STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 2, 2022)

STATE OF RHODE ISLAND, DEPARTMENT OF CORRECTIONS *Appellant,*	:	
v.	:	**C.A. No. PC-2021-4279**
RHODE ISLAND STATE LABOR RELATIONS BOARD and RHODE ISLAND BROTHERHOOD OF CORRECTIONAL OFFICERS *Appellees.*	:	

DECISION

LANPHEAR, J. This matter is before the Court on the Complaint of the Rhode Island Department of Corrections (DOC) seeking judicial review of a Decision of the Rhode Island State Labor Relations Board (Board) dated May 24, 2021. *See* Board Decision. The Board found that the DOC unilaterally changed the bargaining unit members' working conditions of employment when it issued a memorandum amending the Absenteeism Management Program (AMP). *See* Board Decision 15. The Board found DOC violated G.L. 1956 §§ 28-7-13(6) and (10) when it sent out the memorandum making the changes and when it refused to negotiate with the Rhode Island Brotherhood of Correctional Officers (the Union) before making such changes. *See* Board Decision 15. The Board ordered the DOC to cease and desist from making unilateral changes to the working terms and conditions of employment without first notifying the Union and providing it the opportunity to bargain, ax well as from implementing changes to the AMP, and from implementing changes to the AMP without first engaging in good faith negotiations with the

Union. *Id.* This is an administrative appeal pursuant to G.L. 1956 § 42-35-15. For the reasons set forth herein, this Court reverses and remands the Board's Decision back to the Board.

I

Facts and Travel

A. The "New Absenteeism Management Initiatives" E-mail

The matter before this Court stems from an e-mail memorandum which DOC Director of Corrections, Patricia Coyne Fague (DOC Director), issued entitled "New Absenteeism Management Initiatives" (AMP Memo). (Board Decision Joint Ex. 1 (AMP Memo).) The AMP Memo served as notice of upcoming changes to the DOC's AMP, outlining the importance of sick leave to DOC employees and noted that sick time was being used excessively so that "some abuse [is] taking place." *Id.* In the AMP Memo, the DOC Director stated that "[a]n extraordinary amount of time and effort is expended in [the DOC] trying to address and remedy our absenteeism problem." *Id.* She then opined, "[i]n the uniform ranks, those who are chronically absent are not being fair to their co-workers who get ordered to over to fill the vacancy, nor is it fair to the RI residents whose taxes are paying their salaries." *Id.* The DOC Director concluded

> "the system in use at the DOC for addressing sick time abuse is simply not working. There is little to no deterrent value in the way absenteeism has been handled and the problem has not only persisted, it's gotten worse. Because we are a 24/7 operation, the price tag for sick time abuse is high and continues to climb. Something has to change." *Id.*

The DOC Director then outlined a new system addressing absenteeism which would be implemented, effective September 1, 2019. *Id.* The proposed new system would address four areas: discipline tracks, sanctions for absenteeism, sick notes, and pattern abuse. *Id.* at 1-2.

In the AMP Memo, the DOC Director identified the current practices in those four areas and the new system which was being implemented. *Id.* at 1-2. For discipline tracks, the DOC

Director modified the previous discipline tracks, going from "separate 'tracks'" to "two discipline tracks: Absenteeism/Tardiness/IMOT[1] on one track, and every other kind of discipline on the other." *Id.* The DOC Director also laid out the new system of sanctions for absenteeism, with discipline "[a]t the [f]acility level" being handled through "progressive sanctions," after which discipline would be handled "at the Department level." *Id.* at 2.

