

**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-6327
	:	
STATE OF RHODE ISLAND	:	
DEPARTMENT OF PUBLIC SAFETY	:	
DIVISION OF SHERIFFS	:	
	:	
	:	

DECISION AND ORDER

TRAVEL OF CASE

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") on an Unfair Labor Practice Complaint (hereinafter "Complaint"), issued by the Board against the State of Rhode Island Department of Public Safety Division of Sheriffs (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated November 23, 2021 and filed on the same date by Rhode Island Council 94, AFSCME, AFL-CIO, Local 2409 (hereinafter "Union").

The Charge alleged as follows:

The State of Rhode Island, Department of Public Safety, Division of Sheriffs has formed a new Covid-19 unit for certain RI Council 94, AFSCME, AFL-CIO, Local 2409 members without negotiating with the Union. The Union is the exclusive bargaining agent for the work performed by the sheriffs. Conditions of work is a mandatory subject of bargaining. These changes to working conditions, including swabbing for Covid in a completely separate unit, were never negotiated with the Union prior to their unilateral implementation. This move by management completely changes the nature of our members' work. This is a violation of R.I.G.L. 28-7-13 (6) and (10) by a failure to bargain.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board's informal hearing process. On January 13, 2022, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (6) and (10) when, through its representative, the Employer (1) unilaterally created a new Covid-19 unit for bargaining unit members that changed the working terms and conditions of employment for the bargaining unit members assigned to the new unit; and (2) failed and refused to bargain with the Union regarding the Employer's unilateral creation of a new Covid-19 unit and the working terms and conditions of the new unit.

The Board initially scheduled a formal hearing, but at the request of the parties the formal hearing was postponed and rescheduled. The Board held rescheduled formal hearings on October 6, 2022 and November 3, 2022. Post-hearing briefs were filed by

the Union and the Employer on January 24, 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 the Employer's unilateral creation of a new Covid-19 unit and its alleged failure to bargain with the Union over the creation of the new unit and the change in working terms and conditions for the bargaining unit created due to the implementation of the new unit.

The Employer and the Union are parties to a collective bargaining agreement dated July 1, 2020 through June 30, 2021. (Joint Exhibit 1). On March 9, 2020, the Governor of the State of Rhode Island declared a state of emergency due to the impact of Covid-19 (see Joint Exhibit 7). Members of the bargaining unit employed by the Employer were required to continue to come into work and physically manage the high- risk population of incarcerated individuals during the Covid emergency. The Employer is responsible for, among other things, "the care, custody and control of the inmates [of the Adult Correctional Institution (ACI)] . . . and judicial security." (Transcript dated November 3, 2022 at page 116). Since the initial Executive Order of the Governor declaring an emergency, the Executive Order has been renewed on several occasions (see Joint Exhibits 8 – 12; Joint Exhibit 15; Joint Exhibit 19). At all times during the period of this dispute (December 2020 through February 2022), there is no disagreement between the parties that the original emergency Executive Order initiated by the Governor in March 2020 has not been rescinded (see Transcript dated October 6, 2022 at pages 18, 19 – 20, 25; Transcript dated November 3, 2022 at page 125; see also Joint Exhibits 15 and 19).

In the fall of 2020, the Employer was contacted by personnel from the Department of Corrections inquiring as to whether deputy sheriffs assigned to transport inmates between the ACI and the State courts were subject to "surveillance testing." (Transcript dated November 3, 2022 at page 117). Testimony before the Board revealed that the Department of Corrections was concerned that deputy sheriffs who were Covid-positive might infect the inmates being transported and thereby bring Covid into the ACI. (Transcript dated November 3, 2022 at page 117). Because of the need for surveillance testing and the lack of a state-wide surveillance testing program for State employees, the Employer was in the position of having to create a Covid testing unit and train employees in surveillance testing. Since the Employer did not have this capability internally, the Rhode Island National Guard was enlisted to train deputy sheriffs who could then provide the necessary in-house Covid surveillance testing. (Transcript dated November 3, 2022 at pages 116 – 119; Transcript dated October 6, 2022 at pages 87 – 88). During the fall of 2020 and as the decision to create a new Covid unit was being made, the Employer (the Department Chief, Major and Captain) met with the

then-Union President to explain the creation of the new unit. (Transcript dated October 6, 2022 at pages 87 – 88). According to the testimony, the Union President at the time had no objection to the creation of the unit. (Transcript dated October 6, 2022 at page 88).¹

