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- STATE OF RHODE ISLAND - DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES	:	CASE NO. ULP-6368

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 Children, Youth and Families (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated May 10, 2023 and filed on the same date by Rhode Island Council 94, AFSCME, AFL-CIO, Local 314 (hereinafter "Union").

The charge alleged as follows:

> The State of Rhode Island, DCYF, RI Training School has begun unilaterally freezing our RI Council 94, AFSCME, AFL-CIO, Local 314 members who work at the Rhode Island Training School, who work in the Shift Coordinator classification, in the Juvenile Program Worker classification. Over at least the last thirty (30) years, Local 314 members have never been subjected to being frozen into a different and lower classification. This change was never negotiated with the Union prior to its unilateral implementation. Following the implementation of this new practice, the administration has refused to stop this practice or negotiate with the Union. This is a violation of R.I.G.L. 28-7-13 (3), (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 August 10, 2023, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (3), (6) and (10) when, through its representative, the Employer (1) unilaterally changed terms and conditions of employment for bargaining unit members in the classification of Shift Coordinator when it froze them into the lower classified position of Juvenile Program Worker at the RI Training School; without notifying or bargaining with the Union; (2) unilaterally changed terms and conditions of employment for bargaining unit members in the classification of Shift Coordinator when it froze them into the lower classified position of Juvenile Program Worker at the RI Training School without notifying or bargaining with the Union; and (3) failed and refused to engage and/or negotiate in good

faith with the Union over its unilateral change in terms and conditions of employment regarding unilaterally changed terms and conditions of employment for bargaining unit members in the classification of Shift Coordinator when it froze them into the lower classified position of Juvenile Program Worker at the RI Training School.

The Board initially scheduled a formal hearing, but at the request of the parties the formal hearing was postponed and rescheduled. The formal hearing was held on November 16, 2023. Post-hearing briefs were filed by the parties on January 5, 2024. 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 action in freezing in Shift Coordinators to the lower rated classification of Juvenile Program Worker (JPW) without first notifying and negotiating with the Union. The Employer has denied the Union's allegation that it committed an unfair labor practice in violation of the State Labor Relations Act (hereinafter "Act").

The parties are subject to a collective bargaining agreement dated July 1, 2021 through June 30, 2024. (Joint Exhibit 2). The issue involved in this case occurred at the Rhode Island Training School, a secure juvenile correctional facility. The Training School houses individuals aged 19 and younger who have been judged delinquent by the Rhode Island Family Court or who are awaiting disposition of criminal charges that have been brought against them. (Transcript at pages 74 – 75). The mission of the Training School, in addition to incarceration of youth offenders and providing for their safety while at the facility, is to attempt to rehabilitate those who are in its custody. (Transcript at pages 74 – 75). This rehabilitation includes an educational and counseling component. (Transcript at page 75). As noted, the Training School is a locked facility that is organized around four separate mods. (Transcript at page 76). There is one mod for females and the other three mods hold male youths who have either been sentenced (two mods) or are awaiting sentencing or a community program or are potentially dangerous (one mod identified as the Detention Center). (Transcript at page 76). The mods are staffed by JPWs with generally two to three JPWs being assigned to each mod. (Joint Exhibit 5; Transcript at page 77). Each mod is led by a Cottage Manager, who directly supervises the JPWs. (Joint Exhibit 8). JPWs are in daily contact with the Training School residents and are responsible for the supervision, care, custody and control of the residents of the mod to which they are assigned. (Joint Exhibit 6; Transcript at pages 15; 30; 79).

In addition to Cottage Managers and JPWs, the Training School (as relevant to the instant conflict) also employs Shift Coordinators. (Joint Exhibit 7). Shift Coordinators work in a control center and are responsible for oversight of the Training School facility.

Shift Coordinators watch cameras, oversee movement, receive phone calls from the courts, sheriffs or parents, coordinate overtime and staff the facility. (Transcript at pages 21; 79; Joint Exhibit 7). Shift Coordinators generally do not have direct contact with residents but, when needed, they will respond to a disturbance or incident on a unit and they coordinate responses in the case of medical emergencies or other incidents such as a fire at the facility. (Transcript at pages 25 – 26; 79; Joint Exhibit 7). In short, Shift Coordinators, as testified to by the Training School Superintendent, are "responsible for the day-to-day operation of the facility, first and second and third shift." (Transcript at pages 79 – 80).

