is obligated to comply with under most circumstances. A failure to provide such information without a justifiable explanation for refusing to do so makes the Employer's conduct a violation of the Act. See *Rhode Island State Labor Relations Board and State of Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals,* ULP-6261/6270 (August 24, 2021).

In the instant case, the Union was faced with the Employer's claims that it was requiring bargaining unit members to return to work because, among other things, remote working had allegedly been proved to be inefficient (Transcript, Vol. I at pages 64 – 68; page 95). However, when the Union requested that the Employer provide the Union with specific information in order to be able to negotiate with the Employer concerning its actions, the Employer failed to provide the requested materials (Transcript, Vol. I at pages 58 – 59; 64 – 68). As Mr. Mullane testified, the Union was seeking the following materials:

> And so we were trying to find out as we're getting close to the point where the employer seemed to be saying everybody has got to come back, we were representing to the employer that our members -- as the survey had shown that we had shared with them, that our members are working from home, they're working efficiently from home, they consider themselves to be working as productively as ever and as hard as they've ever worked. And we said, "Show us where that's not the case. Show us whose job is such that it is impossible for them to work from home when they've been working from home this whole time efficiently?" So we wanted to know who is it that can't work from home, who is it that has to work at the Department, what parts of their job are such that it is impossible for them to be working from home because the guidance from the state, not only to protect employees, but to protect against the proliferation of the virus was that if you can work from home, if it's possible for you to work from home, you should be working from home. And so we wanted to know from RIDE -- we wanted that information from RIDE. So that was the main part of our purpose of continuing the meeting was to find that out from them.
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> Transcript, Vol. I at pages 65 – 66.

In response to this request, according to Mr. Mullane's testimony, the Employer's legal counsel, Mr. Cottone, stated as follows:

> he would not tell us, he would not tell us what jobs could only be performed at the Department. He would not tell us what parts of jobs could only be performed at the Department, he generally said that that's a conversation that employees are going to have to engage in with their immediate supervisors and that that's not something that they felt that they had the obligation to bargain with us over or that they were going to bargain with us over.
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> Transcript, Vol. I at pages 66 – 67.

More to the point, while the Employer argues to this Board that the information requested by the Union didn't and doesn't exist as the Employer did not do any studies of work efficiency by remote

workers (Transcript, Vol. IV at pages 58 – 59), the Employer, according to the evidence before this Board, never made this clear to the Union (see Transcript, Vol. I at page 95).[10]

Prior to the above request made at the August 19 meeting, the Union had made a previous request for information at an August 5 meeting between the parties. The request on August 5 included

> all of what RIDE was working on with respect to this issue of reopening, you know, what the provisions were, the draft they'd been thinking with respect to working -- the continuation of working from home, the termination of working from home, all of what their thinking was, we were requesting those documents and any other documents pertaining to the planned reopening of the Department, reopening in the sense that our members would be by RIDE's requirement coming back to work at the Shepard Building.
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> Transcript, Vol. I at page 58.

According to Mr. Mullane's testimony, the above requested information was not provided to the Union by the Employer but, instead, was made public by the Employer through an email to all the Employer's employees (Transcript, Vol. I at pages 58 – 60; Joint Exhibit 37).

Under both our Act and the National Labor Relations Act (NLRA at Section 8(a)(5)), there is a general obligation intertwined with the duty to bargain in good faith to "supply the union, upon request, with sufficient information to enable it to understand and intelligently discuss the issues raised in bargaining." *S.L. Allen & Co.,* 1 NLRB 714, 728 (1936); see also *Industrial Welding Co.*, 175 NLRB 477 (1969); *American Baptist Homes of the West*, 362 NLRB 1135, 1136 (2015), citing *NLRB v. Acme Industrial Co.*, 385 US 432 (1967); see also R.I.G.L. 36-11-7; *Belanger v. Matteson,* 346 A.2d 124 (R.I. 1975).

