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-5588

-AND-

TOWN OF EAST GREENWICH

DECISION AND ORDER OF DISMISSAL

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 East Greenwich (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge"), dated January 7, 2002 and filed on January 18, 2002, by International Brotherhood of Police Officers, Local 472 (hereinafter "Union").

The Charge alleged:

> That the Employer violated 28-7-12 and 28-7-13 (3), (6) and (10) of the Act, when on or about November 29 and 30, 2001, representatives of the Employer interfered, coerced, and otherwise threatened disciplinary action against the president of Local 472 for engaging in conduct protected by the provisions of the Act.

Following the filing of the Charge, an informal conference was held on April 10, 2002, 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 May 23, 2002. The Employer filed its Answer to the Complaint on May 30, 2002.

A formal hearing on this matter was held on September 3, 2002. Upon conclusion of the hearing, both the Employer and the Union submitted written briefs at the end of October, 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.

FACTUAL SUMMARY

The dispute, in this case, emanates from discussions and a volley of memoranda and grievances pertaining, in part, to an alleged "abuse of sick leave' within the Town of East

Greenwich's Police Department. On or about November 7, 2001, at about 7:00 A.M., Police Chief David Desjarlais had a discussion with Lt. Mark L. Davis concerning a report that the Chief had received, alleging that Lt. Davis was abusing his sick leave. (TR. p. 7) The Chief followed up this discussion with a memorandum, dated the same day, in which he notified Lt. Davis that should he use any sick leave for the period November 7, 2001 through December 31, 2001, the Chief would be requiring Lt. Davis to provide a Doctor's note, pursuant to Article 22, Section 5, Paragraph 5 of the parties' collective bargaining agreement. (Union Exhibit #1)

Lt. Davis responded by sending a memorandum to the Chief (Union Exhibit #2) and by filing a grievance, #01-10, (Union Exhibit #3) over the order contained in the Chief's memorandum. The Chief responded to Lt. Davis' memorandum by another memorandum dated November 13, 2001 In this November 13th memo, the Chief wrote, in part: "I have no recollection of giving an order restricting you to your home on your time off. As stated above, I was very specific on what would lead me to believe you feigned illness." Also on November 13, 2001, the Chief denied grievance # 01-10. (Employer's Exhibit #1)

On November 17, 2001, Lt. Davis filed another grievance, #01-08, (Union Exhibit #5) in response to the Chief's November 13th memo. In response to grievance #01-08, the Chief sent Lt. Davis another memo dated November 19, 2001, which contained the identical language used in his November 13th memorandum. (Union Exhibit # 6) On November 21, 2001, Lt. Davis filed a third grievance, #01-1 (Union Exhibit #7)

On November 27, 2001, the Union held a meeting at which time Lt. Davis, who was also the Union President, explained the three grievances to the membership, and apparently made a remark that he thought the Chief was acting like a "tyrant". On November 29, 2001, the Chief conducted a mandatory staff meeting to discuss the sick leave issue, and other issues of interest to the department. (TR. p. 22) Lt. Davis claims that the Chief "dragged me through the mud" at this meeting in an effort to undermine Lt. Davis' authority within the Union. The next day, a level II grievance hearing was held in the Town Manager's office to discuss Lt. Davis' three pending grievances. Lt. Davis alleges that, at the end of this grievance meeting, the Chief told Lt. Davis that the reason the Chief had treated Lt. Davis poorly at the staff meeting was because the Chief had heard that Lt. Davis had stated, at the union meeting, that the Chief was acting like a tyrant. (TR. p. 25)

POSITIONS OF THE PARTIES

The Union claims that the Employer unlawfully interfered, coerced and otherwise restrained the President of Local 472, either in the exercise of, or in retaliation for his exercising protected rights. The Union argues that, as soon as Lt. Davis resumed his duties as President of the Union, the Chief targeted Lt. Davis for disparate treatment. The Union claims that the record establishes that no other member of the bargaining unit had sick leave "restrictions" imposed, as did Lt. Davis. The Union also claims that no other member of the bargaining unit had been denied overtime pay when taking a compensatory day off during their four day work cycle. The Union argues that, because Lt. Davis had three pending grievances, the Chief targeted Lt. Davis and singled him out for ridicule, in front of the bargaining unit, in an effort to undermine Lt. Davis' leadership of Local 472. The Union seeks an order from this Board directing the Employer to cease and desist, and that the Board's order be posted in a conspicuous location in the workplace.