As mentioned above, the issue before the Board involves the requirement or mandate by the Employer that Shift Coordinators fill vacant JPW slots when no JPWs are available. As the evidence before the Board demonstrated, there are plentiful overtime opportunities for JPWs. (Transcript at page 80). However, there are not enough JPWs to fill the overtime needs of the Training School. (Transcript at page 80). In addition, JPWs are limited to working no more than sixteen (16) consecutive hours before they have to be relieved. (Transcript at page 95; Joint Exhibit 2, Article 8, Section 8.9). Prior to the instant dispute, Shift Coordinators have, over the years, volunteered to work the JPW overtime vacancies. (Transcript at pages 25; 41 – 42; 83 – 84). However, beginning in 2023 Shift Coordinators stopped volunteering to take the available overtime in the JPW classification. (Transcript at pages 84 – 85).[1] In response to this action of not volunteering to take overtime, the Training School Superintendent began ordering or freezing in Shift Coordinators to the vacant JPW positions. (Transcript at page 85; Joint Exhibit 10). As the Training School Superintendent testified, there is a process in place for filling overtime vacancies. Shift Coordinators have a list from which they attempt to fill as many of the vacant overtime slots as possible. If the overtime slots can't be filled from the list, then the Employer looks to other positions (i.e., managers, social workers) to fill the overtime vacancies. If there are still overtime slots that are not filled, then the Shift Coordinators will be ordered to fill the slot. (Transcript at pages 81 – 83). Prior to 2023, the evidence before the Board shows that Shift Coordinators had not been frozen in to vacant JPW positions for overtime by the Employer. (Transcript at pages 38 – 39; 84 – 85; 93).

The parties held several meetings and negotiations to discuss the staffing issues involving the JPW position without achieving any positive agreement or result. (Transcript at pages 34; 51). The parties also held discussions/negotiations around changing the Shift Coordinator job description though they were unable to reach a satisfactory resolution. (Transcript at page 66; 86 – 87). However, at no time during the course of the discussions/negotiations about the Shift Coordinator and JPW positions was there any

[1] Prior to the Shift Coordinators ceasing to volunteer to cover open JPW shifts, the Union had raised the alarm regarding the need for the Employer to hire additional personnel to fill the JPW position. According to the Union, it had filed numerous "health and safety grievances" concerning so-called "short staffing" issues and had brought their staffing concerns to the Governor and the General Assembly. (See Transcript at pages 33 – 38).

conversation or mention between the parties about freezing the Shift Coordinators into the JPW classification. (Transcript at pages 38 – 39; 68).[2]

As previously noted, in early 2023 the Employer began freezing in Shift Coordinators to JPW overtime slots that it couldn't fill. In May 2023 the Union filed the instant unfair labor practice charge.

POSITION OF THE PARTIES

Union:

The Union claims that the Employer unilaterally changed the terms and conditions of employment of Shift Coordinators when it began ordering (freezing in) the Shift Coordinators to fill vacant JPW overtime slots that the Employer couldn't otherwise fill and refused to bargain with the Union over its freezing in decision. The Union claims that this action by the Employer was in violation of the Act.

Employer:

In contrast to the Union's position, the Employer asserts that it has not violated the Act with respect to its decision to begin freezing in Shift Coordinators to vacant JPW overtime slots that could not otherwise be filled. The Employer initially defends its action by claiming that it had no obligation to bargain with the Union over the freezing in of Shift Coordinators to vacant JPW overtime slots because the Shift Coordinators had been doing this work for many years and, therefore, a past practice had been created. The Employer also claimed that the collective bargaining agreement authorized the Employer's action in two specific ways: first, the CBA language created a waiver by the Union of its right to challenge and bargain over the Employer's action, both through the language in the Management Rights clause and based on a so-called "zipper" clause contained in the CBA; and, second, the emergency rights language of the CBA authorized the Employer to act in the manner that it did in this case. The Employer also raised two (2) procedural issues in its defense, asserting that the Board did not have jurisdiction in this case because the matter required the Board to interpret the collective bargaining agreement, something the Board is prohibited from doing, and arguing that the Training School Superintendent had a non-delegable duty to take the action he did as he was acting to protect the safety and security of the staff and residents of the Training School. Finally, the Employer argues that even though it had no obligation to do so, it did, in fact, negotiate with the Union to impasse over the freezing in of Shift Coordinators to JPW overtime slots.

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[2] The parties dispute when the Union first learned that the Employer was freezing in Shift Coordinators to work JPW overtime slots that could not otherwise be filled. According to the Union, it first learned of the freezing in through an email (Transcript at pages 38 – 39). The Employer, however, asserted that the Union was notified that Shift Coordinators would be frozen in during discussions between the parties over the Shift Coordinator position. (Transcript at pages 87 – 88).

