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-6297
RHODE ISLAND COUNCIL ON ELEMENTARY and SECONDARY EDUCATION and RHODE ISLAND DEPARTMENT OF ELEMENTARY and SECONDARY EDUCATION	:	

DECISION AND ORDER OF DISMISSAL

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 Council on Elementary and Secondary Education and the Rhode Island Department of Elementary and Secondary Education (hereinafter collectively "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated November 19, 2020 and filed on the same date by the RIDE Legal Counsel/Hearing Officer Professional Union, (hereinafter "Union") and an Amended Charge filed by the Union on December 28, 2020.

The initial Charge alleged as follows:

> On November 16, 2020, Employer's Chief Legal Counsel, Anthony F. Cottone, Esq., sent separate emails to RIDE legal counsel/hearing officers Paul Pontarelli and Kathleen Murray demanding that they take and/or refrain from certain actions adversely affecting the terms and conditions of employment because of their protected, concerted activity under the Act.

The amended Charge alleged the following:

> On December 15, 2020, Respondent terminated the employment of Paul Pontarelli "effective immediately" because of his concerted activity protected under R.I.G.L. 28-7-12. On or about December 23, 2020, Respondent withheld the payment of Paul Pontarelli's accrued sick leave because of his concerted activity protected under R.I.G.L. 28-7-12 and/or conditioned payment of his accrued sick leave upon his agreement to an unlawful proposed settlement agreement initiated by Respondent which required Pontarelli to arrange for the dismissal of his and Murray's unfair labor practice allegations contained in the original charge in this matter.

Following the filing of the initial Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. Similarly, following the filing of the amended Charge by the Union each party was given an

opportunity to submit a written position statement and response. The parties submitted both statements and responses in a timely manner. On February 19, 2021, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (5), (8) and (10) when, through its representative, the Employer (1) withdrew work from one bargaining unit member and threatened another bargaining unit member with discipline for engaging in protected and/or concerted activities; (2) directed bargaining unit members to take and/or refrain from taking certain action that adversely impacted the employees' terms and conditions of employment because the employees engaged in protected and/or concerted union activity; (3) retaliated against bargaining unit members because the employees engaged in protected and/or concerted union activity; (4) terminated the employment of bargaining unit member Paul Pontarelli because he engaged in protected and/or concerted union activity; (5) withheld and/or refused to provide to Pontarelli his accrued and unused sick leave benefits because he engaged in protected and/or concerted union activity; and (6) discouraged employees to become members of a labor organization by engaging in some or all of the conduct set forth in numbers (1) – (5) of this complaint.

The Board held sixteen (16) formal hearings over the course of almost two (2) years (the hearings commenced on April 1, 2021 and the final hearing was held on February 23, 2023) with an additional number of hearings scheduled and postponed during that period. In addition to the formal hearings, the parties engaged in a lively motion practice before the Board. For example, the Union issued several subpoenas to the Employer for information and documents. These subpoenas prompted a flurry of motions before the Board dealing with requests to comply and produce documents (the Union) and motions to quash the requested information and materials (the Employer). Further, the Union presented motions involving a request for sanctions (twice), default judgment (twice), recusal and a request to consolidate this case with ULP-6344 (and a motion to reconsider consolidation after the Board denied the original motion). The Employer filed objections to these motions and, as noted above, filed its own motions to quash information requested by the Union through subpoenas to which the Union objected. The Board reviewed each of these motions and objections carefully and decided each on the facts and information submitted to it by the parties.

At the conclusion of the formal hearings, post-hearing briefs were filed by the Union and the Employer on April 25, 2023. In arriving at the Decision 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 (1) the Employer's discharge of the Union President, Paul Pontarelli, allegedly because Pontarelli engaged in protected and/or concerted union activity; (2) the Employer's denial to afford Pontarelli his accrued sick leave time after he was discharged because Pontarelli engaged in protected and/or concerted union activity; and (3) the

Employer's withdrawal of assignments to and/or discipline of Kathleen Murray because she engaged in protected and/or concerted union activity.

The genesis of this matter goes back to 2012 when Pontarelli and Murray formed the Union and filed a petition with this Board seeking a representation election for the legal counsel/hearing officers then employed by the Employer. While the Union has not, in its presentation to the Board, contended that any of the concerted activity allegedly engaged in by Pontarelli and Murray goes back to the formation of the Union and Pontarelli's and Murray's involvement in that formation, the Union has stressed that the concerted activity to which the Employer allegedly illegally reacted involved the ongoing battle over the certification of the Union. Therefore, the Board believes at least a brief recitation of the history of this matter is relevant to the instant case.

After the initial representation petition was filed and formal hearings before the Board were concluded, the Board, on April 30, 2014 issued its decision. In that decision, the Board held that the position of Legal Counsel/Hearing Officer was not excludable from collective bargaining as a confidential position under either prong of the labor nexus test. Additionally, the Board also held that an expansion of the labor nexus test was not warranted based on the facts presented in the case. Subsequent to the Board's Decision and Direction of Election, the Union prevailed at the election and the bargaining unit was certified by the Board on May 28, 2014.

On May 30, 2014, the Employer filed an appeal of the Board's Decision and on July 8, 2014 sought a stay of the Board's Decision to certify the Union. On September 4, 2014, the Superior Court entered an Order for an executed Consent Agreement staying the decision and establishing an expedited briefing schedule. The Consent Agreement provided that the Employer treat the employees in question the same as other non-union, non-classified employees as it pertains to terms and conditions of employment. In late fall 2014, Attorney Anthony Cottone, a new Hearing Officer hired by the Employer, moved to intervene in the pending appeal and moved for a remand of the matter for further proceedings before the Board. After extensive litigation, on June 12, 2015 Superior Court Judge Brian Van Couyghen, entered an Order granting remand, with these directions to the Board:

> (a) Upon remand, the SLRB shall reconsider whether the Legal Counsel/Hearing Officer position at RIDE should have been deemed managerial, and thus, exempt from collective bargaining at the time the Union's petition was filed with the SLRB; and
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> (b) Determine, in its discretion: (i) if the parties should be permitted to introduce additional evidence on the issue; and (ii) if so, what additional evidence should be admitted.

In a supplemental decision dated December 2, 2015, the Board addressed each of the above directives issued by the Court. Initially, the Board reviewed the evidentiary record before it to determine whether additional evidence was needed to decide if the Legal Counsel/Hearing Officer position "should have been deemed managerial, and thus, exempt from collective bargaining at the time the Union's petition was filed..." Finding the evidentiary record, including the examination of witness testimony, to be "sufficiently thorough", the Board concluded that "the record [was] adequate" to allow the Board to

answer the question of whether the Legal Counsel/Hearing Officer position was managerial in nature so as to be excluded from participation in the collective bargaining process. (See Board's Supplemental Decision in Case EE-3729 at page 2). After reviewing the history of the term managerial employee and looking closely at case law relied on by the Employer as determinative of the managerial status of the Legal Counsel/Hearing Officers, the Board applied the facts and evidence before it[1] and found that

> Most of the duties set forth on the Legal Counsel/Hearing Officer job description are common typical task [sic] performed by any attorney for a client providing legal opinions, providing legal representation, interpreting and keeping abreast of law, and advising others accordingly and preparing advisory opinions for review. While these functions require an attorney to represent a client's interest competently, they do not require the attorney to be "aligned with management" to be successful, competent or appropriate. Indeed, the Board believes that there are likely many attorneys who may not even like their clients or believe in their clients' positions, but that can nevertheless wage impressive representation.
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> (Board's Supplemental Decision Case EE-3729 at page 6.)

The Board concluded that the reliable and competent evidence before it, which was sufficient for it to determine whether the Legal Counsel/Hearing Officer position was managerial, supported "the conclusion that the position is not managerial. As such, the position of Legal Counsel/Hearing Officer is not excluded from collective bargaining on that basis." (Board's Supplemental Decision Case EE-3729 at page 6).

The Employer once again sought judicial review of the Board's decision and also filed a second motion to remand the matter to the Board. The second remand request sought the opportunity to submit new evidence regarding changes that had occurred at the Employer since the Board issued its original decision in 2014. Unfortunately, and for reasons not entirely clear to the Board, the Employer's second administrative appeal languished in the Court with no action taken by any of the involved parties for several years. In fact, it was not until 2020 that the matter was revived before the Superior Court. It is this revival of the case and the filing of a memorandum of law to the Superior Court on behalf of the Union that represents an updating of the story and brings this instant conflict before the Board.[2]

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[1] The Board incorporated its original decision in its supplemental decision. As the Board noted, in its original decision the Board reviewed all the job duties of the Legal Counsel/Hearing Officer position and found "no mention anywhere of a requirement for drafting policies, effectuating policies, developing a budget, or assuring that the department or agency runs effectively. Likewise, there is no direction on the job description or evidence in the record that the Legal Counsel Hearing Officers direct the governmental enterprise of RIDE in a hands-on way or that they possess the authority to broadly affect its mission or fundamental methods." (Board's Supplemental Decision in Case EE-3729 at page 5). While the Board found some similarity in the duties of the Legal Counsel/Hearing Officer position with the managerial position, ultimately the Board determined that the role of Legal Counsel/Hearing Officer in "hearing teacher discipline and termination disputes" was "but one (1) small piece of the massive role RIDE holds" and is "not the main avenue by which the Commissioner of Education carries out her statutory duties under Title 16." (Board's Supplemental Decision in case EE-3729 at pages 5 – 6).

[2] On August 20, 2020, the Superior Court issued an Order in Case PC-2015-05683 (consolidated with PC-2014-2730) requesting briefs on the Employer's then pending (its second) administrative appeal of the Board's initial 2014 and supplemental 2015 decisions regarding certification of the Union as the exclusive bargaining representative for the Legal Counsel/Hearing Officers unit. (Respondents Exhibit 5). On September 1, 2020, the Board, the Union and the Employer filed a briefing schedule with the Court indicating briefs would be due on November 1, 2020.

According to the evidence, at the time of Pontarelli's termination in December 2020, he was completing his 31st year of employment as a Legal Counsel/Hearing Officer with the Employer (Tr. Vol. XIII, dated August 30, 2022, at page 16). By that same time, Murray had completed 33 years of service as a Legal Counsel/Hearing Officer. (Tr. Vol. II, dated April 20, 2021, at pages 28 – 29). There was no indication in the record before the Board that either Pontarelli or Murray had any prior disciplinary history with the Employer before March 2020. (See Union Memorandum of Law at page 1). In addition, the Union asserts that both Pontarelli and Murray performed at a high level for the Employer regarding their duties and responsibilities and that there was no question concerning the performance of their duties until the hiring of Anthony Cottone as Chief Legal Counsel in March 2020 (see Union Memorandum of Law at pages 1 – 3). The duties and responsibilities of the Legal Counsel/Hearing Officer position are set forth in the job description. (Petitioner Exhibit 34). As described in the testimony, the duties and responsibilities of the Legal Counsel/Hearing Officer contain the following: conducting hearings on a variety of topics including teacher terminations and providing legal advice and working on various projects for the numerous departments within the Employer's organization chart (i.e., Office of Certification Services and Educator Excellence, Office of Student Community and Academic Supports, Office of College and Career Readiness, among others) (Petitioner Exhibit 34; Tr. Vol. XIII, dated August 30, 2022, at pages 16 – 17).

