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- TOWN OF WARREN	:	CASE NO. ULP-6371

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 Town of Warren (hereinafter "Employer" or "Town") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated May 23, 2023 and filed by the United Steelworkers Local 14845 (hereinafter "Union").

The Charge alleged as follows:

> The Town of Warren has retaliated against the Union for exercising its rights pursuant to the CBA for filing grievances and prohibited practices charges pursuant to RI State Law 28-7-13 by terminating light duty assignments.

Following the filing of the initial Charge on May 31, 2023, each party submitted written position statements as part of the Board's informal hearing process. On August 10, 2023, the Board issued its Complaint, alleging the Employer violated R.I.G.L. § 28-7-13 (8) and (10) when, through its representative, the Employer (1) retaliated and/or discriminated against members of the bargaining unit for exercising their rights under the State Labor Relations Act; and (2) retaliated and/or discriminated against members of the bargaining unit when it altered the light duty work assignments of bargaining unit members because they exercised their rights under the collective bargaining agreement by filing grievances and State Labor Relations Act by filing an unfair labor practice Charge. After several postponements, the Board held a formal hearing for this matter on February 20, 2024. Post-hearing briefs were filed by the Employer on April 11, 2024 and the Union on April 15, 2024. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and exhibits submitted at the hearing and the arguments contained within the post-hearing briefs submitted by the parties.

FACTUAL SUMMARY

The matter before the Board is the Union's claim of an unfair labor practice against the Employer due to the Employer's alleged retaliatory action against bargaining unit

members by altering the conditions of their light duty work assignment because the Union filed grievances under the collective bargaining agreement and an unfair labor practice Charge under the Rhode Island State Labor Relations Act (hereinafter "Act").

The facts surrounding this unfair labor practice Complaint are, for the most part, not in dispute between the parties. The Union and the Employer were, at all times relevant to the instant proceedings, subject to a collective bargaining agreement dated July 1, 2021 through June 30, 2024 (Joint Exhibit 1). As is relevant to the instant matter, the Union represents employees in the Employer's Public Works Department (DPW). (Joint Exhibit 1, Article I, Section 1). At the time of the claimed unfair labor practice, the DPW was headed by Brian Wheeler who had been DPW Director since March 2022. (Tr. at page 16).[1] Prior to Mr. Wheeler becoming DPW Director, the position had been held by Jan Malik who was DPW Director for approximately 10 to 12 years. (Tr. at page 16).

Stephen Marques is a member of the relevant bargaining unit and had been a Leadman in DPW for approximately 10 years when the events that are the subject of the present unfair labor practice occurred. (Tr. at page 15).[2] Marques also served as a "Unit Griever" which is a position in the Union that is responsible for filing grievances based on alleged violations of the CBA. (Tr. at pages 60 – 61). In or around December 2022, Marques learned that DPW Director Wheeler was giving the Working Foreman (a bargaining unit position) a take home vehicle so that he (the Working Foreman) could respond to emergency calls whenever they arose. (Tr. at page 25; 103 – 104). Shortly after learning this information about Wheeler's decision to provide a take home vehicle to the Working Foreman, Marques had a discussion with Director Wheeler in which Marques informed the Director that a take home vehicle was not part of the Working Foreman position and was a benefit to the position that was not negotiated with the Union. The Director responded to Marques that he "felt he was within his rights" to take the action he had. (Tr. at pages 25 – 26). Not satisfied with the Director's response, on December 28, 2022 Marques filed a grievance. (See Tr. at pages 24; 26; Petitioner Exhibit 2). According to Marques's testimony, this was the first grievance that he had filed since Wheeler became DPW Director in March 2022. (Tr. at pages 26 – 27).[3] Director Wheeler denied the grievance on December 29, 2022. (Petitioner Exhibit 3). The Union did not accept the Director's denial and filed for arbitration pursuant to the CBA. (Tr. at pages 27 – 28).

---

[1] The "Tr." abbreviation refers to the transcript of the formal hearing held on February 20, 2024. The Board only held one formal hearing in this matter.