DISCUSSION

The issue before the Board is did the Employer, beginning in 2023, unilaterally change the terms and conditions of employment for Shift Coordinators by ordering or freezing in the Shift Coordinators to vacant JPW overtime shifts that the Employer could not otherwise fill and fail to bargain with the Union over this change. While this issue may seem relatively simple and straightforward, the evidence demonstrates that the actions of both parties in this dispute have complicated the facts and made this decision for the Board more complicated and difficult than it might appear. Finally, the Board will discuss the various defenses raised by the Employer to its conduct in this case.

The Board has recently been presented with a significant number of cases that claim the employer in question has acted in violation of the Act by making unilateral changes that impact the terms and conditions of employment of bargaining unit members. The instant case is no different in the sense that the Union has alleged the Employer unilaterally changed how Shift Coordinators perform their jobs by ordering or freezing in the Shift Coordinators to vacant JPW overtime shifts that the Employer cannot otherwise fill. As this Board has repeatedly stated, 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; §36-11-1(a); R.I.G.L. §36-11-7; *Rhode Island State Labor Relations Board v. City of East Providence,* ULP-6344 (December 14, 2023); *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").[3]

A. The Employer Engaged In Improper Unilateral Action.

In the present case, there appears to be little dispute between the parties that the Employer unilaterally acted in early 2023 when it began freezing in Shift Coordinators to perform vacant JPW overtime shifts. Instead, the central issue is whether this unilateral action resulted in material and substantial changes to the employees' working conditions.

As discussed above, the facts in this case are generally not in dispute. JPWs interact on a daily basis with the residents at the Training School. They are responsible for the care, custody and control of said residents. (Joint Exhibit 6). Shift Coordinators are

[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)).

responsible for the daily operation of the Training School and "the coordination and supervision of the movement and location assignment of subordinates engaged in the care, custody and control of the residents" of the Training School. (Joint Exhibit 7). Beginning in early 2023, the Employer began freezing in Shift Coordinators to perform the overtime work of JPWs when the Employer could not otherwise fill the overtime shift. (Transcript at pages 81 – 83; 84). This was a change from what the Employer had previously done because prior to 2023 Shift Coordinators had volunteered to work the JPW overtime. (Transcript at pages 25; 41; 84). The issue, therefore, is focused on whether the mandate or requirement, unilaterally imposed by the Employer, to have Shift Coordinators perform unfilled JPW overtime was a material and substantial change in the working terms and conditions of employment for the Shift Coordinators. Such a change, in the Board's view, represents a substantial and material change in working conditions for employees and, therefore, is a violation of the Act.

While the evidence before the Board is clear that Shift Coordinators have previously performed JPW duties, the material change in the circumstances is that the Shift Coordinators were no longer in charge of when they would work the JPW overtime. In other words, prior to 2023, a Shift Coordinator was in control of his/her own time and could decide whether he/she wanted to work an overtime shift in the JPW slot. However, beginning in 2023 that option was summarily removed from Shift Coordinators. Instead, Shift Coordinators were being told they had to work the unfilled JPW overtime slots. (Transcript at pages 81 – 83; 84). In the Board's view, this unilateral decision significantly impacted the terms and conditions of the employees in the Shift Coordinator position. While the Union argued that the Employer mandate was a violation of the Act because the Shift Coordinators did not have the training to perform the JPW job (see Transcript at pages 22; 31 – 32; Joint Exhibits 6 and 7), the real imposition upon Shift Coordinators is the loss of control over their work life. There is, in other words, a distinct difference between volunteering to work a certain amount of overtime (i.e., making the choice to do so) and being ordered to work overtime without being able to exercise any choice. In the latter case, the imposition is, in the Board's view, a significant and material change to an employee's terms and conditions of employment. As such, it is the Board's view that the Employer's unilateral decision to freeze in Shift Coordinators to JPW overtime slots and the implementation of this decision constitutes a violation of the Act.

B. The Employer Failed To Bargain With The Union

In addition to unilaterally changing terms and conditions of employment for bargaining unit members, the Employer failed to bargain with the Union over the unilateral decision to begin freezing in Shift Coordinators to the JPW overtime slots. While there was testimony that the parties met on several occasions to discuss the Shift Coordinator position (Transcript at pages 34; 51; 61 – 62; 83; 86 – 87), there was no evidence

presented that the concept of freezing in Shift Coordinators to the JPW position was ever discussed. (Transcript at pages 38 – 39).[4]

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); *Rhode Island State Labor Relations Board and Middletown School Department,* ULP-6257A, (September 9, 2020); *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. §36-11-1(a)).

