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-5680

-AND-

STATE OF RHODE ISLAND, DEPARTMENT OF MHRH

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 (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated August 19, 2003 and filed on August 21, 2003 by RI Council 94, AFSCME, AFL-CIO Council (hereinafter "Union").

The Charge alleged:

> "The Department of MHRH (RICLAS) has violated the above cited paragraphs [6 and 10) by failing to honor a Special Purpose Agreement the parties negotiated by John Vars.

Following the filing of the Charge, an informal conference was held on September 1, 2003. The Board issued its Complaint on September 30, 2003 The Employer failed to file a formal answer in this matter. A formal hearing on this matter was held on November 6, 2003. Upon conclusion of the hearing, the parties filed written briefs. In arriving at the Decision and Order of Dismissal herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

FACTUAL SUMMARY

The Department of Mental Health, Retardation and Hospitals (MHRH), through its division known as Rhode Island Community Living and Supports (RICLAS) operates residential programs for clients with mental retardation and other developmental disabilities. RICLAS' residential facilities include group homes, supervised apartment

programs and three special living facilities which provide round the clock nursing care. The rank-and file staffing, "Community Living Aides", within the RICLAS facilities are members of Local 1293, Council 94. According to Union Exhibit #2 and #3, the job duties and responsibilities of the Community Living Aides (hereinafter "CLA's") include:

> "Health, hygiene care and training. Providing transportation to and from daysite and various other community settings in order to integrate consumers into their community/neighborhood. Duties also include shopping for food, clothing and supplies; cooking meals, cleaning the home; passing medications and doing treatments, as well as assisting consumers who can learn any of these tasks. An appropriate driver's license is required for this position. Staff may be required to follow consumers throughout the day in a variety of settings."

The salary range for these positions is $26,937.00 - $29, 261.00.

Historically, CLA's have been hired or have "bid" into one of three (3) work shifts at a specific work site. The work sites are referred to by name, which corresponds to the name of the street upon which the facility is located. Thus, CLA's assigned to a specific work site could not be moved or "floated" to another work site to fill vacancies or daily absences. Therefore, whenever an employee's absence on an upcoming shift would otherwise create an unsafe staffing level, mandatory overtime or "freezing in" would occur for the employees who were completing their regular shifts.

In March 2003, Gerald Clancy, the Associate Director of RICLAS had a meeting with Union officials and informed them that he intended to post all future vacancies for CLA's with a primary work site and a "float" feature. The "float" element of the position would permit the Employer to assign the CLA to a site other than his or her primary site, on an as-needed basis, to reduce the level of "freezing in".[1] The Union was adamantly opposed to the concept of adding the "float" element to the vacant positions for various reasons, including the fact that it was not the best approach for the clients who needed consistency in their care. After additional discussion, the Employer and the Union both reluctantly agreed to create a "float pool" of 10 positions that would be used to fill daily float assignments.[2] In April, 2003, the Employer posted the ten (10) "float pool" positions from April 11 through April 17. (Union Exhibit #2) As a result

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[1] Both the Union and the Employer indicated at the hearing that both parties were trying to reduce the amount of "freezing in".

[2] It should be noted that these 10 positions would be " fully" floated - that is both as to shift hours and days and as to work-site location.

of the "float pool" posting, either five or six float positions were filled.[3] The remaining 4 or 5 "float pool positions" were not reposted at any time. The parties memorialized the terms of the "float pool" by entering into a written "Special Purpose Agreement" dated May 5, 2003. (Union Exhibit #1)

On August 1, 2003, Mr. Clancy had a meeting with the Union and indicated that the Department would go forward with its original plan of posting CLA vacancies with a "float" component. That same day, the Employer posted thirty-one (31) openings for CLA positions with fixed work site locations and floating shifts. (Union Exhibit #3) On August 8, 2003, the Union notified the Department that it considered these latest postings to be violative of the "Special Purpose Agreement". (Union Exhibit #4) On August 19, 2003, the Union also filed a "class Action grievance with the Employer which alleged:

> "We are aggrieved by the State of RI for violation of Articles 1.40 and any other applicable articles of the Master Contract. A change in working conditions, without negotiating with the collective bargaining agent as in the past."

