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- STATE OF RHODE ISLAND, DEPARTMENT ELDERLY AFFAIRS	CASE NO: ULP-5833

DECISION AND ORDER

TRAVEL OF CASE

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as an Unfair Labor Practice Complaint (hereinafter "Complaint") issued by the Board against the State of Rhode Island, Department of Elderly Affairs (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated January 16, 2007 and filed on January 19, 2007 by the RI Council 94, AFSCME, AFL-CIO, Local 2895 (hereinafter "Union").

The Charge alleged violations of R.I.G.L. 28-7-13 (6) and (10) as follows:

> The State has requested and received bids from Vendors to contract out bargaining unit work for the Emergency Response Program for Elders in Crises without bargaining with the certified collective bargaining representative.

Following the filing of the Charge, an informal conference was held on February 16, 2007, with representatives of the Union and the Employer in attendance. On March 21, 2007, the Board issued its Complaint. The matter was heard formally on October 4, 2007. Representatives from both the Union and the Employer were in attendance and had full opportunity to present evidence and to examine and cross-examine witnesses. The Board received the Employer's Brief on October 24, 2007. After several requests by the Union for extension of time for filing of their Briefs, the Union's Brief was filed with the Board on January 4, 2008.

FACTUAL SUMMARY

The Rhode Island Department of Elderly Affairs operates a Unit which provides "elderly abuse protective services" and which operates a special phone line for reporting allegations of abuse or neglect. According to the testimony at hearing, when a call comes in on this line during the traditional work week (Monday through Friday, from 8:30 am to 4:30 pm), Ms. Marilyn Sales, a Principal Resource Specialist, takes the call. She uses an intake form and then brings the various cases to the attention of Mary Ladd, a Clinical Social Worker. Ms. Ladd testified that the calls are generally categorized as being in one (1) of three (3) general areas: elderly abuse, elderly self-neglect, or crisis/early intervention. If a call presents what might be an emergency situation, Ms. Sales brings the matter to Ms. Ladd's attention right away for follow-up. Prior to June 2007, this reporting phone line was equipped with a voice mail system. The Department also utilized a fax machine for reporting and referrals. When a call came in during evening and weekend hours, the message would be recorded and then addressed at the commencement of the next business day.

Ms. Paula Parker has been employed by the State of Rhode Island within the Department of Elderly Affairs as the Administrator of the Protective Services Unit since December 2005. She testified that sometime in 2005, she attended several meetings with community policing and community providers for the aging network to discuss the "gap" in services during nights and weekends. She testified that when police officers encountered an elder "in crisis" after the normal department work-day, they typically would bring the elder to a hospital emergency room because there was no other way to deal with the situation of an elder in crisis. As a result, Ms. Parker wrote a "white paper" proposing an after hours emergency response program and submitted it to the Governor's office for funding approval. Ultimately, the program was funded; an RFP was created; and then an award for the work was made to Family Service of Rhode Island (hereinafter "vendor").

POSITIONS OF THE PARTIES

The Union alleges that the State has transferred bargaining unit work to non bargaining unit members, without engaging in prior bargaining with the Union. The Union argues that the work which is being performed by the Vendor is by and large the exact same work that bargaining unit members have been performing for years during regular business hours.

The State's position is that the work being performed in the one (1) year pilot program is innovative and different and requires the use of licensed clinicians. The State argues that none of the bargaining unit members are licensed clinicians and therefore, could not have been performing the same work. The State argues that the work being done during the daytime by the State employees in the Elderly Affairs Unit is work that is related to preventing and dealing with abuse and neglect of elders. The State employees working in this division have back-up available to them during the daytime working hours via appropriately licensed administrators and legal counsel. The evening and weekend program deals with elders "in crisis" - which may or may not be an elder that has been abused or neglected, but could be someone whose caretaker has been suddenly hospitalized or other wise incapacitated, leaving the elder with no caregiver. The State argues that the program is designed to provide a clinical evaluation of elders in these types of emergency situations, to assess the appropriate response service or placement. The State argues that prior to the program, local police departments would simply transport an elder to the local emergency room- as being the safest alternative to leaving an elder at home alone.

SUMMARY OF TESTIMONY

The Union's first witness, Mary Ladd, a Clinical Social Worker for seven (7) years within the Department of Elderly Affairs. She explained the "Elderly Affairs Protective Services Intake Triage Form" which is a form that is used by the bargaining unit members during the regular workweek to log and categorize calls that come into the Protective Services Unit through a special telephone number. Ms. Ladd testified that Ms. Marilyn Sales, a Principal Resource

Specialist, generally answer the calls and that the call volume varies from ten (10) to twenty (20) calls per day. Ms. Sales will ask the caller the necessary information and then transcribe it onto the form. Once the form is completed, Ms. Sales puts it on Ms. Ladd's desk for review. If Ms. Sales feels that the caller has presented an emergency situation, she will bring it to Ms. Ladd's immediate attention. Once Ms. Ladd reviews the form, she then calls the reporter or may make other collateral calls to assess the situation and to categorize further as to whether the situation is an abuse, neglect, or financial exploitation.