[2] At the time of the formal hearing, Marques testified he had been a Leadman for "around 11 years." The events that are the basis of the unfair labor practice occurred in December 2022 and the early part of 2023.

[3] The Employer disputed the Union's claim that the take home vehicle grievance was the first grievance filed by the Union since Wheeler became DPW Director. (See Tr. at pages 102 – 103). However, the Employer did not submit as exhibits these other grievances. In any event, there was no dispute between the parties that the take home vehicle grievance was the first grievance to proceed to arbitration since Wheeler became DPW Director. (Tr. at page 103).

As noted above, Marques was a long-time member of the bargaining unit. As a Leadman, Marques would receive job assignments from the Foreman and then "instruct the guys on what materials or trucks we're going to need, any equipment, and then we'll go to the job." (Tr. at page 15). As a Leadman, Marques is on the job supervising the work of other bargaining unit members. (Tr. at page 15). Marques suffered a neck injury in 2017 while on the job. (Tr. at page 17). He required surgery and rehabilitation, but eventually was cleared to return to work with restrictions. (Tr. at pages 17 – 18; Petitioner Exhibit 1).[4] According to Marques's medical note, the work restrictions included "no lifting over 20-25lbs." (Petitioner Exhibit 1). Marques testified that when he returned to work in June 2020, he presented his medical note to then DPW Director Malik and explained to him the medical procedure he had gone through and the work restrictions placed on him by his physician. (Tr. at page 19). According to Marques, the Town accommodated his restrictions without any apparent problem. (Tr. at page 20).

In November 2020, Marques, after being questioned by Director Malik as to whether he would be able to drive a snowplow truck during the winter season, obtained a note from his physician indicating that he was able to drive a plow truck "as tolerated." (Tr. at page 21; Petitioner Exhibit 1 at page 2). However, during the first storm Marques hit a manhole cover with the plow and reinjured his neck. (Tr. at page 22). Marques was out of work again and this time when he returned in February 2021 his restrictions included "no driving plow truck." (Tr. at pages 22 – 23; Petitioner Exhibit 1 at page 3). According to Marques, the Town was able to accommodate this added restriction. (Tr. at page 23).

Marques apparently worked under the above noted restrictions without incident or issue until January 2023 when he once again reinjured his neck. (See Tr. at pages 28 – 29). Marques was eventually cleared to return to work in May 2023 with the same physical restrictions he had when he returned to work in 2021, i.e., "no repetitive or prolonged cervical extension, no lifting more than 20 - 25 pounds, and the no driving plow trucks." (Tr. at pages 29 – 30; Petitioner Exhibit 1). Marques notified the Town's Worker's Compensation adjuster, Cindy Smith, on May 24 that he had been cleared to return to work with the same restrictions he had previously had in place. (Tr. at page 33). Marques reported to work on May 25, 2023 and testified that he presented his medical note with restrictions to Director Wheeler. (Tr. at page 33). Marques testified that during this meeting at which he gave his medical note to Wheeler, Director Wheeler told Marques that he didn't know Marques had work restrictions and that Wheeler was sending him home. (Tr. at page 33). Marques questioned why he was being sent home since he had the same restrictions in place since his initial injury several years earlier. (Tr. at page 34). There was a back and forth between Wheeler and

---

[4] According to Marques testimony, after the initial injury he went for treatment, had surgery and returned to work. However, he continued to have pain which ultimately led to a second surgery and a return to work in June 2020 with restrictions. There was no testimony as to whether Marques had restrictions in place when he returned to work after the first surgery, the date of the first surgery or the date Marques returned to work. The record does not contain any medical notes for Marques dated prior to June 15, 2020. (See Petitioner Exhibit 1).

