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

CASE NO: ULP-4905

-AND-

STATE OF RHODE ISLAND,
DEPARTMENT OF LABOR AND TRAINING
(formerly known as the DEPARTMENT OF EMPLOYMENT AND TRAINING)

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 Labor and Training (formerly known as the Department of Employment and Training) (hereinafter Employer) based upon an Unfair Labor Practice Charge (hereinafter Charge) dated September 27, 1994 and filed on September 28, 1994 by the Local 2884, Rhode Island Council 94, AFSCME, AFL-CIO (hereinafter Union).

The Charge alleged

"Violation of Section 28-7-13 Paragraphs (1), (2), (3), (5), (8), (9) (10) and other applicable provisions

1) The Department of Employment and Training is interfering with R.I. Council 94, AFSCME bargaining unit employees. The Director of D.E.T. and other departmental representatives have targeted members of the bargaining unit through layoffs and the transfer of bargaining unit positions to non union positions.

2) The Department of Employment and Training after receiving notice from the Rhode Island State Labor Relations Board that R.I. Council 94, AFSCME requested that non-union employees who shared a community of interest with members of R.I. Council 94 be placed into the Union, embarked on a calculated plan for the purpose of interfering with the existence of the bargaining unit at the Department of Employment and Training".

Following the filing of the Charge, an informal conference was held on November 28, 1994 between representatives of the Union and Respondent and an Agent of the Board When the informal conference failed to resolve the Charge, the Board issued the instant Complaint on February 18, 1997 and an Amended Complaint on February 21,

1997. The Employer filed its answer on March 10, 1997 denying the charges outlined in Paragraphs 3 and 4 of the Complaint. The Employer also filed a Motion to Dismiss and a Motion for Production of Documents and Other Information.

Formal hearings on this matter were held on March 27, 1997 and June 10, 1997. Upon conclusion of the hearings, both the Employer and the Union submitted written briefs. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

BACKGROUND

In 1985, part of the State Department of Economic Development was merged into the Department of Employment and Training. As a result of this action, eighteen employees of the Department of Economic Development, several of whom were represented by Council 94, became employees of the Department of Employment and Training. A short time later, Local 401, which was and still is the certified bargaining unit representative for non-management employees at the Department of Employment and Training, initiated a Unit Clarification Petition (EE 3270) seeking a determination as to whether Council 94 still represented the eighteen employees from the Department of Economic Development. This Board held that Council 94's bargaining unit would indeed remain intact. Therefore, both Local 401 and Council 94 would continue to have bargaining units within the Department of Employment and Training. The job classification of "Senior Electronic Computer Programmer" then existed as both a Union position in Council 94 (which came from the Department of Economic Development merger) and a pre-existing, non-union position within the Department of Employment and Training. Sometime thereafter, the Department of Employment and Training became the Department of Labor and Training.

POSITION OF THE PARTIES

The Union alleges that in September of 1994, the Employer embarked on a calculated plan to interfere with the existence of its bargaining unit. The Union alleges that two of its employees were essentially coerced into leaving their union positions for non-union positions of similar natures and that Council 94 members were then targeted for layoffs in an effort to decimate the bargaining unit. In support of its position, the

Union argues that it has established a prima facie case of discrimination in that of the employees to receive layoff notices, 62.5 % were from Council 94, 3.33% were from management and 2.1 % were from Local 401 The Union also argues that the Employer has failed to rebut the presumption of discrimination and has offered only a broad economic defense to its actions. Furthermore, the economic defense has failed because although the Department's witness testified that three Senior Electronic Computer Programmer positions were necessary, after a Council 94 Programmer member transferred to a non-union position, the Employer did not post or fill the now vacated Council 94 position.

The Employer argues that it only engaged in across-the-board-layoffs which were done for strictly budgetary reasons and that the layoff affected all areas of the Department and not just Council 94 members. Furthermore, the Employer disputes the percentages quoted by the Union because many of the Council 94 members who originally received layoff notices did not get laid off because they had achieved a "protected" status and could not be laid off. The Employer also argues that because the position of Senior Electronic Computer Programmer historically existed as a non-union position in the Department of Employment and Training (prior to the Department of Economic Development merger) it has shown that the Department did not create a non-union position in an attempt to raid Council 94's bargaining unit The Department also argues that Council 94 positions have dwindled over the years since the merger through the normal course of state service, ie, retirements and persons bidding out of their positions.