The Union sought the following remedy for the alleged class action grievance:

> "That the practice cease and desist and that all terms of working conditions be negotiated with the collective bargaining agent as in the past."

DISCUSSION

The threshold issue for this Board is whether or not the unfair labor practice charge in this case is barred by the election of remedies doctrine because of the Union's class action grievance. In order to make that determination, the Board must look to both the allegation and the remedy sought in each forum.

In its unfair labor practice charge, the Union alleged a failure to honor the special purpose agreement and sought a "cease and desist" remedy. In its class action grievance, the union alleged a change in working conditions without negotiating and sought a cease and desist remedy as well as an order to negotiate all terms of working conditions. In its post hearing brief to the Board however, the Union seeks not only compliance with the "Special Purpose Agreement" but also seeks a rescission of the thirty-one (31) "float component" positions that have been filled.

Since the Union did file a class action grievance concerning the float component of the thirty-one (31) positions posted in August 2003, this Board is precluded from

[3] None of the witnesses at the formal hearing could recall the exact number of positions filled.

considering the unfair labor practice charge to the extent that is seeks the same remedy Department of Environmental Management v RI State Labor Relations Board, 799 A.2d 274 (RI 2002). Therefore, as to the "float" component of the thirty-one positions posted in August 2003, the Union has elected its remedy by filing its class action grievance and the Board is precluded from hearing or ruling on that issue. The Board's authority in this case is strictly limited to the issue that was originally charged, to wit, whether the Employer failed to fully implement the "Special Purpose Agreement"

The Employer argues that it had no duty to negotiate the posting of vacant positions with the Union because management retains the exclusive right to determine whether it will initiate recruitment for vacant positions. The Employer acknowledges that once it has posted a vacant position, the seniority article of the collective bargaining agreement restricts management's rights to select an applicant and imposes controlling criteria such as seniority, bargaining unit membership, etc.

In its defense, the Employer also argues that the "Special Purpose Agreement" was not "bargained for", was not supported by any consideration and is not enforceable because it was merely a "conciliatory gesture" on the part of the Employer. The Employer claims that the union did not show or even claim that it agreed to do anything or that it made any concession in return for the employer's agreement to post the float pool assignments. With these contentions, the Board disagrees. There most certainly was "consideration" for this agreement. On cross examination, Mr. Clancy acknowledged that the Union was ready to fight the Employer on this issue and would file grievances, etc. Thus, the Union's forbearance on challenging the Employer's actions and continuing to work towards a favorable resolution (suggesting the float pool) certainly provided sufficient contractual consideration for this Agreement.

The Employer also argues that even though it wasn't required to enter the agreement and that the agreement wasn't even valid, that it did fulfill its agreement by posting the float pool positions. The Union argues that the Employer didn't fulfill the terms of the Special Purpose Agreement because the ten (10) "fully floating" positions were not filled after the first posting and that the Employer did nothing further to effectuate the terms of the Agreement. In essence, the Union argues that the Employer abandoned the agreement after the first round of hiring under the Agreement. The Union

also argues that the agreement requires that ten (10) and only ten (10) float positions *of any type* be filled and the situation reviewed after ninety (90) days. Therefore, at the end of its brief, the Union argues that the Employer unilaterally and without negotiations posted and filled thirty-one (31) CLA positions, with a float component.

The agreement itself is silent on the issue of CLA positions other than those which were contemplated by the statewide centralized "pool". The Employer argues that since the agreement is silent on those positions that it was completely free to post and fill the thirty-one additional positions in August 2003. The Union essentially argues that the Employer did not have the authority to move ahead with any other hiring unless and until it completed all terms of the Special Purpose Agreement; that is hiring five more CLA's and then reviewing the program ninety (90) days after all positions had been filled.

The Board has carefully reviewed the language of the Special Purpose Agreement and finds that the agreement is in fact silent on the issue of whether or not the Employer could fill other vacancies outside the scope of this agreement. It seems however, that if the parties had in fact agreed on such an issue, it would have been incorporated into this agreement. This Board has no authority to order such a term written into an agreement and cannot construe the agreement as if it were included therein. Thus, the subsequent posting and hiring in August of any type of CLA vacancy would appear to not be prohibited by this agreement.