Marques, with Marques reminding Wheeler that he had been doing his job with the restrictions and that there had been no complaints about his work and Wheeler indicating that work restrictions "had become a problem." (Tr. at page 34; Petitioner Exhibit 4). Marques also raised with Wheeler during this conversation the fact that there were other employees who were then working with restrictions and were not being sent home. According to Marques, Wheeler responded that "he was going to be addressing it with them." (Tr. at pages 34 – 35; see also Petitioner Exhibit 4). Marques was sent home on May 25, 2023. (See Petitioner Exhibit 10). Marques did not return to work until sometime in October 2023.[5] During his time out of work, Marques contacted the Town on several occasions regarding his circumstances and though he was told someone would contact him, no one ever did. (Tr. at pages 40 – 47; Petitioner Exhibits 5 – 7).

As noted above, on May 24 the day before he was scheduled to return to work, Marques contacted the Town's insurance adjuster, Cindy Smith, to let her know that he was cleared to return to work with the same restrictions he previously had in place. (Tr. at page 33). Sometime thereafter on May 24, Smith contacted Wheeler by email to let him know that Marques was returning to work with a medical note with restrictions. (Tr. at pages 84 – 85). Also on May 24, the day before Marques was to return to work, Director Wheeler testified that he met with Smith, the Town Manager and the Town Human Resources representative to develop a policy to prevent anyone with restrictions from returning to work. (Tr. at pages 78; 94 – 96; 107 – 110). The policy was not in writing and was not posted on any communal bulletin boards or in places where employees would normally congregate. According to Director Wheeler, the policy was to be communicated by word of mouth. (Tr. at pages 107 – 110).

Wheeler testified that since his arrival as DPW Director in March 2022, he had been trying to better organize how files were maintained, what happened to doctor notes and generally getting a handle on policies and procedures. (Tr. at pages 70 – 73; 74 – 76). In focusing on doctor's notes received from employees, Wheeler testified that he was receiving multiple notes that were "restricting work to the point where we couldn't continue operations effectively." (Tr. at page 70). He testified that DPW did not have a light duty policy and that there was no light duty language in the CBA. (Tr. at page 79). He also testified that the overall situation was "frustrating." (Tr. at pages 70; 71). Wheeler further testified about a situation involving one employee, Vincent Arrenegado, who presented a note with restrictions, but when he was instructed to do a job within his medical restrictions (using a chain saw that weighed less than the 20 pound restriction in his medical note) Arrenegado balked at doing the job and then went and got a revision to his medical restrictions lowering the weight restriction to 5 pounds. (Tr. at page 71). According to Wheeler, it was these various issues that propelled him to want a policy that would prohibit anyone with a restriction from being able to work. (Tr. at page 71; 74 – 75). According to Wheeler's testimony, he brought this issue to human resources and the insurance

[5] While he was out of work, the parties agree that Marques did not suffer a loss of pay or benefits. (Tr. at pages 48; 51 – 52; 79).

company and the Town Manager to try and get a resolution. (Tr. at pages 72 – 73; 74 – 76). These discussions, according to Wheeler's testimony, led to the implementation of the no work with restrictions policy that he testified was put in place on May 24, 2023. (Tr. at pages 78 – 79; 94 – 96; 98; 107 – 109). As previously noted, Wheeler conceded during his testimony that the policy was not in writing, was not emailed to employees and would be communicated only by word of mouth. (Tr. at pages108 – 110).

As noted above, when Marques returned to work on May 25, 2023, he testified he gave his return-to-work medical note with restrictions to Wheeler. (Tr. at page 33).[6] It was at this time that Wheeler informed Marques that he was being placed back on Workers' Compensation and would not be allowed to return to work. (See Petitioner Exhibits 4 and 10). In addition to Marques, two other employees who had been working with medical restrictions prior to Marques's return to work on May 25, Arrenegado and Marco Carreiro, were also informed by Wheeler that they would no longer be allowed to work with their restrictions and were being placed back on Workers' Compensation. (See Petitioner Exhibits 11 and 12;[7] Tr. at pages 56 – 60; 76 – 78; 86 – 87). After Marques and Arrenegado were placed back on Workers' Compensation, the Union filed its Charge with the Board.