For sick notes, the DOC Director stated after September 1, 2019, DOC would accept "sick notes" to excuse absence only when such notes meet the requirements attached to the AMP Memo. *Id.* Further, for the "[eight]-hour restriction" notes,[2] the DOC Director stated such notes would no longer be accepted, and, going forward, such individuals would "have to apply for and be approved for FMLA [leave]." *Id.* Finally, addressing "[p]attern abuse," the DOC Director stated that "[p]attern sick time use will be more closely scrutinized, and abuse will be referred for discipline, even if prior to the trimester review." *Id.*

On August 16, 2019, the Union sent DOC an e-mail, indicating that the Union had received DOC's proposed changes to the current AMP and stated it believed that such issues were "mandatory subjects of bargaining," requesting that an "immediate bargaining session be scheduled for this purpose." (Board Decision 3; Board Decision Joint Ex. 2.) DOC responded that it did not believe it was obligated to negotiate the changes to the AMP and, as such, it was not going to negotiate with the Union. Board Decision 3 (referencing Tr. Vol. I 18, Dec. 3, 2019; Tr. Vol. II 125-126, Feb. 25, 2021.) On August 27, 2019, the Union filed an unfair labor practice charge with the Board in response.

[1] IMOT is involuntary mandatory overtime.
[2] Eight-hour restriction notes refer to notes from an employee's doctor which limit an employee to work only eight hours per day. *Id.* (referencing Hr'g Tr. Vol. II 91:16-21, Feb. 25, 2021.)

B. The Board's Decision

1. The Parties' Arguments before the Board

Succinctly, the Union asserted that DOC's changes to the AMP were unilateral changes, and such unilateral changes were material and substantial changes to working conditions, making such changes mandatory subjects of bargaining. (Board Decision 4.) As such, the Union alleged DOC's failure to engage in good-faith negotiations with the Union violated the State Labor Relations Act (Act). *Id.*

In rebuttal, DOC contended the DOC Director's AMP Memo did not make changes that altered the working terms and conditions of employment for bargaining unit members. *Id.* DOC continued that any changes the DOC Director made were insignificant and not material and substantial changes, and, as such, the DOC Director was authorized to make such changes under the Management Rights Clause of the Collective Bargaining Agreement (CBA) (CBA Management Rights Clause). *Id.* DOC also asserted that based on the CBA Management Rights Clause, changes to the existing AMP and sick leave policies were a part of the DOC Director's non-delegable authority under G.L. 1956 § 42-56-10. *Id.* (referencing Appellees' Ex. 1).

2. The Board's Decision and Rationale

Ultimately, the issue before the Board was whether DOC's AMP Memo made unilateral changes to the AMP, and, if so, were those changes material and substantial, which meant DOC was obligated to bargain with the Union over such changes. *Id.*

The Board stated it "has long been the position of this Board that when an [e]mployer unilaterally changes terms and conditions of employment without first engaging in bargaining with the bargaining unit's exclusive representative, the [e]mployer commits a violation of the State Labor Relations Act[.]" *Id.* (citing G.L. 1956 §§ 28-7-12; 28-7-14; 28-9.7-4; 28-9.7-6; *Rhode*

Island State Labor Relations Board v. Town of North Smithfield, ULP-5799 (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 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")). For the sake of brevity, this Court will not address the Board's findings in full but will provide a summary of the Board's findings.

a. DOC Engaged in Unilateral Action

The Board first addressed whether DOC engaged in improper unilateral action and concluded it did so. (Board Decision 4) (referencing Tr. Vol. I 19-20, 29-32, Dec. 3, 2019; Tr. Vol. II 99-100, Feb. 25, 2021).) In coming to its conclusion, the Board gave an overview of the AMP, stating the AMP has been in place since the early 1990s and has provided structure for the use and submission of sick notes, tracking absenteeism, abuse of sick time, and potentially disciplining employees for use of sick time beyond forty hours during a trimester. *Id.* (internal references omitted). The Board then stated that when the DOC Director introduced the AMP Memo, she made significant, substantial, and material changes to the existing AMP sufficient to obligate DOC to bargain before implementation. *Id.* at 5-6.

b. The AMP Memo Changes Were Substantial and Material Changes to the Working Terms and Conditions of Bargaining Unit Members

The Board then discussed all four of the changes the DOC Director made—the discipline tracks, the sanctions for absenteeism, the sick notes, and the pattern abuse issues. *See id.* at 6-9. The Board stated the changes to the discipline tracks to compressed tracks makes it easier for the DOC to discipline employees through consolidation. *See id.* at 6. The Board concluded these

changes were significant, substantial, and material changes to the working terms and conditions of the bargaining unit member, in violation of the Act. *Id.* at 6-7 (referencing Tr. Vol. II 107-08, Feb. 25, 2021).