Following this line of thinking in a long line of cases, the NLRB has applied a liberal test to determine whether information is relevant by looking at whether the requested information is of "probable" or "potential" relevance. *Transport of New Jersey*, 233 NLRB 694 (1977); *American Baptist*, at 1136-1137. As the NLRB has previously stated, relevant information is "information...directly related to the union's function as a bargaining representative and that it appear reasonably necessary for the performance of this function." *Food Service Co.,* 202 NLRB 790 (1973); *Otis Elevator Co.*, 170 NLRB 395 (1968); *Oaktree Capital Management*, 353 NLRB No. 127 (2009); *Metropolitan Home Health Care*, 353 NLRB No. 3 (2008). In the instant matter and according to the testimony provided to the Board, the Employer, in wanting to return employees to in person work, had indicated to the Union, among other things, that employees could be more efficient working in the Shepard Building and that members of another Union

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[10] According to Mr. Cottone's testimony, when asked what he recalled about the Union's request for information regarding teleworking he responded as follows:

A. They asked why it was not possible for their members to work from home. And they further asked why -- or they asked us to identify those job descriptions and those functions that could not be in effect -- that could not be performed from home.

Q. And what was your response; did you respond to the union?

A. I said we can't do that. We haven't done that. I mean, that's why I included that I thought they were looking for something different than what temporary, COVID-related, safety-focused policy was. In other words, that is not related to the job functions and doing it by category of working from home. There's no connection. We never did an analysis of that nature at all, ever, in terms of linking job function with working from home. (Transcript, Vol. IV at page 59).

After being asked by counsel if the Employer had such information in its possession, Mr. Cottone asserted that the Employer did not. However, according to the testimony before this Board, it does not appear that such an assertion was ever clearly made known to the Union. (Transcript, Vol. IV at page 59).

(Council 94) had told the Employer that their jobs were being made more difficult because members of Local 2012 were working from home. (Transcript, Vol. I at page 67). Thus, the Union's request for information showing that inefficiencies had been addressed or discussed with bargaining unit members or there was an actual need to have employees work in person is, in this Board's view, certainly relevant to the discussions that the Union had been requesting with the Employer. Similarly, information about how the return to work would be accomplished and the health and safety concerns of employees returning to work was clearly relevant information that the Employer should have shared with the Union or been clear that no such information existed.

In the present case, there was no evidence submitted to this Board that in any way demonstrated the information requested by the Union was not relevant to its ability to negotiate with the Employer over issues involving health and safety and returning employees to in person work. In fact, the Employer did not even argue against the relevancy claims made by the Union regarding the information requests. As noted above, the Employer submitted no evidence to the Board to suggest that the documents and materials requested by the Union were not relevant to aid the Union in in its discussions with the Employer.

The Employer has apparently tried to imply that the information or documentation requested by the Union was not available because it did not exist. Obviously, an employer cannot produce documents or materials that do not exist nor is an employer obligated to create information that is not in its possession or does not exist simply because the Union has made a request for such information. However, the Employer cannot put forth reasons for wanting employees to return to in-person work and then either refuse to produce or fail to support its reasoning when the Union questions its motivations. Further, the Employer was obligated to make a reasonable search of its records to determine whether the information requested by the Union existed and, if so, it should have been provided to the Union. Again, no evidence was presented to this Board to suggest that the Employer acted to satisfy its obligation in this area. Under the circumstances, the Employer's failure to produce the information requested constitutes a violation of the Act.

D. The Employer's Defenses

The Employer has basically argued in this case that it had no obligation to bargain with the Union over its unilateral action in implementing a Working From Home Policy and later requiring bargaining unit members to return to in person work. The Employer claims that the conduct of the Union shows that the Union had waived its right to contest or bargain over the Employer's policy and/or its actions. The Employer has also argued that was under no obligation to bargain with the Union regarding issues covered by the Governor's Executive Orders. The Employer further argued that any alleged unilateral action it engaged in was not a material or substantial change in terms and conditions of employment and, therefore, no bargaining obligation arose as a result of its failure to bargain with the Union. The Employer also posits that even if its Working From Home Policy and requirement that employees return to in person work were considered mandatory subjects of bargaining that it has met its bargaining obligation through its various meetings and communications with the Union. Finally, the Employer argues that it did not fail to provide the Union with requested information because the Employer did not have the information in its possession. As will be discussed in more detail below, the Board rejects these arguments by the Employer as insufficient, inapplicable and/or without merit to justify its actions in violation of the Act.

I. The Employer's Obligation to Bargain

The issue before the Board is whether the actions of the Employer in making unilateral changes to working terms and conditions of employment and allegedly failing to bargain with the Union over the claimed unilateral changes is a violation of the Act.