POSITION OF THE PARTIES

Union:

The Union asserts that the Employer engaged in an unfair labor practice when it retaliated and/or discriminated against bargaining unit members by altering their light duty assignments because the Union filed a grievance against the Town for providing a benefit (i.e., a take home vehicle) to a working foreman, a bargaining unit member, that was not included in the CBA and that had not been negotiated with the Union and for filing an unfair labor practice Charge with the Board regarding the same issue.

Employer:

The Employer contends that it did not violate the Act when it altered how it addressed light duty assignments. The Employer argues that the Management Rights clause of the collective bargaining agreement authorized its action. Further, the Employer asserts that it did not retaliate against any employees, nor did it act because the Union exercised its rights under the collective bargaining agreement.

---

[6] There was some confusion in the record as to whether Wheeler agreed that he received the medical note Marques testified he gave to Wheeler upon his return to work on May 25, 2023. (See Tr. at pages 80 – 82; 84 – 85; Petitioner Exhibit 4). There is no document in the record before this Board that shows the medical note. (See Tr. at 52 – 53; 54 – 55; Petitioner Exhibit 1). Wheeler did testify that he had been informed of the contents of Marques's medical note from an email sent to him by Cindy Smith, the Employer's Workers' Compensation representative, on May 24, 2023. (Tr. at pages 76; 84 – 85; 89). Further, Wheeler confirmed during his testimony that he did not challenge or question the authenticity or validity of the medical restrictions contained in the information provided to him by Ms. Smith. (Tr. at pages 89 – 90).

[7] The documents labeled Petitioner Exhibits 11 and 12 were submitted to the Board at the Board's request after the close of the formal hearing in order to try and have a complete record. (Tr. at pages 86 – 88).

DISCUSSION

The issue before the Board is whether the actions of the Employer in unilaterally altering how it managed light duty assignments, i.e., prohibiting employees with medical work restrictions from working light duty, was in retaliation for the Union exercising its rights under the CBA and whether such action by the Employer was in violation of the Act. The Employer, as noted above, denies any wrongdoing or any violation of the Act.

A. The Employer Engaged in Improper Conduct Under the Act

As noted above, the allegations against the Employer center around whether it retaliated against members of the bargaining unit by altering, i.e. discontinuing, their ability to work light duty while on medical work restrictions because the Union exercised its rights under the collective bargaining agreement when it filed a grievance against the Employer for providing a benefit to a bargaining unit member that was not contained in the CBA and was not negotiated with the Union and when the Union filed an unfair labor practice Charge regarding the same issue.

As set forth in R.I.G.L. 28-7-2(d), it is the public policy of the State of Rhode Island

> to protect employees in the exercise of full freedom of association, self organization, and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint, or coercion of their employers.

When an employer interferes in, restrains or coerces employees from exercising their rights as provided for under the Act, the employer commits an unfair labor practice. See *Rhode Island State Labor Relations Board and Rhode Island Council on Elementary and Secondary Education/Rhode Island Department of Elementary and Secondary Education*, ULP-6297 (September 5, 2023); see also *United States Postal Service*, 352 NLRB 923 (2008); *Post Tension of Nevada, Inc.*, 352 NLRB 1153 (2008).[8] As the language of the Act makes clear, the ambit of the above provision is broad and wide ranging, but for a violation to be found the protected activity engaged in by the employee must be "concerted," that is, undertaken together by two or more employees, or by one employee on behalf of others. See *Rhode Island State Labor Relations Board and Rhode Island Council on Elementary and Secondary Education/Rhode Island Department of Elementary and Secondary Education*, ULP-6297 (September 5, 2023); *Air Contact Transportation*, 340 NLRB 688 (2003); *White Oak Manor*, 353 NLRB 795 (2009).

