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-5533

-AND-

BRISTOL COUNTY WATER AUTHORITY

DECISION AND ORDER OF DISMISSAL

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board"), on an Unfair Labor Charge (hereinafter "Charge") dated April 26, 2001, and filed on April 27, 2001, by Teamsters Local Union No. 251 (hereinafter "Union")

The Charge alleged:

> "Dalton Whitford was terminated due to his Union Activities in violation of RIGL 28-7-13, subsections 5 and 10"

Following the filing of the Charge, an informal conference was held on May 18, 2001 between representatives of the Union and Respondent and an Agent of the Board. The informal conference failed to resolve the Charge and the Board issued the instant Complaint on May 29, 2001. The Employer filed its Answer to the Complaint on June 4, 2001, denying the allegations contained in paragraphs 3 and 4 of the Complaint.

Formal hearings on this matter commenced on June 21, 2001 Additional hearings were held on October 30, 2001 and March 19, 2002. Upon conclusion of the hearings, both the Employer and the Union submitted written briefs on July 8, 2002. 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.

POSITION OF THE PARTIES

The Union alleges that the Employer unlawfully terminated the employment of Mr. Dalton Whitford, its Water Quality Supervisor of fifteen years, in retaliation for Mr. Whitford's activity in supporting an unionization drive at the water plant. The Union argues that the evidence established that: (1) Whitford was engaged in union activity, (2) the Employer was well aware of Whitford's activity, (3) the Employer's rationale for terminating Whitford, in the midst of an organizing campaign was clearly pre-textual; and that, therefore, Whitford's termination was in violation of R.I.G.L 28-7-13 (5) and (10).

The Employer maintains that there is absolutely no evidence to support the charge that Mr. Whitford was terminated from employment for engaging in a union organization drive or that any "union animus" existed. The Employer maintains that the evidence clearly established that Mr. Whitford was terminated for a string of ongoing performance problems.

FACTUAL SUMMARY

Dalton Whitford had been employed by the Bristol County Water Authority, as its Water Quality Supervisor, for almost fifteen (15) years at the time of his termination. (TR. #1, p. Over the years, Whitford's duties as Water Quality Supervisor expanded considerably. Whitford began working for the Authority, he was responsible for running the lab, performing various tests, monitoring water treatment, the reservoirs and the distribution system. As time went by, his responsibilities also included involvement in workplace safety issues, enforcing new safe drinking water requirements and the problems of a water plant with an aging infrastructure. (TR. #1, p. 19-22) Whitford, a salaried employee, was often called for problems that occurred during nights, weekends and holidays. Whitford also assumed the duties and responsibilities of other employees when they were ill. (TR. #1, p. 22)

In approximately 1994, Whitford realized that he needed additional assistance in the laboratory and began making requests to his supervisors for the same. (TR. #1, p. 22) During his years of employment, Mr. Whitford received annual performance reviews that were generally very favorable. (TR. #1, p. 25-33) The reviews acknowledged Whitford's efforts at keeping up with an increasing workload. In 1996, Mr. Whitford suffered a heart attack that kept him out of work for a while. When he returned, he continued to ask for assistance, a call that went for the most part, ignored. (TR. #1, p. 34)

In January of 1999, while Mr. Whitford was hospitalized for surgery, the laboratory which he supervised failed to test the reservoir waters for sodium, as required by law. During Mr. Whitford's hospitalization, he was regularly contacted by Mr. Pasquale DeLise, who was concerned to make sure that things would be done while Mr. Whitford was recovering. Mr. Whitford failed to notify Mr. DeLise of the sodium testing requirements. (TR. #1, p. 60-61) As a

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[1] Witness testimony of Michael Munroe was taken by deposition on April 9, 2002, and the transcript of the deposition was filed on May 1, 2002.