As described by Murray in her testimony, trouble in her employment first arose in the late summer of 2020 when she was preparing a decision involving Claudia Hoddersen and the South Kingstown School Department. According to Murray's testimony, after completing a draft decision in the Hoddersen case, she submitted it to Chief Legal Counsel Anthony Cottone for his review. (Tr. Vol. II, dated April 20, 2021, pages 40 – 41). Around October 2020, Murray received an email from Cottone expressing some substantive and editorial concerns with the decision. Murray made the suggested editorial changes. However, on the substantive issue, Murray did not agree with Cottone's stated concerns.[3] Cottone disagreed with Murray's decisional resolution of the due process issue and indicated in his email that "he wanted a legal memorandum on the issue of whether or not a teacher's de novo hearing before the Commissioner or any de novo hearing remedied due process violations . . ." (Tr. Vol. II, dated April 20, 2021, page 43). Murray disagreed with what Cottone was seeking and instead thought her decision to send it back to the parties could resolve and settle the issue and she relayed this to Cottone. Specifically, Murray gave Cottone "an extensive email describing what the process had been and why I wasn't-it wasn't necessary for a hearing officer, me, to prepare a legal memorandum on that issue. I wasn't deciding the issue". (Tr. Vol. II, dated April 20, 2021, page 44; Petitioner Exhibit 12). The disagreement over this due process issue between Murray and Cottone prompted a number of conversations, both virtual and through email. (Petitioner Exhibits 12 and 14; Joint Exhibit 4).[4] During these discussions, according to Murray's testimony, Cottone became upset and raised his voice to her and became

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[3] The Hoddersen case involved a dismissal of a tenured teacher. While there was just cause to find for the dismissal, Murray's decision found that procedures used by the South Kingstown School Committee did not comply with due process. Murray's decision sent the due process issue back to the parties for their discussion and possible resolution of the issue. (Tr. Vol. II, dated April 20, 2021, pages 41 – 42).

[4] Petitioner Exhibit 14 and Joint Exhibit 4 are the same document.

insulting. (Tr. Vol. II, dated April 20, 2021, pages 45 – 46). Murray testified that these discussions veered off the original issue into Cottone telling her to follow his directives and Murray, as a Hearing Officer, feeling she could not or would not accept direction regarding the decisions that she reached based on the evidence she heard in a particular case. (Tr. Vol. II, dated April 20, 2021, page 46; Petitioner Exhibit 12). Despite the back and forth discussion between Murray and Cottone, they were not able to resolve their disagreement about the Hoddersen decision. (Tr. Vol. II, dated April 20, 2021, pages 46 – 47). As Murray testified, after being unable to resolve this disagreement with Cottone, "the next thing after that I received a notice from him that based on a philosophical approach, I didn't quite understand all of it, that I would no longer be assigned new hearings to hear, and my conclusion was that I was just to prepare the decisions on the 17 or so outstanding decisions-hearing that I had already been assigned". (Tr. Vol. II, dated April 20, 2021, pages 49 – 50; see Petitioner Exhibit 14).

While Murray's testimony focused on the Hoddersen decision and her disagreement with Cottone over his directives regarding that decision and his ultimately refusing to provide Murray with new assignments, there were also other areas of disagreement between Murray and Cottone (see Petitioner Exhibit 14). One area involved the independence of a Hearing Officer and whether it was appropriate for Murray acting as a hearing officer to have discussions regarding her decisions with her supervisor, the Chief Legal Officer. (Tr. Vol. II, dated April 20, 2021, pages 59 – 63). Also, though Murray did not testify to this item, the Union submitted documentation regarding a disagreement between Murray and Cottone over the internal review of contracts used by the Employer and who the "client" was in the review process. (Petitioner Exhibit 13). These various disagreements between Murray and Cottone leading to Cottone deciding not to assign new cases to Murray covered a period beginning in October 2020 and running until November 16, 2020, the date of Cottone's decision (Petitioner Exhibit 14).

Unlike Murray and her disagreements with Cottone as described above, Pontarelli's issues that were the subject of his termination in December 2020 were more diverse, varied and involved. Prior to March 2020, the Union asserts that Pontarelli had no disciplinary issues and was a model worker on behalf of the Employer. However, according to the Union, things changed when Cottone was appointed Chief Legal Counsel in March 2020. The Union claims that Pontarelli's first indication of problems with his work performance was on November 16, 2020, 15 days after the Union submitted its memorandum of law to the Superior Court in the pending certification appeal from the Board's decision in EE-3729, when Pontarelli received an email from Cottone, following a November 12, 2020 zoom meeting the two had, indicating numerous areas of work performance deficiencies by Pontarelli. (Joint Exhibit 5). According to the email, Cottone stated

> I have been informed of several untimely work assignments and others routinely completed at the very last minute, as well as communication from you that has come across as hostile. Thus, OSCAS, OEECS and the Office of College and Career Readiness all are consistent in their complaint that your work is always done *at the very last minute*, and that your disorganization and inability

to keep track of your work has created additional, unnecessary stress.
(Joint Exhibit 5) (Emphasis in original).

In addition to identifying several alleged deficiencies in Pontarelli's work performance and interaction with various departments of the Employer, Cottone's email referenced specific information that he wanted, including "a detailed reply, with appropriate legal citation, to all points made in my emails to you beginning July 15, 2020 re [sic] your decision in [redacted], by the close of business on Tuesday, November 17, 2020; . . ." and also "an updated pending matters list containing descriptions of: (a) the last activity in the matter; and (b) what remains to be done and the estimated time to complete, by the close of business on Wednesday, November 18, 2020; . . .". (Joint Exhibit 5). Cottone's email sought from Pontarelli "written evidence of your commitment to turn things around" by the following day, i.e., November 17, 2020 and concluded by wanting Pontarelli to

(3) make the effort to improve your reputation with the clients you work for at RIDE by avoiding procrastination and remaining polite and cooperative when dealing with other agency employees;
(4) evidence your intention to become better organized by preparing the weekly work summaries I have requested in a thoughtful manner;
(5) promptly address any concerns I may have regarding the legal adequacy of decisions you draft for the Commissioner; and finally,
(6) show some initiative with respect to any needed improvement to procedures and regulations in special ed. and certification, areas in which you have worked for many years.
(Joint Exhibit 5).

Upon receipt of Cottone's email, Pontarelli sought additional time to respond to Cottone's email and the extra time was granted.

In response to Cottone's email, Pontarelli secured the services of an attorney who produced a lengthy rebuttal to Cottone's allegations of workplace performance issues. (Joint Exhibit 6). In addition to Pontarelli's attorney's lengthy point-by-point rebuttal of the allegations against Pontarelli, the letter to Cottone also attached a significant number of documents ("hundreds" of emails according to Pontarelli's testimony – see Tr. Vol. XIII, dated August 30, 2022, at pages 36 – 38) which allegedly supported the vigorous defense of Pontarelli's workplace performance set forth by his attorney in the correspondence to Cottone. (See Joint Exhibit 6).

Apparently, there was no response to Pontarelli's attorney's letter to Cottone. (See Tr. Vol. XIII, dated August 30, 2022, at page 38). Instead, on November 30, 2020, the Commissioner of Education, Angelica Infante-Green, sent a letter to Pontarelli memorializing the allegations of performance issues previously set forth in Cottone's

November 16 email (Joint Exhibit 7).[5] In the correspondence, the Commissioner notices Pontarelli of possible "job termination" and sets forth as grounds for such action the following:

> The charges of inadequate job performance referenced above which have led to a resulting lack of trust, include: (1) a disturbing lack of sound legal judgment and inability and/or unwillingness to conduct basic legal research; (2) a refusal and/or inability to recognize any need for improvement in your performance and a resulting refusal to take direction from your immediate supervisor; and (3) an inability to effectively organize your work and perform it in a timely fashion, as evidenced by:
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> (a) your refusal, despite the repeated demands of your immediate supervisor for more than six months, to follow direct instructions from your immediate supervisor and Deputy Commissioner Ana Riley to clarify and provide legal support for questionable legal conclusions contained in your draft decision in DCYF v. Smithfield, RIDE No. 19-033P, thus preventing its timely issuance;
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> (b) your demand that the agency retain a criminal attorney to represent you in a pending teacher certification matter without sound basis in Cynthia Jones v. RIDE, and then your subsequent failure to articulate whether you should withdraw as attorney for the agency under the applicable Rules of Professional Conduct, or report the status of the matter to your immediate supervisor;
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> (c) your insistence, again without any legal support, that a parent's claim that his child should be excused from his school's face-mask requirement since the child suffered from asthma and allegedly could not breathe with a face-mask on, was "not a Section 504 case," even after having been shown Section 504 guidance from the U.S. Department of Education using asthma as an example of a prototypical Section 504 case;
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> (d) the fact that the Directors of OSCAS and the Office of College and Career Readiness, as well as the Chief of OEECS, are all consistent in their complaint that your work often is completed at the very last minute, and that your disorganization and inability to keep track of your work frequently creates additional, unnecessary stress;
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> (e) your misguided concept of your independence as Hearing Officer, which you have maintained despite being notified on numerous occasions by your immediate supervisor that it is not

[5] The Union did point out in its memorandum of law to the Board that the Commissioner's November 30, 2020 letter to Pontarelli used different language in several areas when compared with Cottone's November 16 email. While the Union places great significance upon the comparative changes between the two documents, and concludes the variations act as an admission by the Employer that Cottone's initial email was inaccurate and "excessive" (Union Memorandum of Law at page 18), The Board's review and comparison of these two documents does not produce the same sinister conclusion or admission against interest as posited by the Union.

consistent with the state's Administrative Procedures Act, conflates the concept of impartiality with the independence of an Art III judge, and leads to a refusal to follow the direction of your immediate supervisor with respect to the need to provide adequate legal support in the decisions you write on my behalf, as described above, for example; and finally

(f) your unsatisfactory reply to specific requests made, in writing, by your immediate supervisor which he deemed necessary to turn things around, a reply which consisted of a letter from your lawyer that not only made clear your refusal and/or inability to recognize any need for improvement in your job performance and to commit to do what your supervisor deemed necessary to turn things around, but which also blatantly misrepresented your role with respect to, inter cilia, an ESY in-person special education services matter last July.

(Joint Exhibit 7).

After receiving the Commissioner's letter, a meeting was scheduled for December 9, 2020. (See Tr. Vol. XIII, dated August 30, 2022, at page 38). According to Pontarelli's testimony, the December 9 meeting was conducted regarding the allegations of workplace performance problems as contained in the Commissioner's November 30 letter. At this meeting, attended by the Commissioner, Cottone, Deputy Commissioner Ana Riley, Chief of Staff Tom McCarthy, Personnel Director Margaret Santiago, Pontarelli and his attorney, Pontarelli was afforded an opportunity to respond to the allegations of workplace performance issues raised by the Commissioner in her November 30 letter. (See Tr. Vol. XIII, dated August 30, 2022, at pages 39 – 41). Pontarelli testified that during the meeting he requested more specifics and/or additional information regarding the allegations of workplace performance problems of which he was being accused. (See Tr. Vol. XIII, dated August 30, 2022, at pages 40 – 41). According to the Union, Pontarelli never received the additional specifics he was seeking. Further, during the meeting, Pontarelli questioned the Commissioner over whether she had any knowledge of Pontarelli's union activity. Specifically, Pontarelli testified that during the December 9 meeting he stated that he was being singled out for special or disparate treatment. When Pontarelli was asked by the Commissioner why he thought he was being singled out, Pontarelli stated that it was because he "was engaged in union activity and had filed two memos in support of my union in Providence Superior Court in the past six weeks". (Union Memorandum of Law at page 28; See Tr. Vol. XIII, dated August 30, 2022, at page 40). According to Pontarelli's testimony, the Commissioner responded that she didn't know anything about Pontarelli's union or his claimed union activity.[6] After the

