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-5200

-AND-

STATE OF RHODE ISLAND, DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES

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 September 11, 1996 and filed on September 12, 1996 by R.I. Council 94, AFSCME, AFL-CIO, Local 314, (hereinafter "Union").

The Charge alleged:

Violation of Section 28-7-13 Paragraphs (1) (3) (6) and (10)

1. The Department for Children, Youth and Families has unilaterally introduced a video recorder to record pre-disciplinary meetings with the employees and their meetings with the employees and their union representatives.

2. The Department for Children, Youth and Families in (sic) interfering with the Union and refuses to negotiate this change.

Following the filing of the Charge, an informal conference was held on September 27, 1996, 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 31, 1998. The Employer filed its Answer to the Complaint on September 25, 1998, denying the allegations contained in paragraphs 3 and 4 of the Complaint and asserting six (6) affirmative defenses.

A formal hearing on this matter was originally scheduled for September 17, 1998, but at the request of the Union, was rescheduled to January 26, 1999. Both the Employer and the Union were represented by legal counsel at the formal hearing, and both parties had full opportunity to present evidence and both examine and cross-examine witnesses. 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

The Employer operates facilities known as the "Training School" and the "Detention Center" where youthful offenders, referred to as "residents", are detained under court order, either before or after trial. The DCYF has no control over the time that the "residents" are in the custody of the DCYF; the same is determined by the Family Court.

Periodically, "residents" make allegations against the employees of these facilities; sometimes charging sexual assault or other serious crimes and misconduct. In these cases, a "pre-hearing" is held by the Employer to give notice to the employee of the allegations and an opportunity to respond prior to issuing any discipline against the accused employee. (Employer's brief, p. 1) The accused employee is notified of the "pre-hearing" and has the opportunity to attend, if he or she so chooses. (TR. p. 9) The accused may also choose to have representation or union representation. The Union has the opportunity to cross examine witnesses at the "pre-hearing." (TR. p. 19)

For a number of years prior to 1996, testimony by "residents" at the "pre-hearings" was recorded stenographically. (TR. p. 22) The purpose of the stenographic record was to preserve the testimony in the event that the resident was unavailable, for whatever reason, at the time of the level three hearing. (TR. p. 43) On June 5, 1996, Arbitrator Lawrence E. Katz, Esquire issued an award in case number 11 390 00929 95 (Re: Discharge of George Schiano). In that case, Mr. Schiano had been accused of sexually assaulting a training school resident. Schiano's accuser testified at the level three hearing, but the Employer was not able to produce her for testimony before the arbitrator. Over the Union's objection, the arbitrator admitted her stenographic testimony in the arbitration. However, when it came time to make the award, the arbitrator found that there were credibility issues in dispute which could not be determined solely from the pages of a transcript. In that case, he found that the Employer had not met its burden of proof for discharging the accused employee for just cause. Arbitrator Katz did however state that, had there been a videotape of the resident's testimony that could be reviewed along with the transcript, then his findings may have been different. Thereafter, the Employer decided to begin

videotaping witness' testimony in the "pre-disciplinary" hearings. (See generally, Employer's Exhibit #1)

POSITION OF THE PARTIES

The Union makes two arguments. First, that the Employer is eliminating a contractually guaranteed step-three grievance hearing for a terminated employee. Second, that the State has unilaterally instituted a new step to the grievance procedure - the Administrative Hearing, and has made this step potentially the most important step in the grievance procedure. The Union claims that the imposition of the new requirement of videotaping witnesses in the disciplinary process is a mandatory subject for bargaining, and that the Employer wholly failed to bargain prior to implementing this change.

The Employer argues that the "pre-disciplinary" hearing is merely a gratuitous step in the disciplinary process and is not mandated or contemplated by the collective bargaining agreement. The Employer, therefore, argues that it retains its management right to conduct any pre-disciplinary hearings it sees fit. Further, the Employer states that the only change in the pre-disciplinary hearing is the videotaping of the proceedings. The accused is still invited to attend and is permitted to cross examine the witness. The Union can obtain a copy of the videotape and other documents produced during the course of the pre-disciplinary hearing. The Employer further argues that the evidence established that, of the five hearings which have been videotaped, which have progressed from the pre-disciplinary hearing to level three labor relations hearings and then to arbitration, none of the videotapes were used at the arbitration hearings.

DISCUSSION

Both the Union's charge and the Board's Complaint allege that the Department for Children, Youth and Families has unilaterally introduced a video recorder to record pre-disciplinary meetings with the employees and their meetings with the employees and their union representatives. The evidence clearly established that the Employer did, in fact, make a unilateral determination to videotape and that it has done so on several occasions since 1996. The issue for the Board is whether such a unilateral implementation constitutes an unfair labor practice.

It is well settled that issues pertaining to grievance and arbitration procedures are mandatory subjects for bargaining. In the present case, the issue of disciplinary action (Article 24 of the CBA) ties into the grievance and arbitration procedures (Articles 25 & 26). Neither

Article 25 nor Article 26 sets forth the precise procedures to be used at the hearings or the parameters by which the hearings shall be conducted. The contract is silent on the issue of whether the hearings are to be recorded via any method -- stenographic, video or both. (See Union Exhibit #1) The testimony of the witnesses from both parties established however, that for years prior to 1996, pre-disciplinary hearings were stenographically recorded but were never videotaped. The evidence also established that the Employer implemented this method of recording after it lost an arbitration, which reversed its discharge of an employee accused of serious misconduct and sexual assault of a resident.

