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-6348
CITY OF EAST PROVIDENCE	:	

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 City of East Providence (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated December 12, 2022 and filed by the International Brotherhood of Police Officers Local 569 (hereinafter "Union").

The Charge alleged as follows:

> That on or about November 17, 2022, members of the bargaining unit assigned to the Detective Division of the East Providence Police Department were notified that the longstanding benefit of receiving an unmarked police vehicle to take home would cease effective December 5, 2022. That on November 21, 2022, the duly elected president of IBPO Local 569 submitted a timely demand to bargain upon Roberto DaSilva, Mayor of the City of East Providence. That on or about December 1, 2022, the Union received written notice from the City Solicitor that the City would not bargain over the decision to eliminate take home vehicles.

Following the filing of the Charge, each party submitted written position statements as part of the Board's informal hearing process. On January 25, 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 changed terms and conditions of employment when it eliminated a benefit from bargaining unit members (the allowance of a take-home vehicle) and (2) failed to bargain with the Union over its unilateral change in terms and conditions of employment when it decided to eliminate the benefit of a take-home vehicle from certain bargaining unit members. The Board held formal hearings for this matter on March 21, 2023, May 4, 2023 and July 27, 2023. Post-hearing briefs were filed by the Employer and the Union on October 10, 2023. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and exhibits submitted at the hearings and the arguments contained within the post-hearing briefs submitted by the parties.

FACTUAL SUMMARY

The matter before the Board is the Union's claim of an unfair labor practice against the Employer due to the Employer's unilateral change in eliminating the benefit received by some bargaining unit members of a take-home vehicle and the Employer's failure and/or refusal to bargain with the Union over the change the Employer unilaterally enacted.

The facts surrounding this unfair labor practice complaint are, for the most part, not in dispute between the parties. The Union and the Employer were, at all times relevant to the instant proceedings, subject to a collective bargaining agreement dated November 1, 2017 through October 31, 2022 (Joint Exhibit 1) and a tentative Agreement dated November 1, 2022 through October 30, 2025 (Joint Exhibit 2). The current dispute involves the Employer's decision to unilaterally eliminate the benefit of use of a take-home vehicle for some members of the Employer's Detective Division without notifying or bargaining with the Union over this change to terms and conditions of employment.

The current dispute between the parties has its genesis in 2014. In 2014 the Employer had more detectives than available unmarked police vehicles for detectives to use as part of their daily activities. (Tr. Vol. I dated March 21, 2023, at page 26). Also in 2014, the Employer was part of a federal investigation of Google that ultimately resulted in a settlement that netted the Employer $60 million dollars (Tr. Vol. I, dated March 21, 2023, at page 24). Based on the testimony before the Board, this settlement money contained restrictions on its use, i.e., the expenditure of the money had to be dedicated to public safety and law enforcement. (Tr. Vol. I dated March 21, 2023, at page 25). The Employer used some of the settlement funds to purchase unmarked police vehicles which were provided to the detectives to use as part of their daily law enforcement duties. At this same time, the Union proposed to the Employer that detectives be allowed to take the vehicles home as part of their duties and responsibilities. (Tr. Vol. I dated March 21, 2023, at pages 26 – 27). After making the proposal to the Employer, the Union and the Employer engaged in negotiations for a policy to cover take-home vehicles for members of the Detective Division. (Tr. Vol. I dated March 21, 2023, at page 27; Petitioner Exhibit 1). The parties eventually were able to mutually agree on the contents of a take-home vehicle policy (Tr. Vol. I dated March 21, 2023, at pages 27 – 28; Petitioner Exhibit 1). Thereafter, each member of the Detective Division received a take-home vehicle and was required to sign a document indicating that he/she would comply with the terms of the take-home vehicle policy. (Tr. Vol. I dated March 21, 2023, at page 29 – 30; Petitioner Exhibit 2).[1]

The take-home vehicle policy was in effect when the parties commenced negotiations for a new collective bargaining agreement in 2017. During the negotiations, the Union did not raise the issue of incorporating the take-home vehicle policy into the collective

[1] In addition to receiving a take-home vehicle, each detective received a "gas fob" which allowed them to fill up the take-home vehicle with gas paid for by the Employer. (Tr. Vol. I dated March 21, 2023, at pages 30 – 31).

bargaining agreement. (Tr. Vol. I dated March 21, 2023, at page 35; pages 48 – 49).[2] Ultimately, the parties reached a new collective bargaining agreement that was dated November 1, 2017 through October 31, 2022 and ratified by both parties. From 2014 when detectives initially received take-home vehicles and the take-home vehicle policy was agreed upon between the Employer and the Union through the negotiation of the 2017 – 2022 CBA, all members of the Detective Division received a take-home vehicle. (Tr. Vol. I dated March 21, 2023, at page 36; pages 72 – 73; Joint Exhibit 3; Petitioner Exhibit 7).[3]