Ms. Ladd testified that prior to June 2007, if a call came into the hotline after regular working hours, a message would be left on voice mail or a fax would be sent in. Then, the next working day, the Protective Services Unit staff would access the messages and begin triaging and assigning the cases. All these calls and resulting cases were regularly complied and reported on department forms. (Union # 4) Ms. Ladd testified that the number of hours per day that she would work on cases that came in overnight or on the weekend varied with the volume of calls or complexity of the cases. Some days she might work an hour and some days it might be as many as four (4) hours. On cross examination, she clarified that there are criteria on how certain calls are to be handled. For instance, if the caller presents an immediate situation, then a DEA case worker has to respond within 1-2 days. If the situation is not an emergency, then the scheduled response time is 3-5 days. Ms. Ladd testified that there are no licensed clinicians on the DEA staff that perform the previously described work during regular hours. Ms. Ladd testified that on the occasions when she is out of the office, whether on vacation or for any other reason, the work she performs is done by one of her supervisors.

The State presented the testimony of Paula Parker, the Assistant Administrator for Program & Planning who previously served as the Administrator of the Protective Services Unit. As Assistant Administrator for Program & Planning, Ms. Parker oversees the operations of the entire Unit and not the daily operations of the Protective Services Unit. Paula also develops policies for the Unit; serves as a liaison between other professionals that may be calling with

issues relating to the Protective Services Unit; and interprets legislation and provides supervision and support for the supervisor and staff concerning issues of a clinical nature.

Ms. Parker described elder abuse as not typically being a crisis situation. Usually, an elder's family is dysfunctional, leading to abuse. The department typically knows these elders and often there are on-going problems which are very difficult to resolve. Ms. Parker described an elder in crisis as being someone who perhaps has a mental illness or perhaps someone whose caregiver has died or been arrested. Ms. Parker testified that when calls come in during the day, there are many resources available for the staff to access to deal with their cases including legal counsel and licensed clinicians. These resources are not available after hours. Ms. Parker testified that prior to the pilot program, if police found elders in crisis when responding to calls, they would bring the elders to the local hospital emergency room, whether emergency care was warranted or not.

Ms. Parker explained that the new after hours program was designed to be staffed by licensed clinicians who would be able to understand crisis management; how to diffuse a situation; how to evaluate a client in terms of mental status and who could work closely with hospital and police personnel; and then prepare detailed reports for the department on a daily basis. She further testified that the social caseworkers in the bargaining unit are not licensed clinicians and are not required to have a master's level degree in social work. The personnel employed by the new program are licensed; and they could actually set up their own private practices and bill health insurance companies for their services.

Ms. Parker also testified that the work being done in the after hours program is not the same as the work being performed by the bargaining unit members. She also testified that she felt very strongly that the department would be acting irresponsibly to hold itself out to the community as having an emergency response program for elders in crisis, without staffing it with qualified clinicians. Ms. Parker described these licensed clinicians as "first-responder" type personnel.

On cross examination, Ms. Parker acknowledged that as of date of the formal hearing, the program had received approximately 106 calls and that approximately 1-2 site visits were actually made by the on-call clinician. She indicated that most of what had been done so far was over the phone evaluations, referral, and talk therapy.[1] She also reluctantly acknowledged that the department's policy (Union Exhibit #11) was that if the primary intake specialist (Sales) or triage specialist (Ladd) were not available, that the intake and triage work is performed by the social caseworkers. She also acknowledged that the job description for social caseworker requires the employees to have a high degree of social worker skills, including the identification and analysis of social problems. The social case worker is also required to exercise a wide degree of independent judgment, decision, and action. Ms. Parker also acknowledged that there are occasions during the day when the social caseworkers are, indeed, dealing with the same type of emergency situations being called in as occur during the nighttime hours.

DISCUSSION

The issue before the Board is whether or not the work being performed by the Vendor is the same work as is performed by the bargaining unit personnel. Ms. Parker was steadfast in her opinion that the work being performed by the vendor was not the same as that performed by the Protective Services Unit during the day. Of course, Ms. Parker's opinion is a conclusory one which must be examined against the facts in evidence and the testimony adduced at hearing.