The Board then addressed the sanctions for absenteeism, which the Board again concluded were substantial and material changes to the working conditions of employees. *Id.* at 7. This change would result in speeding up the disciplinary process to quickly uncover policy violations to the detriment of the bargaining unit members. *Id.* The Board concluded that this unilateral change to progressive disciplinary sanctions, which significantly and materially impacts bargaining unit members, is a violation of the Act. *Id.*

The Board concluded the changes to the sick notes were not material and substantial changes, while the changes to the eight-hour restriction notes were. *Id.* at 7-9 The Board found that based on the testimony, the purpose in identifying the sick notes in the AMP Memo was intended to "actually reinforce rights the [DOC] apparently had concerning the receipt and content of sick notes but had not been strictly enforcing over time." *Id.* at 7 (referencing Tr. Vol. II 36-37, 40-42, 43-44, 102-104, Feb. 25, 2021). To the Board, this was not a material and substantial distinction from what DOC had said it would do for many years. *Id.* at 8 (referencing Appellees' Ex. 6). Instead, the AMP Memo was merely "reemphasizing . . . the process that has been in place since at least 2014. . . ." *Id.* (referencing Appellees' Ex. 6).

For the eight-hour restriction notes, the Board stated such changes were potentially significant and material changes to the procedures that DOC has applied in the past and could have a deleterious effect on members of the bargaining unit who submit such eight-hour restriction notes. *Id.* at 9. The Board found that should an employee's eight-hour restriction note not be accepted, it could require the employee to work "well beyond the eight-hour restriction" listed in

the note, which ultimately could impact an employee's health and well-being. *Id.* Therefore, the Board found that the change to the procedure in accepting eight-hour restriction notes was a substantial and material change, in violation of the Act. *Id.*

Finally, the Board addressed the "pattern abuse" addressed in the AMP Memo. *Id.* The Board concluded this was also a material and substantial change to the working terms and conditions, since "by referencing possible discipline of the employee 'prior to the trimester review period,' the [DOC] seems to be implying that it will scrutinize this conduct more closely. . . and will take action that it has not previously engaged in or taken." *Id.*

c. DOC's Failure to Bargain with the Union

The Board then addressed DOC's failure to bargain with the Union, stating the statutory law and caselaw makes clear that under the Act, an employer is required to negotiate with the exclusive representative of its employees over mandatory subjects of bargaining. *Id.* (internal references omitted). The Board cites § 28-7-2(c), which the Board states makes clear that it is "the policy of the State to allow and encourage bargaining over wages, hours and other working conditions between employees and [e]mployers." *Id.* at 10 (referencing §§ 28-7-14, 28-9.7-4). Further, in Rhode Island, "§ 28-7-13(6) makes it an unfair labor practice for an [e]mployer to 'refuse to bargain collectively' with its employees' representative . . . concerning wages, hours and other terms and conditions of employment, so-called mandatory subjects of bargaining." *Id.* at 10. The Board continued that "changes to plan rules where the rules effect terms and conditions of employment[,]" in this case changes to sick time benefits and issues effecting discipline, are mandatory subjects of bargaining, and by failing to bargain with the Union regarding the AMP, DOC violated the Act. *Id.* at 11.

d. DOC's Defenses and the Board's Responses

DOC raised two main defenses before the Board. *Id.* at 12. The first argument DOC set forth was that the CBA Management Rights Clause, Article IV, Section 4.1, authorized the DOC Director to make changes under the AMP. *Id.*

The Board found the CBA Management Rights Clause cannot be inconsistent with the other provisions set forth in the CBA or violate "applicable laws and regulations." *Id.* The Board continued that while the rights granted under the CBA Management Rights Clause are extensive, these unilateral changes, made without negotiation with the Union, are not allowed. *Id.* The Board conceded that the CBA authorized DOC to "take whatever actions may be necessary to carry out its mission in emergency situations," but, ultimately, the Board did not find any evidence the AMP Memo responded to an emergency situation. *Id.* at 13 (referencing Appellees' Exs. 2, 12).