[6] The Union notes that despite the Commissioner's denial at the December 9 meeting of knowledge of Pontarelli's union activity, she had signed an affidavit that was attached to the Employer's memorandum of law in its Superior Court appeal of the Board's certification decision. (Joint Exhibit 3). The Union combines the affidavit with the Commissioner's reference in her December 15 termination letter to Pontarelli of his union activity to conclude that the Commissioner's December 9 statement that she did not know anything about Pontarelli's union activity to be "patently false". (Union Memorandum of Law at page 29). While the Board will discuss this conclusion by the Union later in its decision, suffice it to say that the Board's review of the conversation on this topic, the Commissioner's affidavit and the contents of the Commissioner's

meeting concluded, on December 15, 2020, the Commissioner of Education sent Pontarelli a letter terminating his employment with the Employer. (Joint Exhibit 8). In her December 15 letter, the Commissioner reviewed what had transpired beginning with the November 12 zoom meeting between Cottone and Pontarelli, Cottone's November 16 email to Pontarelli in response to Pontarelli's request for more "specific information," Pontarelli's attorney's response of December 18 and how she was "troubled" by the response as it caused her to question whether Pontarelli would "ever be willing to redress your job performance in response to legitimate concerns raised by your immediate supervisor." (See Joint Exhibit 8). The Commissioner then recounted the meeting on December 9 at which she asserted Pontarelli

> continued to dismiss all of my concerns without specifically denying most of the facts alleged in my November 30 letter, and you requested greater specificity with respect to the general allegations made in connection with work you performed on behalf of RIDE's Offices of Student, Community and Academic Supports, Educator Excellence and Certification Services and College and Career Readiness. In addition, you argued that the request by your supervisor that you make a written turnaround commitment within thirty (30) hours was for some reason unreasonable, and claimed that after thirty (30) years as a "stellar" employee at RIDE, you had been "blindsided" by the complaints articulated by the Chief Legal Counsel. Finally, your attorney: (1) reiterated your claim that all of my concerns and charges were "false and arguably defamatory;" (2) referred to his written general denial of the charges that he had submitted on your behalf on November 18 without specifically denying most of the facts that had been alleged; and (3) claimed on your behalf that the charges were motivated by the "flurry of recent legal activity" concerning the agency's appeal of the State Labor Board decision...
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> (Joint Exhibit 8).

In concluding that termination was the only option remaining to her, the Commissioner stated as follows:

> As I stated in my letter of November 30, "I expect that all staff members will follow the direction of their immediate supervisor, and your failure to do so coupled with the other described problems has resulted in a complete lack of trust and confidence in your continued ability to act as my legal counsel, and to perform the other duties required of one serving in the position of Legal Counsel/Hearing Officer." This expectation is particularly significant during this period of increased stress and activity for RIDE that has been created not

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December 15 termination letter do not lead the Board to draw the same conclusion as the one put forth by the Union.

only by the COVID-19 pandemic, but also by the state takeover of the Providence Public School District. Nowhere is this expectation, and the need for trust, of more significance than with respect to the three (3) individuals serving in the position of Legal Counsel/Hearing Officer. Yet, nothing in your attorney's letters or the statements made by him or you during our meeting on December 9 has restored my trust in your loyalty to the agency or my confidence in your continued ability to act as my legal counsel and perform the other duties required of one serving in your current position. This was underscored by your refusal to accept *any* responsibility for *any* of the concerns cited by your supervisor.

RIDE can no longer tolerate "business as usual," especially when it involves an attorney who is supposed to be working on behalf of the agency but who, as described in my letter of November 30, has displayed: "(1) a disturbing lack of sound legal judgment and inability and/or unwillingness to conduct basic legal research; (2) a refusal and/or inability to recognize any need for improvement in his performance or take direction from his immediate supervisor; and (3) an inability to effectively organize his work and perform it in a timely fashion." Thus, for good cause, I am hereby terminating your continued employment in the position of RIDE Legal Counsel/Hearing Officer, effective immediately.

(Joint Exhibit 8) (Emphasis in Original).

On December 16, 2020, Pontarelli went to the Employer's office to begin collecting his personal belongings. While there, Pontarelli learned from Margaret Santiago that he would not be receiving payment for his accrued and unused sick time. (See Tr. Vol. XIII, dated August 30, 2022, at page 45). On December 17, 2020, Pontarelli sent an email to Santiago reminding her of his request "for payment of accrued sick leave under the Council's personnel policy..." (See Joint Exhibit 18).[7] Pontarelli did not receive his accrued sick leave.

As noted above, on December 16, 2020 the Union filed its initial unfair labor practice Charge with the Board. Thereafter, on December 28, 2020, the Union filed an amended unfair labor practice Charge with this Board.

[7] After making his request for payment of accrued sick leave on December 17, Pontarelli received a written settlement agreement from the Employer (see Joint Exhibit 9). The Union has argued that sending such an unsolicited document in order to get Pontarelli and Murray to drop their unfair labor practice claims against the Employer was not only "coercive under the Act" but also "potent evidence of the continuing discriminatory motive behind a termination letter on which the ink was barely dry." (See Union Memorandum of Law at page 31). Under the RI Superior Court Rules of Evidence, settlement agreements are generally not admissible as evidence against either party. (See RI Rules of Evidence, Rule 408, which states "Evidence of conduct or statements made in compromise negotiations is likewise not admissible.") The Board denied the Union's request to admit the settlement agreement as an exhibit at the hearing and, for the above stated reasons, will not consider it as part of its review and decision-making process in this case.

POSITION OF THE PARTIES

Union:

The Union makes three basic claims that the Employer has violated the State Labor Relations Act (hereinafter "Act"). First, the Union alleges that the Employer illegally terminated the Union President, Paul Pontarelli, for engaging in protected and/or concerted activities. Second, the Union claims that the Employer violated the Act when it denied Pontarelli payment for his accrued sick leave due to his protected and/or concerted activities. Third, the Union also alleges that the Employer withdrew work assignments or otherwise disciplined the Union Vice-President, Kathleen Murray, for her engaging in protected and/or concerted activities.

Employer:

In contrast to the Union's position, the Employer asserts that it has not violated the Act with respect to its conduct toward Pontarelli and Murray. Initially, the Employer claims that its termination of Pontarelli's employment was due to Pontarelli's inadequate performance and failure to follow the directions of the Employer's Chief Legal Counsel and Pontarelli's direct supervisor and not because of his alleged engagement in protected and/or concerted activities. Next, the Employer argues that the denial of payment of accrued sick time to Pontarelli was based on the clear and plain language of the Employer's sick leave policy and had nothing to do with any protected and/or concerted activities Pontarelli may or may not have engaged in during his employment. Finally, the Employer claims that it never disciplined Murray nor did it treat her in a disparate manner when the Chief legal Counsel decided to suspend giving Murray new assignments. The Employer asserts that such action was not disciplinary, that Murray did not lose any wages or benefits and was not prevented or prohibited from performing her job duties.

DISCUSSION

The issues before the Board encompass three distinct and separate claims by the Union that the Employer violated the Act. The Board will address each of these issues separately.

A. Was Paul Pontarelli Discharged Due to His Protected and/or Concerted Union Activity

On December 15, 2020, Pontarelli, a 31-year employee of the Employer and the President of the Union, was terminated from his Legal Counsel/Hearing Officer position (Joint Exhibit 8). The Union asserts that Pontarelli's termination was because he had engaged in protected and/or concerted activities. The Union, in essence, has argued that the Employer retaliated against Pontarelli by terminating his employment on made up charges due to his involvement with the Union and, specifically, his writing a memorandum of law on behalf of the Union in opposition to the Employer's second administrative appeal challenging the Board's decision to certify the Union as the

bargaining representative for the Legal Counsel/Hearing Officer unit in Case EE-3729. (See Joint Exhibit 6). The Employer has denied the Union's allegations of violations of the Act and has defended its position by claiming that its termination of Pontarelli was justified due to his documented poor performance and his unwillingness to follow his supervisor's directives. (See, for example, Joint Exhibits 5, 7 and 8)

As noted above, the Union asserts that Pontarelli was illegally terminated because he exercised his protected rights under the Act. Specifically, the Union claims that Pontarelli's involvement in the submission of a memorandum of law to the Superior Court opposing the Employer's administrative appeal of the Board's decisions in EE-3729 was protected, concerted activity. (See Joint Exhibit 1; Tr. Vol. XIII, dated August 30, 2022, at pages 19 – 21).[8] According to the Union, the Employer's actions against Pontarelli were taken because Pontarelli engaged in protected conduct.

1. The Concerted Activity

The rights of employees are set forth in R.I.G.L. § 28-7-12 of the Act. One of these rights is to engage in what is termed "concerted activity". Interference, restraint or coercion in the exercise of these additional rights under the Act or discrimination by an employer against employees for engaging in such concerted activities violates the Act. The term "concerted activities" is intentionally broad. However, for "concerted activities" to be protected, the employee activity that is undertaken must be done by two or more employees or by one employee on behalf of other employees. Thus, the National Labor Relations Board (NLRB) has determined, for example, that a conversation involving only a speaker and a listener may constitute concerted activities if it has some relation to group action in the interest of employees (*see Mushroom Transportation Company v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964); *see also Mobile Exploration and Producing U.S. v. NLRB*, 200 F.3d 230 (5th Cir. 1999)).[9] To be protected under the Act, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection". Thus, the concert requirement of the Act has not been literally construed to limit protection solely to employee activity involving group action directly. Thus, in determining whether activity by a single employee is concerted, the NLRB (and this Board) will look to the purpose and effect of the employee's actions. (*See NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2nd Cir. 2001; see also Rhode Island State Labor Relations Board and Providence School Department, ULP-6207). In the instant case, as will be

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[8] While the Union referenced the fact that both Pontarelli and Murray were involved in the formation of the Union (activity that started in 2012 and carried through the Board's 2014 and 2015 decisions in EE-3729, see Tr. Vol. XIII, dated August 30, 2022, at page 18), the main thrust of its claim that Pontarelli and Murray engaged in protected and/or concerted activity rested with the filing of the memorandum of law in the Employer's administrative appeal case.

[9] Rhode Island courts have looked to the Act's federal counterpart, the National Labor Relations Act, and federal case law decided under the federal Act for guidance in the field of labor law. (*See DiGuilio v. Rhode Island Brotherhood of Correctional Officers*, 819 A.2d 1271, 1273 (R.I. 2003); *MacQuattie v. Malafronte*, 779 A.2d 633, 636 n.3 (R.I. 2001)). Thus, as appropriate, the Rhode Island Supreme Court has adopted federal labor law case decisions. (*See Belanger v. Matteson*, 115 R.I. 332, 338 (R.I. 1975)).

discussed below, the reliable and probative evidence presented to the Board demonstrated that the conduct the Union alleges Pontarelli engaged in that constituted protected, concerted activity, i.e., his writing and submitting a legal memorandum on behalf of the Union opposing the Employer's administrative appeal of the Board's decision in EE-3729, was protected activity under the Act.

From the Board's review of the testimonial and documentary evidence and the arguments contained in the respective memoranda of law from the parties, it is undisputed that Pontarelli represented the Union at meetings with the Superior Court regarding the Employer's administrative appeal of the Board's decision and the scheduling of briefs to be submitted to the Court in that matter. It is also undisputed that Pontarelli participated in the writing and filing of the Union's memorandum of law with the Court and, in fact, signed the memorandum on behalf of the Union. (See Joint Exhibit 1; Tr. Vol. XIII, dated August 30, 2022, at pages 19 – 21). It is also without dispute that the Employer had knowledge of Pontarelli engaging in concerted activity. This knowledge arises from Cottone's motion to intervene in the original Employer administrative appeal from the Board's decision in EE-3729 as well as the Employer's involvement and participation in the Court meetings and submission of memoranda of law to the Court in November 2020. (See Joint Exhibits 1 and 3; Respondents Exhibits 6, 8, 9 and 10). It is also clear, at least to this Board, that the submission of the Union's memorandum of law was designed to support the certification of the Union as the exclusive representative of individuals in the Legal Counsel/Hearing Officer position. In other words, the purpose of Pontarelli writing the Union's memorandum of law was aimed at both collective bargaining and "mutual aid or protection" of employees impacted by the certification of the Union by the Board. In the Board's view, Pontarelli's conduct clearly falls within the definition of protected and/or concerted activity as that term has been used by the NLRB and this Board. (*See NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2nd Cir. 2001).