The Board, quite frankly, can well understand the Employer's frustration with losing an arbitration award due to the fact that, through no fault of its own, its witnesses are no longer available to testify at arbitration. Furthermore, the Board can also understand that the Employer felt that it was being prudent by following the suggestion of an arbitrator that he would have found a videotape to be helpful when making a credibility determination. We cannot say that such a procedure should not be used or even become standard operating procedure in the processing of grievances such as those challenging allegations of serious misconduct or criminal activity, particularly when they pertain to children who are in the care, custody and control of the State at the time of the alleged misconduct or criminal activity. However, notwithstanding the laudable motives behind such an action, there can be no question that the parties have conducted these pre-disciplinary hearings in the same way for many years. The testimony is unrebutted that the Employer unilaterally implemented this new change to the procedure without first bargaining with the Union. The Board understands that the videotapes have not, at the time of the formal hearing in this matter, been used at any arbitration hearings. The Board also understands that there have been occasions when the videotapes have been used at level three hearings before a Departmental Hearing Officer. So that the record is clear, the Board is not mandating what witnesses should or must be presented or what evidence must be represented at level three hearings, by either party. Such a mandate is not the function of this Board, nor is it within our jurisdiction to make such edicts. Furthermore, we do not make any determination as to how a case is presented to an arbitrator or what types of evidence he or she may admit. Again, the same is not within our domain.

We are concerned, however, that the process for preserving witness testimony has been changed without prior discussion by the parties. One may ask, if the Board knows that it cannot control the presentation of evidence or witnesses at either grievance or arbitration hearings, then what is the harm of permitting the unilateral decision by one party to begin videotaping at the pre-disciplinary hearings. The Board is concerned that that unilateral implementation of such a recording tips the balance of proceedings in the employer's favor after the conclusion of the pre-disciplinary hearing. For instance, the witness may make some statements during the course of the pre-disciplinary hearing which may be highly detrimental to the accused, and which upon further investigation by the accused or its union after the hearing, are not true. If the Employer does not later produce the witness at the arbitration, the accused does not have the ability to cross examine the accuser on that issue. Since this may have a grave effect on the outcome of the arbitration hearing, we believe that the Employer's ability to create this lopsidedness must first be negotiated. There may be protections to the accused that could be built into this videotaping process and its ultimate use. For instance, the parties may negotiate that prior to the introduction of any such videotaped testimony at arbitration, the Employer must provide the last known address of the resident after discharge, thereby affording the Union the opportunity to attempt to locate the accuser for the arbitration. Or, the parties might agree that videotaped testimony of witnesses who have escaped or "eloped" from the State's custody might not be used. There might be any number of issues that could be negotiated to preserve the rights of both parties and the use of the videotaped testimony. Therefore, because of the inter-relatedness of the disciplinary procedures with the grievance and arbitration procedures, and because of the long standing methods for conducting the process, we find that the Employer's unilateral change to the process constitutes an unfair labor practice pursuant to R.I.G.L. 28-7-13 (10).

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 Employer operates facilities known as the "Training School" and the "Detention Center" where youthful offenders, referred to as "residents", are detained under court order, either before or after trial The DCYF has no control over the time that the "residents" are in the custody of the DCYF; the same is determined by the Family Court.

4) Periodically, "residents" make allegations against the employees of these facilities; sometimes charging sexual assault or other serious crimes and misconduct. In these cases, a "pre-hearing" is held by the Employer to give notice to the employee of the allegations and an opportunity to respond prior to issuing any discipline against the accused employee. The accused employee is notified of the "pre-hearing" and has the opportunity to attend if he or she so chooses. The accused may also choose to have legal representation or union representation. The Union has the opportunity to cross examine witnesses at the "pre-hearing."

5) For a number of years prior to 1996, testimony by "residents" at the "pre-hearings" was recorded stenographically. The purpose of the stenographic record was to preserve the testimony in the event that the resident was unavailable, for whatever reason, at the time of the level three hearing.

6) On June 5, 1996, Arbitrator Lawrence E. Katz, Esquire issued an award in case number 11 390 00929 95 (Re: Discharge of George Schiano). Over the Union's objection, the arbitrator admitted stenographic testimony in the arbitration, but because of his inability to judge the credibility of witnesses in person, he ultimately held that the Employer had not met its burden of proof for discharging the accused employee for just cause. Thereafter, the Employer decided to begin videotaping witness testimony in the pre-disciplinary hearings.

7) The parties agree that there was no prior negotiation before instituting the practice of videotaping witnesses.

CONCLUSIONS OF LAW

) 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 (10).

ORDER

1) The Employer's Motion to Dismiss is denied.

2) The Employer shall cease and desist from the use of video recorders at pre-disciplinary meetings without first negotiating the same with the Union.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (Dissent)

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: May 1, 2001

By: Joan N. Brousseau, Administrator