The Board then addressed DOC's second argument, that the changes made to the AMP were covered as part of the non-delegable authority DOC was granted under § 42-56-10. *Id.* at 13. To support this contention, DOC relied on *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913 (R.I. 1991), which held that the DOC Director had the authority to institute a mandatory overtime policy in order to safely and appropriately staff the prison in light of an increasing population. *Id.* In *Vose,* the Union objected to the mandatory overtime policy, stating that the CBA prohibited it. *Id.* (referencing generally *Vose*, 587 A.2d at 915). Ultimately, the Court in *Vose* found that the limitations placed in the contract language interfered with the DOC Director's ability to provide safe and adequate security for the facility, specifically finding that the contractual prohibition stripped the DOC Director of his ability to implement rules "incidental to . . . his . . . powers [to provide for] . . . care, and custody for all persons committed to the correctional facility." *Id.* (quoting *Vose,* 587 A.2d at 915).

The Board, however, distinguished the AMP Memo from *Vose*, stating that DOC presented no similar evidence to the Board, and, instead, the Board viewed DOC's evidence as the AMP Memo addressing a monetary issue. *Id.* The Board found while these are "serious concerns, they do not . . . go to the core mission of [DOC.]," and referred to *North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers*, 945 A.2d, 339, 347 (R.I. 2008), for the notion that the school committee could not rely on "fiscal rationale" when acting pursuant to its respective statutory authority, but, rather, needed to be acting to "improv[e] the education" of its students. *Id.* at 13-14.

e. The Board's Findings of Fact and Conclusions of Law

Accordingly, the Board made findings of fact and conclusions of law. *See* Board Decision 14, 15. The Board ordered the following:

> "1. [DOC] is hereby ordered to cease and desist from making unilateral changes to working terms and conditions of employment, without first notifying the Union and giving it the opportunity to bargain over any proposed changes.
> "2. [DOC] is hereby ordered to cease and desist from implementing changes to the [AMP], consistent with the terms of this Decision.
> "3. Should [DOC] decide to implement changes to the [AMP], consistent with the terms of this Decision, [DOC] must first engage in good faith negotiations with the Union." *Id.* at 15.

C. The Issues Before the Board

Following the Board's May 24, 2021 Decision, DOC filed its appeal to this Court pursuant to §§ 28-7-9 and 42-35-15. *See* Compl. In its Complaint, DOC asks this Court to reverse the Board's Decision and dismiss and deny the Board's order. DOC alleges the decisions and findings of the Board are:

> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;

> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

1. The Parties' Arguments Before the Court

The parties set forth substantially the same arguments that were presented in front of the Board to this Court.

a. DOC's Argument

DOC contends the Board's Decision should be reversed as it "effectively usurps the [DOC Director's] non-delegable authority[.]" (DOC's Mem. 5.) DOC continues that the Legislature granted the DOC Director "broad statutory powers and responsibilities" to run Rhode Island's prison system, consistent with budgetary restraints. *Id.* (referencing G.L. 1956 §§ 42-56-10; 35-3-24). Under § 42-56-10(2), DOC states the DOC Director is statutorily obligated to maintain safety, security, and order in all facilities, and under § 42-56-10(5), the DOC Director must also manage, direct, and supervise operations. *Id.*

The DOC further cites § 42-56-10(7) as giving the DOC Director certain powers, including the powers to "suspend, demote, discharge or take other necessary disciplinary action." *Id.* The DOC references *Vose* as holding the CBA "shall not limit or restrict the director's broad statutory authority to run the [DOC] as outlined in § 42-56-10. . . ." *Id.* (citing *Vose*, 587 A.2d 913). DOC likens the DOC Director's actions here with the AMP Memo to the actions of the director in *Vose*, who instituted a mandatory staffing overtime policy (IMOT). *Id.* at 5-6. In *Vose*, the Court stated that inadequate staffing, even in a non-emergency, could itself foster an emergency and, under no circumstance, should the director be left unable to provide safety and security in a prison setting. *Id.* at 6 (referencing *Vose*, 587 A.2d at 916). DOC also cites *Laurie v. Senecal*, 666 A.2d 806 (R.I.