The language in R.I.G.L. 28-7-2(d) and 28-7-12 is similar to the language in Section 7 of the National Labor Relations Act (NLRA). Thus, similar to the NLRB, this Board is

---

[8] This Board and the courts of this State have, with respect to labor law issues, consistently looked to federal labor law for guidance. (*See Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO,* 107 A.3d 304 (R.I. 2015); and *Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d 113, 120 (R.I. 2007); see also *DiGuilio v. Rhode Island Brotherhood of Correctional Officers*, 819 A.2d 1271, 1273 (R.I. 2003); *MacQuattie v. Malafronte*, 779 A.2d 633, 636 n.3 (R.I. 2001)). Thus, as appropriate, the Rhode Island Supreme Court has adopted federal labor law case decisions. (*See Belanger v. Matteson*, 115 R.I. 332, 338 (R.I. 1975)).

empowered by R.I.G.L. 28-7-20 to enforce the provisions of the Act that protect employees against employer interference, restraint or coercion in the exercise of their rights unrelated to union organizing. This enforcement authority extends to preventing unfair labor practices where an employer seeks to interfere with, restrain or coerce employees in the exercise of their rights under R.I.G.L. 28-7-12 and/or engages in discriminatory conduct that is motivated by union animus. (See R.I.G.L. 28-7-13, subsections 8 and 10). To find a violation of the Act under any of the above provisions, there must be evidence presented that the employer had knowledge that the employee was engaged in protected activity and that the action taken by the employer was due to the employee's union activity. As mentioned above, to be protected, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid and protection." See *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3d Cir. 1980); *Hospital Cristo Redenter, Inc. v. NLRB*, 488 F.3d 513 (1st Cir. 2007); *Weldon, Williams & Lick, Inc.*, 348 NLRB 822 (2006); *North Carolina Prisoner Legal Services*, 351 NLRB 464; *Five Star Mfg.,* 348 NLRB 1301 (2006). In most cases, in order to prove that the employer's action or conduct violated the Act, it first must be established that prior to the action or conduct in question the employer had knowledge of the effected employee's union activities. *North Carolina Prisoner Legal Services*, 351 NLRB 464; *Five Star Mfg.,* 348 NLRB 1301 (2006); *NLRB v. Yellow Transportation, Inc.*, 343 NLRB 43 (2004).

1. Employer Knowledge

In the instant case, the knowledge of the Employer that Marques was involved in Union activity was both obvious and straightforward. Marques testified that he learned Director Wheeler had provided the working foreman, a bargaining unit position, with a take home vehicle so the working foreman could respond to emergency calls. (Tr. at page 25). Upon learning this information, Marques went to Director Wheeler to discuss what he had done in providing a take home vehicle to a bargaining unit member without the benefit having been negotiated with the Union. (Tr. at page 26). Director Wheeler told Marques that he (the Director) believed he was within his rights to provide the take home vehicle to the working foreman. (Tr. at page 26). Marques testified that he informed Director Wheeler that he would be filing a grievance and, in fact, on December 28, 2022 a grievance was filed by Marques. (Tr. at page 26; Petitioner Exhibit 2). On December 29, 2022, Director Wheeler denied the grievance in writing. (Petitioner Exhibit 3). Thereafter, the Union filed a demand for arbitration pursuant to the CBA.

There can be no question that, in the instant case. Wheeler had knowledge that Marques was a Union member and, most importantly, that Marques filed the grievance challenging Wheeler's action of providing a take home vehicle to the working foreman. As contained in the grievance, Marques signed as being the individual who "reported" the grievance. (Petitioner Exhibit 2). In addition, there is no evidence in the record that Wheeler denied knowing or understanding that Marques had filed the grievance on December 28, 2022. Therefore, the Board has determined that the Employer had

knowledge of Marques Unionactivity before the date (May 25, 2023) on which the alleged retaliation, i.e., Marques being placed on Workers' Compensation instead of being returned to work with restrictions, occurred.