[2] Reference to the transcripts shall be denoted as follows: Formal Hearing of June 21, 2001 (TR. #1), Formal Hearing of October 30, 2001 (TR. #2), Formal Hearing of March 19, 2002 (TR. #3)

result, the Employer received a notice of violation dated April 5, 1999, which the Authority had to then publicize in the newspapers and in correspondence to customers. (TR. #1, p. 61) (See Employer Exhibit #4) It took until approximately October of 1999 to straighten out the sodium testing deficiency (TR. #1, p. 61-62) As a result of the sodium violation, Mr. DeLise met with Mr. Gary Furtado, the Chairman of the Authority's Personnel Committee. At that time, Mr. DeLise indicated that he thought that he should suspend Mr. Whitford, but expressed concerns about the lack of other personnel to cover work during a suspension. Mr. DeLise memorialized this meeting with a memo. (Employer Exhibit #5)

Also, during the 1999 testing year, Mr. Whitford failed to take sufficient samples for lead and copper testing. (Employer Exhibits #1 & #2) These samples could have been taken any time during July 1998, August 1998, September 1998, or June 1999. Mr. Whitford took all the samples during the last week of June 1999, but failed to take a sufficient amount of samples. (TR. #1, p. 69) On August 13, 1999, Mr. Whitford sent a memo to one of his supervisor, Mr. Michael Munroe, (copied to Mr. DeLise) that the Authority had sixty days from July 1, 1999 to notify the public of the Authority's failure to meet an "action limit" for lead and copper. (Employer Exhibit #2) This notice was the first indication that Mr. DeLise received that there was a problem with the copper and lead levels. (TR. #2, p. 125) As a result of the violation, the Authority had to undertake an extensive public notice/educational program, which included sending every customer a brochure, inform the television stations, newspapers, hospital and schools. (TR.#2, p. 127-128) The Authority also had a public meeting to discuss the problem.

In approximately April 2000, Mr. Whitford became actively involved with other employees at the Water Authority to organize a bargaining unit with the Union. Whitford was a strong supporter of the Union, a fact that Whitford did not attempt to hide from the Employer. (TR.#1 p. 50) In the summer of 2000, due to equipment malfunction, a violation of the acceptable levels of trihalomethanes (hereinafter "TTHM") levels occurred. (TR.#1, p. 73) A second violation also occurred in July 2000 because Mr. Whitford failed to report in the "Consumer Confidence Report"[3] that the Authority had exceeded the TTHM levels. This second violation also required the Authority to go through the public notice process. On August 8, 2000, Mr. Whitford received a written warning (his first ever) from his supervisor for his "work performance. (Employer Exhibit #29) This written warning referenced the summer

[3] The Consumer Confidence Report is required by the Safe Water Drinking Act.

2000 sampling and reporting violations, but also referenced other occasions of "poor" or "unacceptable" work performance, including initial reports for the previous two Annual Reports.

Also in the summer of 2000, the Authority was assessed a $25,000.00 fine by the Warren Sewer Commission for Mr. Whitford's failure to submit a required semi-annual report, again due to the failure to take samples because of equipment failures. (TR.#1, p. 78) (Employer Exhibit #16) Although "hand samples" were apparently allowed by the Authority's Industrial Waste Discharge Permit (Employer Exhibit #17) during times of equipment failure, Mr. Whitford was not aware of this provision (because he had not read the permit). Therefore, the samples were not taken in a timely manner, thus leading to the violation. When the fine was first assessed, Mr. Whitford was not disciplined. [4]