In early December 2020, a Covid testing unit was implemented by the Employer. (Transcript dated October 6, 2022 at page 91; Joint Exhibit 4). At the time of implementation, the Union neither filed a grievance nor an unfair labor practice charge regarding the creation of the new Covid unit. Staffing of the new Covid unit was done on a voluntary basis. (Transcript dated November 3, 2022 at page 120). Volunteers for the new unit were selected from those deputy sheriffs who were certified as CPR and AED instructors. (Transcript dated October 6, 2022 at page 85).² Though the original purpose of the Covid testing unit was to provide tests to deputy sheriffs involved in the transport of ACI inmates to and from the courts, the testing process eventually expanded to all sheriffs employed by the Employer. (Joint Exhibit 5). Additional expansions of the program occurred throughout the unit's existence. (Transcript dated October 6, 2022 at page 89; page 92; Transcript dated November 3, 2022 at page 167; see Joint Exhibit 5). While the Union apparently discussed the Covid-19 unit with management during this period of time, no grievance or unfair labor practice charge was filed by the Union objecting to the continued testing work of the unit. (Transcript dated October 6, 2022 at page 37; page 57; pages 59 – 61).

According to the Union's testimony, discussions over the Covid unit became more frequent in July 2021 when the Union President complained about the Covid unit during labor management meetings. (Transcript dated October 6, 2022 at page 37). The concerns raised by the Union President regarding the Covid unit involved, in broad terms, the working terms and conditions (i.e. hours of work, overtime), members of the Covid unit and seniority issues. Transcript dated October 6, 2022 at pages 37, 39 – 40, 44 – 45). Though the Union testified that it consistently raised concerns about the Covid unit in July 2021 and thereafter, it alleged that no action was taken by the Employer to address the Union's concerns. As a result, in November 2021, the Union filed the instant unfair labor practice charge.

POSITION OF THE PARTIES

Union:

The Union claims that the Employer has violated the Rhode Island State Labor Relations Act (hereinafter "Act") by its unilateral creation of the Covid-19 unit and its failure and refusal to bargain with the Union over the working terms and conditions of employment associated with the creation of the unit and its work.

¹ As will be discussed in this Decision, the Union has conceded that in December 2020 the Employer was within its rights to unilaterally create the Covid-19 unit due to the state of emergency that had been declared in March 2020 by the Governor and was still in effect at the time of the creation of the unit. (See Transcript dated October 6, 2022 at pages 5 and 18 – 20).

² AED stands for Automated External Defibrillator. (Transcript dated October 6, 2022 at page 86).

Employer:

In contrast to the Union's position, the Employer asserts that it has not violated the Act with respect to its creation of the Covid-19 unit and the alleged failure to bargain with the Union regarding the terms and conditions of the work of the unit. The Employer's position is that it was under no obligation to bargain with the Union over the creation of the unit as the implementation of the unit was pursuant to its emergency management authority. In addition, the Employer argues that the Union's unfair labor practice charge was untimely filed as it was filed outside the six month statute of limitations set forth in the Board's Rules and Regulations. The Employer also claims that since the Covid-19 unit was disbanded in February 2022 the instant matter is moot. Finally, the Employer posits that the Union is asking the Board to interpret the terms of the parties' existing collective bargaining agreement, a task that is outside the scope of the Board's jurisdictional authority.

DISCUSSION

The issue before the Board is the Employer's unilateral creation of a Covid-19 unit to perform surveillance testing and its alleged failure and refusal to bargain with the Union over the working terms and conditions of employment of members of the unit. As will be discussed in greater detail below, the Board has reviewed the testimony of the parties and documents presented to it along with the memoranda of law submitted by the parties. Based on all the evidence, the Board has concluded that the Employer did not violate the Act when it created the Covid-19 unit. Separately, the Board has also concluded that the Employer, under the circumstances presented in this case, did not have an obligation to bargain with the Union regarding the Covid-19 unit.