In 2020 a second or revised take-home vehicle policy was implemented by the Employer. (See Petitioner Exhibit 1A; Tr. Vol. I dated March 21, 2023, at pages 38 – 42; 45 – 46). With the advent of a revised policy, detectives were also asked to sign a new use agreement (Petitioner Exhibit 2A; Tr. Vol. I dated March 21, 2023, at pages 42 – 44). However, the implementation of the revised take-home vehicle policy did not spur a change in the ability of detectives to receive a take-home vehicle. In fact, all detectives continued to receive a take-home vehicle until the Employer's notice of a change in November 2022 (Joint Exhibit 3).

In 2022 the parties entered into negotiations for a new collective bargaining agreement to replace the 2017 – 2022 that was set to expire at the end of October 2022. (Tr. Vol. I dated March 21, 2023, at page 73). The Employer did not make or submit any proposals to the Union regarding take-home vehicles. (Tr. Vol. I dated March 21, 2023, at pages 74 – 75). The Union, however, did make a proposal regarding take-home vehicles and detectives who are "on-call", but the proposal was rejected by the Employer without discussion or comment. (Tr. Vol. I dated March 21, 2023, at pages 75 – 78; Petitioner Exhibit 4). Also, at no time during the negotiations for the new CBA did the Employer indicate or mention that it was considering or planning to eliminate take-home vehicles from some members of the Detective Division. (Tr. Vol. I dated March 21, 2023 at page 78; page 80). At the conclusion of the negotiations, the parties did not make any changes to the Management Rights or Scope of Agreement language nor did they add any language regarding detective take-home vehicles nor did they change or modify the language regarding Captains take-home vehicles. (Tr. Vol. I dated March 21, 2023, at page 90 – 91).

The parties reached a tentative agreement on the 2022 – 2025 collective bargaining agreement in mid-November 2022. (Tr. Vol. I dated March 21, 2023, at pages 78 - 80). On November 17, 2022, after the ratification of the 2022 – 2025 CBA, the Union received

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[2] During the negotiations for the 2017 – 2022 collective bargaining agreement, the parties inserted language in the CBA covering Captains having vehicles and their ability to take-home said assigned vehicles. (Tr. Vol. I dated March 21, 2023, at page 35; see Joint Exhibit 1, Section 6.06). The Captains take-home vehicle language is not in dispute and is not a part of the instant unfair labor practice case.

[3] Testimony before the Board was that during the negotiations for the 2017 – 2022 CBA, the Union agreed to and ratified the Management Rights clause language and the Scope of Agreement language contained in that document. (Tr. Vol. I dated March 21, 2023, at pages 46 – 47; see Joint Exhibit 1, Section 2.01 and Section 2.02). The evidence before the Board was the language in each of those provisions had been in previous contracts and was not changed in the 2017 – 2022 CBA (Tr. Vol. I dated March 21, 2023, at page 67). Similarly, the language in those clauses was not changed during negotiations for the 2022 – 2025 CBA. (Tr. Vol. I dated March 21, 2023, at pages 90 – 91).

notification from the Employer that detectives within the Detective Division would no longer receive the benefit of a take-home vehicle. (Tr. Vol. I dated March 21, 2023, at pages 80 – 82; Petitioner Exhibit 5).[4] After receiving the notification from the Employer regarding the elimination of detective take-home vehicles, the Union sent correspondence to the Employer demanding to bargain with the Employer over its decision. (Tr. Vol. I dated March 21, 2023, at page 82; Petitioner Exhibit 6). On or about December 1, 2022, the Union received a response from the Employer indicating that it did not have to bargain with the Union over its decision, but that it would bargain over the effects or impact of the decision on the bargaining unit. (Tr. Vol. I dated March 21, 2023, at pages 86 – 87; Petitioner Exhibit 7). On December 8, 2022, the Employer and the Union met. (Tr. Vol. I dated March 21, 2023, at page 87). At that meeting, the Union inquired as to whether the Employer was going to bargain over its decision to take away the take-home vehicles. The Employer responded that it would not change its decision and asked if the Union had any proposals for the Employer. The Union responded that if the Employer would not bargain over its decision, then there would be no proposal from the Union. (Tr. Vol. I dated March 21, 2023, at page 88). After the meeting, the Employer did, in fact, eliminate the ability of certain detectives to have take-home vehicles. (Tr. Vol. I dated March 21, 2023, at page 88).[5] On December 15, 2022 the Union filed an unfair labor practice charge with this Board.