The Employer did not spend a great deal of effort attempting to argue that Pontarelli writing and signing the memorandum of law did not constitute protected and/or concerted activity. Its only real argument against the Board finding that Pontarelli's conduct constituted concerted activity was its claim that because the Superior Court had entered a stay of the Employer's first administrative appeal of the Board's initial decision in Case EE-3729, no union activity could occur. (See Employer Memorandum of Law at pages 2 – 3; page 10 at Footnote 23). This argument, quite frankly, makes no sense to the Board. The stay of proceedings issued by the Court simply froze in place the circumstances of the parties with respect to the Union issue prior to implementing the Board's certification of the Union. The stay did not, at least to this Board's understanding, prevent Pontarelli or Murray from engaging in protected activity nor did the stay somehow insulate the Employer from acting in a manner that interfered with Pontarelli or Murray engaging in protected, concerted activity. Said a different way, the fact that the Employer agreed to treat its employees, including Pontarelli and Murray, as it did all other non-union employees would not hamper, restrict or otherwise prevent Pontarelli and/or Murray from, at least theoretically, engaging in protected and/or concerted activity. Therefore, the

Board is not persuaded by the Employer's apparent argument that the stay of the Court proceedings somehow makes the Union's claim that Pontarelli and/or Murray engaged in protected and/or concerted activity without merit.[10]

2. <u>The Union's Evidence of Illegal Employer Conduct</u>

According to the Union's presentation of testimony, the allegations raised against Pontarelli by the Employer were completely untrue and lacked both credibility and substantive proof. According to the Union, there were procedural defects in the Employer's determination that "just cause" existed to terminate Pontarelli. These procedural defects included the Employer's failure to follow its personnel policies, failure to act in accordance with the job descriptions of its managerial employees, the lack of contemporaneous documents concerning Pontarelli's alleged work issues, a failure to provide Pontarelli with specific information about alleged complaints regarding his work and a failure to interview witnesses who would have actual knowledge of how Pontarelli performed his work. In addition, the Union asserted the investigation into Pontarelli's alleged wrongdoing was conducted by the individual who made the allegations. As noted, the Union also raised substantive issues regarding the Employer's alleged "just cause" reasoning asserting that numerous witness testimony presented by the Union contradicted or disputed the allegations of "just cause" raised by the Employer and that the Employer's shifting reasons and apparent failure to take into account numerous documents demonstrating the competency and high quality of Pontarelli's work formed the foundation for this Board to find the Employer engaged in unfair labor practices regarding Pontarelli's termination.

As noted above, the Employer identified a number of issues in Pontarelli's job performance that it considered to be significant and serious enough to ultimately terminate Pontarelli's employment for cause. (See Joint Exhibits 5, 7 and 8). In each of these documents the Employer sets forth the basis for its final action, noting such performance problems by Pontarelli as the following

> The charges of inadequate job performance referenced above which have led to a resulting lack of trust, include: (1) a disturbing lack of sound legal judgment and inability and/or unwillingness to conduct basic legal research; (2) a refusal and/or inability to recognize any need for improvement in your performance and a resulting refusal to take direction from your immediate supervisor; and (3) an inability to effectively organize your work and perform it in a timely fashion, as evidenced by:
>
> (a) your refusal, despite the repeated demands of your immediate supervisor for more than six months, to follow direct instructions from your immediate supervisor and Deputy Commissioner Ana Riley to clarify and provide legal support for

[10] The Employer also argues in its memorandum to the Board that its actions involving Pontarelli and Murray were not based upon their claimed protected and/or concerted activity. The Board will address this Employer defense later in this decision.

questionable legal conclusions contained in your draft decision in DCYF v. Smithfield, RIDE No. 19-033P, thus preventing its timely issuance;

(b) your demand that the agency retain a criminal attorney to represent you in a pending teacher certification matter without sound basis in Cynthia Jones v. RIDE, and then your subsequent failure to articulate whether you should withdraw as attorney for the agency under the applicable Rules of Professional Conduct, or report the status of the matter to your immediate supervisor;

(c) your insistence, again without any legal support, that a parent's claim that his child should be excused from his school's face-mask requirement since the child suffered from asthma and allegedly could not breathe with a face-mask on, was "not a Section 504 case," even after having been shown Section 504 guidance from the U.S. Department of Education using asthma as an example of a prototypical Section 504 case;

(d) the fact that the Directors of OSCAS and the Office of College and Career Readiness, as well as the Chief of OEECS, are all consistent in their complaint that your work often is completed at the very last minute, and that your disorganization and inability to keep track of your work frequently creates additional, unnecessary stress;

(e) your misguided concept of your independence as Hearing Officer, which you have maintained despite being notified on numerous occasions by your immediate supervisor that it is not consistent with the state's Administrative Procedures Act, conflates the concept of impartiality with the independence of an Art III judge, and leads to a refusal to follow the direction of your immediate supervisor with respect to the need to provide adequate legal support in the decisions you write on my behalf, as described above, for example; and finally

(f) your unsatisfactory reply to specific requests made, in writing, by your immediate supervisor which he deemed necessary to turn things around, a reply which consisted of a letter from your lawyer that not only made clear your refusal and/or inability to recognize any need for improvement in your job performance and to commit to do what your supervisor deemed necessary to turn things around, but which also blatantly misrepresented your role with respect to, inter cilia, an ESY in-person special education services matter last July.

(Joint Exhibit 7).

While the Union, as indicated above and discussed in more detail herein, disputed the accuracy and truthfulness of these various claims, the Employer did present evidence to

the Board to support its claims of complaints regarding Pontarelli's performance problems. (See Tr. Vol. IV, dated June 1, 2021, at pages 87 – 90; 95 – 103; Tr. Vol. V, dated June 3, 2021, at pages 100; 110 – 111; 113 – 118; Tr. Vol. VI, dated June 8, 2021, at pages 51 – 59; 64 – 67; 70 – 71; 76 – 77; Tr. Vol. VII, dated June 15, 2021, at page 19; Tr. Vol. VIII, dated November 30, 2021, at pages 46; 50 – 62; and Tr. Vol. IX, dated March 15, 2022, at pages 29; 32 – 35; 36 – 39; 41; 47).

As mentioned above, the Union makes a number of so-called procedural arguments in attacking the Employer's actions against Pontarelli. While the Union asserts these alleged procedural defects demonstrate anti-union bias by the Employer, a closer look reveals, in the Board's view, a series of innocuous acts that neither show anti-union feelings nor a bias in the Employer's investigation of Pontarelli's performance problems.

Initially, the Union argues that Pontarelli was only notified of problems with his performance after he wrote, signed and submitted the memorandum on the Union's behalf opposing the Employer's administrative appeal of the Board's decisions in EE-3729. (See Union Memorandum of Law at page 24). However, the evidence before the Board indicates that there were several issues contained in Cottone's November 16 email to Pontarelli and the Commissioner's November 30 letter to Pontarelli (Joint Exhibits 5 and 7) that had been raised by Cottone to Pontarelli well before even the August 2020 date of the Court's direction to the parties to submit briefs. For example, there was evidence submitted to the Board that Cottone questioned Pontarelli regarding his decision in the Smithfield case as early as June 2020. It was also in June 2020 that the issue of Pontarelli requesting a criminal attorney be hired to represent him due to a complaint filed against Pontarelli with the State Police by a teacher on whose case Pontarelli was working was initially raised. There was also evidence that Cottone had sought, albeit unsuccessfully, at least starting in July 2020, and possibly as early as March 2020, to receive updates from Pontarelli regarding his caseload. There was also dissatisfaction expressed by Cottone over Pontarelli's action when Cottone assigned, in early July 2020, Pontarelli the responsibility to address a letter from several civil rights attorneys (See Tr. Vol. XI, dated June 23, 2022, at pages 33 – 41 and Respondent Exhibit 25; pages 41 – 48 and Respondent Exhibit 22; and pages 55 – 70 and Respondent Exhibits 4 and 23; see Joint Exhibit 5). While obviously not exculpatory by itself to defeat the Union's claims of anti-union bias against Cottone and the Employer, this evidence does demonstrate that the Employer and, specifically, Cottone were focused on performance issues they believed Pontarelli had well prior to the filing of the memorandum of law in November 2020 in the Superior Court administrative appeal case.

The Union also argued that the Employer deviated from its personnel policy and job descriptions in allowing Cottone to conduct his own investigation of Pontarelli's performance issues and failed to interview witnesses that the Union claims would support its view that the performance issues raised by Cottone against Pontarelli were simply a pretext for anti-union discrimination. In reviewing the documents and testimony, the Board sees no evidence prohibiting a supervisor, in this case Cottone, from following up on information he received regarding performance complaints as well as acting on issues

with which he was personally involved. In arguing that the Employer disregarded or violated its personnel policies, the Union states that the Employer did not follow its policies on conducting performance reviews. (See Union Memorandum of Law at pages 15 – 16; Petitioner Exhibits 5, 146 and 147). Based on the evidence presented to the Board, Cottone's review/investigation of complaints regarding Pontarelli's performance is a potential disciplinary process and not a performance evaluation as suggested by the Union. In the Board's view, the Union is advocating an overly rigid (and likely inaccurate) interpretation of how an investigation must be handled. As noted previously, Cottone was contacted in several instances regarding concerns or complaints about Pontarelli as well as having his own difficulties with certain issues involving Pontarelli. (See Tr. Vol. VI, dated June 8, 2021, at pages 76 – 77; Tr. Vol. VIII, dated November 30, 2021, at pages 58 – 59; Tr. Vol. IX, dated March 15, 2022, at pages 32 – 35). To say Cottone should not investigate those issues and should instead hand them over to the Personnel Director is not for this Board to say. However, the Board sees no evidence in Cottone's conduct in this area (and no action that contradicts the Employer's personnel policies) that leads the Board to conclude his actions were based on or due to Pontarelli's alleged union activity.

As to Cottone's failure to speak with witnesses that Pontarelli brought to his attention, the Board does not view this as evidence of anti-union bias. The Union certainly brought forward at the hearings before the Board several witnesses who indicated that they had no knowledge of the performance problems of which Pontarelli was accused. (See, for example, Tr. Vol. V, dated June 3, 2021, at pages 25 and Petitioner Exhibit 161; pages 38 – 42 and Petitioner Exhibit 72; pages 73 – 81; Tr. Vol. VI, dated June 8, 2021, at pages 22 – 25; Tr. Vol. VII, dated June 15, 2021, at pages 15 – 16). However, in most cases these witnesses were not supervisors of their respective departments. While they seemed to enjoy working with Pontarelli and testified that they had no problems with his work performance or work habits, such evidence doesn't mean that what the Employer heard from supervisors who complained about Pontarelli or the concerns Cottone had due to his personal interactions with Pontarelli weren't of real concern. (See *Sutter East Bay Hospitals v. National labor Relations Board*, 687 F.3d 424 (D.C. Cir. 2012)). Instead, the Union simply concludes that because Cottone did not interview witnesses Pontarelli wanted him to speak with, this refusal must be due to anti-union bias. Having searched the reliable and probative evidence submitted, the Board is simply unable to make this leap of faith with the Union. As the testimony provides, the Employer did have information it believed showed Pontarelli had work performance issues. (See Joint Exhibits 5 and 7). The Employer asserts that it had a reasonable belief that the information it received about Pontarelli's work performance was accurate and justified an investigation. In this proceeding, it is up to the Union to present this Board with credible evidence that the Employer's reasons were a pretext and that its true motivation was anti-union bias. In reviewing the reliable and probative evidence before it, the Board has concluded that on this issue the Union did not present any compelling or convincing evidence to demonstrate that Cottone's failure or refusal to speak to all employees who Pontarelli believed would support his positive work habits shows any anti-union bias on Cottone's

part. Similarly, there was no evidence to show that this failure to interview certain witnesses by Cottone was based on Pontarelli's concerted activity.