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

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

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[4] The Board does note that the Training School Superintendent testified he discussed the ability to "order" in Shift Coordinators with the Union president. (Transcript at pages 86 – 87). There was no corroboration of this testimony and there was no indication as to whether these discussions were part of the negotiations or simply away from the table conversation.

occasions. Thus, for example, in *Ford Motor Company v. NLRB*, 441 U.S. 488 (1979), the Supreme Court described mandatory bargaining subjects as those subjects that are "plainly germane to the 'working environment'..." Similarly, our Supreme Court has recognized that items which are considered mandatory subjects of bargaining are subject to both negotiation and/or arbitration. *See Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 107 A.3d 304, 313 (R.I. 2015); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342, 349 (1958); *Barrington School Committee v. Rhode Island State Labor Relations Board, supra*; *School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, supra*; and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra*.

In the instant case, while it is undisputed that the parties had discussions/negotiations concerning the JPW and Shift Coordinator positions, the evidence before this Board does not conclusively demonstrate that the concept of freezing in Shift Coordinators to the vacant JPW position for purposes of working forced overtime was ever raised or fully discussed. The concept of overtime, how overtime is selected, who has to work overtime and when employees have to work overtime are clearly part of the terms and conditions of employment and, thus, mandatory subjects of bargaining. (See Joint Exhibit 2, Article 8). As this Board and the courts have made clear, a failure to bargain over a mandatory subject of bargaining constitutes an unfair labor practice and a violation of the Act (*See Rhode Island State Labor Relations Board v. City of East Providence, supra*; *Barrington School Committee, supra; School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, supra;* and *Town of Narragansett v. International Association of Firefighters, Local 1589, supra)*.

The evidence before the Board makes clear that the unilateral changes made by the Employer in ordering (freezing in) Shift Coordinators to fill vacant JPW overtime slots impacted terms and conditions of employment which are mandatory subjects of bargaining. By failing and/or refusing to bargain with the Union over a mandatory subject of bargaining, the Employer's conduct was in violation of the Act.

C. The Employer's Defenses

The Employer has put forth before the Board a series of defenses to its action in this matter. One of the Employer's main arguments centers on its claim that it was authorized to assign Shift Coordinators to fill vacant JPW shifts because they had been doing the work for many years. The Employer also argued that its actions were authorized because the Union had waived its right to bargain under the management rights clause about the issue of assigning Shift Coordinators to fill vacant JPW shifts and under the contractual "zipper" clause of the contract. The Employer further argues that any change it made was authorized under the Emergency Rights provision of the collective bargaining agreement. The Employer also put forth the claim that the Training School Superintendent's need to ensure the safety and security of the staff and residents gave him the authority to act in the manner he did. The Employer also contends that even though it had no obligation to

do so, it did, in fact bargain with the Union with ordering Shift Coordinators to fill vacant JPW slots. Finally, the Employer raises a procedural argument claiming the Board does not have jurisdiction over this issue because it requires the Board to interpret the collective bargaining agreement, something the Board is prohibited from doing. As will be discussed in more detail below, the Board rejects these arguments by the Employer as insufficient to justify its actions in the instant case.[5]

(i). Past Practice

The Employer initially argues that it had no bargaining obligation in this matter because "Shift Coordinators have been covering JPW assignments since 1992." (Employer Memorandum of Law at page 10). In essence, the Employer is claiming that it was simply acting within the confines of an established past practice when it mandated Shift Coordinators to work in vacant JPW jobs and that this mandate did not cause or create a change in terms and conditions of employment. In Rhode Island, past practice for purposes of collective bargaining is set forth in statute. (See R.I.G.L. 28-9-27). The statute provides as follows:

> (a) * * * (1) The collective bargaining agreement does not contain an express provision that is the subject of the grievance; *or*
> (2) The collective bargaining agreement contains a provision that is unclear and ambiguous; *or*
> (3) The collective bargaining agreement contains a provision which has been mutually agreed upon by the parties that preserves existing past practices for the duration of the collective bargaining agreement.
> (b) A party claiming the existence of a past practice shall be required to prove by clear and convincing evidence that the practice:
> (1) Is unequivocal;
> (2) Has been clearly enunciated and acted upon;
> (3) Is readily ascertainable;
> (4) Has been in existence for a substantial period of time; and
> (5) Has been accepted by representatives of the parties who possess the actual authority to accept the practice. * * *
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> R.I.G.L. § 28-9-27.

A review of the brief history of use by the Employer of Shift Coordinators in unfilled JPW overtime slots demonstrates to this Board that a past practice has been established.

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[5] The Employer also argued to the Board that the Union's complaints about JPW staffing levels were not relevant to the issue before the Board. While staffing is certainly a critical subject and played a part in how the parties came to be before this Board, the Board does agree with the Employer that staffing is ultimately not relevant to the Board's inquiry as to whether the Employer committed a violation of the Act.