POSITION OF THE PARTIES

Union:

The Union asserts that the Employer engaged in an unfair labor practice when it unilaterally eliminated the benefit of a take-home vehicle from certain bargaining unit members in the Detective Division and failed and refused to bargain with the Union over the decision to change the terms and conditions of employment of certain bargaining unit members due to its unilateral action.

Employer:

The Employer contends that it did not violate the Rhode Island State Labor Relations Act ("Act") when it failed and/or refused to bargain with the Union over the claimed unilateral change to the terms and conditions of employment of certain bargaining unit members. The Employer argues that the Management Rights and Scope of Agreement clauses of the collective bargaining agreement authorized its action and that it had no obligation to bargain over its decision to make a unilateral change in benefits because the

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[4] According to the testimony before the Board, while the Union ratified the tentative agreement covering the period November 1, 2022 through October 31, 2025, the Employer has not yet (as of the date of the hearings before the Board) ratified the tentative CBA. (Tr. Vol. I dated March 21, 2023, at page 90).

[5] According to the evidence submitted to the Board, the Employer delayed the implementation of its initial November 17, 2022 notice regarding eliminating access to take-home vehicles for certain detectives (see Petitioner Exhibit 5). Originally, the elimination of take-home vehicles was to begin on December 5, 2022. (See Petitioner Exhibit 5). Instead, the Employer reissued its notice of the discontinuation of take-home vehicles on December 12, 2022 and gave a thirty (30) day implementation period. (See Joint Exhibit 3).

Union waived its right to engage in such bargaining when it negotiated and executed the current collective bargaining agreement.

DISCUSSION

The issue before the Board is whether the actions of the Employer in unilaterally changing terms and conditions of employment by eliminating the benefit of a take-home vehicle and failing and refusing to bargain with the Union over the Employer's unilateral elimination of the benefit of a take-home vehicle for certain members of the Detective Division constitutes a violation of the State Labor Relations Act. As discussed in more detail below, it is the Board's view that the conduct of the Employer in the instant case is not a violation of the Act. Moreover, the Employer's affirmative defense does, based on the entire record before the Board, set forth sufficient evidence to demonstrate that the Union waived its bargaining rights with respect to the Employer's change in the application of the take-home vehicle policy.

It has long been the position of this Board that when an employer unilaterally changes terms and conditions of employment without first engaging in bargaining with the bargaining unit's exclusive representative, the employer commits a violation of the Act. (See R.I.G.L. § 28-7-12; §28-7-14; §28-9.7-4; R.I.G.L. § 28-9.7-6; *Rhode Island State Labor Relations Board v. State of Rhode Island – Department of Corrections,* ULP-6256 (May 24, 2021); *Rhode Island State Labor Relations Board v. Middletown School Department*, ULP-6257A (September 9, 2020); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Fire Fighters, AFL-CIO v. The Town of North Providence*, PC-13-5202 (September 26, 2014); and *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an employer is in violation of a governing collective bargaining statute "when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the union").[6] As will be discussed in detail below, an employer may defend against such charges by claiming, among other things and as relevant to the instant matter, that the collective bargaining agreement authorized the employer to act unilaterally regarding a particular policy, in this case the take-home vehicle policy.

A. The Employer's Complained of Conduct.

In the present case, there appears to be no dispute between the parties that the Employer unilaterally acted in eliminating the ability for certain members of the Detective Division to receive a take-home vehicle. (See Petitioner Exhibit 5; Joint Exhibit 3). In fact, the Employer has conceded that its decision to eliminate the use of a take-home vehicle

[6] This Board and the courts of this State have, with respect to labor law issues, consistently looked to federal labor law for guidance. (*See Town of North Kingstown v. International Association of 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)).

for certain bargaining unit members was unilateral in nature. (See Employer Memorandum of Law at page 14).