The Union also raised substantive concerns regarding the Employer's termination of Pontarelli. Chief among the Union's defenses was that the list of performance related problems set forth by the Employer (see Joint Exhibits 5 and 7) were simply not true. The Board has already discussed the evidence it has reviewed showing (a) that there were supervisors (i.e., David Sienko, Ana Riley, Lisa Foehr) who complained about Pontarelli's work performance and (b) there were employees with whom Pontarelli worked who appeared to have no issues with Pontarelli's work performance (i.e., Christine McGregor, Joshua Flanigan, Vilma DiOrio, Sarah Halberstadt). In reviewing closely and balancing the testimony of these witnesses the one thing the Board did not glean from the evidence submitted by the Union was any connection to anti-union bias on the part of the Employer. The Union spent a great deal of time during the course of the hearings before the Board attempting to prove that the claims of performance problems raised by the Employer were inaccurate or flat out wrong and that Pontarelli was an outstanding performer. The Union conducted extensive examinations of witnesses and introduced literally hundreds of exhibits designed to show that Pontarelli's work performance was not lacking as alleged by the Employer. Pontarelli testified extensively and forcefully regarding the incidents that were the basis for the Employer's action against him. Even if the Board looks at the evidence presented by the Union on this point in a light most favorable to the Union and Pontarelli, there is still the problem of connecting the alleged false claims about Pontarelli's work performance to his protected and/or concerted activity. The Union, in the Board's view and based on its review of all the evidence submitted in this case, has simply failed to make the necessary connection.[11] While the Union has argued that there is evidence to show anti-union behavior by the Employer and that it acted based on Pontarelli's concerted activity, upon closer inspection in the Board's view the Union's reasoning and conclusions simply do not have substantive merit.

The Union raised several arguments in support of its claims of anti-union bias or that the actions taken against Pontarelli were due to his concerted activity. These included Cottone's alleged history of anti-union beliefs as expressed through his writings (Petitioner Exhibits 131 and 186), statements by the Commissioner during the December 9 meeting with Pontarelli as compared to an affidavit she submitted in support of the Employer's administrative appeal and that Pontarelli was subject to disparate treatment. While the Union argued vociferously that these actions by the Employer's representatives demonstrated anti-union bias or that their actions were due to Pontarelli's concerted activity, a closer look shows that there is little evidence to support the Union's argument.

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[11] For example, the Union mentioned on more than a few occasions that Cottone had intervened in the Employer's administrative appeal of the Board's certification decision on the side of the Employer and had written articles, in 2012 and 2014, that were extremely critical of teacher unions (see Petitioner Exhibits 131 and 186). However, each of these acts, taken at least six (6) years before the events that gave rise to the pending unfair labor practice complaint now before the Board, does not, in the Board's view, show that the actions taken and recommended by Cottone in 2020 were due to or based on anti-union animus or Pontarelli's protected, concerted activity.

Initially, the Union argues that the Commissioner's comments during the December 9 meeting with Pontarelli regarding his Union activity were disingenuous and "patently false" and, therefore, call into question the Commissioner's credibility. (See Union Memorandum of Law at pages 28 – 29). As the Union sees it, during the meeting on December 9, Pontarelli questioned the Commissioner over whether she had any knowledge of Pontarelli's union activity. Specifically, Pontarelli testified that during the December 9 meeting he stated that he was being singled out for special or disparate treatment. When Pontarelli was asked by the Commissioner why he thought he was being singled out, Pontarelli stated that it was because he "was engaged in union activity and had filed two memos in support of my union in Providence Superior Court in the past six weeks". (Union Memorandum of Law at page 28; See Tr. Vol. XIII, dated August 30, 2022, at page 40). According to Pontarelli's testimony, the Commissioner responded that she didn't know anything about Pontarelli's union or his claimed union activity. The Union notes that despite the Commissioner's denial at the December 9 meeting of knowledge of Pontarelli's union activity, she had signed an affidavit that was attached to the Employer's memorandum of law in its Superior Court appeal of the Board's certification decision. (Joint Exhibit 3). The Union contends that the Commissioner's affidavit mentions Pontarelli three times and thereby infers that the Commissioner had to know about Pontarelli's Union involvement. The Union further asserts that the Commissioner's reference in her December 15 termination letter to Pontarelli of his union activity means that the Commissioner's December 9 statement that she did not know anything about Pontarelli's union activity to be "patently false". (Union Memorandum of Law at page 29). While the Board cannot comment on what the Commissioner meant by her comments at the December 9 meeting, it is clear to the Board from a review of the affidavit and the December 15 termination letter that the inferences drawn by the Union are simply misplaced.

In reviewing the Commissioner's affidavit (Joint Exhibit 3 and Respondents Exhibit 8), the Union is correct that Pontarelli's name is mentioned on three occasions: once to identify the individuals who occupied the position of Legal Counsel/Hearing Officer when the Commissioner first arrived; a second time when talking about the attorneys then presently in the Legal Counsel/Hearing Officer position having "their own unique skill set" that was different from Pontarelli and Murray; and, a third time, when the Commissioner noted that different areas of "expertise" neither define nor limit the role of the Legal Counsel/Hearing Officer position. (See Respondents Exhibit 8). In the Board's view, a plain reading of the Commissioner's affidavit shows her advocating for her ability to be able to freely consult with her Legal Counsel/Hearing Officers and rely upon their advice and loyalty and that being a part of a bargaining unit would impact the manner by which attorneys could be utilized and would chill the relationship with the client. (See Respondents Exhibit 8). In the Board's reading, this affidavit is speaking generically about the role of the Legal Counsel/Hearing Officer in the Commissioner's office and how the Commissioner views the attorney/client relationship. It certainly does not, as the Union

would have the Board believe, single out Pontarelli or his involvement with or actions on behalf of, the Union.

Similarly, the Commissioner mentioning Pontarelli's union activity in her December 15 letter is nothing more than a reciting of the claims Pontarelli made during the December 9 meeting. (See Joint Exhibit 8). The statement is not a recognition of alleged union activity by Pontarelli nor does it serve to question the credibility of the Commissioner's actions or testimony during this case. In the Board's view of the evidence as a whole on this point, neither the affidavit nor the mentions in the December 15 letter show that the Commissioner's response to Pontarelli on December 9 was "patently false" as the Union asserts.

Regarding the Union's contention that Cottone's actions involving Pontarelli showed both an anti-union bias and were taken because of Pontarelli's concerted activity, the Union focused on a book review Cottone wrote in the Rhode Island Bar Journal in 2012 (see Petitioner Exhibit 131), a memorandum Cottone wrote in 2014 titled "Trouble in Paradise: How an Incompetent Judiciary, a Powerful Teachers' Union and a Somnolent Fourth Estate Created the Perfect Anti-Education State in Little Rhody" (see Petitioner Exhibit 186)[12] and Cottone's motion to intervene in the Employer's administrative appeal and his memorandum in support of the Employer's position. Each of these documents appear to express antipathy for public sector unions and, in the case of the memorandum in the court case, strong opposition to having the Legal Counsel/Hearing Officer position become part of a unionized bargaining unit. The Union looks at these materials and sees not only a dislike for unions but the basis for anti-union behavior by Cottone against Pontarelli and Murray. While the documents, especially the book review and "Trouble in Paradise", can be read as being anti-union, they do not, in the Board's view and in light of the evidence presented at the hearings, support the Union's contention that Pontarelli's termination for just cause was due to his concerted activity.

Initially, it must be pointed out that all of the documents mentioned by the Union were written by Cottone between 2012 and 2015 or more than 5 years prior to Pontarelli's termination and the suspension of new assignments to Murray. In other words, while the documents certainly can be read to express a dislike of unions when they were written, they add little in attempting to discern whether those same feelings existed in 2020 at the time of the events in question. In reviewing the testimony before it, the Board found little evidence to link Cottone's feelings as expressed in the book review and "Trouble in Paradise" documents and his actions concerning Pontarelli's job performance. In fact, Cottone testified that he did not harbor any anti-union feelings toward Pontarelli or Murray. (See Tr. Vol. XI, dated June 23, 2022, at page 30). Though such a statement could clearly be viewed as self-serving and, therefore, not highly probative of the issue before the Board, what is apparent is the Union's lack of evidence showing that any anti-union bias

[12] According to the testimony, while "Trouble in Paradise" was written by Cottone, it was never published or made public and was designed as an internal document only with limited distribution. (See Tr. Vol. XI, dated June 23, 2022, at pages 21 – 24).

Cottone allegedly harbored was activated in the termination of Pontarelli's employment. Even if the Board agrees with the Union's claim of the significance of Cottone's writings, it is a leap too far for this Board to conclude that the termination of Pontarelli was due to anti-union bias.

3. The Employer's Defenses for Pontarelli's Discharge

As previously discussed, the Employer set forth several reasons for its discharge of Pontarelli. (See Joint Exhibits 5, 7 and 8). In addition to the documentation setting forth the reasons for the discharge, the Employer also had Cottone testify to the circumstances surrounding the various items. (See Tr. Vol. XI, dated June 23, 2022, at pages 32 – 70). In essence, the Employer argues to the Board that it had legitimate reasons to discharge Pontarelli and that none of its reasons had anything to do with anti-union bias or with Pontarelli engaging in concerted activity.

As discussed above, the Union disputes the legitimacy of the Employer's reasons for discharging Pontarelli and asserts that the reasons were, at worse, fabricated and, at best, simply not accurate. The Union spent a great deal of effort and time during the hearings attempting to prove the inaccuracy of the Employer's reasons for discharging Pontarelli. While the Union's presentation in this area was notable,[13] in the Board's view of the reliable and probative evidence submitted, the Union simply missed the mark in that it was unable to show that the Employer's reasons were merely a pretext for anti-union bias against Pontarelli.

Often in termination cases, the NLRB looks to *Wright Line*, 251 NLRB 1083 (1980) as the standard for establishing whether protected activity was the motivating factor in an employer's termination or discipline of an employee. As the NLRB noted in *Volvo Group North America, LLC,* 370 NLRB No. 52 (2020)

> The Board has most often summarized the [*Wright Line*] elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. But the General Counsel does not invariably sustain his burden by producing any evidence of animus or hostility toward union or other protected concerted activity. Rather, the evidence must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6–8 (2019).
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> *Volvo Group North America, LLC,* 370 NLRB at page 2.

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[13] As discussed, the Union's testimonial evidence centered primarily around individuals who worked with Pontarelli giving their opinions/observations of whether Pontarelli was disorganized, lacked initiative, was unable to keep track of his work, thought Pontarelli's work performance slowed down the work in the office or complained about Pontarelli's work performance (see Tr. Vol. V, dated June 3, 2021, at page 25; page 54; pages 70 – 76; 79 – 80; 101 – 102; Tr. Vol. VI, dated June 8, 2021, at pages 21 – 23; Tr. Vol. VII, dated June 15, 2021, at pages 15 – 18; pages 29 – 43; Tr. Vol. VIII, dated November 30, 2021, at pages 22 – 23; page 39; pages 46 – 48; see also Petitioner Exhibits 72, 106, 107, 117, 118, 119, 128 and 161). While much of this testimonial evidence showed that the individual witnesses did not believe Pontarelli's work performance was poor, this evidence did not link in any manner the Employer's actions against Pontarelli to his union activity.

In the present case, while the Board has determined that there is sufficient evidence to show that Pontarelli engaged in protected and/or union activity and that the Employer was aware of that activity, the Union has been unable to "establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee." *Volvo Group North America, LLC,* 370 NLRB at page 2.