DISCUSSION

The Union first presented the testimony of Salvatore Lombardi, an investigator for the Treasury Department and the President of Local 2884. He testified that five of nine Council 94 members at the Department of Labor and Training received layoff notices in September, 1994 Of the five[2], three Mr. Henry, Mr. Ayotte, and Mr. Accioli) had military status and could not be laid off (TR #1, p. 26) Also in September 1994, Judith Magarian, Senior Electronic Computer Programmer in a Council 94 position, bid on the

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[1] Judith Magarian, Wayne Edmonson (a.k.a. Johnis Edmonson) William Henry, Jean Hunt, Andy Accioli Paul Ayotte, Deborah Fontaine. Norbert Smith,III, Lynn Stone.

[2] Henry, Accioli, Ayotte, Edmonson and Fontaine

same job title, but in a non-union status. (TR #1, p. 31) After Mr. Lombardi learned of the Magarian transfer, he then conducted an investigation of Council 94 members to determine whether or not any other employees had changed from union positions to non-union positions. (TR #1, p. 33) He found that Edward Foster (who was retired at the time of the formal hearing) was a Senior Community Development Training Specialist (union position) and in the early 1990's, Mr. Foster went into a non-union position with the same job title. (TR #1, p. 35) He also testified that Paul Ayotte, an Employment and Training Manager (a union position) was offered another non-union position and accepted it and that the new position had similar duties to his former position. (TR #1, p. 37) Deborah Fontaine, another Council 94 member, received a layoff notice, but managed to locate a position at the Department of Elderly Affairs. (TR #1, p. 38) When Ms. Fontaine tried to take a "leave to protect status", she was denied by the Employer. The Union then filed a grievance on that issue and won. (TR #1, p. 38-39)

On cross examination, Mr. Lombardi testified that he was not aware that the Department of Employment and Training also had the job title of Senior Community Development Training Specialist but, this fact was not important in his determination of whether Council 94 had been raided by the Employer. (TR #1, p. 40-42) He also acknowledged that Judith Magarian transferred voluntarily, under certain circumstances, to her new position. (TR #1, p. 43) He also acknowledged that no individuals from Council 94 were placed in non-union positions without bidding for them. (TR #1, p. 47-48) Mr. Lombardi also testified that Council 94 had not filed a unit clarification petition regarding the Senior Electronic Computer Programmer's position or for any of the other "overlapping positions" within the department. (TR #1, p. 66-67) Upon conclusion of the first formal hearing the Union rested its case, subject to State's production of Judith Magarian for direct examination by the Union.

At the second formal hearing, the Union put Judith Magarian on the stand for direct examination. She testified that she held the position of Senior Electronic Computer Programmer since September 1986. (TR #2, p. 4) In the summer of 1994, there were three other Senior Electronic Computer Programmers in the Information Processing Division where she worked, none of whom were in Council 94 with her. (TR #2, p. 5) In the early part of September 1994, she was called into Mr. Bill Fagan's office and shown a

job posting. (TR #2, p. 13) Mr. Fagan told her that Mr. McGarry said to be sure to show this posting to her. (TR #2, p. 13) When she inquired whether it would be good for her to give up her Council 94 status, Mr. Fagan told her that giving up her status was not a threat to her but that it would be a help to her. (TR #2, p. 13) Mrs. Magarian applied for and got the job which had been posted. She testified that after she took the new job that neither her benefits nor her rate of pay changed. (TR #2, p. 14) She testified that it had been suggested to her that she take the new position to solidify her employment, but that she did not feel threatened or pressured to take the position. (TR #2, p. 14-15)

On cross examination, she stated that the vacancy she filled had been created by retirement. (TR #2, p. 17) She also testified that she was not told to bid on the job, nor was she told that if she didn't bid, she would be laid off, nor was she told that she would be promoted if she bid on the position. (TR #2, p. 18) No one told her that this posting was a way to get her out of Council 94. No one suggested to her that she should leave Council 94 or that it was bad for her to be in Council 94. She made her own decision to bid on the position. (TR #2, p. 19)

The Employer then presented the testimony of Walter McGarry, the Chief of Employment and Training Operations in the Personnel Unit. Mr. McGarry testified that in the summer of 1994, the Department was dealing with funding problems and was looking at ways to effect cost savings, with layoffs being the last option. (TR #2, p. 27) He testified that he'd been instructed that the layoffs "can't all be done on the backs of the Union, that there had to be management personnel changes as well". (TR #2, p. 28) He stated that he did not target Council 94 members for layoff. (TR #2, p. 32) Mr. McGarry also testified that the reason Mrs. Magarian was shown the job posting is that sometimes a person will bid on a position and take the posting down so that others do not see the opportunity and that they wanted to make sure she saw the posting. (TR #2, p. 36)