It has long been the position of this Board that when an employer unilaterally changes terms and conditions of employment without first engaging in bargaining with the bargaining unit's exclusive representative, the employer commits a violation of the State Labor Relations Act (see R.I.G.L. 28-9.3 - 2(a); R.I.G.L. 28-9.3-4; *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an employer is in violation of a governing collective bargaining statute "when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the union").³

In the present case, there is no dispute between the parties that in December 2020, the Employer unilaterally created the Covid unit for the purpose of being able to perform

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

surveillance testing of sheriffs within the employ of the Employer. There is also little dispute regarding the reasoning behind the creation of the Covid unit, how the idea arose, how the training of sheriffs to be part of the Covid unit occurred and how assignments to the Covid unit were made. (Transcript dated October 6, 2022 at pages 83 – 87). Further, there is no dispute between the parties that the Employer created and implemented the Covid unit at a time when an Executive Order from the Governor was in place that identified an emergency situation in the State regarding the Covid pandemic. (Transcript dated October 6, 2022 at pages 37 – 38; Joint Exhibit 7). In addition, the language in the collective bargaining agreement makes clear that the Employer may:

Take whatever actions may be necessary to carry out its mission in emergency situations, i.e. an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(Joint Exhibit 1 at Article 4.1F at page 11).

Finally, and perhaps most critical of all, the evidence before this Board clearly demonstrates that the Union did not object to the Employer's unilateral implementation of the Covid unit in December 2020. (Transcript dated October 6, 2022 at pages 49 – 50). In fact, the evidence is clear that the Union believed that the Employer had the right to unilaterally create the Covid unit in December 2020 as such action was within its management rights under the collective bargaining agreement and the emergency authorization from the State. (Joint Exhibit 1, Article 4.1F; Transcript dated October 6, 2022 at pages 49 – 50; 68 – 69; 84 – 85). Therefore, it is clear the Union's original unfair labor practice charge objecting to the formation of the Covid-19 unit without negotiating with the Union is simply without merit. There is no evidence before this Board to substantiate the Union's claim that the admittedly unilateral creation of the Covid unit violates the provisions of the Act. Instead, the evidence clearly demonstrates that the implementation of the Covid unit was within the Employer's authority pursuant to the emergency Executive Order (Joint Exhibit 7) and the terms of the collective bargaining agreement. In addition, and as previously noted, the Union had no objection to the creation and implementation of the Covid unit in December 2020.

For all of the above stated reasons, the Board finds that no violation of the Act occurred when the Employer created and implemented the Covid unit in December 2020.

B. The Union's Refusal to Bargain Allegation

The Union also alleges that the Employer violated the Act when it refused to engage in negotiations over the creation of the Covid unit and the changes to working terms and conditions the implementation of the Covid unit forced on bargaining unit members. (See Transcript dated October 6, 2022 at pages 38 – 40; 44 – 45;). As the case law of this Board and the statutory law make clear, an employer is required to negotiate with the representative of its employees over mandatory subjects of bargaining. See *Barrington School Committee v. Rhode Island State Labor Relations Board*, 388 A.2d 1369,

1374-1375 (R.I. 1978); *Town of Narragansett v. International Association of Fire Fighters, Local 1589*, 380 A.2d 521, 522 (R.I. 1977). As R.I.G.L. § 28-7-2(c) also makes clear, it is the policy of the State to allow and encourage bargaining over wages, hours and other working conditions between employees and employers. In the instant case, however, while the Union alleges that the Employer failed to bargain over issues (overtime, seniority) that are patently mandatory subjects of bargaining, there is a question as to whether the Employer had an obligation to bargain at the time the Union made its request for bargaining around July 2021.