As has been previously discussed, the Union, in the Board's view of the evidence before it, has not brought forth evidence sufficient to make a link between the Employer's termination of Pontarelli and his union activity. The Union points to a number of factors that it says show that the Employer's actions against Pontarelli were based on his union activity. The Union claims the timing of the emails from Cottone to Pontarelli (and Murray) in November 2020 so soon after Pontarelli filed the memorandum of law on behalf of the Union in opposition to the Employer's administrative appeal is evidence of anti-union animus on the part of the Employer. However, as has been discussed above, Cottone had several discussions with Pontarelli regarding several different work-related items prior to the November 1 filing date and even prior to the August 20 Court order requiring the filings.[14] Similarly, the Union points to Cottone's allegedly cursory investigation of Pontarelli's work performance and Cottone's failure/refusal to interview individuals suggested by Pontarelli who may have had information about Pontarelii's work performance, the alleged inconsistencies of the Employer's reasons for terminating Pontarelli (i.e., comparing language changes between the November 16 and November 30 communications – see Joint Exhibits 5 and 7) and how Pontarelli was allegedly treated differently than others (mainly Cottone). As previously addressed by the Board (see Sub-section 2 above), a closer examination of each of these claims provides no sufficient evidence to support a link between the Employer's action against Pontarelli and his union activity.

As noted, the Union has loudly claimed that the reasons for Pontarelli's termination were inaccurate. Even if the Union were correct in this claim, it is not enough, in the Board's view and under existing case law, to support a finding of anti-union animus.[15] Initially, and perhaps most significantly, the Employer argues that its reasons for terminating Pontarelli were accurate based on the information it had, that whether Pontarelli engaged in union activity or not the Employer still would have terminated his

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[14] At least 3 issues mentioned in Cottone's November 16 email (Joint Exhibit 5) appeared to have their genesis prior to August 2020: Cottone had questioned Pontarelli about the Smithfield decision in June 2020 and wanted Pontarelli to make changes but Pontarelli refused (Tr. Vol. XI, dated June 23, 2022, at pages 33 – 41); Pontarelli had requested the Employer hire a criminal attorney to represent Pontarelli against a complaint filed by a teacher with the State Police but Cottone refused (Tr. Vol. XI, dated June 23, 2022, at pages 41 – 48); and Cottone had sought a work status update from Pontarelli that Pontarelli ignored (Tr. Vol. XI, dated June 23, 2022, at pages 59 – 60).

[15] Under the NLRB's *Wright Line* standard, if there is no finding that the adverse action was based on or motivated by anti-union animus/the employee's protected union activity, the NLRB will not address whether the employer's defense that it would have taken the action anyway has merit. See *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 2–4 (2020) (reversing unlawful discipline finding for lack of evidence that the employer harbored animus against the employee's protected activity). Even assuming the Union could link the Employer's adverse action with Pontarelli's union activity, as will be discussed the Employer did not violate the Act.

employment and, finally, the Employer had a good faith or reasonable belief that the information it received about Pontarelli was accurate. In addressing the argument that an employer would have acted the same way even if no union activity were involved, the NLRB and the courts have found that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the National labor Relations Act. As the First Circuit noted in *NLRB v. Prince Macaroni Manufacturing Co.*, 329 F.2d 803 (1st Cir. 1964)

> The finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or by supplying a possible motive, allow the [NLRB] without more, to conclude that the act of discharge was illegally inspired. *National Labor Relations Board v. McGahey*, 233 F.2d 406, 410 (5th Cir. 1956). "It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the Act." *National Labor Relations Board v. Standard Coil Products*, 224 F.2d 465, 470, (1st Cir.) cert. denied. 350 U.S. 902, 76 S.Ct. 180, 100 L.Ed. 792 (1955).
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> *NLRB v. Prince Macaroni Manufacturing Co.*, 329 F.2d at 806.

See also *Raytheon Company v. N.L.R.B*, 326 F.2d 471 (1st Cir. 1964).

In a more recent decision, *Sutter East Bay Hospitals. v. National Labor Relations Board*, 687 F.3d 424 (D.C. Cir. 2012), the Court was presented with a NLRB decision upholding a violation of the Act involving a representation dispute between two unions and the discipline of a union member. In discussing the disciplinary action, the Court initially focused on the administrative law judge's (ALJ) application of *Wright Line* in the context of a situation where "an employee is disciplined for a reason purportedly unrelated to any protected activity" *Sutter East Bay Hospitals. v. National Labor Relations Board*, 687 F.3d at 434. The Court noted the appropriate *Wright Line* standard of proof and then addressed the hospitals' argument that the ALJ had improperly applied *Wright Line* because he had failed to consider the employer's reasonable belief that the employee had engaged in misconduct. As the Court stated

> An employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line. See DTR Indus., Inc.,* 350 NLRB 1132, 1137 (2007). This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive. *See id.*
>
> *Sutter East Bay Hospital. v. National Labor Relations Board,* 687 F.3d at 434.

The Court then analyzed the multiple failings of the ALJ in not taking into consideration whether the employer had a reasonable belief, based on the information it had received, that the employee had engaged in misconduct. This, of course, is similar to the argument that the employer would have acted in the same way regardless of whether or not a claim of union activity had been made.

In the instant case, the Employer claims that the performance issues it identified with Pontarelli were items in which it reasonably believed Pontarelli had engaged to the detriment of the Employer. Some of the concerns raised by the Employer cannot, in the Board's view of the evidence, be objectively disputed. For example, Cottone wanted Pontarelli to provide legal support for "questionable conclusions" he had made in the Smithfield decision. (See Joint Exhibits 5 and 7). However, Pontarelli refused to do so. (See Tr. Vol. XI, dated June 23, 2022, at pages 34 – 36; Pages 38 – 40; Respondent Exhibit 25).[16] Similarly, Cottone sought to have Pontarelli provide him with a list of pending matters on which Pontarelli was working. However, despite numerous requests, Pontarelli refused to comply with this request from his supervisor. (See Tr. Vol. XI, dated June 23, 2022, at pages 59 – 61; Respondent Exhibit 26). In addition, there was a dispute between what Cottone wanted and what Pontarelli was willing or not willing to do regarding a child in the Cranston school system with asthma who couldn't wear a mask. Pontarelli, according to Cottone's testimony, didn't believe that Section 504 (a federal disability discrimination statute) applied to the situation even though in the FAQ asthma was used as an example of a situation covered by Section 504 (Tr. Vol. XI, dated June 23, 2022, at pages 49 – 51). As he testified, Cottone lost trust in Pontarelli's (and Murray's) judgment based on a stated insistence and belief of their independence as administrative hearing officers. (See Tr. Vol. XI, dated June 23, 2022, at pages 50 – 51; see also pages 55 – 56; Joint Exhibit 8). Also, there was a situation in which the Employer received correspondence signed by several civil rights attorneys accusing the Employer of violating the Individual with Disabilities Education Act (IDEA) by not providing appropriate services to children with disabilities (Tr. Vol. XI, dated June 23, 2022, at pages 63 – 64). Cottone assigned the response to Pontarelli because of a conflict Cottone believed he had but, according to Cottone's testimony, Pontarelli did not respond quickly enough and the delay caused Cottone to be the one to write the letter. (See Tr. Vol. XI, dated June 23, 2022, at pages 65 – 70).

As can be seen by the above examples, Cottone and the Employer have shown that they had a reasonable belief that the performance issues raised with Pontarelli (Joint Exhibits 5 and 7) were legitimate and needed to be corrected. However, Pontarelli simply refused to comply with Cottone's requests. Further, the evidence shows that this type of reaction from Pontarelli was not a one off but was a consistent reaction to requests from Cottone. (See Joint Exhibit 8 at pages 2 – 3). The Union, as noted above, has decried the Employer's reasons and actions against Pontarelli, claiming that there is no truth to the allegations made by the Employer about Pontarelli's work performance. This position, in the Board's view, simply misses the point, i.e., that notwithstanding whether or not Pontarelli engaged in the conduct the Employer had a good faith or reasonable

[16] Whether Pontarelli was right or wrong in his belief that his Smithfield decision was correct, his failure and refusal to follow a directive from his supervisor and his apparently dismissive attitude toward his supervisor (see Tr. Vol. XI, dated June 23, 2022, at pages 38 – 40; Respondent Exhibit 25 at pages 15 – 18) could be seen, as it obviously was in the instant case by Cottone, as grounds for discipline.

belief that he did based on the information it collected. Under existing case law,[17] this is sufficient to find that the Employer did not violate the Act when it discharged Pontarelli.

For all of the above stated reasons, the Board finds that the Employer did not violate the Act when it terminated Pontarelli's employment.

B. Was Paul Pontarelli Denied His Sick Leave Accrual Due to His Protected and/or Concerted Union Activity

The Union also claims that Pontarelli was denied payment for his accrued and unused sick leave because he engaged in protected concerted activity.[18] The Employer counters that its denial of payment to Pontarelli for his accrued sick leave was consistent with the terms of its sick leave policy and had nothing to do with any protected concerted activity in which Pontarelli might have taken part.

The Employer, as part of its Personnel Manual, has a section 5.06 titled Sick Leave Policy (Petitioner Exhibit 5). The relevant portion of the Policy provides as follows:

> When the service of a non-union employee shall be terminated by retirement (mandatory, involuntary or voluntary) or death, such employee or his/her estate shall be entitled to receive full pay for each hour of accrued sick leave to his/her credit, in accordance with the following formula. As of the date of the termination, an employee shall be entitled to receive full pay for 50% of all accrued sick leave over 390 hours up to and including 630 hours, and 75% pay for all accrued sick leave over 630 hours up to and including 875 hours.

After Pontarelli was terminated on December 15, 2020, he applied to receive payment for his sick leave accrual. He was denied payment of his accrued sick time by Margaret Santiago, the Employer's Personnel Director. (Tr Vol IV, dated June 1, 2021, at page 18). According to Ms. Santiago's testimony, Pontarelli was terminated for cause and did not come within the conditions set forth to allow someone to receive payment for sick leave. In other words, Pontarelli's for cause termination did not fit into the Policy's definition of "terminated by retirement (mandatory, involuntary or voluntary)" and therefore Pontarelli didn't qualify to receive payment for his accrued sick leave (Tr. Vol IV, dated June 1, 2021, at page 18 – 21). On December 23 Pontarelli again requested payment of his accrued sick time asserting that he had filed for retirement with the State Retirement System. (Petitioner Exhibit 3, December 23, 2020 email from Pontarelli to Santiago). However, this information did not change the Employer's decision to deny Pontarelli payment for his accrued sick time. (See Tr. Vol. IV, dated June 1, 2021, at page 17).

The Union claims that there are multiple reasons to not believe the Employer's stated position for why Pontarelli did not receive payment for his accrued sick leave. Initially, the Union asserts that the reason for denying the payment shifted, i.e., Santiago first told

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[17] See *Volvo Group North America, LLC,* 370 NLRB No. 52 (2020); *Circus Circus Casino*, 370 NLRB No. 108.

[18] The alleged protected concerted activity the Union identifies in the denial of sick leave payment is the same protected concerted activity identified in the termination matter, i.e., that Pontarelli prepared and submitted on behalf of the Union a memorandum of law to the Superior Court opposing the Employer's administrative appeal of the Board's decision in the certification contest in Case EE-3729.

Pontarelli that he did not qualify because he didn't retire, but when Pontarelli subsequently informed Santiago that he had filed his application for retirement he was still denied his sick leave payment. The Union also asserts that the denial finds no basis in the language of the Policy. Further, the Union claims that an offer of a settlement agreement by the Employer where in exchange for Pontarelli receiving the sick leave payout he and Murray would drop the pending Board case demonstrates how little faith the Employer had in the accuracy of its interpretation of the Sick Leave Policy.[19] Finally, the Union points to the Employer's testimony that it had a "practice" of denying accrued sick leave payouts under its Policy to non-union, non-classified employees. As the Union revealed during its examination of Santiago, the only individual who fit into the non-union, non-classified employee niche was Pontarelli. The Union concludes that all these reasons demonstrate the Employer's denial of a sick leave payout to Pontarelli was based on his engaging in concerted activity and, thus, a violation of the Act.