Initially, a review of the collective bargaining agreement shows that past practice language exists within its terms. (See Joint Exhibit 2, Article 35.2 at page 76).[6] This language simply allows for the continuance of benefits or practices that have been established between the parties. Under the Rhode Island statute, however, in addition to looking for existing contract language, there is an obligation upon the party claiming the practice to show that the practice is "unequivocal", "clearly enunciated", "readily ascertainable", "has been accepted by representatives of the parties" and has "been in existence for a substantial period of time..." R.I.G.L. § 28-9-27. The evidence before the Board makes clear that Shift Coordinators voluntarily filling in to cover vacant JPW slots satisfies the five factors set forth in the statute, i.e., it was unequivocal, clearly enunciated, readily ascertainable, accepted by the parties and had been in existence for a substantial period of time. (See Transcript at pages 25; 41; 83 – 84). In other words, the practice of having Shift Coordinators volunteer to take vacant JPW overtime slots was clear, unequivocal, known to the Union and in place for a substantial period of time. However, where the Board believes the Employer's evidence falls short is that while the practice was in place, the Employer did not follow the practice in the present matter. The Employer, in fact, changed the practice by ordering Shift Coordinators to work in unfilled JPW overtime slots. As the Employer stated in its Memorandum, an employer can defend against a claim of a unilateral change by showing that it acted in accordance with its past practice. (See Employer Memorandum of Law at page 11, citing *The Atlantic Groug v. National labor Relations Board*, 2023 WL 5584119 at 3 (CA No.: 22-60442 dated August 29, 2023). As previously noted, the Employer did change the manner in which it operated its past practice by changing the method of assignment from accepting volunteers from the Shift Coordinator position to ordering Shift Coordinators to fill the JPW slots. Thus, while the past practice did exist, the Employer's action in mandating Shift Coordinators to fill vacant JPW slots instead of only accepting volunteers to fill the slots, represented a material change that had to be negotiated with the Union.

(i) The Management Rights Clause

The Employer next argues that the language of the management rights clause of the collective bargaining agreement, (Joint Exhibit 2, Article 4, Section 4.1), acts as a waiver of the Union's right to bargain over the involuntary assignment of Shift Coordinators into unfilled JPW jobs. The Employer points to several provisions of the management rights section and argues that the authority to "direct employees in the performance" of their duties, "to be able to "maintain the efficiency of the operations", and to "determine the methods, means and personnel by which such operations are to be conducted" allows the Employer to act as it did in the instant matter. (Joint Exhibit 2 at pages 10 – 11; Employer Memorandum of Law at pages 13 – 14). The provisions identified by the Employer represent a standard set of rights and responsibilities that it may exercise.

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[6] The language at Article 33.2 states: "Except as otherwise expressly provided herein, all privileges and benefits which employees have hereto enjoyed shall be maintained and continued by the State during the term of this Agreement."

These rights, however, are limited by the contract, which notes that the Union recognizes these employer rights "except as specifically limited, abridged, or relinquished by the terms and provisions of this agreement, . . . and consistent with applicable laws and regulations . . ." (Joint Exhibit 2 at page 10). While the CBA, as noted, provides the rights enumerated therein to the Employer, the setting forth of these rights does not absolve the Employer of its obligation to bargain over mandatory subjects of employment nor does it authorize the Employer to unilaterally change the terms and conditions of employment of bargaining unit members.

The management rights clause makes clear that the rights set forth in Section 4.1 cannot be inconsistent with the provisions set forth in other parts of the CBA nor can it use its management rights to violate "applicable laws and regulations." (Joint Exhibit 2). In the Board's view, when the Employer decided to mandate Shift Coordinators fill vacant JPW slots, the Employer not only violated the contract overtime provision (Joint Exhibit 2, Article 8), but also its obligation to bargain over a unilateral change in terms and conditions of employment. Though the Employer is certainly correct to point out that there is nothing in the CBA that "prohibits the Training School from assigning Shift Coordinators to cover JPW assignments, when necessary," (Employer Memorandum of Law at page 14), that absence doesn't mean the Employer's statutory obligation to bargain over mandatory subjects has disappeared or been eliminated. While the rights granted under the management rights clause can be described as extensive, nowhere within the terms of Section 4.1 does it allow the Employer, in the Board's view, to make a unilateral change to terms and conditions of employment as it did when it ordered Shift Coordinators to fill vacant JPW slots without first notifying the Union and bargaining over the proposed change.