A failure to bargain with the exclusive representative of the employees over a mandatory subject of bargaining, as this Board has repeatedly stated, is a violation of the Act. In addition, 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. § 36-11-1(a) and (b); 36-11-7; *Rhode Island State Labor Relations Board v. Middletown School Department,* ULP-6257A (September 9, 2020); *(Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an employer is in violation of a governing collective bargaining statute "when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the union"). In the case before the Board, the Employer has defended its actions and conduct by claiming, as previously noted, that it had no obligation to bargain with the Union, even if it had an obligation to bargain over mandatory subjects it met its bargaining obligation and even if it had an obligation to bargain with the Union the obligation has been satisfied as the Union waived any right it had to bargain through its acquiescence and conduct.

It appears that the Employer's position that it had no legal obligation to bargain with the Union is centered around a variety of positions, i.e., its Chief Legal Counsel opined it had no duty to bargain and the issuance of Executive Orders from the Governor removed those subjects (such as health and safety and returning to work) from bargaining consideration (see Transcript, Vol. IV at pages 28 – 33). The Board will address each of these positions separately, but it is clear from the entire record before the Board that the Employer had an obligation to bargain with the Union over mandatory subjects of bargaining (such as health and safety concerns, working from home and returning employees to in person work) and the Governors Executive Orders did not abrogate or eliminate that responsibility from the Employer.

This Board needs to spend little time on whether an employer is obligated to bargain with a union over issues identified as mandatory subjects of bargaining. See R.I.G.L. 36-11-1(a); *Rhode Island State Labor Relations Board and Middletown School Department,* ULP-6257A (September 9, 2020); *Rhode Island State Labor Relations Board and State of Rhode Island Department of Labor & Training,* ULP-6280 (March 8, 2022). Similarly, there should be little, if any, legitimate debate that changing terms and conditions of employment, which in this Board's view (and the view of the NLRB) includes changes to or an impact upon employee health and safety, constitutes a mandatory subject of bargaining. See *Rhode Island State Labor Relations Board and Middletown School Department,* ULP-6257A (September 9, 2020); see *Armour Oil Co.*, 253 NLRB 1104 (1981); *Lockheed Shipbuilding & Construction Co.,* 273 NLRB 171 (1984). In the present case, the Employer unilaterally implemented a Working From Home Policy that, by its very nature, changed how, where and under what circumstances bargaining unit members would be conducting their day to day job functions and responsibilities (see Joint Exhibits 5 – 7; Transcript,

Vol. I at pages 26 – 27). Thereafter, the Employer sought to change and modify the Working From Home policy as part of its plan to reopen in person working without including the Union (see Joint Exhibits 37 and 38; Transcript Vol. I at pages 43 – 48). These actions by the Employer were material changes to the terms and conditions of how employees performed their daily job duties, something this Board considers to be at the very heart of the definition of a mandatory subject of bargaining. (See *Rhode Island State Labor Relations Board and State of Rhode Island Department of Labor & Training,* ULP-6280 (March 8, 2022). Thus, the Employer's refusal to discuss, among other items, the health and safety concerns raised by the Union (Joint Exhibits 28 and 41; Transcript, Vol. I at pages 58 – 64) constitutes a violation of the Act.

The Employer has suggested as part of its argument that it was not required to bargain with the Union over such mandatory subjects of bargaining as health and safety and returning employees to in person work because it was subject to the dictates of the Governor's Executive Orders (see Joint Exhibits 46, 47, 48, 49 and 50; Transcript, Vol. IV at pages 28 – 33). However, a close review by this Board of the Executive Orders does not reveal any provision or language in the Orders that supersedes or renders meaningless the provisions of the Act and the statutory obligations set forth therein. Specifically, the Employer has argued that certain health and safety issues were not subject to bargaining because the Employer was subject to the Executive Orders (Transcript, Vol. IV at pages 34 – 35; 36 – 38). In reviewing the Executive Orders, the Board has found that the Governor used very generic language in discussing health and safety or return to work issues. For example, Executive Order 20-40 (Joint Exhibit 46) speaks to, among other items, the "Limited Reopening of Office-Based Businesses" (Joint Exhibit 46 at page 3).[11] Initially, this section of the Executive Order makes quite clear that "Working from home is still strongly encouraged when possible." (Joint Exhibit 46 at page 3). It also notes that office-based businesses "may" begin on-site work, a term that is permissive as opposed to mandatory. This is significant because there is nothing in the Executive Order that mandated or required office-based businesses to return to on site work (see also Joint Exhibit 47 at page 5). In other words, while the Employer decided it wanted bargaining unit employees to return to in person work (a decision it was certainly within its rights to make), there was nothing in the Executive Order that prohibited or restricted the Employer from bargaining with the Union over how the return to work could or should be accomplished or the effect or impact of the Employer's decision on the Union's members.