As stated earlier, the Board does not have the authority to decide whether or not there has been a "unilateral change" to working conditions for those thirty-one (31) "float component" positions for three reasons: (1) The original unfair labor practice charge only alleges a failure to implement the Special Purpose Agreement; (2) The Union has already filed a class action grievance on the change of working conditions; (3) The Union specifically acknowledged that the posting of the thirty-one (31) positions in August 2003 is a separate issue that is the subject of the separate class action grievance.

The only issue then is whether or not the Employer acted in good faith in implementing the "Special Purpose Agreement", prior to deciding to fill the remaining vacancies in another manner. The evidence establishes that the Employer posted the ten (10) "full float" positions for a period of seven (7) days in April 2003, even before signing the "Special Purpose Agreement". The Employer was able to hire five (5)

employees for the float positions from this first posting. These acts certainly signal an intent to act in good faith. However, in the Board's opinion, the agreement does call for ten (10) positions to be actually filled as "float pool" positions and for a review ninety (90) days "after the float assignments are filled". Despite this requirement, the Employer did not ever re-post the five remaining positions. The Board does not find it reasonable for the Employer to have abandoned the agreement after one seven-day posting and move on its original plan to post all new vacancies with a float component. The Board finds this to be acting in bad faith in violation of R.I.G.L. 28-7-13 (10).

Unfortunately, since this Union has elected its remedy for the thirty-one (31) float component positions with the class action grievance and since the record suggests that neither the Union nor the Employer really want the "float pool", the Board's finding of an unfair labor practice is a "hollow victory" for the Union. Therefore the Board has struggled with finding an appropriate remedy for this case.

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, through its division known as Rhode Island Community Living and Supports (RICLAS) operates residential programs for clients with mental retardation and other developmental disabilities. RICLAS' residential facilities include group homes, supervised apartment programs and three special living facilities which provide round the clock nursing care.

4) Community Living Aides (CLA's) provide the day to day staffing at RICLAS' residential facilities.

5) Historically, CLA's have been hired or have "bid" into to one of three work shifts at a specific work site. CLA's assigned to a specific work site could not be moved or "floated" to another work site to fill vacancies or daily absences. When an employee's absence on an upcoming shift would otherwise create an unsafe staffing

level, mandatory overtime or "freezing in" would occur for the employees who were completing their regular shifts.

6) In March 2003, Gerald Clancy, the Associate Director of RICLAS, had a meeting with Union officials and informed them that he intended to post all future vacancies for CLA's with a primary work site and a "float" feature. The "float" element of the position would permit the Employer to assign the CLA to a site other than his or her primary site, on an as-needed basis, to reduce the level of "freezing in".

7) After additional discussion, the Employer and the Union both reluctantly agreed to create a "float pool" of ten (10) positions that would be used to fill daily float assignments. In April, 2003, the Employer posted the ten (10) "float pool" positions from April 11 through April 17. As a result of the "float pool" posting, either five (5) or six (6) float positions were filled. The remaining four (4) or five (5) "float pool positions" were not reposted at any time. The parties memorialized the terms of the "float pool" by entering into a written "Special Purpose Agreement" dated May 5, 2003.

8) On August 1, 2003, Mr. Clancy had a meeting with the Union and indicated that the Department would go forward with its original plan of posting CLA vacancies with a "float" component. That same day, the Employer posted thirty-one (31) openings for CLA positions with fixed work site locations and floating shifts.

9) On August 19, 2003, the Union filed a class action grievance that sought a cease and desist remedy and an order requiring that all terms of working conditions be negotiated with the collective bargaining agent, as in the past.

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 (10).

ORDER

1) The Employer is hereby ordered to comply with the terms of the "Special Purpose Agreement" by posting the next five vacant "Community Living Aide" positions as "float pool", unless the Union and the Employer hereafter agree in writing that they do not desire to fill all ten "float pool" positions.

RHODE ISLAND STATE LABOR RELATIONS BOARD

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

Dated: MAY 11, 2004

By: Robyn H. Golden
Robyn H. Golden, Acting Administrator

ULP-5680