The Employer argues, first, that the Union cannot maintain this action because of the election of remedies doctrine. The Employer also argues that, assuming the events of November 29th could be considered to constitute a separate unfair labor practice, the Union has utterly failed to meet its burden to demonstrate that he was interfered with, coerced, or otherwise threatened with disciplinary action as a result of his comments at the union meeting.

DISCUSSION

The first issue to be discussed is whether the complaint herein is barred by the election of remedies doctrine. The grievances which were filed seek redress for individual pay and sick leave problems encountered by Lt. Davis. The unfair labor practice alleges that, as a result of having filed these grievances and having called the Chief a tyrant, Lt. Davis was ridiculed in front of the staff, and otherwise retaliated against by the Chief. Clearly then, the grievances seek entirely different relief and, in fact, arise prior to the acts complained of in the unfair labor practice charge. Moreover, the relief sought from the grievances is completely different that that sought from this Board. Therefore, the election of remedies does not bar the within complaint.

The unrebutted evidence, in this case, established that the Town of East Greenwich had experienced some significant problems with sick time within the East Greenwich Police Department. At one point, during a two-year period, there had been 568 sick days for the 32 man

department, an average of approximately 18 days per officer. The Chief testified, however, that not all 32 members of the department were sick time abusers, and that some of the employees had significantly higher numbers of sick days than 18. (TR. p. 44) As a result, during negotiations for a successor collective bargaining agreement, the parties agreed to a revision of the sick leave provisions, which grants, to the Chief, the discretion of requiring a certificate from a medical doctor when the Chief perceives a pattern of abuse of sick leave.

The evidence also established that the Chief had received a complaint from a citizen alleging that, on some days after Lt. Davis had called in sick from his third shift assignment, he had been seen doing manual labor on his investment house, which is located close to the police station. (TR. p. 41) The Chief spoke to Lt. Davis on the morning of November 7, 2001, essentially giving him the "heads up" that he's been spotted working on his property during some days, after having called in sick the previous evening. The Chief also warned Lt. Davis that, if he called in sick for reasons of neck or back injuries, and was then spotted working on his investment properties the next day, the Chief would consider him as feigning illness. (TR. p. 42) The evidence also established that the Chief reviewed Lt. Davis' attendance and found that he had called out sick 10 times between July 1, 2001 and November 7, 2001. The Chief believed that Lt. Davis' attendance records indicated a pattern of abuse, in that it appeared that Lt. Davis was using sick leave on days when other officers under his command were on vacation.[1] The Chief also indicated that he personally saw Lt. Davis performing manual labor on his investment properties the day after calling in sick. (TR. p. 56) As a result, the Chief elected, pursuant to the discretion granted to him under the collective bargaining agreement, to require Lt. Davis to produce a doctor's certificate for any instance of illness from November 7, 2001 through December 31, 2001. (Union Exhibit #1)

It is important to note that the Chief's memo to Lt. Davis regarding the requirement to produce a doctor's certificate was prepared the same day as his discussion with Lt. Davis regarding Lt. Davis' sick time. Lt. Davis did not file his grievance, or the request to bargain, until the next day. Therefore, it is virtually impossible to sustain any allegation that the Chief's request for a doctor's certificate is in response to anything but the complaint received about Lt.

[1] The Chief noted that the contract restricted vacation time to one officer per shift at any one time.

Davis' sick time abuse and the Chief's investigation, which revealed 10 days of absence in slightly more than three months.

The record also established that, while a department meeting took place to discuss the sick leave issue, the same had been scheduled in response to numerous requests by members of the department to clarify the sick leave abuse issue. The Chief testified that he had scheduled the mandatory staff meeting earlier in the week of November 27th, before the Union meeting had been held. (TR. p. 43) This testimony was unrebutted.