1995) for the principle the DOC Director has "extensive deference . . . in [executing such] powers and duties." *Id.*

The DOC mentioned further testimony regarding the rationale for the reasons for the AMP Memo changes, stating that a lack of staffing can "have a direct impact on inmate life, and, thus, inmate climate[, and] [i]nmate climate can have a very, very deleterious effect on the safety of the institution which affects public safety." *Id.* at 14 (referencing Tr. Vol. II 100, 129, Feb. 25, 2021).

In its reply to the Union's argument that the changes had significant, substantial, and material impacts on the working terms and conditions of employment of the bargaining unit members, DOC stated that such changes were minimal and were a reorganization of existing discipline sanctions and merely reinforcing preexisting policies. (DOC Reply 1-2.)

b. The Union's Argument

The Union states it did not waive the right to bargain by virtue of the CBA Management Rights Clause. (Union Mem. 7.)

The Union further alleges the DOC Director's statutory authority does not supersede validly negotiated provisions of the CBA or other statutory mandates. *Id.* at 8. Finally, the Union contends the DOC Director's exclusive statutory authority is limited to ensuring the safety and security of the facility, and the DOC Director's AMP Memo changes were based on primarily financial considerations. *Id.* at 9.

II

Standard of Review

When reviewing the decisions of an administrative agency, the Court "sits as an appellate court with a limited scope of review." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993). The Court's review is governed by the Rhode Island Administrative Procedures Act

(APA), chapter 35-1 of title 42. *See Iselin v. Retirement Board of Employees' Retirement System of R.I.*, 943 A.2d 1045, 1048 (R.I. 2008) (citing *Rossi v. Employees' Retirement System of R.I.*, 895 A.2d 106, 109 (R.I. 2006)); *see also Vito v. Department of Environmental Management*, 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides, in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Publication Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 484 (R.I. 1994)). When reviewing a decision under the APA, the Court may not substitute its judgment for that of the agency on questions of fact. *See Johnston Ambulatory Surgical Associates v. Nolan*, 755 A.2d 799, 805 (R.I. 2000). The Court defers to the administrative agency's factual determinations, provided that they are supported by legally competent evidence. *See Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level." *E. Grossman & Sons*,

Inc. v. Rocha, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977).

Accordingly, the Court will '"reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record."' *Baker v. Department of Employment Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 272 (R.I. 1981)). The Court is free to conduct a *de novo* review of determinations of law made by an agency. *See Arnold*, 822 A.2d at 167 (citing *Johnston Ambulatory Surgical Associates*, 755 A.2d at 805). The Court is limited to the certified record in its determination as to whether legally competent evidence exists to support the agency's decision. *Barrington School Committee v. Rhode Island State Labor Relations Board,* 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

The pertinent issue before this Court is whether the DOC Director acted within the scope of the powers vested in her by the CBA, specifically the CBA Management Rights Clause, and those statutorily mandated under § 42-56-10. If she was, then the changes she made to the AMP through the AMP Memo, though unilateral in nature, even if substantial and material changes to

the working conditions of the bargaining unit members, were not violations of the Act. However, if she was acting outside of the scope of such powers, then her actions were a violation of the Act.

A. The State Labor Relations Act

Chapter 7 of title 28 is known as the Rhode Island State Labor Relations Act (Act). The Act governs the relationship between employees and employers covered under the Act, granting such employees certain rights and protections. *See* § 28-7-2. Section 28-7-2(c) encourages "practices fundamental to the friendly . . . disputes arising out of differences as to wages, hours, or other working conditions," with § 28-7-14 providing that the bargaining over such items shall be done by the "[r]epresentatives designated or selected for the purposes of collective bargaining . . . ."

As a preliminary matter, DOC is an employer within the meaning of the Act, meaning the employees of DOC are also covered under the Act. Neither party contests this. Here, both the Board and the Union allege DOC has violated §§ 28-7-13(6) and (10) when it unilaterally changed the working terms and conditions of employment of the bargaining unit members through the AMP Memo and refused to negotiate with the Union after making such changes. *See* Board Decision 15.