The Board has closely examined the language of the Policy as well as the testimony of Pontarelli and Santiago regarding this issue. Initially, in reviewing the evidence, the Board does not agree with the Union's claims that the Employer had shifting or changing reasons for denying Pontarelli his sick leave payment or that the language of the Policy does not support the Employer's reason for denying the payment. Based on the evidence the Board has reviewed, it is apparent that the Employer maintained its position that Pontarelli's termination for cause was not a "retirement" as that term was defined in the Policy. Even after Pontarelli applied for his retirement benefit with the State this did not change the fact that he had initially been terminated for cause. (See Joint Exhibit 8). While the Union may believe that the Employer's application or interpretation of the Policy is wrong or too strict, that does not change the fact that the Employer was consistent in its application toward Pontarelli. In the Board's view, the evidence supports the fact that the Employer followed the language contained in its sick leave policy and did not alter or change its reasoning as to why it denied Pontarelli payment for his sick time.

Similarly, and as noted, the Employer's reasoning for denying Pontarelli payment appears to follow precisely how the language in the Policy reads. One could certainly argue that the Employer was strictly applying the definition in making its decision, but the fact remains that the Employer did not deviate from the language of the Policy in its application toward Pontarelli. At no point during the hearing has the Board been able to find any evidence from the Union that shows the Employer's strict application of the language of the policy was in error. More to the point, the Board has found no evidence to support the Union's contention that the Employer's denial of payment of the sick leave to Pontarelli was due to his engaging in union activity.

As to the Union's argument that the proposal of a settlement agreement somehow taints the Employer's reasoning, the Board does not agree with this position for two reasons. First, as previously discussed, the introduction of a settlement agreement or

[19] As previously noted, the Board will not consider the Union's arguments based on the Employer's offer of a settlement agreement to Pontarelli.

settlement discussions is generally not admissible in this type of proceeding or to attempt to show that the party offering the settlement somehow had less faith in its position. The Board will not ascribe a nefarious reason to the Employer's proposal of settlement and, in fact, does not consider it a legitimate piece of evidence to be considered in this matter. Second, settlement agreements are proposed for a variety of reasons that often have nothing to do with the strength or weakness of a party's case. In the instant matter, there was no admissible evidence of the basis for the proposed settlement. The Board will not apply an adverse inference to the Employer, as apparently the Union wants, based on the Employer suggesting a means for settling a dispute.

Finally, the Board is not persuaded that the Employer's testimony that it had a "practice" of denying sick leave payments to non-union, non-classified employees only to learn that Pontarelli was the sole member of the category demonstrates that the Employer violated the Act when it denied Pontarelli his sick leave payment. In fact, what is lacking in the Union's entire presentation on this issue is any evidence that the Employer denied the sick leave payment due to Pontarelli's protected concerted activity. The Union produced no evidence that the Board could find linking in any manner the decision to deny Pontarelli his sick leave payment with his union activity. According to the complaint, that was the reason why Pontarelli was denied his sick leave payment. Yet the Board has been unable to locate any testimonial or documentary evidence linking Pontarelli's union activity to Santiago's decision.[20] In short, the Board can find no basis to support the Union's contention that the Employer violated the Act when it denied Pontarelli payment for his accrued sick time.

For the above stated reasons, the Board finds that the Employer did not violate the Act when it refused to pay Pontarelli his sick leave.

C. Did The Employer Withdraw Work or Otherwise Discipline Kathleen Murray Due to Her Protected and/or Concerted Union Activity

The Union also alleges that Murray was illegally disciplined by her supervisor, Cottone, when the latter stopped giving Murray new work assignments. The Union claims that Cottone's actions were in retaliation for Murray engaging in protected concerted activity. The Employer disputes the Union's claim that it disciplined Murray. Instead, the Employer, while it does not contest that it stopped giving new work assignments to Murray, asserts that its action was not disciplinary in nature nor was it based on Murray's alleged engagement in protected and/or concerted activity. (Tr. Vol. XI, dated June 23, 2021, at pages 30 – 32). The Employer claims that Murray did not lose any time at work (i.e., she was not suspended or placed on leave) nor were her wages or benefits impacted by Cottone not assigning Murray new work (a point Murray confirmed in her testimony on cross examination – see Tr. Vol. II, dated April 20, 2021, at

[20] While the Board acknowledges that Santiago attended the December 9 meeting at which Pontarelli told the Commissioner she was aware of his union activity (and Santiago confirmed in her testimony that she heard Pontarelli raise this issue at the meeting – Tr. Vol. III, dated April 22, 2021, at pages 99 – 103), this information is, in the Board's view, simply too tangential to be the basis of a finding of a violation of the Act.

pages 103 – 104). The Employer states that its action was based on Murray not agreeing with directives given to her by Cottone and her refusal to follow those directives.

The genesis of the disagreement between Murray and Cottone appears to stem from Cottone's review of a decision (Hoddersen) that Murray had drafted. Cottone believed that the Hoddersen decision contained a legal error that he wanted Murray to correct. As Cottone testified

> [Hoddersen] was a teacher termination appeal, and Kathie rendered a decision which upheld the School Committee's dismissal of the teacher, but found that there had been a due process violation at the School Committee level, but what she also said is that there may be a damage claim that the teacher may have as a result of the due process violation that occurred at the School Committee level. I believe, and still believe, that there's accepted and settled law that the de novo appeal that is afforded to teachers under the Teacher Tenure Act before RIDE, where they get a whole new hearing with all new evidence and everything, cures any due process violation that may have occurred at the School Committee level. So when I saw that in Kathie's decision, I called that to her attention, and I said the law, showed her the case, and said, I don't know if there is additional law that I'm not aware of, but if you are going to say that there is a damage claim that exists, even though you're upholding the termination, then you have to spell it out in some case law...
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> (Tr. Vol. XI, dated June 23, 2022, at pages 78 – 80).

(See also Respondents' Exhibit 24.)

According to Murray's testimony, Cottone wanted her to prepare a legal memorandum on "whether or not due process could be remedied through monetary damages in addition to a *de novo* hearing." (Tr. Vol. II, dated April 20, 2021, at pages 50 – 51). In addition, Murray testified that Cottone did not "want to have an alternate decision of the Commissioner. So implicitly I took it as a directive to take that out of the decision, to take that part of the decision and remove it because when the alternate decision was done, that's how it was handled." (Tr. Vol. II, dated April 20, 2021, at pages 50 – 51). In clarifying her position on direct examination, Murray stated as follows:

> Q. So to put a finer point on it, the Hoddersen case that you testified about earlier, you felt that it was inappropriate when Mr. Cottone asked you to provide legal authority in the decision related -- in the draft decision in support of the concept that an award of monetary damages against the school department in connection with a violation of a due practice issue was appropriate, correct?
>
> A. Right. I hope I'm explaining this correctly. If I did research on that issue, legal research and I imposed that into the text of the decision, I would be helping one party or the other and I would be making a final finding on that. That's what Anthony was proposing. And the way that I was proposing to handle it was to leave the state of the legal arguments on that point as they were and to send that issue back to the parties. So yes -- for resolution, for a voluntary resolution. So yes, I felt doing what he was proposing was inconsistent with that objective.
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> (Tr. Vol. II, dated April 20, 2021, at pages 97 – 98).

There was a second area of concern that Cottone raised with Murray involving the State's procurement policies and Cottone's desire to have Murray prepare a legal memorandum regarding certain changes to the policy. (Tr. Vol. XI, dated June 23, 2022, at pages 74 – 77; see also Respondents' Exhibit 24). According to the Employer's evidence, Murray refused to perform the tasks Cottone directed her to perform regarding the Hoddersen decision and the State's changes in procurement policies. (Respondents' Exhibit 24). The Union's evidence did not dispute the fact that Murray refused to provide the legal memorandum requested by Cottone. Instead, Murray testified that the reason she didn't comply with Cottone's directive was because she believed Cottone was asking her to alter the substantive portion of her decision, an act which she believed to be inappropriate. (Tr. Vol. II, dated April 20, 2021, at page 97).[21]

Based on the Board's review of the evidence, both testimonial and documentary, two things appear clear: first, Murray directly refused to follow her supervisor's directive when she refused to draft two legal memoranda as he requested and, second, there was no evidence submitted by the Union that the decision made by Cottone regarding Murray's work assignments was based on or due to any alleged protected and/or concerted activity in which Murray might have engaged.[22] While the Board does not sit here to judge the justness or lack of just cause in an employer's action, it does have the authority to rule on whether an employer acts toward an employee based on union animus. Regarding Murray and her disputes with Cottone and Cottone deciding not to assign Murray new cases, the Board does not see any link between the action to stop assigning Murray new cases and any protected concerted activity allegedly engaged in by Murray. Perhaps what most defeats the Union's arguments in this area are Murray's own words in her resignation letter. (Respondent Exhibit 16). As is patently clear from Murray's retirement notification letter, her reason for leaving has to do with Cottone's attempt to "introduce an unseemly and unethical degree of control over the decisions that I write on behalf of the Commissioner in the disputed cases brought to RIDE for resolution." (Respondent Exhibit 16). While Murray excoriates Cottone for his "interference" and "level of control" and alleged "bullying and retaliation" in attempting to convince Murray to comply with his directives, nowhere in this correspondence does Murray mention the

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[21] A tangential dispute between Murray and Cottone revolved around the difference between an administrative hearing officer and an Article III judge. Apparently, Cottone was attempting to explain to Murray how her position as an administrative hearing officer (contrary to that of an Article III judge) allowed her more flexibility in discussing policy matters impacting a pending decision with agency personnel (See Employer Memorandum of Law at page 29). Murray, however, had her own views as to how she was to handle her hearing officer duties and those ideas were not aligned with Cottone's thoughts on the subject (Tr. Vol. II, dated April 20, 2021, at pages 59 – 61).

[22] While there is evidence before this Board that Murray was initially involved in the formation of the Legal Counsel/Hearing Officer union and the legal battle to gain certification of the Union, there is less evidence that she had any involvement in the preparation and submission of the memorandum of law to the Superior Court opposing the Employer's administrative appeal of this Board's decision in EE-3729, i.e., while Murray testified that she was involved in the preparation of the memorandum submitted to the Court, there is no indication anywhere in the document that she signed the memorandum. (See Joint Exhibit 3; Tr. Vol. II, dated April 20, 2021, at pages 27 – 28; pages 102 – 103). In addition, there was no evidence that Murray participated in any of the Court proceedings surrounding the revived appeal. Frankly, in this Board's view, there is simply a paucity of evidence showing Murray engaged in protected concerted activity or that Cottone acted toward Murray because she engaged in protected concerted activity.

Union, her actions or activities on behalf of the Union or that any protected concerted activity she engaged in was the basis for how she was treated/mistreated by Cottone. In short, while Murray clearly did not like working for Cottone, there is simply no evidence before this Board that shows that Cottone's actions toward Murray were in retaliation for or because of her protected concerted activity.

For the above stated reasons, the Board finds that the Employer did not violate the Act when it failed to assign new cases to Murray.

D. Other Miscellaneous Claims by Union of Wrongful Conduct by Employer Under the Act

In addition to the main arguments raised by the Union and discussed above, the Union also brought forth other arguments that it claimed demonstrated how the Employer treated Pontarelli and/or Murray in an illegal manner in violation of the Act. The Board has reviewed the evidence presented regarding these claims and, as discussed below, has been unable to discern any violation of the Act as claimed by the Union. To be clear and as has been mentioned above, the Board's decision only addresses whether the Union was able to present evidence to show that the alleged wrongful conduct against Pontarelli and/or Murray was based on their protected and/or concerted activity and, therefore, in violation of the Act. As noted, the Union has failed, in the Board's view of all the reliable and probative evidence in the record and the exhibits, to demonstrate a violation of the Act.