2. The Concerted Activity

The rights of employees are set forth in R.I.G.L. § 28-7-12 of the Act. One of these rights is to engage in what is termed "concerted activity". Interference, restraint or coercion in the exercise of these additional rights under the Act or discrimination by an employer against employees for engaging in such concerted activities violates the Act. The term "concerted activities" is intentionally broad. However, for "concerted activities" to be protected, the employee activity that is undertaken must be done by two or more employees or by one employee on behalf of other employees. The NLRB has determined, for example, that a conversation involving only a speaker and a listener may constitute concerted activities if it has some relation to group action in the interest of employees (*see Mushroom Transportation Company v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964); *see also Mobile Exploration and Producing U.S. v. NLRB*, 200 F.3d 230 (5th Cir. 1999)). To be protected under the Act, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection". Thus, the concert requirement of the Act has not been literally construed to limit protection solely to employee activity involving group action directly. In determining whether activity by a single employee is concerted, the NLRB (and this Board) will look to the purpose and effect of the employee's actions. (*See NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2nd Cir. 2001); *Rhode Island State Labor Relations Board and Rhode Island Council on Elementary and Secondary Education and Rhode Island Department of Elementary and Secondary Education*, ULP-6297 (September 5, 2023)). In the instant case, as will be discussed below, the evidence presented demonstrated that the conduct the Union alleges Marques engaged in that constituted protected, concerted activity, i.e., his filing a grievance pursuant to the collective bargaining agreement, was protected activity under the Act.

From the Board's review of the testimonial and documentary evidence and the arguments contained in the respective memoranda of law, it is undisputed that Marques, as the so-called "Union Griever", filed a grievance on December 28, 2022 challenging Director Wheeler providing a take home vehicle to the working foreman (a bargaining unit position) and calling in the working foreman for overtime. (Petitioner Exhibit 2). There can be little doubt that the filing of a grievance pursuant to a collective bargaining agreement is protected, concerted activity. It is also clear, at least to this Board, that the filing of the grievance was designed to support the integrity of and uphold the terms of the collective bargaining agreement. In other words, the purpose of Marques filing the grievance was aimed at both collective bargaining and "mutual aid or protection" of employees impacted by the Employer disregarding or not following the terms of the collective bargaining

agreement.[9] In the Board's view, Marques's conduct clearly falls within the definition of protected and/or concerted activity as that term has been used by the NLRB and this Board. (*See NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2nd Cir. 2001); *Rhode Island State Labor Relations Board and Rhode Island Council on Elementary and Secondary Education/Rhode Island Department of Elementary and Secondary Education*, ULP-6297 (September 5, 2023).

The Employer did not spend a great deal of effort attempting to argue that the filing of a grievance by Marques pursuant to the CBA did not constitute protected and/or concerted activity. To be fair, it would have been extremely difficult for the Employer to argue that the filing of a grievance is not protected concerted activity. See *Yellow Transportation, Inc.*, 343 NLRB No. 9 (2004); *Southern California Edison*, 307 NLRB 1426 (1992). As would appear to be clear, certainly to this Board, the filing of a grievance under a collective bargaining agreement fits squarely into the concept of what concerted activity means, i.e., employee activity that is taken by one person on behalf of others. Clearly, the filing of a grievance in an attempt to rectify an alleged contract violation comes within the concept of protected and/or concerted activity. Therefore, the Board finds that the filing of a grievance on December 28, 2022 by Marques was, in fact, protected, concerted activity.

3. Employer Conduct

As discussed above, when an employer is alleged to have violated the Act by engaging in action or conduct designed to interfere, restrain or coerce employees in the exercise of their rights under the Act or to have discriminated against employees in their employment, the Board looks to a number of factors to determine whether sufficient evidence exists to find that the Employer's conduct was in violation of the Act. In the instant case, where it has been demonstrated that the Employer had knowledge that a member of the bargaining unit, Marques, engaged in union activity (filing a grievance under the CBA), the question turns to whether the Employer acted against the employee (retaliated against Marques and other bargaining unit members by altering light duty assignments) because of the employee's union activity. Some of the factors that the Board reviews to make this determination include the timing of the Employer's action in relation to when the employee engaged in the protected activity, the pretextual nature of the Employer's motivation, whether the Employer's action was inconsistent or showed disparate treatment toward the employee and whether the Employer exhibited shifting or changing justifications for its action. See *Intertape Polymer Corp. and Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL-CIO*, 372 NLRB No.133, August 25, 2023 (where the NLRB stated "Motivation is a question of fact that may be inferred from both direct and circumstantial