The essence of the Union's complaint against the Employer appears to be that the Employer unilaterally changed terms and conditions of employment without bargaining with the Union. (Transcript dated October 6, 2022 at page 37). The Union, however, does not pinpoint December 2020 as the time when the alleged unilateral changes to terms and conditions occurred but, instead, points to some time in July 2021 as the period when the violation occurred. (Transcript dated October 6, 2022 at page 42). The Union asserts that in June and July 2021, the number of Covid-19 cases was significantly lower than in December 2020 when the Covid unit was initially created. (Transcript dated October 6, 2022 at pages 45 – 46; 51, 69; Joint Exhibit 13). The Union argues that this drop in the number of Covid-19 cases and the consistent scheduling of work for the Covid-19 unit was evidence that the emergency, which existed in December 2020, was no longer a factor. As such, the Union argues that in July 2021, the Employer had an obligation to bargain with the Union over its claims that working terms and conditions of bargaining unit members had been unilaterally altered by the Employer.

In reviewing the evidence presented, the Board sees at least two critical errors in the Union's assertion that the Employer was obligated to bargain with it over changed terms and conditions as manifested by the creation of the Covid-19 unit. Initially, the Union argues, as noted above, that in July 2021, the number of Covid-19 cases was lower than at the time the Covid-19 unit was created and this lessening of Covid-19 cases somehow demonstrated that the state of emergency that justified the creation of the Covid-19 unit no longer existed (see Joint Exhibit 13). However, the Union's position is contradicted by the fact that the state of emergency covered by the Governor's Executive Order (which was initially implemented in March 2020 and extended on several occasions through 2021 and 2022), was never lifted or ended. (Joint Exhibits 7 – 12 and 19; Transcript dated October 6, 2022 at page 51). While the Union attempts to argue that in July 2021 (Transcript dated October 6, 2022 at page 51), the reality on the ground was that the emergency circumstances that existed at the creation of the unit in December 2020 were not still in existence in June and July and August of 2021, there was simply no compelling evidence to support such a claim. (Joint Exhibits 13 and 14; Transcript dated October 6, 2022 at page 42). In other words, the Board has been unable to locate any substantial evidence presented by the Union to demonstrate that the emergency circumstances that authorized the creation of the Covid-19 unit in December 2020 had changed in any significant manner so as to create a bargaining obligation for the Employer. While the

Board has little doubt that changes in terms and conditions of employment occurred because of the creation of the Covid-19 unit, the issue before this Board is whether the Employer had an obligation to bargain with the Union over those changed terms and conditions of employment. As the evidence clearly demonstrates, the Covid-19 unit was created under the Employer's emergency authority pursuant to the management rights clause of the collective bargaining agreement and pursuant to the state of emergency declared by the Governor starting in March 2020. There was no evidence presented to this Board by the Union to convince the Board that the emergency circumstance ever changed between December 2020 and February 2022 (when the Covid-19 unit was disbanded) so as to create a bargaining obligation on the part of the Employer.

C. The Employer's Defenses

The Employer has raised several defenses to the unfair labor practice allegations brought by the Union in this case. Because the Union conceded, during the course of the hearing, that the original creation of the Covid-19 unit was appropriate and within the Employer's rights⁴ and the Board has determined that no bargaining obligation arose for the Employer as the circumstances in place at the time of the creation of the Covid-19 unit did not substantially change between December 2020 and February 2022, there is little need for the Board to spend extensive time discussing the majority of defenses raised by the Employer. The one defense that does merit some discussion is the Employer's claim that the instant Charge was untimely filed in that the Charge was filed in November 2021, more than six (6) months after the creation of the Covid-19 unit in December 2020. It is the Board's belief, based on the evidence submitted in this matter, that the Charge filed by the Union was untimely in that it was not filed pursuant to the Board's Rules and Regulations. (Board's Rules and Regulations, 1.22B1). As such, this untimely filing provides another basis for the Board to conclude that no violation of the Act occurred in the present case.

As previously discussed, there is no dispute between the parties that the Covid-19 unit was created in December 2020 and began its work that month. At no time during the six months following the creation of the Covid-19 unit in December 2020 did the Union object to the creation of the unit or file a grievance or unfair labor practice charge challenging the unit's existence.⁵ While the Union presented testimony that it raised issues with the Employer regarding the Covid-19 unit, it did not become truly active (according to its own testimony) until July 2021 or more than six (6) months after the creation of the Covid-19 unit (see Transcript dated October 6, 2022 at pages 45 – 46; 56 – 57; 58 – 59; 59 – 61). Other than asserting that the Covid-19 cases were lower in June and July 2021 than they were in December 2020 and January 2021 (Joint Exhibit 13), the Union presented no evidence to suggest that there was a change in circumstances sufficient to restart the statute of limitations clock regarding the filing of

⁴ See testimony at Transcript dated October 6, 2022 at pages 37 – 38; 49 – 50; 68, 85.

