

**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-6349
	:	
	:	
RHODE ISLAND DEPARTMENT OF	:	
ELEMENTARY and SECONDARY	:	
EDUCATION	:	

**DECISION AND FINAL ORDER OF FAILURE TO CONCLUDE
ON SUBSTANTIVE GROUNDS**

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 December 27, 2022 and filed on the same date by the RIDE Legal Counsel/Hearing Officer Professional Union, (hereinafter "Union").

The Charge alleged as follows:

In order to expedite consideration of this matter, the Union submits its charge and statement of facts simultaneously. There is no need to schedule a date for the Union to file its statement. Paul Pontarelli is the President of the RIDE Legal Counsel/Hearing Officer Professional Union. On November 19, 2020, Union President Pontarelli filed an unfair labor practice charge against RIDE. Case No. ULP-6297 proceeded to the Board's informal hearing process. On December 15, 2020, RIDE/Council on Elementary and Secondary Education terminated Pontarelli's employment. On December 28, 2020, Union President Pontarelli filed an amended unfair labor practice charge against RIDE and the Council to include his termination from employment. The amended charge in Case No. ULP-6297 proceeded to the Board's informal hearing process. On February 16, 2021, the Board unanimously voted to issue an unfair labor practice complaint in Case No. ULP-6297. The Board's complaint includes an allegation that RIDE and the Council violated R.I.G.L. 28-7-13 (5), (8) and (10) of the Act by terminating Pontarelli's employment. The matter proceeded to formal hearing. On November 17, 2022, RIDE filed a complaint against Pontarelli with the Rhode Island Supreme Court Disciplinary Board seeking to discipline Pontarelli for violating the rules of professional conduct. RIDE's complaint alleges, in part, that Pontarelli has a "twenty-year pattern" of "unethical conduct" and filing "frivolous legal complaints against his client." The allegation includes statements that Pontarelli filed a "baseless" and "frivolous unfair labor practice complaint (sic)" at the Board "concerning his termination." RIDE's complaint to the Disciplinary Board violates

R.I.G.L. 28-7-13 (5), (8) and (10) of the Act by seeking to discipline Pontarelli for filing a “baseless” and “frivolous” amended unfair labor practice charge in Case No. ULP-6297. The statement in RIDE’s complaint threatens, coerces, intimidates and retaliates against Pontarelli for engaging in protected, concerted activity. RIDE is not satisfied with terminating Pontarelli’s employment there. It is now taking aim at his ability to practice law anywhere in Rhode Island. In doing so, RIDE again knowingly misrepresents facts to accomplish its objective. RIDE would have the Disciplinary Board believe that Pontarelli filed an unfair labor practice “complaint” with the Board while at the same time neglecting to inform the Disciplinary Board that the [SLRB] Board unanimously voted to issue a complaint in Case No. ULP-6297 following the conclusion of an informal hearing process on the Union’s initial and amended charges not one Board member believed that the amended charge was baseless or frivolous and should be dismissed administratively. An unfair labor practice charge cannot be frivolous if it results in the issuance of a complaint by the Board. Such a charge is per se non-frivolous. Resorting to an affirmative misrepresentation and the misleading omission of material facts to the Disciplinary Board, RIDE has violated the Act in attempting to have Pontarelli disciplined for filing an amended charge in Case No. ULP-6297.

Following the filing of the Charge, each party submitted written position statements and responses as part of the Board’s informal hearing process. The parties submitted both statements and responses in a timely manner. On March 16, 2023, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (5), (8), (9) and (10) when, through its representative, the Employer (1) filed a complaint with the Rhode Island Disciplinary Counsel against the Union’s president/legal counsel alleging violation of the Rules of Professional Conduct which attorneys in Rhode Island must abide by in retaliation for the Union’s counsel exercising his right to engage the protections of the State Labor Relations Act; and (2) filed a complaint with the Rhode Island Disciplinary Counsel against the Union’s president/legal counsel alleging violation of the Rules of Professional Conduct which attorneys in Rhode Island must abide by in an effort to interfere, restrain or coerce the Union’s legal counsel in the exercise of his rights under the Act.

The Board held a single formal hearing on May 18, 2023. In addition, the Union submitted to the Board a motion to consolidate ULP-6349 with ULP-6297 and the Employer objected to the motion. After consideration of the evidence, the Board denied the motion to consolidate and the Union’s renewed motion to reconsider its decision which the Board also denied.

At the conclusion of the formal hearings, post-hearing briefs were filed by the Union and the Employer on June 12, 2023. In arriving at the Decision herein, the Board has reviewed and considered the testimony and exhibits submitted at the hearing and the arguments contained within the post-hearing briefs submitted by the parties.