Similarly, there is nothing contained in Executive Order 20-40 (or Executive Order 20-50, Joint Exhibit 47) that prohibited or restricted the Employer from engaging in good faith bargaining with the Union over the Union's expressed health and safety concerns for its members. Though the Executive Order makes clear that office-based businesses "must follow state requirements" on a variety of listed items ("cleaning, screening employees, wearing masks...health and safety protocols") and "must develop" a Covid-19 Control Plan, there is nothing in the Executive Order that states or implies that the "state requirements" could not be discussed with or bargained about with the Union or that the effect or impact of these items on bargaining unit personnel could not be the subject of bargaining. While the Employer in this case apparently takes the position that it had no flexibility in even discussing the various health and safety issues in Executive Order 20-40 (Joint Exhibit 46 at page 4), this Board sees no such constriction in the

[11] Mr. Cottone testified that he considered the Employer an office-based business and, therefore, subject to the provisions of the Executive Order (Transcript, Vol. IV at page 31).

language.[12] In fact, throughout the various Executive Orders submitted to this Board (Joint Exhibits 46 – 50) the language in the sections referring to office-based businesses returning to on site work does not change. In this Board's view, the Employer's narrow view of its obligations and the lack of flexibility it had under the various Executive Orders simply does not square with the language of the Executive Orders or the Employer's obligations under the Act.

II. Waiver

The Employer also argues that even if it had an obligation to bargain with the Union over health and safety, work from home policies and returning to work plans, the Union waived its right to bargain through acquiescence and its conduct.[13] As the Board gleans the Employer's argument, the Employer took numerous steps in response to requests from the Union, including establishing a Health and Safety Committee, sharing plans for action with the Union and generally discussing with and keeping the Union informed on plans for reopening the workplace, working from home, etc., and the Union either never responded or never sought to negotiate or never provided any objection to the Employer's plans or put forth any plan or proposal of its own that could be understood by the Employer. The Union, of course, disputes these claims and, instead, asserts it tried numerous times to get the Employer to bargain over its plans without success.

The issue of a union's waiver of its right to bargain over changes to terms and conditions of employment was addressed by our Supreme Court in *Town of Burrillville v. Rhode Island State Labor Relations Board,* 921 A.2d 113 (R.I. 2007). In *Town of Burrillville,* the police chief issued a general order regarding injured on duty status. The chief showed the proposed order to the union and discussed its contents, but the union never requested to bargain over the implementation of the order. In finding that the union had waived its right to bargain over the order, the Supreme Court noted that a "union must do more than merely protest the proposed change or file an unfair labor practice action in order to preserve its right to bargain; a union must affirmatively advise the employer of its desire to engage in bargaining." *Town of Burrillville v. Rhode Island State Labor Relations Board,* 921 A.2d at 120. In the present case, there are numerous examples of the Union asking for, seeking and/or requesting bargaining from the Employer regarding its various policies and plans to no avail (see Transcript, Vol. I at pages 24 – 25; 29; 35 – 36; 37 – 38; 41; 43 – 46; 49 – 50; 61 – 63; Joint Exhibits 6, 8, 13, 28, 36 and 41). Unlike the union in the *Burrillville* case, the Union here tried consistently to get the Employer to bargain with it over working from home policies, health and safety issues and returning to work plans. At each juncture, the Employer said no (if it responded at all). (See Joint Exhibits 7, 28, 36 and 41).[14] Based on the evidence

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[12] The Executive Order sites R.I.G.L. 30-15 for authority to issue the Order. R.I.G.L. 30-15-7 gives the Governor the authority to issues Executive Orders under the emergency management responsibilities of the office of Governor. Such Orders have the force and effect of law. However, there is no provision in the statute that indicates the issuance of an executive order supersedes another statute. In fact, our Supreme Court has made clear that when it is called upon to interpret statutes or laws that may seem to be in conflict, it will do everything it can not to interpret one statute so as not to invalidate another. See *State v. Andujar*, 899 A.2d 1209, 1215 (R.I. 2006); see also *Champlin's Realty Associates, L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003).