Also on July 27, 2000, the Department of Health notified Mr. Whitford that his laboratory's certification had been down graded to "provisional" because of the lab's failure to participate in mandatory proficiency testing. (TR.# 1, p. 81) (See also Employer Exhibit # 18) The Department of Health gave Mr. Whitford until the end of the year to take and submit two more sets of samples for proficiency testing, and warned that failure to obtain acceptable results will result in decertificaiton. By memo dated August 23, 2000, Mr. Whitford notified Mr. DeLise of the provisional decertification and assured Mr. DeLise that the problem was being addressed. (Employer Exhibit #19) Despite the Department of Health's clear instructions and Mr. Whitford's August 23 assurances to Mr. DeLise, Mr. Whitford wholly failed to do the required testing. As a result, the Department of Health decertified the laboratory and notified the Authority by letter dated February 12, 2001. (TR.# 1, p. 81-82) (Employer Exhibit #20) By letter dated February 14, 2001, Mr. Whitford was notified by the Department of Health that it could not accept the Authority's laboratory results for fluoride testing due to the fact that the lab had been decertified. (Employer Exhibit # 21)

Also, in August 2000, after receiving a complaint from a customer claiming that the water was staining her son's teeth, Mr. DeLise asked Mr. Whitford to perform some water samples. (TR. # 2, p. 181) In January or February, the customer called back to find out what

[4] Later however, when Mr. DeLise found out that hand samples were permitted, he issued a written warning to Mr. Whitford on February 27, 2001.

had happened with the water samples, Mr. DeLise discovered that Mr. Whitford had failed to take the samples. (TR. #2, p. 182) [5]

After Mr. DeLise received copies of the decertification notice and the fluoride test rejection notice, he hired Mr. Edward Girard on a consulting basis to look into the decertification - how it came about and what caused it. (TR.#2 p. 171) On February 22, 2001, Mr. Girard submitted a two page confidential report to Mr. DeLise. (Employer Exhibit #22) Subsequently, Mr. Girard's tasks were expanded to include an investigation as to if the water system could operate without a chemist in the laboratory and to make recommendations on how the water system and laboratory could come back into compliance. On February 25, 2001, Mr. Girard submitted a four page report regarding his findings. In that report, he stated "Because I am not aware of Dominic's knowledge regarding treatment processes and reporting procedures, I would recommend that the chemist, Mr. Dalton Whitford, be retained". (Employer Exhibit # 23) Mr. Girard submitted subsequent reports on March 10, March 23, and March 30, and April 20, 2001 (Employer Exhibits #24, #25, #26, and #27) On March 2, 2001, Mr. DeLise prepared a field memo which stated, in part: "I have decided to terminate Whitford within the next three to four weeks based upon the fact that he received a final warning during August 2000, has continued to have performance problems since that time, and now has failed to follow my specific instructions regarding how copies of documents were to be furnished to Maguire." (Employer Exhibit #33)

In April 2001, the Union and the Authority both submitted their post hearing briefs for the election petition. Also in April 2001, Mr. Whitford was terminated from his employment with the Authority.

DISCUSSION

When an employer is accused of discriminating against an employee for union activity, the Board must consider whether the employee's protected conduct was a substantial or motivating factor in the adverse action. NLRB v Transportation Management Corporation, 462 U.S. 393,401 (1983). In the event that the evidence establishes that the union activity was a substantial or motivating factor in terminating the employee, the burden then shifts to the Employer to show that it would have terminated the employee, irrespective of his or her union activity. If the Employer meets this burden, then it cannot be found to have committed an unfair

[5]Also, in late 2000 and the early part of 2001, the Union continued to press its election petition and testimony was taken before this Board during that timeframe. Mr. Whitford participated in those hearings and testified before this Board.

labor practice in terminating the employee. Wright Line, Wright Line Div., 251 NLRB 1083 (1980) enf. 662 F.2d 899 (C.A. 1981) cert denied, 455 U.S. 898 (1982) [6]