DISCUSSION

The matter before the Board is the Union's claim of an unfair labor practice against the Employer due to the Employer's action of (1) filing of a complaint with the Rhode Island Disciplinary Counsel against the Union's president/legal counsel alleging violation of the Rules of Professional Conduct which attorneys in Rhode Island must abide by in retaliation for the Union's president exercising his right to engage the protections of the State Labor Relations Act; and (2) filing a complaint with the Rhode Island Disciplinary Counsel against the Union's president/legal counsel alleging violation of the Rules of Professional Conduct which attorneys in Rhode Island must abide by in an effort to interfere, restrain or coerce the Union's legal counsel in the exercise of his rights under the Act.

The background and history surrounding the dispute between the Employer and the Union in the instant case has been well documented by this Board in its Decision in ULP-6297 and will not be repeated in full in this decision. However, the Board believes setting forth the salient facts that gave rise to the present unfair labor practice Complaint are important and are described below.

The case before the Board, as noted above, at its essence involves the Union's allegation that a disciplinary complaint was brought against Mr. Pontarelli, the Union president, because of his engaging in protected concerted activity. According to the Union, the current matter began in November 2020 when Pontarelli filed an unfair labor practice Charge with the Board in ULP-6297. After filing the initial Charge, on December 15, 2020 the Employer terminated Pontarelli's employment for cause. The Union responded to this action on December 28, 2020 by filing an amended unfair labor practice Charge. The amended Charge alleged that Pontarelli's termination from employment was due to his engaging in protected concerted activity and in retaliation for his filing the original unfair labor practice Charge. The Board conducted its normal informal hearing process with the parties and thereafter issued a Complaint in ULP-6297. The Complaint alleged, in part, that Pontarelli's termination was due to his engaging in protected concerted activity and was in retaliation for exercising his protected rights under the Rhode Island State Labor Relations Act (hereinafter "Act"). After the Complaint issued in ULP-6297, the Board began its formal hearing process. In November 2022, prior to the completion of the Board's formal hearing proceedings and nearly two years after the Union filed its amended Charge in ULP-6297, the Employer's counsel, ostensibly on behalf of his client, filed a complaint against Pontarelli with the Rhode Island Supreme Court Disciplinary Board for allegedly violating the Rules of Professional Conduct. The Union contends that the filing of a disciplinary complaint against Pontarelli violates the Act because it was done in retaliation for Pontarelli exercising his protected rights, i.e., filing an unfair labor practice charge with this Board and to threaten, intimidate and coerce Pontarelli for exercising his rights.

As the Board has made clear in the past and reiterated in its decision in ULP-6297, if an employer takes adverse action against an employee due to or because the employee

engaged in protected concerted activity the employer would be in violation of the Act. As the Board stated in ULP-6297, 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)).¹ 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)). In the instant case, the evidence presented claimed that the conduct the Union alleges Pontarelli engaged in that constituted protected, concerted activity, i.e., his filing of unfair labor practice charges with the Board, was protected activity under the Act. In the Board’s view, there can be no doubt nor legitimate argument nor need for extensive discussion to understand the notion that the filing of an unfair labor practice charge is protected concerted activity under the Act.

While there is no dispute that Pontarelli engaged in protected concerted activity when he filed the unfair labor practice charges that became ULP-6297, the issue before the Board is whether the Employer’s action in filing a disciplinary complaint against Pontarelli was due to Pontarelli’s engaging in the identified protected concerted activity. The Employer argued that the Board did not have jurisdiction to hear this matter because addressing disciplinary matters involving professional conduct is the exclusive purview of the Supreme Court. While this position by the Employer is accurate, it is also irrelevant in the instant case. The Board is not concerned with whether the disciplinary complaint is valid or not; instead, the Board is looking at whether the filing of the disciplinary complaint was done due to or because of Pontarelli engaging in protected concerted activity. This latter question is squarely within the jurisdiction of the Board.

¹ 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)).

The Union, in its argument, seemed to assert that the Board issuing a Complaint in the present case conclusively proves that one or more of the specific allegations contained in the disciplinary complaint (Joint Exhibit 1) are false. This assertion is simply not the case. The issuance of a Complaint by the Board after the Board's informal hearing process has been completed does not represent a finding for or against one party or the other involved in the unfair labor practice case. This was made clear to the parties by the Board's legal counsel during the formal hearing (Tr. at pages 22 – 24). Thus, the Union's assertion that the issuing of a Complaint by the Board is akin to a finding that the filings with the Board by Pontarelli could not be "baseless" or "frivolous" is not accepted by the Board.