Just as there appears to be little dispute between the parties that the Employer acted unilaterally in revoking the ability of certain detectives to access and use a take-home vehicle, there also appears to be little dispute that the elimination of this benefit changed the terms and conditions of employment of the impacted detectives.[7]

As previously mentioned, the Board has long held that an employer violates the terms of the Act when it unilaterally changes terms and conditions of employment without first engaging in bargaining with the exclusive representative of the employees. See *Rhode Island State Labor Relations Board v. State of Rhode Island – Department of Corrections,* ULP-6256 (May 24, 2021); *Rhode Island State Labor Relations Board v. Middletown School Department*, ULP-6257A (September 9, 2020); *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997). In the instant case, as mentioned above, there can be little legitimate argument against the notion that the discontinuation of take-home vehicles for certain bargaining unit members changed the terms and conditions of employment for those effected individuals. (Tr. Vol. I dated March 21, 2023, at pages 33 – 34; 36 – 37). Further, there is no dispute that the actions taken by the Employer, i.e., changing the working terms and conditions of employment of bargaining unit personnel, is a mandatory subject of bargaining which would require the Employer to bargain with the employees' exclusive bargaining representative. (See R.I.G.L. § 28-9.4-1; *Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO,* 107 A.3d 304, 313 (R.I. 2015).[8]

As noted above, the issue of unilateral changes to terms and conditions of employment is one that frequently comes before the Board and is an issue upon which much has been written. Basically, an employer is prohibited from making unilateral changes in terms and conditions of employment (which, as discussed above, are mandatory subjects of bargaining) where those changes represent a material and substantial alteration of what the previous application or practice has been. (See R.I.G.L. § 28-7-12; § 28-7-14; § 36-11-1; and § 36-11-7; *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5799 (May 15, 2006); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*,

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[7] The Board acknowledges and will discuss *infra* the Employer's argument that it was authorized to unilaterally change detectives access to take-home vehicles based on language in the management rights clause and the Scope of Agreement provision contained in the existing CBA. The Board has considered the affirmative defense and concluded that, in the instant case and based on the particular set of facts presented to the Board, it is sufficient to demonstrate that the Union waived its bargaining rights regarding the Employer's unilateral action in eliminating the take-home vehicle for some detectives.

[8] As R.I.G.L. § 28-9.4-1 makes clear, the right "to bargain on a collective basis with municipal employers, covering hours, ... working conditions and other terms of employment;" is part of the panoply of rights given to municipal employees by the statute. These rights are further enunciated within R.I.G.L. § 28-9.4-3(a). As the statutory language establishes, these are mandatory rights over which an employer has an obligation to bargain before it unilaterally makes changes in these areas. (*See Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 107 A.3d 304 (R.I. 2015)).

PC-2013-5202 (Sept. 26, 2014); and *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012) (providing that an employer is in violation of a governing collective bargaining statute "when it makes a unilateral change to a term or condition of employment without first bargaining to impasse with the union")). In the instant case, there was no debate or disagreement upon the fact that the Employer unilaterally eliminated the benefit of a take-home vehicle. Further, there was little to no discussion concerning whether this change to the terms and conditions of employment of certain bargaining unit members was material and substantial and had a significant impact on the performance of their daily job duties and responsibilities.[9] The change implemented by the Employer meant that certain designated detectives would no longer receive the benefit of a take-home vehicle. This meant that the impacted detectives would have to travel to and from the station by their own means to retrieve an unmarked vehicle in order to perform their assigned duties. Detectives who were denied use of a take-home vehicle also suffered an economic impact with the loss of a take-home vehicle. (See Joint Exhibit 3; Joint Exhibit 4; Petitioner Exhibit 9). Generally, an employer that makes a substantial and material change regarding a mandatory subject of bargaining without first providing the union with a meaningful opportunity to bargain about the change violates the Act absent a valid defense. See *NLRB v. Katz,* 369 U.S. 736 (1962); *Alamo Cement Co.*, 281 NLRB 737 (1986).

In addition to unilaterally changing terms and conditions of employment for bargaining unit members, the Employer failed to bargain with the Union over the unilateral change it implemented when it eliminated the take-home vehicle for certain bargaining unit members. As the case law of this Board and the statutory law makes clear, an employer is required to negotiate with the exclusive representative of its employees over mandatory subjects of bargaining (*see Barrington School Committee v. Rhode Island State Labor Relations Board,* 388 A.2d 1369, 1374-75 (R.I. 1978); *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930*, 390 A.2d 386, 389 (R.I. 1978); *Town of Narragansett v. International Association of Firefighters, Local 1589*, 380 A.2d 521, 522 (R.I. 1977); *Belanger v. Matteson*, 346 A.2d 124, 136 (R.I. 1975)). As R.I.G.L. § 28-7-2(c) makes clear, it is the policy of the State to allow and encourage bargaining over wages, hours and other working conditions between employees and employers. (See also R.I.G.L. § 28-7-14; R.I.G.L. § 28-9.7-4).