On cross examination, he testified that despite the budgetary constraints, the Department decided to post another management position for Senior Electronic Computer Programmer, a position that had been vacant for about 2 years. (TR #2, p. 48) He also acknowledged that if Mrs. Magarian had not bid and received the position, there would have been three Programmers employed during this tight budgetary time. Furthermore, Mrs. Magarian could have remained in her union position and still have been instructed to

do the work that was ultimately assigned to her new position. (TR #2, p. 53-54) Finally, he testified that he did not know the intricacies of why the new Programmer position was needed. (TR #2, p. 54)

On redirect examination, the following testimony took place:

Q. Mr. McGarry, in July, August, September, `1994, the Department was looking for ways to save money, to avoid layoffs; is that a fair statement?

A. Yes, they were.

Q. So the Department would not have filled a vacant or an old position unless it was absolutely necessary; isn't that correct?

A. That's true.

Q. So, the Department determined that it was absolutely necessary for the Department to have three Senior Electronic Computer Programmers; isn't that correct?

A. That would be, yes.

Q. Yet, after Mrs. Magarian went from the Union to a non-union position, the Department suddenly decided they didn't need three Senior Electronic Computer Programmers; isn't that correct?

A. Well, they didn't fill the position if that's what you mean, yes.

DISCUSSION

The Union has alleged that it has established a prima facie case of discrimination This Board often looks to federal labor law for guidance on dealing with particular issues under the State Labor Relations Act. Under the National Labor Relations Act, the Board will look to two principal factors in cases where an Employer's layoffs are alleged to be discriminatory:

1) The employer's alleged justification for the layoff.
2) Examination of the process for selecting those who are to be laid off.

Under the first part of the inquiry, if an Employer claims a business reason for the layoff, the factual basis for such a claim will be examined. Even if a layoff is necessary for business reasons, an employer is not permitted to rid itself of union supporters.

In this case, the only testimony or evidence presented on the necessity for layoffs and/ or the underlying selection process for layoffs was presented by the Employer. Mr. McGarry testified that the Department's funding, which was primarily federally funded, was being cut back. (TR # 2, p. 26) As a result, Mr. McGarry was told to receive input from the associate directors and have them give him information on their staff and what

functions they could do without and who would be affected without that function and what employees would be involved. (TR # 2, p. 27-28) He further testified that he was also told that "it can't all be done on the backs of the Union". (TR # 2, p. 28) He also testified that the most recent prior layoff occurred in 1981 and essentially all of those laid off were union personnel, the rank and file members of Local 401. (TR # 2, p. 31) This testimony was unrebutted in any fashion by the Union and the Board finds Mr. McGarry's testimony credible and reliable.

The Union argues that the number of layoff notices sent to Council 94, Local 401 and management respectively establishes a prima facie case of discrimination. The Union did not set forth any testimony or evidence concerning the types of positions that received layoff notices. The Board has no way of knowing whether or not there was a greater percentage of Council 94 members in a particular job classification that received layoff notices than did Local 401 or management. We think that if only Council 94 members had been laid off when employees in Local 401 and management in the same job classification remained untouched, then perhaps the Union would have established a prima facie case of discrimination. Furthermore, the Board is mindful of the fact that Council 94 had a small number of employees in a Department of hundreds, so any percentages of affected employees in Council 94 is bound to appear high Therefore, the Board finds that the Union has not set forth sufficient evidence to establish a discriminatory intent or actions on the part of the Employer in the 1994 layoffs.

The Union has also alleged that the Employer has targeted Council 94 members through the transfer of bargaining unit positions to non-bargaining unit positions. In support of its allegations, the Union established through direct testimony that Mrs. Magarian was told that giving up her union status would be of help to her and that it had been suggested to her that she should take the new position to solidify her employment. (TR #2, p. 13-15) The Union also established that at the time the position was posted, there were rumors about layoffs and that Mrs. Magarian testified that she knew of the rumors. (TR #2, p. 15) Mr. McGarry testified that the Department would not have posted the vacant non-union Senior Programmer's position that fall unless it really needed to fill that position. He also acknowledged that Mrs. Magarian could have been made to do that work while remaining in her union position. The most persuasive element of the Union's

case however is the fact that once Mrs. Magarian left the union position for the non-union position, her old union position was not posted or filled. The Employer could offer no explanation for this crucial fact. Furthermore, the posting of this new position was not discussed in any way with the bargaining agent. The foregoing testimony and evidence convinces this Board that the Employer did indeed target the elimination of a union position, without a legitimate business purpose and without first negotiating the same with the Union, in violation of R.I.G.L. 28-7-13 (5) and (10).