The Employer also argues, in essence, that its decision to order Shift Coordinators to cover JPW vacancies was a managerial prerogative covered under the emergency provisions of the management rights clause of the CBA. (Joint Exhibit 2, Section 4.1F). For example, the Employer argues that its decision was authorized or sanctioned by the language in the CBA that allows the Employer to "take whatever actions are necessary to carry out its mission in emergency situations..." (Joint Exhibit 2, Article 4, Section 4.1F). However, this language defines "emergency situations" as "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." In the Board's view, this language speaks to a single or isolated situation that unexpectedly arises and needs to be addressed quickly. In the present case, it is difficult for the Board to see how the Employer could view the need for Shift Coordinators to fill vacant JPW slots as unforeseen. There is ample evidence before this Board that the Union was complaining about a lack of staffing for some time prior to 2023 when the Employer first started to order Shift Coordinators to fill JPW slots. (Transcript at pages 33 – 38; Respondent Exhibit 1; Union Exhibits 1 and 2). It is apparent to this Board that not having enough personnel to fill vacant JPW overtime slots could not reasonably be viewed as something unforeseen when it occurred in 2023.

In addition, the Board cannot agree with the Employer's suggestion that this situation falls under the Emergency Rights language as being a "situation which is not expected to be of a recurring nature." (Joint Exhibit 2, Section 4.1F). The fact is, as the evidence before the Board makes clear, the mandating of Shift Coordinators to fill vacant JPW slots has been ongoing throughout 2023. (See Joint Exhibit 10). That this situation has gone on for as long as it has clearly placed it outside the conditions set forth in the contract. Therefore, the Board does not credit the Employer's claim that its actions were authorized by the Emergency Rights clause of the CBA.

Finally, the Employer raises the issue of waiver, claiming that through the negotiation of the CBA and, more particularly, the so-called "zipper" clause, the Union has waived its right to contest the Employer's actions regarding its ordering of Shift Coordinators to perform vacant JPW jobs. (Joint Exhibit 2, Article 45). The Employer cites this Board's recent decision in *Rhode Island State Labor Relations Board and City of East Providence*, ULP-6348, December 14, 2023, to support its contention that the Union waived it right to bargain over the Employer's unilateral action. The Employer is correct that in the *City of East Providence* case it cites, this Board did find that the Union had waived its right to bargain over the employer's unilateral change in the use of certain police vehicles. The basis for the Board's decision in that case was the fact that the City had a policy in place prior to the time the most recent contract was negotiated between the parties which authorized the City to eliminate vehicles from take home use by detectives. In other words, the Union was aware of the policy at the time it signed the contract and the scope of agreement language contained therein. (See *City of East Providence*, ULP-6348 at pages 11 – 12). While the language in the Employer's so-called "zipper" clause is certainly broad based, there is no comparable policy or prior action that can support its argument of a waiver.

The Board recently decided another East Providence matter, *Rhode Island State Labor Relations Board and City of East Providence*, ULP-6344/6344A, December 12, 2023, in which the Board determined that the exact same scope of agreement language found in ULP-6348 was not sufficient to support a claim that the union had waived its right to bargain over the installation of video and audio recording equipment in City Hall and the Emergency Communication Center. In ULP-6344/6344A, the Board found that the installation of audio and video equipment would be used by the employer, at least in part, for possible disciplinary purposes. (See *City of East Providence*, ULP-6344/6344A at pages 9 – 11). The unilateral changing of existing contract language, i.e., the discipline clause, was not something that the union had agreed to waive in that case. The instant case is, in the Board's view, more akin to the Board's decision in *City of East Providence*, ULP-6344/6344A. Here, the Board believes the evidence demonstrates that the Employer's actions changed the application and intent of the overtime provision, something the Union never agreed to when it signed the current contract. As the Board noted in its *City of East Providence,* ULP-6344/6344A decision,

> As the State Employee Relations Board of Ohio noted in *City of North Ridgeville*, SERB Opinion No. 2000-008 (June 22, 2000), clauses like the Scope of Agreement language presented here are designed to "protect the status quo rather than provide justification for unilaterally changing the employment relationship." Nowhere within the Scope of Agreement is there language that allows or authorizes the Employer to make unilateral changes to existing negotiated terms in the CBA. Yet, based on the evidence presented to this Board, that is precisely what the Employer attempted to accomplish...
>
> *City of East Providence,* ULP-6344/6344A at page 11.

As discussed above, the Board believes the evidence does not support the Employer's waiver claim against the Union.