As noted above, the Board need not spend a great deal of time on whether a unilateral change by an employer to terms and conditions of employment represents a mandatory subject of bargaining. This Board's decisions as well as the overwhelming number of decisions from Rhode Island courts, the NLRB and the federal courts all support the notion that wages, hours and terms and conditions of employment represent mandatory subjects of bargaining and changes in these areas by an employer obligates the employer

[9] Neither party argued that the unilateral change by the Employer constituted either a material and substantial change (a potential Union argument) or that the change was not material and substantial (a potential Employer argument). In the instant case, because the Board has determined that the Employer's affirmative defense of waiver prevails in the instant case, it need not address whether the unilateral change was a material and substantial change. *MV Transportation, Inc.*, 368 NLRB at page 19.

to bargain with the union representing the employees before making any changes. *See NLRB v. Katz,* 369 U.S. 736 (1962); *Rhode Island State Labor Relations Board v. State of Rhode Island – Department of Corrections,* ULP-6256 (May 24, 2021); *Rhode Island State Labor Relations Board v. Middletown School Department*, ULP-6257A (September 9, 2020); *Rhode Island State Labor Relations Board v. Town of North Smithfield*, ULP-5759 (May 15, 2006); *Rhode Island State Labor Relations Board v. Woonsocket School Committee*, ULP-4705 (June 4, 1997); *Local 2334 of the International Association of Firefighters, AFL-CIO v. The Town of North Providence*, PC 13-5202 (September 26, 2014); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012). Thus, the United States Supreme Court made clear in *Litton Financial Printing Division, A Division of Litton Business Systems, Inc. v. National Labor Relations Board*, 501 U.S. 190, 198 (1991) that "[n]umerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA."

In Rhode Island, R.I.G.L. § 28-7-13(6) makes it an unfair labor practice for an employer to "refuse to bargain collectively" with its employees' representative. Generally, an employer violates its bargaining obligation when it refuses to bargain with its employees' representative concerning wages, hours and other terms and conditions of employment, so-called mandatory subjects of bargaining. Much has been written on the subject of what constitutes a mandatory subject for bargaining. Mandatory subjects of bargaining are those subjects that address wages, hours and other terms and conditions of employment. The determination of whether an item is to be considered a mandatory bargaining subject has been discussed by the NLRB and the United States Supreme Court on numerous occasions. Thus, for example, in *Ford Motor Company v. NLRB*, 441 U.S. 488 (1979), the Supreme Court described mandatory bargaining subjects as those subjects that are "plainly germane to the 'working environment'..." Similarly, our Supreme Court has recognized that items which are considered mandatory subjects of bargaining are subject to both negotiation and/or arbitration. *See Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 107 A.3d 304, 313 (R.I. 2015); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342, 349 (1958); *Barrington School Committee v. Rhode Island State Labor Relations Board, supra*; *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, supra*; and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra*. As was pointed out by the NLRB in *Yellow Cab Co.*, 229 NLRB 1329 (1977), "The privilege of employees to take-home company vehicles is a mandatory subject of bargaining, at least with respect to any change in the employer's policy." *Id.* at 1335.

In the instant case, the Union was afforded no legitimate opportunity to bargain with the Employer over the unilateral elimination of the take-home vehicle. (Tr. Vol. I dated March 21, 2023, at page 88). There can be little argument or legitimate disagreement that changes to the duties and responsibilities of an employee's bargaining unit position represents a change to terms and conditions of employment. See *Rhode Island State Labor Relations Board v. Middletown School Department*, ULP-6257A

(September 9, 2020). In the *Middletown* case, the employer unilaterally altered the working conditions of several bargaining unit members. In implementing its reorganization of bargaining unit position duties due to a funding cutback, the employer met with the union to "discuss" the changes that were being made. However, as this Board noted in its Decision,

> while Union representatives were able to meet with representatives of the School Department, the discussion regarding the School Department's unilateral action did not afford the Union an opportunity to engage in meaningful bargaining over the School Department's decision to reorganize the Facilities division. Instead, the School Department simply notified the Union of the changes it was making and refused to alter or modify its position.
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> *Middletown School Department*, ULP-6257A, at page 8.

In the instant case, similar facts are present. While the parties did meet in response to the Union's letter demanding bargaining (Petitioner Exhibit 6), the Employer clearly rejected any discussion or negotiation over its decision to eliminate the use of take-home vehicles. (Tr. Vol. I dated March 21, 2023, at page 88).[10]

B. The Employer's Defense.

During the presentation of its witnesses and in its memorandum of law, the Employer has presented to the Board an argument to justify and/or support its action in unilaterally changing the working terms and conditions of employment of bargaining unit personnel and not bargaining with the Union over the mandatory subject of the change. As is discussed below, the Board has reviewed the Employer's argument and, in the Board's view, believes that it offers sufficient grounds to authorize the Employer's unilateral action in the instant case.