1. Disparate Treatment

The Union has asserted a disparate treatment argument. This claim is basically that Pontarelli was treated differently than similarly situated employees of the Employer because of his engaging in protected union activity. As evidence of this alleged disparate treatment, the Union notes that Cottone was engaged in a private law practice while working for the Employer and was using the Employer's computers for his personal law practice which allegedly was a violation of the Employer's computer policy. (Tr. Vol. XI, dated June 23, 2022, at pages 24 – 26). The Union further asserts that Cottone was not disciplined for his alleged violation of this computer policy. The Union also claims that Pontarelli was terminated for alleged violation of policies and that he was treated differently by the Employer because he was terminated for policy violations while Cottone was not disciplined for his alleged policy violations. The Union also argues that Cottone was involved in a loud and heated dispute with a former Commissioner over a decision Cottone wrote while in the position of Legal Counsel/Hearing Officer and that Cottone was never disciplined for such conduct. On the other hand, the Union claims Pontarelli was disciplined for similar conduct and that such different treatment shows discriminatory intent by the Employer against Pontarelli.[23]

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[23] The Union also attempted to argue that discipline taken against an assistant superintendent in the Providence School System (which was under the control of the Rhode Island Department of Education at the time of the incident and discipline) was more lenient than the discipline imposed on Pontarelli and, as such, the Employer engaged in disparate treatment against Pontarelli. As this evidence involved a completely different institution and different set of circumstances, the Board determined the information to

The Board has thoroughly reviewed the Union's claims in this area and finds them to be lacking in relevance or substantive merit. As to Cottone allegedly engaging in the private practice of law while on the Employer's time (and apparently using the Employer's copy machine for his personal law practice), the testimony before the Board is that the Employer was aware of the fact that Cottone was engaged in the private practice of law while also employed by the Employer and that the Employer authorized Cottone to engage in such conduct. (Tr. Vol. XI, June 23, 2022, at pages 24 – 26). There was no credible evidence submitted by the Union that Cottone engaging in the private practice of law with the knowledge and agreement of the Employer was a violation of the Employer's policies. The comparison of alleged disparate application of policy by the Employer toward Pontarelli is simply without merit in the Board's view. The violations of policy the Union attempts to make in its argument simply are not supported by the evidence before the Board.

Regarding Cottone's argument with a former commissioner over a decision Cottone wrote, the Union appears to argue that Cottone was not disciplined for refusing to change the substance of the decision despite the commissioner's insistence that he was wrong. (See Tr. Vol. VII, dated June 15, 2021, at pages 72 – 73). By contrast, the Union argues that Pontarelli (and Murray) were both disciplined for engaging in similar conduct and that disciplining them while Cottone was not disciplined for similar conduct is disparate treatment that violates the Act. (See Union Memorandum of Law at page 27). As is clear from the evidence before the Board on this item, Cottone's argument with the commissioner occurred prior to Commissioner Infante-Green coming into the position. While it might be argued that Cottone not wanting to change his decision even though a former commissioner wanted changes was similar to Pontarelli (and Murray) refusing to make changes to their decisions despite being directed to do so by Cottone, the fact that these incidents occurred under different administrations/different commissioners does not provide the apples-to-apples comparison the Union is suggesting in its argument. Different commissioners (and supervisors) will often have different rules or apply the same policies in a different manner. That does not mean, in the Board's view, that the different application was discriminatory in nature or practice. In short, the comparison the Union wants to make is not present. There simply is no evidence of disparate treatment regarding this issue.

The Union also argues that the Commissioner's response at the December 9 meeting to Pontarelli's statement that he was being "singled out" because of his union activity (she responded that she didn't know anything about the Union or his union activity – Union Memorandum of Law at page 28) was further evidence of disparate treatment. As already discussed by the Board (see Section A, subsection 2 above), an objective view of the Commissioner's response and her affidavit simply do not support the Union's argument on this point. Without repeating what has previously been stated, as to the

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be without relevance to the discharge of Pontarelli. (See Tr. Vol. IV, dated June 2, 2021, at pages 108 – 116).

Commissioner's affidavit, it is the Board's view that the Commissioner was simply advocating for her ability to be able to freely consult with her Legal Counsel/Hearing Officers and rely upon their advice and loyalty and that their joining a union would impact the manner by which attorneys could be utilized and would chill the relationship with the client. (See Respondents Exhibit 8). This viewpoint, while clearly opposite from what the Union advocates and believes is not, in this Board's view, a demonstration of disparate treatment against Pontarelli. Similarly, the Commissioner mentioning Pontarelli's union activity in her December 15 letter is nothing more than a reciting of the claims Pontarelli made during the December 9 meeting. (See Joint Exhibit 8). The statement, based on the Board's review of the evidence and as indicated above, is not a recognition of alleged union activity by Pontarelli nor does it serve to question the credibility of the Commissioner's actions or testimony during this case.

For all of the above stated reasons, the Board has determined that the Union's claims of disparate treatment are unfounded.

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. In 2012 a petition for representation election was filed with the State Labor Relations Board (EE-3729) by Pontarelli and Murray seeking to form a new union at the Employer's place of business covering the position of Legal Counsel/Hearing Officer.

4. After a formal hearing, the Board on April 30, 2014 issued a decision finding that the Legal Counsel/hearing Officer position was appropriately included in the proposed bargaining unit. The decision also directed that an election be held.

5. On May 28, 2014, the Board after having conducted the election and determining that the Union won the election certified the Union as the exclusive representative of the employees in the bargaining unit.

6. On May 30, 2014, the Employer appealed the Board's decision to Superior Court.

7. On July 8, 2014, the Employer sought a stay of the Board's certification and on September 4, 2014, the Superior Court entered an Order for an executed Consent Agreement staying the decision.

8. In the late fall of 2014, Attorney Anthony Cottone, a new Hearing Officer hired by the Employer, moved to intervene in the pending appeal and moved for a remand of the matter for further proceedings before this Board. After extensive litigation, on June 12, 2015 the Superior Court entered an Order granting remand.

9. On December 2, 2015, the Board issued a supplemental decision in EE-3729 finding, once again, that the position of Legal Counsel/Hearing Officer was not a position that should be excluded from the bargaining unit.

10. The Employer once again appealed to the Superior Court and requested a remand of the case to allow it to submit new evidence.

11. On August 20, 2020, the Superior Court issued an order for the parties to submit briefs on the remand question.

12. On November 1, 2020, the Union submitted its memorandum of law to the Court in opposition to the Employer's appeal. The Union's memorandum to the Court was signed by Paul Pontarelli.

13. In November 2020 Pontarelli and Kathleen Murray were both in the position of Legal Counsel/Hearing Officer. Both Pontarelli and Murray had over 30 years of experience with the Employer and had no discernable disciplinary history with the Employer.

14. Beginning around October 2020 Murray had a disagreement with her supervisor, Anthony Cottone regarding a decision (Hoddersen) she was writing. The disagreement centered around an issue of due process and how Cottone wanted Murray to address the issue. Murray considered Cottone's arguments and requests for action but ultimately rejected his directives.

15. In addition to her disagreement with how to handle the due process issue in Hoddersen, Murray also had disagreements with Cottone over the difference between an Article III judge and an administrative hearing officer and Cottone wanting Murray to review certain contracts.

16. On November 12, 2020, Pontarelli's supervisor, Anthony Cottone, asked to meet with Pontarelli. At the meeting, which was conducted virtually, Cottone identified several performance issues that he said Pontarelli had.

17. Pontarelli requested that Cottone provide more specifics of these claimed performance deficiencies and on November 16, 2020 Cottone forwarded to Pontarelli an email detailing a list of performance deficiencies that Cottone had discussed at the November 12 virtual meeting.

18. On November 16, 2020, and based on Murray's refusal to comply with his directives, Cottone decided to suspend assigning new cases to Murray. This suspension of new assignments did not alter or change Murray's wages, benefits or working conditions.

19. On November 18, 2020, after securing the services of an attorney, a letter was sent to Cottone on Pontarelli's behalf responding to Cottone's November 16 email. Pontarelli's attorney's letter to Cottone contained numerous attachments purportedly contradicting Cottone's stated deficiencies regarding Pontarelli's performance. There was no response to the November 18 letter.

20. On November 30, 2020, the Commissioner of Education sent Pontarelli a letter which detailed several areas of performance deficiencies and offering Pontarelli the opportunity to meet and be heard regarding the charges of inadequate performance set forth in the Commissioner's letter.

21. On December 9, 2020, a meeting was held to discuss the charges of inadequate performance against Pontarelli as set forth in the Commissioner's November 30 letter. Present at the meeting were the Commissioner, Cottone, the Deputy Commissioner of Education, the Chief of Staff, the Personnel Director, Pontarelli and Pontarelli's attorney.

22. At the meeting, Pontarelli was afforded an opportunity to respond to the allegations of workplace performance issues raised by the Commissioner in her November 30 letter. Pontarelli requested more specifics and/or additional information regarding the allegations of workplace performance problems but never received the additional specifics he was seeking.

23. During the meeting, Pontarelli claimed that he was being singled out for special or disparate treatment. When the Commissioner asked why he thought he was being singled out, Pontarelli stated that it was because he was engaged in union activity and had filed two memos in support of the Union. The Commissioner responded that she didn't know anything about Pontarelli's Union or his claimed union activity.

24. On December 15, 2020, the Commissioner sent Pontarelli a letter terminating his employment. The letter set forth as reasons for the termination deficiencies in Pontarelli's performance as had been previously identified in the Commissioner's November 30 letter and discussed at the December 9 meeting.

25. On December 16, 2020, Pontarelli went to the Employer's office to begin collecting his personal belongings. While there, Pontarelli learned from the Personnel Director that he would not be receiving payment for his accrued and unused sick time.

26. On December 17, 2020, Pontarelli sent an email to the Personnel Director reminding her of his request for payment of accrued sick leave under the Employer's personnel policy.

27. On December 16, 2020, the Union filed its initial unfair labor practice Charge with the Board. On December 28, 2020, the Union filed an amended unfair labor practice Charge with the Board.

28. On February 2, 2021, Murray sent a letter of resignation to the Personnel Director. Though the resignation letter criticized Cottone's management style, the letter did not allege or claim that Murray's treatment by Cottone was due to her union activity.

CONCLUSIONS OF LAW

1. The Union has not proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 when it discharged Paul Pontarelli.

2. The Union has not proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 when, after discharging Paul Pontarelli, the Employer refused to provide Pontarelli with his accrued and unused sick leave time.

3. The Union has not proven by a preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 when it stoped giving Kathleen Murray new work assignments.

ORDER

1. The Complaint in this matter is hereby dismissed.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Scott G. Duhamel, Member (Dissent)

Aronda R. Kirby, Member

Harry Winthrop, Member

BOARD MEMBER KENNETH CHIAVARINI WAS NOT IN ATTENDANCE TO SIGN THE DECISION AND ORDER.

BOARD MEMBER STAN ISRAEL WAS NOT IN ATTENDANCE FOR THE VOTE ON THE DECISION AND ORDER.

BOARD MEMBER LAWRENCE PURTILL WAS NOT A BOARD MEMBER DURING THE HEARINGS ON THE MATTER, AND THEREFORE, DID NOT VOTE ON THE DECISION AND ORDER.

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

Dated: *September 5, 2023*

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 COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION and RHODE ISLAND DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION -AND- RIDE LEGAL COUNSEL/HEARING OFFICER PROFESSIONAL UNION	CASE NO. ULP- 6297

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-6297, dated September 5, 2023, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 7, 2023.**

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

Dated: September 7, 2023

By: _____
Thomas A. Hanley
Administrator