[13] Though the Employer's memorandum does not specifically argue that the contract language of the collective bargaining agreement created a waiver of bargaining rights, the Board will also briefly address this issue and why it is not applicable to the instant case.

[14] The Board does acknowledge that the parties did appear to engage in discussions which could be referred to as negotiations regarding the Employer's implementation in March 2020 of a Working From Home Policy (see Joint Exhibits 9, 10, 12, 14, 15, 16 and 17). However, this collaboration seemed to end at this point. As noted above, the evidence demonstrates several examples of requests for bargaining by the Union after March 2020 and the Employer's refusal to engage. In short, the Employer cannot be insulated from being

before the Board, the actions and conduct of the Union did not act as a waiver of its right to bargain over health and safety issues, the Employer's return to work plans or other mandatory subjects of bargaining that arose after March 2020.

In addition to the above, there is also the ability for a union to have waived its bargaining rights through contractual language. In a recent NLRB case, *M.V. Transportation, Inc.*, 368 NLRB No. 66 (2019), the NLRB changed the standards by which it would review a claim that a union had waived its right to claim bargaining. Under the old standard, the NLRB would look for "clear and unmistakable" contract language to support a contention that the Union had waived its right to challenge an employer's unilateral action or refusal to bargain over a mandatory subject of bargaining. The new standard established by the NLRB in *M.V. Transportation* changed the method by which the NLRB looked at cases involving a claim that the Union had waived its right to bargain over changes implemented or instituted by an employer during the term of a CBA to a more direct review of the contract language and an interpretation of the clear intent of the language. While some employers have assumed that *M.V. Transportation* would change how waiver cases were decided, this Board has concluded that *M.V. Transportation* was not a signal that every management rights clause, even broadly written clauses, would allow employers the ability to act with impunity and in a unilateral manner without discussing changes in terms and conditions with the Union. See *Rhode Island State Labor Relations Board and State of Rhode Island Department of Labor & Training*, ULP-6280 (March 9, 2022).

In the instant case, the Employer has not raised or presented any argument to this Board that the existing management rights language in the collective bargaining agreement in any way created a waiver by the Union of its rights to seek bargaining over unilateral changes by the Employer in mandatory subjects of bargaining. Therefore, the Board has not considered this as a part of the Employer's waiver argument.

The evidence before the Board was that the Employer unilaterally announced a Working From Home Policy and later changes to the policy without notifying the Union or bargaining with the Union over the policy. The Employer also unilaterally sought to return employees to in person work without prior discussion with the Union. While the Union was able to have input on the initial policy form, subsequent changes and alterations to the policy as well as other actions by the Employer involving health and safety of employees were introduced without any consultation/bargaining with the Union. Thus, based on the reliable, probative and substantial evidence in the record before it, there was nothing to even suggest that the Employer's actions in this case came within the exceptions created in the management rights clause to allow the Employer to act in a unilateral manner to change mandatory subjects of bargaining without first negotiating with the Union.

III. Health and Safety Committee and Notice to the Union

The Employer also relies heavily on the creation and existence of the Health and Safety Committee (HSC) and its assertion that through multiple and numerous communications with the Union, either through the HSC or otherwise, the Union was kept informed and provided ample notice of the Employer's thoughts, actions and conduct regarding working from home, health and safety and returning employees to in person work. (See Employer Memorandum of Law at pages

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found in violation of the Act simply because on one occasion it may have satisfied its obligation to bargain with the Union.

20 – 22; Joint Exhibits 37 and 39). The basis for the Employer's argument appears to be that through regular meetings of the HSC the Employer "provided the Union's representatives,...,advance notice of RIDE's planned introduction of required health and safety protocols at RIDE prior to their implementation." (Employer Memorandum of Law at page 20). According to the Employer, Union representatives also participated in discussions at HSC meetings regarding the reopening of the workplace. The Employer argues that all this information and notice to the Union made it aware of the Employer's plans and gave it ample time and opportunity to request bargaining over these issues. The Employer appears to assert that the Union failed to make its bargaining requests in a timely manner if at all.