1. The Employer's Action was Authorized under the Terms of the Collective Bargaining Agreement.

The Employer argues that its actions in unilaterally discontinuing the use of take-home vehicles for certain detectives was appropriate as the Employer was simply acting in accordance with its bargained for rights under the collective bargaining agreement. The Employer cites a recent National Labor Relations Board (NLRB) case, *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), to support its contention that the contract language allows it to act unilaterally without engaging with the Union. *MV Transportation* overruled *Provena St. Joseph Medical Ctr.*, 350 NLRB 808 (2007), which set forth the clear and unmistakable waiver standard to determine whether an employer's unilateral action was permitted, and instead adopted a "contract coverage" standard, under which unilateral action is permitted if it falls within the compass or scope of certain contractual language in the CBA. While the *MV Transportation* case changed the method by which the NLRB

[10] The Board acknowledges the undisputed evidence that the Employer did offer to bargain with the Union over the effects of its decision. (Petitioner Exhibit 7).

looked at cases involving a claim that the Union had waived its right to bargain over changes implemented or instituted by an employer during the term of a CBA, the case was not a signal that every management rights clause, even broadly written clauses, allow employers the ability to act with impunity and in a unilateral manner without discussing changes in terms and conditions with the Union.[11]

In the instant case, the Employer argues that that the terms of the Management Rights clause and the Scope of Agreement provision granted it the right to act in accordance with the previously implemented take-home vehicle policy (Petitioner Exhibits 1 and 1A).[12] The Board has looked closely at the Management Rights clause in the collective bargaining agreement in place at the time of these events. The CBA provides the Employer with what the Board considers to be a general set of rights and responsibilities, i.e., the Employer has the right to "issue rules and regulations governing the internal conduct" of the Department. (Joint Exhibit 1, Article II, Section 2.01 at page 2). The Management Rights clause also provides the Employer with the responsibility "for the policies and administration of the Police Department which it shall exercise under the provisions of the law and in fulfilling its responsibilities under this agreement." (Joint Exhibit 1, Article II, Section 2.01 at page 2). As can be seen, the rights allowed to the Employer under the Management Rights clause of the CBA are not without some limitation. Notwithstanding any limitation in the language, the Employer has a history of exercising its rights under this clause with the agreement, knowledge, and acquiescence of the Union. (Tr. Vol. I dated March 21, 2023, at pages 26 – 30; 38 – 40; Petitioner Exhibits 1 and 1A). In addition, it is clear that the take-home vehicle policy is only set forth in the rules and regulations of the Employer (Petitioner Exhibits 1 and 1A) and is not found anywhere within the language of the CBA (see Tr. Vol. I dated March 21, 2023,

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[11] In addition to the NLRB's 2019 case law regarding application of the "contract coverage" standard, the Board has in the recent past looked at the "clear and unmistakable" standard for determining whether a waiver of bargaining rights has occurred. This Board has not taken a position on which standard (i.e., the "clear and unmistakable" standard or the more recently described "contract coverage" standard set forth in *MV Transportation*) to adopt. The "clear and unmistakable" standard was long a staple of NLRB decisions addressing waiver claims. However, with a change of NLRB members in 2019 the standard has changed to an analysis of whether the contract language shows that a waiver occurred. See *MV Transportation* at pages 8 – 12. Even under the new "contract coverage" standard, the NLRB has not abandoned the "clear and unmistakable" waiver language. Thus, if a CBA does not cover a disputed unilateral change, the NLRB will consider whether the union waived its right to bargain over the change by attempting to ascertain whether the union ceded full discretion to the employer on the matter. See *Wilkes-Barre Hospital Co. LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017). In making this assessment, the NLRB will determine whether the waiver was "clear and unmistakable." See *MV Transportation* at page 12. This Board, like the Rhode Island courts, has always looked to federal law and especially the NLRB for guidance in determining allegations of unfair labor practice violations and it will continue to do so. However, the Board sees no overarching reason to decide in this case or at this time which standard it prefers or selects for purposes of bargaining waiver allegations that may come before it. Instead, the Board will continue to review the evidence and applicable case law as presented in each case and make its decisions based on what is presented to it.