The evidence established that the Protective Services Unit staff work essentially a regular Monday – Friday daytime workweek. The department maintains a "hotline" type telephone number that receives reports of suspected elder abuse, neglect, and financial exploitation. Normally, the calls are answered by Ms. Marilyn Sales, a Principal Resource Specialist, who fills out an intake form and transfers it to Ms. Mary Ladd, a Clinical Social Worker, who triages the cases and makes assignments to social caseworkers. The social caseworkers actually

[1] She also indicated that training for police and fire personnel had not yet taken place.

respond to the homes to make field determinations of what will be the next steps. However, when the Principal Resource Specialist and the Clinical Social Worker are both absent, the Social Caseworkers handle the intake functions and are assigned to this work on a rotating basis. (Union # 11 - Procedural Guidelines for Contingency Protocols in the Event of Coverage Gaps in the DEA Protective Services Program)

The evening program is handled in a similar manner, except for the type of staffing that is assigned. In the evening, however, when the calls come in, the caller may leave a routine message or may also beep the on-call clinician. The evidence shows that in the first few months of the program, approximately 106 calls were received and of those calls, the licensed clinician only responded to a scene 1-2 times. There was no testimony as to what the outcome was once the clinician arrived. There was no evidence that the clinicians are performing the functions of intake or triage any differently whatsoever than the daytime staff. In addition, the Request for Qualifications (Union Exhibit #4) indicated that the vendor would be required to train a telephone intake person to screen calls of an emergency nature. This individual would only need to have a bachelor's degree and experience working with elders. There can be no question that the functions to be performed for evening calls are indeed highly similar, if not the same as calls that come in during the day. While the testimony at the hearing indicated that the Vendor is actually having the clinician answer all the calls, the program was not designed to require the clinician to answer and assess the calls. Indeed, if it had been, that would require the Board to believe that elders in crisis in the evening are more "deserving" of the services of a licensed clinician, than elders in crisis during the daytime.

We find, therefore, that the work being performed within the grant program by the vendor, although not identical in all respects, is substantially the same as the work being performed by the Protective Services Unit staff during the daytime hours. As such, the work is bargaining unit work. Therefore, the performance of this work and the terms and conditions of employment for this work are subject to collective bargaining. Since the State has freely admitted that it did not engage in

collective bargaining over the subcontracting of this work, the State is guilty of an unfair labor practice.

FINDINGS OF FACT

1) The State of Rhode Island, Department of Elderly Affairs 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 Rhode Island Department of Elderly Affairs operates a Unit which provides, "elderly abuse protective services"; and which operates a special phone line for reporting allegations of abuse or neglect. During the traditional work week (Monday through Friday, from 8:30 am to 4:30 pm), the calls are generally answered by bargaining unit personnel and then categorized as being in one of three general areas: elderly abuse, elderly self-neglect, or crisis/early intervention.
4) If a call presents what might be an emergency situation, the matter is brought to the attention of Mary Ladd, a Clinical Social Worker.
5) In the evening hours, prior to June 2007, the caller may receive a recorded message directing the caller to leave a message or call back during regular business hours. Callers were also directed to call emergency services personnel if the situation so warranted.
6) When the Principal Resource Specialist and the Clinical Social Worker (daytime staff) are both absent, the work of answering and triaging calls is assigned to Social Caseworkers on a rotating basis, per departmental policy.
7) The Principal Resource Specialist, the Clinical Social Worker, and the Social Caseworkers all have the authority to contact Mental Health Agencies for assistance in appropriate circumstances.

8) The evening program was written to be grant-funded and to be staffed with a call coordinator and an on-call licensed clinician who would respond if necessary.

9) The work of answering calls, assessing and assigning cases, and responding according to a priority coding is bargaining unit work.

10) The State did not discuss or bargain the terms or conditions of employment in regards to hours, use of beepers or other elements of work for the evening program with the collective bargaining agent and assigned this bargaining unit work to an outside vendor.

CONCLUSIONS OF LAW

1) The Union has proven, by a fair preponderance of the credible evidence, that the Employer committed a violation of R.I.G.L. 28-7-13 (6) and (10).

ORDER

1) The Employer is hereby ordered to cease and desist from subcontracting out bargaining unit work until it has bargained the same in good faith with the certified bargaining representative.

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-	:	CASE NO: ULP- 5833
STATE OF RI, DEPARTMENT OF ELDERLY AFFAIRS	:	

NOTICE OF RIGHT TO APPEAL AGENCY DECISION PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of ULP No. 5833 dated December 16, 2008, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **December 16, 2008**.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: DECEMBER 16, 2008

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

RHODE ISLAND STATE LABOR RELATIONS BOARD

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

Dated: DECEMBER 16, 2008

By: _____
Robyn H. Golden, Administrator

ULP-5833