Lt. Davis testified that he felt he was personally singled out at the mandatory staff meeting and subjectively felt as though he were "dragged through the mud". Captain William Higgins, who was also present, testified that he did not recall the Chief using Lt. Davis' name, and that the Chief conducted himself professionally thoughout the meeting. (TR. p. 67) Both the Chief and Captain Higgins did testify that, when discussing the sick leave issue, the Chief stated that if an employee had called out sick and was then seen the next day working on investment properties, doing manual labor, the Chief would consider that an example of feigning illness. Lt. Davis felt that everyone knew the Chief was referring to Lt. Davis. This Board believes that the same might be so, based upon the evidence introduced in this record. The evidence established that Lt. Davis himself asked the Chief questions, at that meeting, and the Chief responded to them. There was no evidence to suggest that the Chief had called this meeting for the express purpose of dragging Lt. Davis though the mud. There was absolutely no evidence in the record to suggest, or to establish, that the Chief's reference to working on investment properties after calling out sick was an attempt, in any way, to interfere, coerce, or otherwise threaten disciplinary action against Lt. Davis for engaging in protected conduct. Indeed, the most that could be said is that the Chief took the opportunity to spotlight Lt. Davis' absences in front of the Department, and to imply that he believed that Lt. Davis was abusing sick leave. However, even if the Chief had deliberately attempted to embarrass Lt. Davis over his sick time, the same would not constitute an unfair labor practice. Lt. Davis' use of sick leave, whether abusive or not, is one that relates to Lt. Davis as an individual. There was absolutely no evidence in the record to suggest that the Chief was attempting to embarrass Lt. Davis because he was the President of Local 472. Similarly, there wasn't even a scintilla of evidence to suggest that the Chief was attempting to, or did interfere, coerce or threaten disciplinary action against the President of

Local 472 for engaging in protected conduct. Therefore, this Board finds that the Complaint herein is wholly without merit, and 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 or protection and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) On or about November 7, 2001, at about 7:00 A.M., Police Chief David Desjarlais had a discussion with Lt. Mark L. Davis concerning a report that the Chief had received, alleging that Lt. Davis was abusing his sick leave. (TR. p. 7) The same day, the Chief sent Lt. Davis a memo on the same subject, indicating that Lt. Davis would be required to produce a doctor's certificate for any subsequent absences between November 7, 2001 and December 31, 2001
4) Lt. Davis responded by sending a memorandum to the Chief (Union Exhibit #2) and by filing a grievance, #01-10, (Union Exhibit #3) over the order contained in the Chief's memorandum.
5) The Chief responded to Lt. Davis' memorandum by another memorandum dated November 13, 2001. Also on November 13, 2001, the Chief denied grievance #01-10. (Employer's Exhibit #1)
6) On November 17, 2001, Lt. Davis filed another grievance, #01-08, (Union Exhibit #5) in response to the Chief's November 13th memo. In response to grievance #01-08, the Chief sent Lt. Davis another memo dated November 19, 2001, which contained the identical language used in his November 13th memorandum. (Union Exhibit # 6)
7) On November 21, 2001, Lt. Davis filed a third grievance, #01-11. (Union Exhibit #7)
8) On November 27, 2001, the Union held a meeting, at which time Lt. Davis, who was also the Union President, explained the three grievances to the membership, and apparently made a remark that he thought the Chief was acting like a "tyrant".
9) On November 29, 2001, the Chief conducted a mandatory staff meeting to discuss the sick leave issue, and other issues of interest to the department. At this meeting, the Chief stated

that, if an employee had called out sick and was then seen the next day working on investment properties, doing manual labor, the Chief would consider that an example of feigning illness.

10) The next day, a level II grievance hearing was held in the Town Manager's office to discuss Lt. Davis' three pending grievances.

CONCLUSIONS OF LAW

1) The Complaint herein is not barred by the election of remedies doctrine.

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 (3), (6) 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

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

John R. Capobianco, Member

Elizabeth S. Dolan, Member

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

Dated: February 18, 2003

By: Joan N. Brousseau, Administrator