[12] The Union argues in opposition to the Employer's claims that the Employer acted unilaterally to eliminate take-home vehicles for certain detectives, that the unilateral change was to a term and condition of employment and, therefore was a mandatory subject of bargaining over which the Employer was required to negotiate with the Union. While the Board does not disagree with the positions argued by the Union (in fact, the Employer has conceded that it acted unilaterally and refused to bargain with the Union), as is discussed in this decision the Employer has set forth a legitimate affirmative defense to justify its actions.

at pages 47 – 48; 91 – 94).[13] The Board is convinced, as will be further discussed, that the language of the Management Rights clause provided the Employer with the authority to act unilaterally as it did in the instant case. Said differently, whether this Board applies the "clear and unmistakable" standard or the "contract clause" standard recently set forth in *MV Transportation*, there is ample evidence in the record as a whole before this Board to conclude that the Union waived its right to bargain over this issue. In short, this Board's review of the management rights language shows it to be specific enough in its terms to authorize the Employer to "issue rules and regulations" and have "responsibility for the policies and administration" of the police department subject to the "law and fulfilling its responsibilities under this agreement." (Joint Exhibit 1 at page 2). When this provision of the CBA is coupled with the relatively expansive language of the take-home vehicle policies (Petitioner Exhibits 1 and 1A) and the Union's intentional decision not to attempt to include the issue in the CBA, it is apparent to this Board that the Union, in negotiating and agreeing to the language in the Management Rights clause, authorized the Employer to unilaterally act consistent with the terms of the take-home vehicle policy.

To be clear and as noted above, the take-home vehicle policy has been in effect since 2014 with the Union's consent, knowledge, and acquiescence. (Tr. Vol. I dated March 21, 2023, at pages 27 – 29). The policy was modified and updated in 2020 also with the Union's consent, knowledge, and acquiescence. (Tr. Vol. I dated March 21, 2023, at pages 38 – 40). As previously noted, the Management Rights clause gives to the Employer the "right" to "issue rules and regulations governing" the internal conduct of its police department. (Joint Exhibit 1, Section 2.01). The policy makes clear that the use of a take-home vehicle is a "privilege" that can be "revoked" or "suspended" at any time. (Petitioner Exhibit 1A). Accordingly, the Management Rights clause authorized the Employer to unilaterally apply the accepted and acknowledged provisions of the take-home vehicle policy as written.

The Employer also argues that the Scope of Agreement language further shields it from having to bargain with the Union over its unilateral decision to revoke the take-home vehicles of certain detectives. The Scope of Agreement language is significantly more expansive than the Management Rights clause. (See Joint Exhibit 1, Section 2.02). The relevant provisions of the clause provide that the parties, for the life of the CBA,

> each voluntarily and unqualifiedly waives the right; and each agrees that the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement even though such subjects or matters may not have been within the knowledge or

[13] In fact, as the testimony and evidence before the Board made clear, the Union made a conscious decision not to propose language during the 2022 – 2025 contract negotiations to include the take-home vehicle policy or its contents into the collective bargaining agreement. (Tr. Vol. I dated March 21, 2023, at pages 34 – 35; 48 – 50; 92 – 93).

contemplation of either or both of the parties at the time they negotiated and signed this agreement.

Joint Exhibit 1, Section 2.02

Of particular import to this case in this Board's view is that at the time the Union agreed to this language, both under the 2017 – 2022 CBA and the tentatively agreed to 2022 – 2025 CBA (Joint Exhibits 1 and 2), there was a take-home vehicle policy in place that the Union knew about, was aware of and had acquiesced to in receiving take-home vehicles. While the take-home vehicle policy, as noted previously, was never part of the CBA, it was clearly part of the rules and regulations of the Employer's police department. (Tr. Vol I. dated March 21, 2023, at pages 37 – 40; 93 – 94). Further, the policy was clear in stating (both in its 2014 version and the revised 2020 version – Petitioner Exhibits 1 and 1A) that it was a "privilege" for detectives to have a take-home vehicle and that the "privilege" could be "revoked based on abuse or department needs." (Tr. Vol. I, dated March 21, 2023, at page 40; Petitioner Exhibit 1, Section 1.2).[14] Given that the Union had the opportunity to attempt to include the take-home vehicle policy language in the CBA and chose not to make such a proposal and the breadth of the Scope of Agreement language, it is clear to this Board, based on the evidence presented to it, the CBA authorized the Employer to act unilaterally in applying the terms of the take-home vehicle policy. As such, the Employer did not violate the Act when it unilaterally terminated the use of take-home vehicles for certain detectives and refused to bargain with the Union over its action.

