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- THE TOWN OF BURRILLVILLE	CASE NO: ULP-5419

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 Town of Burrillville (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge"), dated August 24, 1999, and filed on August 27, 1999, by the Local 369, International Brotherhood of Police Officers, (hereinafter "Union" or "IBPO").

The Charge alleged:

> That the Employer violated the General Laws of Rhode Island, specifically 28-7-12 and 28-7-13 (6) and (10) of the Labor Relations Act, when it issued a policy regarding officers who are on injured on duty status.

Following the filing of the Charge, an informal conference was held on September 24, 1999, 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 August 25, 2000, charging the Employer as follows:

> "The Employer has violated RIGL 28-7-13 (6) and (10) by failing and refusing to bargain collectively with the union prior to issuing General Order 1999, No. 1 which unilaterally changed the receipt of injured on duty benefits, a term and condition of employment which is a mandatory subject for bargaining."

The Employer filed its Answer to the Complaint on August 29, 2000, denying the allegations contained in paragraphs 3 and 4 of the Complaint. A formal hearing on this matter was originally scheduled for October 12, 2000, but was rescheduled, due to conflicts. The hearing was held on January 23, 2001. Upon conclusion of the hearing, 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.

FACTUAL SUMMARY

On or about March 10, 1999, Officer Robert A. McBrier and Officer Macomber were summoned to the office of Police Colonel Bernard Gannon for the purpose of reviewing a policy being proposed by Colonel Gannon relative to the receipt of "injured-on-duty" (IOD) benefits in the Police Department. Shortly after this meeting, the Colonel issued and implemented the IOD policy as "General Order 99-1". No bargaining took place with the Union prior to the implementation of General Order 99-1.

POSITION OF THE PARTIES

The Union argues that the contents of General Order 99-1 concerns both wages and conditions of employment; and is, therefore, a mandatory subject for bargaining, and that the Employer simply failed to engage in any bargaining prior to implementation of the order.

The Employer advances several arguments: (1) That it had no duty to bargain, because the content of the order is not a mandatory subject for bargaining, because it is not germane to the working environment of police officers. (2) That the order did not represent any material change in circumstances. (3) That the Union already exercised its right to bargain over the General Order by the inclusion of the management rights clause in the agreement. (4) That the Union waived any right it might have had to bargain, by failing to request bargaining.

DISCUSSION

The threshold question in this case is whether or not the subject of the receipt of injured-on-duty ("IOD") benefits is a mandatory subject for bargaining. The type of benefits received by a police officer while out of when, after being injured in the line of duty, consists of all the wages and benefits that he/she would receive while on duty. This includes wages, health benefits, vacation time, etc. The regulation also addresses more than just the receipt of IOD pay and benefits, it also impacts the temporary and permanent discharge of vacation time and sick time. The regulation also authorizes disciplinary action against police officers, under certain circumstances. [1]

[1] The Board notes that an Arbitrator ruled that the General Order did not conflict with the provision in the collective bargaining agreement concerning the discharge of vacation leave. The arbitration award does not address the issue of whether or not there is a conflict with the discharge of sick leave provision or whether there is a conflict with the agreed upon disciplinary procedures.

This Board finds, therefore, that any regulation that could negatively impact the continued receipt of IOD benefits is a mandatory subject for bargaining. In additional, it is well settled that disciplinary rules are also a mandatory subject for bargaining. Therefore, this Board finds that the subject matter of General Order 99-1 addressed mandatory subjects for bargaining.

The next issue is whether or not bargaining took place prior to the implementation of General Order 99-1. Both the Employer and the Union agree that no bargaining took place. Both also agree that the Police Chief showed a copy of the General Order to the Union President and another officer approximately 10 days prior to implementation. Some discussion took place during a meeting between the parties, but neither party characterized the meeting as a bargaining session. The Union President testified that the Union voiced several concerns to the Chief over the contents of the policy. He also stated that he thought that the parties would be sitting down at another meeting, as they had done in the past, with the Union's lawyer and the Town's lawyer, to "hash things out". However, before any additional meetings or discussions took place, the Colonel issued and implemented the General Order.

The question before the Board then is whether the Union's actions in discussing the policy and failing to specifically request bargaining constitutes a waiver of the Union's right to bargain. It is well settled that the right of a party to demand bargaining during the term of an agreement may be waived. Waivers can be either expressly provided for within the terms of a contract, most typically through "management rights clauses" or "zipper clauses," so-called. A waiver can also be inferred by the conduct of the parties, or their history of bargaining.