---

[9] The Board was informed through the testimony of Marques and Director Wheeler that the grievance initially filed by Marques went to arbitration and the arbitrator ultimately ruled in the Employer's favor. (Tr. at pages 28; 49; 105). The decision by the arbitrator, however, has no bearing on whether the act of filing a grievance constituted protected concerted activity. Further, the arbitrator's decision, by itself, does not answer the question before this Board of whether the action of Director Wheeler in altering light duty job assignments was done due to union animus.

evidence on the record as a whole. Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the Unionor other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. The General Counsel may also use the Employer's own response to the charges to establish animus and discriminatory motive. This includes proof that the Employer's asserted reasons for the adverse action were pretextual." (citations omitted)); *Id.* at pages 6 – 7; see also *Tschiggfrie Properties, Ltd.,* 368 NLRB No. 120 (2019). In the present case, the Board has determined that a review of all the evidence demonstrates that the Employer's action in altering how light duty assignments were used was done in retaliation for the Union filing a grievance complaining about Director Wheeler providing a take home vehicle to the working foreman without negotiating with the Union.

As the evidence before the Board demonstrates, the timing of the grievance filed by Marques (December 28, 2022), Wheeler "creating" a policy that no employee could work with medical restrictions the day before Marques was scheduled to return to work from an injury, Marques (and two other bargaining unit members) actually being sent home and being placed on Workers' Compensation, and the pretextual nature of the Employer's asserted reasons for taking the action it did presented significant evidence that Wheeler's action was due to the grievance being filed by Marques. (See Petitioner Exhibits 2, 3, 4, 10 – 12; Tr. at pages 23 – 26; 33 – 35; 72 – 79; 83 – 86; 95 – 96; 98 – 99; 107 – 110). Initially, the undisputed testimony before the Board was that Marques was injured at work sometime in 2017. Marques was out for treatment and eventually required multiple surgeries to correct the injury and be able to return to work with medical restrictions. (Tr. at pages 16 – 19; Petitioner Exhibit 1).[10] Marques was allowed by the Employer to work with his restrictions without an issue. (Tr. at pages 19 – 20). Marques suffered a recurrence of his injury while driving a plow truck in late 2020 and returned to work in February 2021 with additional work restrictions. (Tr. at pages 21 – 22; Petitioner Exhibit 1 at pages 2 and 3). Again, when Marques returned to work, he was not prevented by the Employer from going back to his previous duties. (Tr. at pages 22 – 23). In other words, prior to Wheeler becoming DPW Director in March 2022, Marques had performed his job duties as a leadman with medical work restrictions for a minimum of three years and as much as five to six years without any objection or interference from the Employer.

As noted, when Wheeler became DPW Director in March 2022 Marques was performing his job with medical work restrictions. (Petitioner Exhibit 1).[11] The testimony

---

[10] While Marques testified that he was originally injured in 2017 (Tr. at page 17), the earliest doctor's note submitted to the Board showing medical work restrictions for Marques is dated June 15, 2020. (See Petitioner Exhibit 1). However, the Employer did not introduce any evidence to dispute Marques's testimony regarding the original date of his injury or that he had medical work restrictions from a date earlier than June 2020 or that the restrictions were not valid.

[11] Wheeler testified that he was unaware that Marques had medical work restrictions until May 24, 2023, when Wheeler received an email from the Employer's Workers' Compensation representative explaining