In the Board's view there are two significant problems with the Employer's arguments that ultimately leads the Board to conclude that this particular Employer defense is without merit and must be rejected. First, the evidence was clear that the HSC was not a bargaining committee or a committee established to conduct bargaining or negotiations between the parties (Transcript, Vol. I at pages 38 – 41; Vol. III at pages 6 – 9). Even the Employer, in its Memorandum to the Board, recognized that meetings of the HSC were not bargaining meetings, referring instead to the parties meeting "on numerous occasions prior to the reopening in September 2020 in **non-bargaining meetings of the Health & Safety Committee,..."** (Employer Memorandum of Law at page 20) (Emphasis supplied). Instead, as the evidence before the Board made clear, the HSC was designed solely as a place to share information and ideas regarding the impact of the pandemic on the workplace and the employees. It was certainly not a situation in which the Employer was announcing that it was going to implement policies or procedures or that it had determined to do something (like reopen the workplace) that would necessitate or prompt a response from the Union. This was clear from the testimony given to the Board describing how the HSC operated (Transcript, Vol. III at pages 6 – 9). In short, the information shared at the HSC did not amount or equate to the type of pronouncement the Union would understand to mean a decision on a specific policy or action had been made. See *Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d at 120 (R.I. 2007) where the Supreme Court noted that ""it is incumbent upon [a] union to act with due diligence" with respect to requesting bargaining once the **union has received adequate notice of a proposed modification in the terms or conditions of employment**." (Citations omitted) (Emphasis supplied). As indicated above, the HSC information sharing between the Employer and both Unions representing its employees did not, in this Board's view, constitute the type of "adequate notice" that is necessary to trigger a request for bargaining by the Union. While the Employer intimates otherwise, there is simply no evidence in the record to substantiate or sustain this argument by the Employer.

Second, it is apparent to the Board, as previously discussed, and it is clear from the evidence in the record that the Union made numerous and repeated attempts to bargain with the Employer during various times between March and the end of August 2020 (Joint Exhibits 6, 8, 13, 28, 36 and 41). Even excluding the early requests to bargain by the Union (as the parties managed to address some concerns with the Working From Home form – see Joint Exhibits 10, 11, 12 and 14 – 17), the Union still produced a steady stream of bargaining requests that shortly followed announcements by the Employer of changes in terms and conditions of employment (Joint Exhibits 28, 36 and 41). These formal, written requests for bargaining are in addition to verbal requests made by the Union to the Employer. In short, it is the Board's view, based on the evidence in the record before it, that the Union did not wait or sit on its rights regarding seeking to exercise its bargaining rights over various proposed changes in terms and conditions of

employment by the Employer. As such, the Union did not waive its right to bargaining with the Employer over unilateral changes to terms and conditions of employment or other mandatory subjects of bargaining. The Employer's failure to bargain with the Union over these items constitutes a violation of the Act.

FINDINGS OF FACT

1. The Respondent is an "employer" within the meaning of the Rhode Island State Labor Relations Act.

2. The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such is a "labor organization" within the meaning of the Rhode Island State Labor Relations Act.

3. The Union and the Employer were subject to a collective bargaining agreement dated July 1, 2017 through June 30, 2020.

4. In March 2020 the Governor declared an emergency due to Covid-19. This emergency declaration resulted in the Employer drafting, releasing and implementing a Working From Home Policy that applied to its employees including members of the Union.

5. The Union requested bargaining regarding the substance of the Working From Home Policy and the Employer refused indicating it did not believe it had an obligation to bargain over the policy or its terms.

6. Because of the nature of the emergency and the fact that all its members were working from home at that time, the Union took no action with respect to the Employer's position concerning bargaining. The parties did have discussions regarding changes proposed to aspects of the policy and agreed, in late March 2020, to revise the working from home form.

7. In May 2020 the Employer agreed to create a Health and Safety Committee. Management and members from both Local 2012 and Council 94 were represented on the committee. The committee met regularly to share information regarding the impact of the pandemic on the workplace and to discuss issues surrounding working from home and health and safety.

