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-5872
-AND-	:	
STATE OF RHODE ISLAND DEPARTMENT OF HEALTH	:	

DECISION AND ORDER OF DISMISSAL

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 Health (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated August 23, 2007, and filed on August 27, 2007, by the Department of Health, Professional Staff Association/NEARI (hereinafter "Union.").

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

> "On April 26, 2004, Governor Carcieri directed the Chief Information Officer to "develop a plan to consolidate, integrate and coordinate IT resources...within the branches of the State of RI. The Professional State Association/NEA certified bargaining unit includes several positions, which perform IT functions at the State of RI -Department of Health. On June 21, 2006, Patricia Luccarelli, Esq., confirmed to NEARI that the "state will not effectuate any employee transfers without complying with its contractual and/or legal obligations under the Collective Bargaining Agreement with the union and the applicable Rhode Island law." On July 19, 2007, Anna Sullivan, President of the PSA/NEA bargaining unit was notified by the Director of Administration that she was willing to meet with the Union to discuss the State's plan for reorganization and to develop a "mutually acceptable procedure for dealing with bargaining unit members affected by the State's reorganization plan" and that Ms. Sullivan should contact John Breguet, Esq. to schedule a meeting for such purpose. In response, President Sullivan contacted John Breguet, Esq. and scheduled a meeting for August 22, 2007 for the purposes set forth in the Director's letter. In total disregard for the letter of July 19th and the pending meeting of August 22nd, on August 3, 2007, the Director of Administration notified PSA/NEA members that effective September 30, 2007, that she was "transferring their positions to the Department of Administration."

> The August 3, 2007 letter from the Director of Administration to PSA/NEA bargaining unit members notifying them that their positions have been transferred from the Department of Health to the Department of Administration constitutes: 1) Unilaterally and unlawfully undertaking action to remove positions from a certified bargaining unit by a governmental entity without statutory authority to do so. 2) Bargaining in bad faith as evidenced by making a request to the Union to meet to develop mutually acceptable procedures and then implementing the reorganization prior to and in complete disregard for said meeting. 3) Failing and refusing to bargain with the Union despite clearly acknowledging the duty to bargain a mutually acceptable procedure the dealing with bargaining unit members affected by the planned reorganization. 4) Intimidation and coercion of bargaining unit members in the exercise of protected rights. 5) Interfering with the administration of the Union by unilaterally excluding positions in the certified bargaining unit. 6) A complete and utter disregard for the rights of employees and their certified bargaining representatives as set forth in RIGL 28-7-12.

Following the filing of the Charge, an informal conference was held on October 31, 2007 in accordance with R.I.G.L. 28-7-9. On December 31, 2007, the Board issued its Complaint alleging:

> "The Employer violated RIGL 28-7-13 (6) and (10) when it: (1) Unilaterally excluded positions from bargaining units prior to the processing of removal petitions filed with the State Labor Relations Board, through its agents; and (2) bargained in bad faith by offering to meet to discuss a mutually acceptable plan for dealing with bargaining unit members affected by the State's reorganization plan and then implementing the reorganization plan prior to discussing a mutually acceptable plan."

The Employer filed its response to the Complaint on January 9, 2008. On January 23, 2008, the Employer filed a Motion to Amend its Answer to add the affirmative defense of the "Election of Remedies," which was granted by the Board on October 14, 2008, over the Union's objection.

The matter proceeded with two (2) formal hearings, which were held on March 20, 2008 and June 5, 2008. Representatives from the Union and the Employer were present at the hearings and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. Upon conclusion of the formal hearing, the Union filed a Brief of July 31, 2008 and the Employer filed its Brief on August 1, 2008. The Union filed a Reply Brief on August 28, 2008 and the Employer filed a Reply Brief on September 3, 2008.

FACTUAL SUMMARY

The Employer and the Union have long been parties to a Collective Bargaining Agreement. The operative Agreement at the time of this dispute covered the period July 1, 2005 through June 30, 2008. (Employer Exhibit #1) Within that agreement is a bargained for provision dealing with the issue of "Reorganization", Article 11.17. (Id at p. 21) As the result of an Executive Order issued on April 26, 2004, the Employer decided ultimately to reorganize its Information Technology ("IT") personnel into a centralized manner within the Department of Administration, as opposed to having IT personnel scattered through-out the state. On July 17, 2007, Ms. Beverly Najarian, the Director of the Department of Administration, issued a letter to Ms. Anna Sullivan, in her capacity as the President of PSA/NEARI, advising of the Employer's intention to reorganize. Employer Exhibit #3, Union Exhibit #6) Within that letter, Ms. Najarian issued an invitation to the Union to meet to review and discuss the state's plan for reorganization and to develop a mutually acceptable procedure for dealing with the bargaining unit members affected by the reorganization plan. After receiving the letter, Ms. Sullivan contacted the Employer's attorney and they scheduled a meeting for August 22, 2007. On August 3, 2007 Director Najarian issued a letter to all affected employees, which stated in part:

> "In order to achieve those objectives, I am transferring your position to the Division of Information Technology within the Department of Administration with the concurrence of the Personnel Administrator, effective September 30, 2007. This action is in accordance with the authority vested in me by 36-4-34.1 of the Rhode Island General Laws of 1956, as amended. It is important to note that you will remain in your current classification and pay grade."

After the Union learned that these letters went out, Ms. Sullivan had a conversation with the Employer's Attorney wherein she inquired as to whether Attorney Breguet had any authority to stop the reorganization. He replied that he did not and that the Union representatives would need to speak to Director Najarian if that was the Union's goal. Ms. Sullivan then canceled the August 22, 2007 meeting and shortly thereafter, the Union filed the instant charge of Unfair Labor Practice. On September 24, 2007, the Employer

scheduled a meeting for all Unions with members affected by the reorganization to come in and discuss the matter. Several Union representatives attended and participated in the meeting, however, PSA/NEARI's representatives, Patrick Crowley, Ms. Sullivan, and other PSA/NEARI members walked out of the meeting after a approximately twenty (20) minutes. On September 30, 2007, the transfers were effectuated, but the affected employees remain members of the Union.

On or about December 5, 2007, the Union filed a grievance, G-8071, with the Department of Administration. (Employer's Exhibit # 7) The grievance was heard and denied by Hearing Officer, Belinda McLaughlin. (Employer's Exhibit # 8) The Union then filed for Arbitration on or about March 3, 2008. (Employer's Exhibit # 9).

DISCUSSION

The Union argues that the Employer has unilaterally removed bargaining unit positions from the bargaining unit and that the Employer bargained in bad faith when it unilaterally implemented the reorganization prior to meeting to discuss a mutually acceptable plan. The Union also argued, in its Reply Brief, that the Governor's Executive Order does not supersede the duty to bargain in good faith and that the Union did not waive the State's duty to bargain.

The Employer argues: (1) That the Employer has the constitutional right, statutory right, and contractual right to reorganize and centralize its functions and that when the State exercises these rights, there is no unfair labor practice. (2) The Employer met any legal requirement to bargain by negotiating Article 11.17 in the Collective Bargaining Agreement and that the Employer is not obligated to do anything other than what is required by Article 11.17. (3) The Union failed to prove that any positions were moved from the bargaining unit, as charged. (4) The Union's claim is barred by the Election-of-Remedies Doctrine.

Since the Employer's affirmative defense of the "Election-of-Remedies" Doctrine is jurisdictional, we will address that issue first. The Election-Of-Remedies Doctrine was first applied by the Rhode Island Supreme Court to this Board's subject matter jurisdiction in State of Rhode Island, Department of

Environmental Management v Rhode Island State Labor Relations Board, 799 A.2d 274 (R.I. 2002) (hereinafter referred to as the "DEM" case). In that case, the Union had filed a grievance over the State's posting of a job, without first negotiating terms and conditions of employment with the Union. The Union lost the grievance, and did not pursue it further in arbitration. The Union had also filed an unfair labor practice change which this Board upheld. The Board's decision was upheld by the Superior Court, but later reversed by the Supreme Court which held that the "Election-of-Remedies" Doctrine is applicable to actions taken and heard by the Labor Board in the same manner as a complaint for Judicial Relief," and that once the Union elected and later abandoned its remedy [grievance/arbitration], the case was not appropriately before the Labor Board, nor was the dispute ripe for judicial review. Id