In this case, the Board finds itself once again in the position of having a deadlocked Board for the purposes of voting. The vote of the Board is deadlocked on the substantive issue of the allegation contained in the Unfair Labor Practice Complaint. Board Members Stan Israel, Scott Duhamel and Lawrence Purtill argued that the Employer's action in filing a complaint with the Supreme Court Disciplinary Board against Pontarelli alleging that Pontarelli had violated the Rules of Professional Conduct was done in reaction to and retaliation for Pontarelli filing unfair labor practice charges against the Employer. As such, Members Israel, Duhamel and Purtill asserted that the Employer's conduct constituted an unfair labor practice. However, Board Chairman Walter Lanni and Board Members Aronda Kirby and Harry Winthrop argued that there was no evidence to support the unfair labor practice allegations. They noted the gap in time between the filing of the amended unfair labor practice Charge (December 28, 2020) and the filing of the disciplinary complaint (November 17, 2022) and the fact that the Board, in ULP-6297, had found that the actions of the Employer that culminated in the termination of Pontarelli were found not to have been in violation of the Act. Chairman Lanni, with Members Kirby and Winthrop in agreement, also pointed out that while the Union identified protected activity engaged in by Pontarelli, there was a lack of evidence that the Employer's filing of the disciplinary complaint was in retaliation for Pontarelli engaging in such protected activity.

Unfortunately, the Board has no mechanism to deal with deadlocked votes. The Board's enabling Act does not provide for alternate members who can be utilized for breaking tied votes. Thus, without a majority to support the motion to deny and dismiss the Charge, the Board has no choice but to dismiss the within matter.

Finally, the Board makes clear that a tie vote among its members, as occurred in this case, means that the Complaint has not been upheld and the allegations raised in the Complaint have been denied as there is no majority consensus on the issue presented to the Board. As explained in *Roberts Rules of Order*, a tie vote on the question presented means the motion is lost (see *Roberts Rules of Order*, Ch. VIII). In the instant case, the Board vote was 3 to 3, meaning the motion to deny and dismiss the Complaint was defeated.

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. On November 19, 2020 the Union filed an unfair labor practice Charge against the Respondent Employer.
4. On December 28, 2020 the Union filed an amended unfair labor practice Charge against the Respondent Employer.
5. On November 17, 2022 the Employer’s attorney filed a complaint with the Rhode Island Supreme Court Disciplinary Board seeking to discipline Pontarelli under the Rules of Professional Conduct.
6. On December 27, 2022, the Union filed an Unfair Labor Practice Charge against the Employer for filing the complaint with the Disciplinary Board.
7. The Charges were processed and on March 16, 2023 the Board issued its Complaint.
8. A formal hearing was held on May 18, 2023 and the parties had a full and fair opportunity to present their respective positions.
9. On September 5, 2023, the Board considered the matter and was unable to arrive at anything other than a deadlocked vote.

CONCLUSIONS OF LAW

Since the Motion to deny and dismiss a Charge of an Unfair Labor Practice resulted in a 3 to 3 tie vote, the Motion was defeated and the within matter must be dismissed.

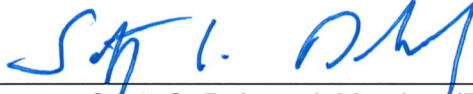
ORDER

The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

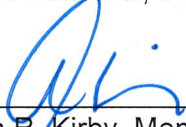
RHODE ISLAND STATE LABOR RELATIONS BOARD



Walter J. Lanni, Chairman



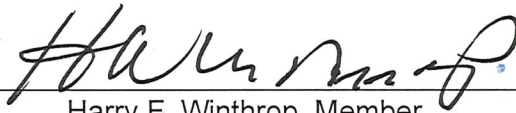
Scott G. Duhamel, Member (Dissent)



Aronda R. Kirby, Member



Stan Israel, Member (Dissent)



Harry F. Winthrop, Member

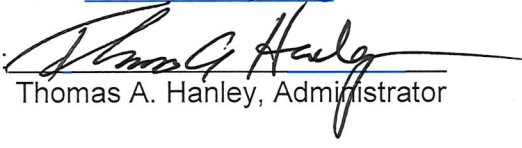


Lawrence E. Purtill, Member (Dissent)

BOARD MEMBER KENNETH B. CHIAVARINI WAS NOT IN ATTENDANCE FOR THE VOTE ON THE DECISION AND ORDER.

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

Dated: October 10, 2023

By: 
Thomas A. Hanley, Administrator