The Union has also alleged that as a result of Council 94's accretion request, the Employer embarked on a calculated plan for the purpose of interfering with the existence of Council 94's bargaining unit at the Department. In support of its position, the Union relied on the Magarian transfer as described above, the transfer of Edward Foster in the early 1990's, the transfer of Paul Ayotte and the layoff of Deborah Fontaine.

The Foster situation clearly came long before Council 94 filed its accretion request, so whatever actions the Employer took in regards to Mr. Foster's position cannot be used to support an allegation of misconduct that is alleged to have started years later. Therefore, the Board disregards the testimony concerning Mr. Foster's transfer. Mr. Ayotte initially received a layoff notice, but was protected from layoff by his military status. The sole testimony regarding Mr. Ayotte's position came from Mr. Lombardi who testified that after the transfer, Mr. Ayotte's job duties were similar and his pay rate was the same. The Board knows nothing else concerning the aspects of Mr. Ayotte's old position or his new position or any other aspects concerning Mr. Ayotte's employment. Based on the limited information presented, this Board is not convinced that the Ayotte matter could be considered part of a "calculated plan" to interfere with the bargaining unit. Likewise, we have very sketchy information concerning Mrs. Fontaine's position and her eventual transfer to the Department of Elderly Affairs. There was testimony that a grievance had to be filed for her to obtain a protection of her status, pursuant to contract. However, one violation of the contract does not a "calculated plan" make. Therefore, the Board finds that the Union failed to establish that the Employer embarked on a calculated plan to interfere with the bargaining unit.

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 Labor Relations Act.

3) The position of "Senior Electronic Computer Programmer" historically existed as a non-union position in the Department of Employment and Training and as a Union position in Council 94 at the Department of Economic Development.

4) When the Department of Economic Development and the Department of Employment and Training merged, the position of Senior Electronic Computer Programmer continued as both a union and a non-union position.

5) In July, 1994, the Department of Labor and Training experienced budgetary shortfalls due to a cut in federal funding. As a result, the Department's associate directors were directed to identify and implement cost saving measures, with layoffs being the last resort.

6) In September 1994, Judith Magarian, a Senior Electronic Computer Programmer in Council 94, was called into the Employer's office and shown a job posting for the non-union Senior Electronic Computer Programmer position which had been vacant for two years due to retirement.

7 At the time she was shown the job posting, Mrs. Magarian was aware of layoff rumors in the Department. When she asked whether she should give up her union status, she was told that giving it up would be a help to her. It was also suggested to her that she take the new position to solidify her employment.

8 In September 1994, the Employer issued layoff notices to 62.5 % of Council 94 employees, 3.33% of management employees and 2.1 % of Local 401 employees.

9) Mrs. Magarian applied for, was offered and took the non union position of Senior Electronic Computer Programmer. Mrs. Magarian's new position was in the exact same location and she performed the exact same duties as her old position. The only

change in the position as of September 18, 1994 was that the position was no longer a union position.

2) The Employer's representative testified that the Department had determined that three Senior Electronic Computer Programmers were necessary and that's why the non union, vacant position was posted.

3 After Mrs. Magarian left the Council 94's position, the Employer did not post or fill her old position, leaving the Department with only two Senior Electronic Computer Programmers.

4) Paul Ayotte received a layoff notice, but was protected from layoff by his military status. He eventually transferred to another position.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (5) and (10).

2) The Union has not proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (1) (2) (3) (8) or (9).

3) Investigative reports of the Board in connection with charges of Unfair Labor Practice are protected from disclosure under R.I.G.L. 38-2-2 (4) (E), (K) and (P) and Article III, Section 20, and Article IV, Section 60 of the State Labor Relations Board's duly enacted Rules and Regulations.

ORDER

1) The Employer's Motion to Dismiss is denied

2) The Employer's Motion for Production of Documents is denied.

3) The Employer is hereby ordered to cease and desist from targeting Council 94 positions for conversion to non-union positions.

4) The Employer is hereby ordered to transfer any duties that traveled from the union position to the non-union position back to the union position. The non bargaining unit position is also hereby precluded from doing work that was done by the bargaining unit position.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Gina A. Vigliotti, Chairperson Dissent as to remedy only.

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member, Dissent, as to remedy only.

Paul E. Martineau, Member

Joseph Virgilio Member

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

Dated: February 26, 1998

By
Donna M. Geoffroy, Administrator