According to the evidence in this case, after the Union filed its charge of Unfair Labor Practice, but before we issued our Complaint, the Union filed a grievance with the Department of Administration. (Employer Exhibit # 7) Belinda McLaughlin heard the grievance, (#G-8071 C/A Management Rights/Seniority-Reorganization of IT Personnel to DOA) on December 19, 2007. (Employer Exhibit # 8) Because the Exhibit submitted is an unsigned version of the Hearing Officer's Decision, it is unclear on the record when it was issued. However, on March 3, 2008, the Union filed a Demand for Arbitration with the Labor Relations Connection. (Employer Exhibit #9) In that Demand for Arbitration, the Union sought the following remedy, "Keep all impacted members within the bargaining unit." The record is not clear as to the disposition of that matter, but in this case the Union seeks essentially the same remedy, to "reinstate the affected members as employees of DOH." In DEM, both the Union and this Board argued to the Court that the remedies sought by the Union from the Labor Board were separate and distinct and that the Election-of-Remedies Doctrine should not apply. The Court disagreed, saying, "the Election-of-Remedies Doctrine is equitable in nature and has at its core the salient purpose of preventing unfairness to the parties" (for having to proceed in two (2) separate forums.) (CITE) In this case, while the timing of filings differs than those in the

DEM case, we believe that the Election-of-Remedies Doctrine is nonetheless applicable. The Union has filed a grievance and proceeded to the Arbitration process and has pursued its remedy of keeping the employees within the bargaining unit through an alternate process. The Union has, therefore, elected its remedy and the Board, in accordance with the Court's holding in State of Rhode Island, Department of Environmental Management v Rhode Island State Labor Relations Board, 799 A.2d 274 (R.I. 2002), has no jurisdiction to consider the Union's request for relief. Also see Cipolla v. Rhode Island College Board of Governors for Higher Education, 742 A.2d 277, 281 (R.I. 1999), Rhode Island Employment Security Alliance v. State Department of Employment and Training, 788 A.2d 465 (R.I. 2002)

FINDINGS OF FACT

1) The State of Rhode Island - Department of Health 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 July 17, 2007, Ms. Beverly Najarian, the Director of the Department of Administration, issued a letter to Ms. Anna Sullivan in her capacity as the President of PSA/NEARI, advising of the Employer's intention to reorganize. (Employer Exhibit #3, Union Exhibit #6) Within that letter, Ms. Najarian issued an invitation to the Union to meet to review and discuss the state's plan for reorganization and to develop a mutually acceptable procedure for dealing with the bargaining unit members affected by the reorganization plan.

4) After receiving the letter, Ms. Sullivan contacted the Employer's Attorney and they scheduled a meeting for August 22, 2007.

5) On August 3, 2007 Director Najarian issued a letter to all affected employees, which stated in part:

> "In order to achieve those objectives, I am transferring your position to the Division of Information Technology within the Department of Administration with the concurrence of the Personnel Administrator, effective September 30, 2007. This action is in accordance with the authority vested in me by 36-4-34.1 of the Rhode Island General Laws of 1956, as amended. It is important to note that you will remain in your current classification and pay grade."

6) After the Union learned that these letters went out, Ms. Sullivan had a conversation with the Employer's Attorney wherein she inquired as to whether Attorney Breguet had any authority to stop the reorganization. He replied that he did not and that the Union would need to speak to Director Najarian if that was the Union's goal. Ms. Sullivan then canceled the August 22, 2007 meeting and shortly thereafter, the Union filed the instant Charge of Unfair Labor Practice.

7) On September 24, 2007, the Employer scheduled a meeting for all Unions with members affected by the reorganization to come in and discuss the matter. Several Unions attended and participated in the meeting; however, PSA/NEARI's representatives, Patrick Crowley, Ms. Sullivan, and other PSA/NEARI members walked out of the meeting after a approximately twenty (20) minutes.

8) On September 30, 2007, the transfers were effectuated, but the affected employees remain members of the Union.

9) On December 5, 2007, the Union filed a grievance with the Department of Administration, G-8071.

10) The grievance was heard on December 19, 2007 by Hearing Officer, Belinda McLaughlin, and was subsequently denied.

11) On March 3, 2008, the Union filed a Demand for Arbitration with the Labor Connection, seeking to "Keep all impacted members within the bargaining unit."

CONCLUSIONS OF LAW

1) The Board does not have subject matter jurisdiction to make a finding of Unfair Labor Practice, because there has been an Election-of-Remedies by the Union which has proceeded with the grievance/arbitration process.

ORDER

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

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 RI – DEPARTMENT OF HEALTH	CASE NO: ULP-5872

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 Case No. ULP-5872 dated October 13, 2009 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **October 13, 2009**.

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

Dated: October 13, 2009

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member (Dissent)

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

John R. Capobianco, Member (Dissent)

Elizabeth S. Dolan, Member

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

Dated: October 13, 2009

By: _____
Robyn H. Golden, Acting Administrator

ULP-5872