(iii)Training School Safety and Security

The Employer also argues that its ordering in of Shift Coordinators to vacant JPW overtime slots was necessary to ensure the health, safety and security of the Training School staff and residents. (Transcript at page 82; See Employer Memorandum of Law at pages 19 – 22). The Employer points to the Training School Superintendent's testimony to support its contention that it not only had the right to act as it did, but that the health, safety and security of the staff and residents superseded any bargaining obligation the Employer may have had. On this latter point the Employer equates the Superintendent's actions as analogous to the concept that public sector employers cannot be "prevented...from discharging their statutory obligations" even in the face of mandatory subjects of bargaining or actions contrary to contract provisions and cites as support the Rhode Island Supreme Court's decisions in *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913 (R.I. 1991) and *Department of Mental Health, Retardation & Hospitals v. Rhode Island Council 94*, 692 A.2d 318 (R.I. 1997). (Employer Memorandum of Law at pages 20 – 22). The *Vose* and *MHRH* cases both address the situation where a director was forced to act contrary to specific statutory mandates that provided the director with certain enunciated powers. (See *Vose* at page 915 – 916; *MHRH* at page 319). The problem with the Employer's argument in the instant case is that the Training School Superintendent, unlike the directors referenced in the *Vose* and *MHRH* decisions, was not following a specific statutory mandate when he acted in the present case. Nowhere within the Employer's argument does it point to or cite any statutory or regulatory authority precisely applicable or even similar to the authority that was the basis of the *Vose* and *MHRH* decisions. While the Board acknowledges that the health, safety and security of the staff and residents of the Training School is an important responsibility, in the instant case there is no statutory basis to allow the Employer to simply ignore its bargaining obligations under the Act.

The Employer's failure to negotiate with the Union regarding its unilateral decision to order (freeze in) Shift Coordinators to fill vacant JPW slots and its failure to bargain over this action represents a violation of the Act.

(iv). Miscellaneous

Finally, the Employer asserts a procedural claim, i.e., that the Board does not have jurisdiction over the instant case because resolution of the case requires the Board to interpret a collective bargaining agreement, something the Board is generally prohibited from doing. (See *Rhode Island State Labor Relations Board and Town of West Warwick*, ULP-5399, July 26, 2001; *Rhode Island State Labor Relations Board and Rhode Island Department of Human Services*, ULP-6299, February 28, 2021), and a general claim that even though it had no obligation to bargain with the Union it nonetheless did so. (See Employer Memorandum of Law at pages 15 – 17 and 22 – 24). As discussed below, the Board rejects each of these defenses as without merit.

As to the Employer's procedural argument, this can be dispensed with quickly. While the Employer is correct that generally this Board does not exercise jurisdiction over Issues involving the interpretation of collective bargaining agreements (see *State of Rhode Island, Department of Environmental Management v. State Labor Relations Board*, 799 A.2d 274 (R.I. 2002)), in the present case the Board is not engaging in such an endeavor. Instead, the Board is determining whether the Employer's unilateral actions and refusal to bargain over those actions violates the Act. Ironically, it is the Employer that has defended its conduct by pointing to provisions of the collective bargaining agreement (specifically, the management rights and alteration of agreement clauses) in an effort to support its position that it did not violate the Act. Finally, although as noted the Board does not usually get into the specifics of contracts, the Board has stated that "when a defense is raised that certain conduct is permitted under the contract . . . we will look to the language of the contract." *In the matter of Rhode Island State Labor Relations Board and Town of North Smithfield*, ULP-6102, at p. 5, n.4 (June 20, 2014). Thus, because the Employer raised such a defense it was proper and necessary for the Board to look to the language of the CBA to determine whether a violation of the Act had occurred. In short, the Board rejects the Employer's not so subtle sleight of hand with this claim and its jurisdictional argument as being without merit.

As to the claim by the Employer that it actually did bargain with the Union, it has already been discussed that there is no evidence before the Board that the parties ever discussed the Employer's decision to freeze in Shift Coordinators to vacant JPW slots during their discussions/negotiations regarding other aspects of the JPW and Shift Coordinator positions. While it is true, as noted, that the parties did engage in negotiations about the positions, they never addressed the freezing in issue which is the very heart of the pending unfair labor practice complaint before this Board. (Transcript at pages 34; 38 – 39; 51; 61 – 62; 83; 86 – 87). Thus, the Board rejects the Employer's contention on this point.

FINDINGS OF FACT

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

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

3. The Union and the Employer were subject to a collective bargaining agreement dated July 1, 2021 through June 30, 2024.

4. The Training School houses individuals aged 19 and younger who have been judged delinquent by the Rhode Island Family Court or who are awaiting disposition of criminal charges that have been brought against them. The mission of the Training School, in addition to incarceration of youth offenders and providing for their safety while at the facility, is to attempt to rehabilitate those who are in its custody. This rehabilitation includes an educational and counseling component.