Section 28-7-13(6) provides that it shall be an unfair labor practice for an employer to:

> "Refuse to bargain collectively with the representatives of employees, subject to the provisions of §§ 28-7-14 [through] 28-7-19, except that the refusal to bargain collectively with any representative is not, unless a certification with respect to the representative is in effect under §§ 28-7-14 [through] 28-7-19, an unfair labor practice in any case where any other representative, other than a company union, has made a claim that it represents a majority of the employees in a conflicting bargaining unit."

Section 28-7-13(10) provides that it shall be an unfair labor practice for an employer to:

> "Do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12."

Section 28-7-12, which lays out the rights of the employees, states in relevant part "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing . . ." *See* § 28-7-12.

B. The DOC Director's Powers Under § 42-56-10 and the CBA

The rules and policies which govern the way DOC operates are found under chapter 56 of title 42. Section 42-56-10 specifically lays out the powers of the DOC Director. The relevant powers of the DOC Director at issue here are her powers as described under §§ 42-56-10(2), (5) and (7). Section 42-56-10(2) provides that, in addition to exercising the powers and performing the duties otherwise designated by law, the DOC Director shall "[m]aintain security, safety, and order at all state correctional facilities. . ." Section 42-56-10(5) states the DOC Director shall "[m]anage, direct, and supervise the operations of the department," and § 42-56-10(7) gives the DOC Director the ability to "[h]ire, promote, transfer, assign, and retain employees and suspend, demote, discharge, or take other necessary disciplinary action[.]"

DOC is also governed by the CBA, which was drafted through negotiations with the Union. CBA Article IV, the CBA Management Rights Clause, states the Union recognizes, "except as limited, abridged, or relinquished by the terms and provisions of this Agreement, the right to manage, direct, or supervise the operations of the State and the employees is vested solely in the State." (DOC's Mem. Ex. 6 at 1.) Providing examples, the CBA Management Rights Clause provides that the employer, in this case DOC, shall have the exclusive right, subject to the terms of the agreement and "*consistent with applicable laws and regulations"*:

> "A. To direct employees in the performance of official duties;
> "B. To hire, promote, transfer, assign, and retain employees in positions within the bargaining unit, and to suspend, demote, discharge or take other disciplinary action against such employees;
> "C. To maintain the efficiency of the operations entrusted to it;
> "D. To determine the methods, means, and personnel by which such

> operations are to be conducted;
> "E. To relieve employees from duties because of lack of work or for other legitimate reasons;
> "F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of recurring nature." (DOC's Mem. Ex. 6 at 1.) (Emphasis added.)

DOC also attached Article XII of the CBA, which provides, in relevant part:

> "The [DOC] absenteeism control policy will not be based exclusively on the number of absences, but will also take into consideration individual circumstances." (DOC's Mem. Ex. 6 at 2.)

C. The Validity of the DOC Director's AMP Memo and the Changes Under It

In § 42-56-1, the Rhode Island General Assembly recognized the state's "basic obligation to protect the public by providing institutional confinement and care of offenders" and "to establish a department of state government to provide for the . . . custody, care, discipline . . . of persons committed[.]" Section 42-56-1. Obviously, this is a critical governmental function, and the department must operate as if it is a paramilitary operation to be successful. Accordingly, the director is provided with broad powers. *See* §§ 42-56-6, 42-56-9, and 42-56-10.

Our Supreme Court has found the director's powers to be so clear that she has "nondelegable authority to maintain security [and] safety…" *State, Department of Corrections v. R.I. Brotherhood of Correctional Officers*, 115 A.3d 924, 933 (R.I. 2015). Thus, a dispute over discipline of a correctional officer was found to be arbitrable, but the broad powers of the director of DOC justified the discipline imposed as appropriate. In *Vose*, our high court reasoned that

> "due to the exigencies incident to running a correctional institution, we could not fathom a result that would leave the director unable to provide for adequate security, regardless of whether an emergency is deemed to be present. We speculate that if adequate staffing was not maintained even in a nonemergency situation, that in and of itself could foster an emergency." *Vose*, 587 A.2d at 915-16.