In this case, the Employer argues that Article 1.9 of the parties CBA (Joint Exhibit 1, p. 7), entitled "Management Rights", read in conjunction with Article 2.1, subsection 2.1.4, authorized the Employer to unilaterally implement General Order 99-1. The Employer argues that because the parties have negotiated contract language that authorizes the issuance of rules and regulations by management, the Union is foreclosed from demanding bargaining during the period of time covered by the agreement. The Employer acknowledges, however, that the rules and regulations, or general orders enacted, not be in conflict with issues addressed in the collective bargaining agreement. The Employer argues that the Union agreed that the implementation of General Order 99-1 was done in accordance with the terms of the contract! (See Employer's brief, p. 15) However, the testimony cited in the transcript by the Employer

does not necessarily support this contention. The Union President testified that the General Order was, in fact, placed into a notebook, as required by Article 2.1.4. He did not testify that "general order 99-1 was issued in accordance with the language of the collective bargaining agreement", as argued by the Employer. Indeed, if the Union had, in fact, agreed to that contention, there would be no reason for this case to exist.

The collective bargaining agreement contains a clause concerning discipline and discharge, Article 2.3 which provides: "The procedure for discharge and discipline of Police Officers shall be in accordance with the Law Enforcement Bill of Rights (G.L. 42-28.6-1), as amended." However, General Order 99-1 provides for the issuance of disciplinary measures (See Section 10 - suspension for 2 days without pay) which, on its face, appears to be in direct conflict with Article 2.3 of the agreement. The Union has argued this point exactly. Whether or not Article 2.3 has been violated is not for this Board to determine. However, to the extent that General Order 99-1 supplants, or replaces the requirements of Article 2.3, those changes are required to be the subject of bargaining.

That is not to say that this Board had found that General Order 99-1 supplants, or replaces the requirements of Article 2.3, because, as stated above, the same is not our function.[2] It may well be that an arbitrator would find that the two provisions could be construed harmoniously. However, since General Order 99-1 is silent on the issue of the Law Enforcement Officers Bill of Rights, and appears to be in conflict with Article 2.3, the Board finds that bargaining over this issue has not been waived by the management rights clause of the agreement.

The Employer also appears to argue that, because the Police Colonel has issued General Orders in the past without objection by the Union, the Union has waived its right to bargain over all general orders. Such an argument, if that is indeed the argument advanced, is not sound. The Union is not required to object to non-objectionable orders in order to preserve a future objection to a specific order which may be objectionably.

The last issue, then, is whether the Union waived its right to bargain because its President knew of the proposed order and specifically failed to request bargaining. Although this is a "close question", the Board finds that the Union, based upon the prior bargaining history of the

[2] The Board notes that the rationale behind General Order 99-1 appears sound and that the requirement of certain forms and paperwork is permissible.

parties, did not waive its right to bargain. The Board finds that the Union President believed that the parties would follow their usual course, and meet with the parties' attorneys to "hash things out," and that there was no reason to demand bargaining in another manner. The Board finds that the discussion between the Union members and the Colonel was sufficient to put the Employer on notice that the Union was not waiving its right to bargain.

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 are parties to a collective bargaining agreement that contains a "management rights" clause, a disciplinary clause, a sick leave clause, and an "injured-on-duty"(IOD) clause.

4) On or about March 10, 1999, Officer Robert A. McBrier and Officer Macomber were summoned to the office of Police Colonel Bernard Gannon for the purpose of reviewing a policy being proposed by Colonel Gannon relative to the receipt of IOD benefits in the Police Department.

5) Shortly after this meeting, the Colonel issued and implemented the IOD policy as "General Order 99-1." No bargaining took place with the Union prior to the implementation of General Order 99-1.

6) Officer McBrier testified that he thought the parties were going to sit down together with their respective lawyers "to hash things out", relative to the implementation of General Order 99-1.

7) The Union and the Employer did have a prior bargaining history relative to the implementation of Rules and Regulations, where they did sit down to "hash things out".

CONCLUSIONS OF LAW

1) The issue of the receipt of injured on duty (IOD) benefits, and the issue of discipline are mandatory subjects for bargaining.

2) The Management Rights clause of the collective bargaining agreement does not amount to a waiver of the right to bargain over the implementation of General Order 99-1, to the extent that General Order 99-1 affected the temporary and permanent discharge of sick time, and to the extent that General Order 99-1 imposed discipline in a manner inconsistent, on its face, with Article 2.3.

3) The Union did not waive its right to bargain over the issuance of General Order 99-1, either through the contract or through its actions.

4) 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 (6).

ORDER

1) The Employer is hereby ordered to cease and desist from further using General Order 99-1, as it pertains to the temporary and permanent discharge of sick time, and discipline, without first bargaining its implementation with the exclusive bargaining agent.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (Dissent)

Ellen I. Jordan, Member (Dissent)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissent)

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

Dated: April 29, 2002, 2002

By: Joan N. Brousseau, Administrator