5. The Training School is a locked facility that is organized around four separate mods. There is one mod for females and the other three mods hold male youths who have either been sentenced (two mods) or are awaiting sentencing or a community program or are potentially dangerous (one mod identified as the Detention Center). The mods are staffed by Juvenile Program Workers (JPW) with generally two to three JPWs being assigned to each mod. Each mod is led by a Cottage Manager, who directly supervises the JPWs.

6. JPWs are in daily contact with the Training School residents and are responsible for the supervision, care, custody and control of the residents of the mod to which they are assigned.

7. The Training School also employs Shift Coordinators. Shift Coordinators work in a control center and are responsible for oversight of the Training School facility. Shift Coordinators watch cameras, oversee movement, receive phone calls from the courts, sheriffs or parents, coordinate overtime and staff the facility. Shift Coordinators generally do not have direct contact with residents but, when needed, they will respond to a disturbance or incident on a unit and they coordinate responses in the case of medical emergencies or other incidents such as a fire at the facility. Shift Coordinators are responsible for the day-to-day operation of the facility, first and second and third shift.

8. There are numerous overtime opportunities for JPWs, but there are not enough JPWs to fill the overtime needs of the Training School. JPWs are limited to working no more than sixteen (16) consecutive hours before they have to be relieved.

9. Shift Coordinators have, over the years, volunteered to work the JPW overtime vacancies.

10. Beginning in 2023 Shift Coordinators stopped volunteering to take the available overtime in the JPW classification.

11. Prior to the Shift Coordinators ceasing to volunteer to cover open JPW shifts, the Union had raised the alarm regarding the need for the Employer to hire additional personnel to fill the JPW position through the filing of numerous "health and safety grievances" concerning so-called "short staffing" issues and bringing their staffing concerns to the Governor and the General Assembly

12. There is a process in place for filling overtime vacancies which involves Shift Coordinators having a list from which they attempt to fill as many of the vacant overtime slots as possible. If the overtime slots can't be filled from the list, then the Employer looks to other positions (i.e., managers, social workers) to fill the overtime vacancies. If there are still overtime slots that are not filled, then the Shift Coordinators will be ordered to fill the slot.

13. In early 2023 the Training School Superintendent began ordering or freezing in Shift Coordinators to the vacant JPW overtime slots.

14. Prior to 2023, Shift Coordinators had not been frozen in to vacant JPW positions for overtime by the Employer.

15. The parties held several meetings and negotiations to discuss the staffing issues involving the JPW position without achieving any positive agreement or result.

16. The parties also held discussions/negotiations around changing the Shift Coordinator job description though they were unable to reach a satisfactory resolution.

17. At no time during the course of the discussions/negotiations about the Shift Coordinator and JPW positions was there any conversation or mention between the parties about freezing the Shift Coordinators into the JPW classification.

18. The decision by the Employer to freeze in Shift Coordinators to vacant JPW overtime slots was made unilaterally and implemented unilaterally.

19. The unilateral decision by the Employer to freeze in Shift Coordinators to vacant JPW overtime slots changed the working terms and conditions of employment of bargaining unit members.

20. The unilateral decision by the Employer to freeze in Shift Coordinators to vacant JPW overtime slots involved a mandatory subject of bargaining

21. The unilateral decision by the Employer to freeze in Shift Coordinators to vacant JPW overtime slots was made without notice to or bargaining with the Union.

CONCLUSIONS OF LAW

1. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 (6) and/or (10) when it unilaterally decided to freeze in Shift Coordinators to unfilled JPW overtime slots.

2. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13 (6) and/or (10) when it unilaterally decided to freeze in Shift Coordinators to unfilled JPW overtime slots and failed and/or refused to bargain with the Union over the implementation of its decision.

ORDER

1. The Employer is hereby ordered to cease and desist from freezing in or ordering in or mandating Shift Coordinators to fill vacant JPW overtime slots without first notifying and bargaining with the Union.

2. Should the Employer decide to mandate, freeze or order in Shift Coordinators to fill vacant JPW overtime slots, it may not do so without first notifying and bargaining with the Union.

3. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than sixty (60) days in each building where bargaining unit personnel work, said posting to be in a location where other materials designed to be seen, read and reviewed by bargaining unit personnel are posted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Scott G. Duhamel, Member

Aronda R. Kirby, Member (Dissent)

Stan Israel, Member

****BOARD MEMBERS KENNETH B. CHIAVARINI, HARRY F. WINTHROP AND LAWRENCE PURTILL WERE ABSENT FOR VOTING ON THE CONCLUDED CASE.**

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

Dated: April 16, 2024

By: _____
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 CHILDREN, YOUTH AND FAMILIES -AND- NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, LOCAL 808	CASE NO. ULP- 6368

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- 6368, dated April 16, 2024, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **April 17, 2024.**

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

Dated: April 17, 2024

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