8. In June 2020 the Employer proposed changes to the in-person screening process in coordination with its decision to begin returning employees to work at the Shepard Building, the Employer's on-site work location. The Union expressed concerns about the proposed changes, requested bargaining over the proposed changes and also requested that any implementation of the changes be suspended until negotiations were concluded.

9. The Employer rejected the Union's request for bargaining and asserted that it was not obligated to bargain over the proposed changes to the in-person screening process or to its decision to reopen in-person work. The parties engaged in back and forth communications over the issue with the Employer asking the Union to specify its concerns and the Union providing a list of items including "remote work", "safe work practices" and "cleaning and disinfection".

10. The parties met on August 5, 2020. At that meeting the parties discussed the Employer's plans for having bargaining unit members return to in person work. Also at that meeting, the Union made a request for information regarding the plans the Employer had or was developing for purposes of bargaining with the Employer over said plans.

11. The next week the Union inquired to the Employer concerning receiving the information it had requested at the August 5 meeting. The Union also requested bargaining regarding the proposed changes to terms and conditions of employment. The Employer responded that it would receive the documents it had requested. The next day the Employer released an email to all employees discussing the documents that the Union had requested to see at the August 5 meeting. The Employer's email discussed an updated work from home policy, a Covid-19 control plan, and a timeline for employees returning to in person work.

12. On August 18, 2020, one day before the parties were scheduled to meet to discuss the Employer's plans, the Employer sent a draft of the revised Working From Home Policy to the Union.

13. On August 19, 2020, the parties met to discuss the Employer's return to work plans. The Union asked the Employer at the meeting whether it was a bargaining session consistent with the Union's request that the Employer bargain over mandatory subjects identified by the Union. The Employer indicated it would not bargain with the Union over health and safety or the return of bargaining unit members to in person work though the Employer did concede that there may be areas within its discretion that it could discuss with the Union without identifying what those areas.

14. During the August 19 meeting, the Union questioned why it was necessary to return bargaining unit members to in person work while the pandemic was ongoing. The Employer identified some reasons it said were behind its actions and the Union requested information regarding those stated reasons. The Employer refused to provide the information.

15. On August 21, 2020, after being unsuccessful in getting the Employer to bargain over changes to terms and conditions of employment, the Union filed an unfair labor practice charge.

CONCLUSIONS OF LAW

1. The Union has proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it unilaterally changed the working terms and conditions of employment of bargaining unit members when it introduced the Working From Home Policy in March 2020 and a revision to the policy in June 2020.

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.

3. The Union has proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it failed and refused to bargain in good faith with the Union over health and safety concerns impacting bargaining unit members.

4. 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 bargain in good faith with the Union over the Employer's reopening plans, return to work plans, reopening of the Shepard Building and the impact and effect of these actions on bargaining unit members.

5. 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 provide the Union with relevant information the Union had requested in order to be able to bargain with the Employer over changes the Employer made to terms and conditions of employment.

ORDER

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

2. The Employer is hereby ordered to cease and desist from refusing to bargain with the Union over mandatory subjects of bargaining including, without limitation, changes to the terms and conditions of employment of bargaining unit members and health and safety issues involving bargaining unit members.

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

Walter J. Lanni, Chairman

Kenneth B. Chiavarini, Member (Dissent)

Derek M. Silva, Member

Harry F. Winthrop, Member (Dissent)

Stan Israel, Member

****BOARD MEMBERS ARONDA R. KIRBY AND SCOTT G. DUHAMEL WERE NOT PRESENT TO SIGN DECISION & ORDER AS WRITTEN.**

****BOARD MEMBER ARONDA R. KIRBY WAS NOT PRESENT FOR VOTE ON CONCLUDED CASE AND BOARD MEMBER SCOTT G. DUHAMEL VOTED IN FAVOR OF THE MOTION.**

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

Dated: *August 16, 2022*

By: _____
Thomas A. Hanley, Administrator

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

IN THE MATTER OF	
RHODE ISLAND DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION	
-AND-	CASE NO. ULP- 6284
RIDE PROFESSIONAL EMPLOYEES UNION, LOCAL 2012, AFT	

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-6284, dated August 16, 2022, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **August 19, 2022.**

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

Dated: August 19, 2022

By: Lisa L Ribezzo
Lisa L. Ribezzo
Programming Services Officer