In this case, the Union essentially argues that the timing of Mr. Whitford's termination in April 2001, which followed the filing of briefs in the election petition, is overwhelming evidence that Mr. Whitford was terminated for his Union activities. Having reviewed the documentary evidence in this case, and Mr. Whitford's candid testimony regarding his professional shortcomings, it is amazing to this Board that the Union would consider such an argument. The evidence in this case as to Mr. Whitford's dismal work performance is overwhelming in its breadth, depth and scope. Even if his failure to conduct sodium testing or inform Mr. DeLise of the need for the same in early 1999 can be forgiven, Mr. Whitford was still culpable for: (1) the failure to take sufficient samples for lead and copper testing, (2) the failure to notify his supervisor of the lead and cooper deficiencies until 43 days into a 60 day correction period, (3) the failure to sample water as directed by Mr. DeLise for response to a customer's complaint, (4) the failure to report the TTHM levels in the Consumer Confidence Report, (5) the failure to submit the annual report to the Sewer Commission in the summer of 2000 (for the second year in a row), resulting in a $25,000.00 fine which the Authority continues to litigate, (6) the failure to conduct the testing required to remove the laboratory from provisional status, despite having assured Mr. DeLise that the matter was being addressed, and (7) the ultimate decertification of the lab.

The only evidence submitted in this case regarding alleged "union animus" is the fact that the Employer would not agree to a consent election and that the members of the Employer's Board of Directors apparently made disparaging statements to the press concerning unions and this Union in particular. These facts, even if viewed in the light most favorable to the Union's claim, do not help its case. The evidence here is overwhelming that, notwithstanding Mr. Whitford's union desires, he was fired for poor performance. The documentary evidence established that, although Mr. DeLise wanted to suspend Mr. Whitford in the spring of 1999, he did not do so because there was no one else available to do the work. Thereafter, Mr. Whitford received three written warnings (two - if the two August 8, 2000 memos are counted as one memo). The reports issued by Mr. Girard become increasingly critical of Mr. Whitford's hostility, procrastination and inability to perform the simplest matters without great delay. It is clear that Mr. Whitford's performance was the major, if not sole factor in his termination.

[6] See this Board's decision & order in re: ULP-5459 Thomas Pizzi v Rhode Island Resource Recovery Corporation.

Although the Union argues that the Employer did not follow its own procedure appropriately in disciplining and ultimately terminating Mr. Whitford, this Board does not believe that translates into discrimination for union activity. As we stated in our decision in ULP-5459, it is not up to this Board "to set a fair disciplinary policy" or to examine whether the Employer violated its own procedure. In addition, it is not up to the Board to examine whether or not the Employer should have provided Mr. Whitford with help years ago, when he began asking for it. Indeed, meddling in such affairs is beyond the jurisdiction of this Board. Therefore, this issue is a non-issue for the purposes of this case.

As in ULP-5459, the Board's function is not to weigh all of Mr. Whitford's shortcomings and determine whether termination was appropriate. It would appear that a history of poor performance (even though not always apparent from Whitford's performance evaluations), and outright failure to perform testing in multiple years, led to Mr. Whitford's dismissal. Therefore, since the Union did not sustain its burden, the charge of unfair labor practice in this matter is hereby dismissed.

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 and protection, and, as such, is "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) Dalton Whitford was employed by the Bristol County Water Authority, as its Water Quality Supervisor, for almost fifteen years at the time of his termination. When Whitford began working for the Authority, he was responsible for running the lab, performing various tests, monitoring water treatment, the reservoirs and the distribution system. As time went by, his responsibilities also included involvement in workplace safety issues, enforcing new safe drinking water requirements and the problems of a water plant with an aging infrastructure.
4) In approximately 1994, Whitford realized that he needed additional assistance in the laboratory and began making verbal requests to his supervisors for the same. During his years of employment, Mr. Whitford received annual performance reviews that were generally very favorable. The reviews acknowledged Whitford's efforts at keeping up with an increasing workload. In 1996, Mr. Whitford suffered a heart attack that kept him out of work

for a while. When he returned, he continued to ask for assistance, a call that went for the most part, ignored.

5) In January 1999, while Mr. Whitford was hospitalized for surgery, the laboratory, which he supervised, failed to test the reservoir waters for sodium, as required by law. As a result, the Employer received a notice of violation dated April 5, 1999, which the Authority had to then publicize in the newspapers and in correspondence to customers.