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, at all times relevant to the instant matter, subject to a collective bargaining agreement dated November 1, 2017 through October 31, 2022.
4. In 2014 the Employer had more detectives than available unmarked police vehicles for detectives to use as part of their daily activities. Also in 2014, the Employer was part of a federal investigation of Google that ultimately resulted in a settlement that netted the Employer $60 million dollars. The settlement money could only be used for public safety and law enforcement purposes. The Employer used some of the

[14] In the revised take-home vehicle policy issued in 2020, the authority of the Employer is even more broad as it states that the "privilege" may be "suspended or revoked at any time by the Chief of Police or designee." (Petitioner Exhibit 1A, Section II).

settlement funds to purchase unmarked police vehicles which were provided to the detectives to use as part of their daily law enforcement duties.

5. Also in 2014, the Union proposed to the Employer that detectives be allowed to take the vehicles home as part of their duties and responsibilities and the Union and the Employer engaged in negotiations for a policy to cover take-home vehicles for members of the Detective Division. The parties mutually agreed on the contents of a take-home vehicle policy.

6. Each member of the Detective Division received a take-home vehicle and was required to sign a document indicating that he/she would comply with the terms of the take-home vehicle policy. In addition to receiving a take-home vehicle, each detective received a "gas fob" which allowed them to fill up the take-home vehicle with gas paid for by the Employer.

7. The take-home vehicle policy was in effect when the parties commenced negotiations for a new collective bargaining agreement in 2017. During the negotiations, the Union did not raise the issue of incorporating the take-home vehicle policy into the collective bargaining agreement.

8. During the negotiations for the 2017 – 2022 collective bargaining agreement, the parties inserted language in the CBA covering Captains having vehicles and their ability to take-home said assigned vehicles.

9. From 2014 when detectives initially received take-home vehicles and the take-home vehicle policy was agreed upon between the Employer and the Union through the negotiation of the 2017 – 2022 CBA, all members of the Detective Division received a take-home vehicle.

10. During the negotiations for the 2017 – 2022 CBA, the Union agreed to and ratified the Management Rights clause language and the Scope of Agreement language contained in that document. The language in each of those provisions had been in previous contracts and was not changed in the 2017 – 2022 CBA or the 2022 – 2025 tentative CBA.

11. In 2020 a second or revised take-home vehicle policy was implemented by the Employer. In addition to the revised policy, detectives were also asked to sign a new use agreement.

12. During negotiations for a new collective bargaining agreement to replace the 2017 – 2022 that was set to expire at the end of October 2022, the City did not make or submit any proposals to the Union regarding take-home vehicles. The Union, however, did make a proposal regarding take-home vehicles and detectives who are "on-call" but the proposal was rejected by the Employer without discussion or comment.

13. At the conclusion of the negotiations, the parties did not make any changes to the Management Rights or Scope of Agreement language, nor did they add any language

regarding detective take-home vehicles nor did they change or modify the language regarding Captains take-home vehicles.

14. On November 17, 2022, after the ratification of the 2022 – 2025 CBA, the Union received notification from the Employer that detectives within the Detective Division would no longer receive the benefit of a take-home vehicle.

15. After receiving the notification from the Employer regarding the elimination of detective take-home vehicles, the Union sent correspondence to the Employer demanding to bargain with the Employer over its decision. On or about December 1, 2022, the Union received a response from the Employer indicating that it did not have to bargain with the Union over its decision, but that it would bargain over the effects or impact of the decision on the bargaining unit.

16. On December 8, 2022, the Employer and the Union met but no bargaining occurred. After the meeting, the Employer did, in fact, eliminate the ability of certain detectives to have take-home vehicles.

17. The Employer delayed the implementation of its initial November 17, 2022 notice regarding eliminating access to take-home vehicles for certain detectives, which was to begin on December 5, 2022, and instead, the Employer reissued its notice of the discontinuation of take-home vehicles on December 12, 2022 and gave a thirty (30) day implementation period.

CONCLUSIONS

1. The Union has not proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it unilaterally eliminated the take-home vehicle for certain bargaining unit members.

2. The Union has not proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it unilaterally eliminated the take-home vehicle for certain bargaining unit members and failed to bargain with the Union over changes to a mandatory subject of bargaining.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Scott G. Duhamel, Member (Dissent)

Aronda R. Kirby, Member

Harry F. Winthrop, Member

Lawrence E. Purtill, Member (Dissent)

****BOARD MEMBERS KENNETH CHIAVARINI AND STAN ISRAEL (DISSENTED) WAS NOT IN ATTENDANCE TO SIGN THE DECISION AND ORDER*****

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

Dated: *December 12, 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 CITY OF EAST PROVIDENCE -AND- INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 569	:	CASE NO. ULP- 6348

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-6348, dated December 12, 2023, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 14, 2023.**

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

Dated: December 14, 2023

By: /S/ Thomas A. Hanley
Thomas A. Hanley
Administrator