⁵ In fact, as noted above, the Union agreed that there was a need for the Covid-19 unit. (Transcript dated October 6, 2022 at pages 49 – 50).

a Charge under the Board's Rules and Regulations. Specifically, there was no evidence presented that there was a change in the state of emergency originally declared in March 2020 by the Governor and extended multiple times after that date. In fact, in September 2022 Governor McKee once again extended the state of emergency (Joint Exhibit 19). In addition, there was evidence presented that the number of Covid cases began to rise again in August and September 2021 (Joint Exhibit 13). Thus, it appears clear to this Board based on the evidence before it that the Charge in the instant matter was filed in an untimely manner. Because the case was not timely filed, there was no obligation for the Employer to bargain with the Union. Thus, for the reasons stated herein, the case should be dismissed.

FINDINGS OF FACT

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

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

3. The Union and the Employer were subject to a collective bargaining agreement and Memoranda of Agreement relative to successor CBAs.

4. In March 2020 the Governor of Rhode Island declared a state of emergency due to Covid-19. That state of emergency continued in place and was extended on several occasions between March 2020 and, at least, February 2022, the duration of the dispute between the parties.

5. In the late fall of 2020, the Employer discussed with the then Union president the need to create a Covid-19 unit to do testing of sheriffs.

6. In December 2020 the Employer created and implemented the so-called Covid-19 unit. The unit was staffed by volunteer applicants from the bargaining unit who possessed CPR and AED credentials.

7. At the time of the creation, announcement and implementation of the Covid-19 unit there was no objection from the Union and no grievance or unfair labor practice was filed by the Union over the action by the Employer to create this new unit.

8. At some point after December 2020, the Union began to mention to the Employer some of its concerns regarding the terms and conditions of employment being changed for individuals working in the Covid unit. By June and July 2021 these conversations became more frequent, especially at the Labor Management Committee meetings. However, no formal notice requesting bargaining was ever filed by the Union.

9. In November 2021 the Union filed the instant unfair labor practice Charge.

10. The statute of limitations for filing a Charge under the Board's Rules and Regulations is six (6) months from the date of knowledge of the alleged unfair labor practice.

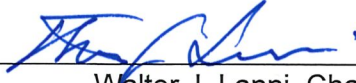
CONCLUSIONS OF LAW

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 (6) and/or (10) when it created and implemented the Covid-19 unit in December 2020.

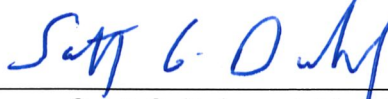
ORDER

1. The above-entitled matter is hereby dismissed.

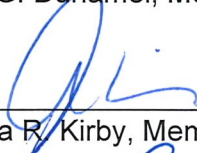
RHODE ISLAND STATE LABOR RELATIONS BOARD



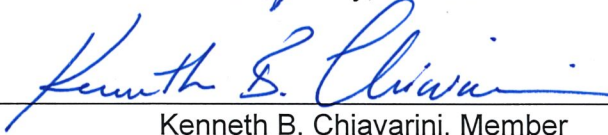
Walter J. Lanni, Chairman



Scott G. Duhamel, Member



Aronda R. Kirby, Member



Kenneth B. Chiavarini, Member



Harry F. Winthrop, Member



Stan Israel, Member

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

Dated: May 12, 2023

By: Thomas A. Hanley *TAH*
Thomas A. Hanley, Administrator

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

IN THE MATTER OF
STATE OF RHODE ISLAND -
DEPARTMENT OF PUBLIC SAFETY -
DIVISION OF SHERIFFS
-AND-
RI COUNCIL 94, AFSCME, AFL-CIO,
LOCAL 2409

CASE NO. ULP- 6327

**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-6327, dated May 9, 2023, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **May 12, 2023**.

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

Dated: May 12, 2023

By: Thomas A. Hanley *TAH*
Thomas A. Hanley
Administrator