6) As a result of the sodium violation, Mr. DeLise met with Mr. Gary Furtado, the Chairman of the Authority's Personnel Committee. At that time, Mr. DeLise indicated that he thought that he should suspend Mr. Whitford, but expressed concerns about the lack of other personnel to cover work during a suspension. Mr. DeLise memorialized this meeting with a memo.

7) Also during the 1999 testing year, Mr. Whitford failed to take sufficient samples for lead and copper testing. As a result of the violation, the Authority had to undertake an extensive public notice/educational program, which included sending every customer a brochure, inform the television stations, newspapers, hospital and schools.

8) In approximately April 2000, Mr. Whitford became actively involved with other employees at the Water Authority to organize a bargaining unit with the Union. Whitford was a strong supporter of the Union, a fact that Whitford did not attempt to hide from the Employer.

9) In the summer of 2000, due to equipment malfunction, a violation of the acceptable levels of TTHM levels occurred. A second violation also occurred in July 2000, because Mr. Whitford failed to report in the "Consumer Confidence Report" that the Authority had exceeded the TTHM levels. This second violation also required the Authority to go through the public notice process.

10) On August 8, 2000, Mr. Whitford received a written warning (his first ever) from his supervisor for his "work performance." This written warning referenced the summer 2000 sampling and reporting violations, but also referenced other occasions of "poor" or "unacceptable" work performance, including initial reports for the previous two Annual Reports.

11) Also in the summer of 2000, the Authority was assessed a $25,000.00 fine by the Warren Sewer Commission for Mr. Whitford's failure to submit a required semi-annual report, again due to the failure to take samples because of equipment failures.

12) Also on July 27, 2000, the Department of Health notified Mr. Whitford that his laboratory's certification had been down graded to "provisional" because of the lab's failure to participate in mandatory proficiency testing. The Department of Health gave Mr. Whitford until the end of the year to take and submit two more sets of samples for proficiency testing, and warned that failure to obtain acceptable results will result in decertificaiton. By memo dated August 23, 2000, Mr. Whitford notified Mr. DeLise of the provisional decertification and assured Mr. DeLise that the problem was being addressed.

13) Mr. Whitford wholly failed to do the required testing. As a result, the Department of Health decertified the laboratory and notified the Authority by letter dated February 12, 2001

14) By letter dated February 14, 2001, Mr. Whitford was notified by the Department of Health that it could not accept the Authority's laboratory results for fluoride testing due to the fact that the lab had been decertified.

15) Also, in August 2000, after receiving a complaint from a customer claiming that the water was staining her son's teeth, Mr. DeLise asked Mr. Whitford to perform some water samples. In January or February of 2001, the customer called back to find out what had happened with the water samples. Mr. DeLise discovered that Mr. Whitford had failed to take the samples.

16) On February 27, 2001, Mr. DeLise issued another written warning to Mr. Whitford.

17) On March 2, 2001, Mr. DeLise prepared a field memo which stated in part: "I have decided to terminate Whitford within the next three to four weeks based upon the fact that he received a final warning during August 2000, has continued to have performance problems since that time, and now has failed to follow my specific instructions regarding how copies of documents were to be furnished to Maguire."

18) In April 2001, the Union and the Authority both submitted their post hearing briefs for the election petition. Also in April 2001, Mr. Whitford was terminated from his employment with the Authority.

CONCLUSIONS OF LAW

1) 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 (5) or (10).

ORDER

1) The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member (DISSENT)

Joseph V. Mulvey, Member (DISSENT)

Gerald S. Goldstein, Member

Ellen L. Jordan,

John R. Capobianco, Member (DISSENT)

Elizabeth S. Dolan, Member

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

Dated: November 15, 2002

By: Joan N. Brousseau
Joan N. Brousseau, Administrator