With that rationale, the Rhode Island Supreme Court found the CBA could not restrict the director's statutory powers.

The factual situations and changes implemented here parallel those in *Vose*. As noted in *Vose*, the ability to staff the various correctional facilities under her control are directly within the DOC Director's statutorily imposed powers to maintain the safety and security of the State's correctional facilities. *See* § 42-56-10(2); *see also* DOC's Mem. Ex. 6 at 1 (referencing CBA Management Rights Clause subsection (F) discussing the DOC Director's powers to "take whatever actions may be necessary to carry out its mission in emergency situations. . ."); *see also Vose*, 587 A.2d at 915-16. *Vose* discussed staffing in instances requiring involuntary overtime. Absences caused by employees making use of the sick leave policy, whether validly or for the purposes of abusing the policy, directly impact the DOC Director's ability to safely staff the State's correctional facilities. *See Vose,* 587 A.2d at 915-16.

Though the Board and the Union frame the DOC Director's AMP Memo as being based on improper, financial-based concern and rationales, this Court does not agree. *See* Board Decision 13. In the February 25, 2021 hearing on this issue, and then raised again in DOC's Memorandum in Support of Administrative Appeal, the DOC Director stated that there was a "direct impact" the lack of staffing can have on "inmate life, and thus, inmate climate," which ultimately can have "deleterious effect[s]" on the safety of the institution . . ." (DOC's Mem. 14 (referencing Tr. Vol. II 100, 129, Feb. 25, 2021).) Though she may have referenced other reasoning in the AMP Memo, such as the expenditure of taxpayer dollars in remedying the absenteeism problem at DOC, this in no way detracts from her valid staffing and safety concerns. *See* AMP Memo 1-2. As the Rhode Island Supreme Court found in *Vose,* "if adequate staffing [is] not maintained even in a nonemergency situation, that in and of itself could foster an emergency." *Vose*, 587 A.2d at 916.

As in *Vose*, the CBA cannot contractually restrict the DOC Director's powers, as the Board and the Union suggest. *See Vose*, 587 A.2d at 916 (citing *Power v. City of Providence*, 582 A.2d 895, 900 (R.I. 1990)) ([T]he collective-bargaining agreement shall not be interpreted as restricting the director's statutory power to order mandatory involuntary overtime.)

Accordingly, this Court is not convinced that the DOC Director's changes to the AMP were made solely based on monetary purposes, as the Board and the Union allege. *See* Board Decision 13. Instead, this Court finds that the AMP Memo's changes, which changed the way in which certain sick leave procedures would be handled, were well within the DOC Director's statutorily vested powers under §§ 42-56-10(2), (5), and (7). As such, the DOC Director acted appropriate and within her authority when she modified the discipline tracks to target sick absenteeism directly and changed the sanctions for such, when she merely added a level of higher management's approval to eight-hour restriction notes, and stated that pattern abuse would be more closely scrutinized and subject to potential discipline. *See* Amp Memo. 1-2.

IV

Conclusion

After review of the entire record, this Court finds that the Board's Decision, issued May 24, 2021, was not supported by reliable, probative, and substantial evidence on the record and was clearly erroneous or affected by error of law. The DOC Director's AMP Memo, which made changes to the DOC's AMP, were well within the DOC Director's statutory authority to make such changes. Though she made such changes unilaterally, the changes to the AMP did not amount to substantial or material changes which required DOC to negotiate with the Union.

Accordingly, this Court reverses and remands the Board's Decision as issued on May 24, 2021 for further determinations to be made consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island, Department of Corrections v. Rhode Island State Labor Relations Board, et al.**
CASE NO:	**PC-2021-4279**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 2, 2022**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Kathleen M. Kelly, Esq.** **Nicole B. DiLibero, Esq.**
For Defendant:	**Christopher M. Cobleigh, Esq.** **Jeffrey W. Kasle, Esq.**