is undisputed that Marques worked from March 2022 until January 19, 2023 under medical work restrictions and without any negative performance issues or incidents. (Tr. at pages 93 – 94; 97 – 98). Yet despite this unblemished work record, the Employer puts in place a policy on May 24, 2023, one day before Marques is scheduled to return to work, indicating that the Employer will no longer allow employees with medical work restrictions to work with those restrictions. (Tr. at pages 95 – 96; 98 – 99;107 – 110). Wheeler asserted that he did not make this policy to retaliate against Marques (Tr. at page 79) or other bargaining unit members, but because there was no light duty language in the CBA and a policy was necessary since the DPW records he inherited were completely disorganized. (Tr. at pages 70 – 76; 79). However, despite Director Wheeler's insistence about the muddled state of affairs regarding lack of policies and general disorganization regarding DPW records and doctor notes upon his arrived, it was not until the day before Marques was to report back to work that the Employer developed a policy that prevented Marques (and other co-workers) from returning to work because of his medical work restrictions. In addition, the arbitration of the grievance Marques filed was scheduled to be heard on the Tuesday after his return to work. (Tr. at pages 35; 39). Further, the policy Director Wheeler developed was not in writing, members of the bargaining unit were not notified of the policy and there appeared to be no communication between Director Wheeler and the bargaining unit about the implementation of the policy or the specific of the policy. (Tr. at pages 107 – 110).[12]

Wheeler treated Marques and two other employees who had been working with restrictions differently than they had been treated in the past, i.e., prior to Wheeler's arrival, the Employer had no issue with allowing employees with medical work restrictions to continue to work within the parameters of the restrictions. In fact, this conduct continued even after Wheeler arrived as he allowed other employees, in addition to Marques, to work with medical restrictions. (Tr. at pages 31 – 33; 37 – 38; 57 – 59; Petitioner Exhibit 4). However, Wheeler testified that it became "frustrating" dealing with doctor's notes and employee's presenting updated notes changing their restrictions. (Tr. at page 71). Wheeler also testified that "there were multiple doctor's notes coming in, restricting work to the point where we couldn't continue operations effectively." (Tr. at page 70). Notwithstanding Wheeler's testimony, there was little to no evidence presented by the Employer showing that the work restrictions had delayed or hampered DPW "operations" or had in any way interfered with DPW getting its work accomplished.

---

the work restrictions Marques would have upon his return to work the next day. (Tr. at pages 74; 76; 80 – 85; 89; Petitioner Exhibit 10).

[12] While Wheeler testified about having meetings/discussions with various Employer representatives about developing a policy (i.e., the Workers' Compensation representative, the Human Resources representative and the Town Manager; see Tr. at pages 71 – 73; 107 – 108), no testimonial or documentary evidence was presented by the Employer to corroborate or verify Wheeler's version of events. For example, there were no notes about the meeting or emails scheduling the meeting introduced as evidence at the hearing. This evidentiary deficiency is significant since Wheeler testified extensively about the "lack of organization" at DPW and not being able to find doctor's notes. (Tr. at page 76). Yet even as of the date of the formal hearing before the Board, the Employer's records were, at best, incomplete. (See Tr. at pages 82 – 83; 86 – 88;90 – 92).

Instead, and as mentioned above, Wheeler had no problems with Marques's work performance. (Tr. at pages 93 – 94; 97 – 98). As for the other two employees working with restrictions, Arrenegado and Carreiro, Wheeler testified that each had very limiting restrictions, but while there seemed to be issues with Arrenegado that were frustrating Wheeler,[13] he disclosed no work issues with Carreiro (Tr. at page 97) and was willing to accommodate Carreiro even after the policy was implemented on May 24. (Tr. at pages 76 – 78). In addition, Wheeler didn't act upon his claimed frustration with changing doctor notes until the day before Marques returned to work from his January injury, at which point he makes a blanket pronouncement prohibiting employees from working with medical restrictions. (Tr. at pages 107 – 110). However, even the implementation of this policy was inconsistent as Wheeler allowed Carreiro to work for another week with medical restrictions. (Petitioner Exhibit 12; Tr. at pages 78; 97 – 99).

In short, it appears to the Board, based on the testimonial and documentary evidence submitted in this case, that Wheeler had no legitimate basis for his sweeping no work with medical restrictions policy. Instead, Wheeler's actions appear to be entirely retaliatory in nature and the trigger is the grievance filed by Marques on December 28, 2022. At the time it was filed, it was the first grievance that had ever been filed against Wheeler and it was the first grievance[14] that ultimately went to arbitration. (Tr. at page 103). Prior to this grievance being filed, the Employer had no issue with the work performance of employees (specifically, Marques, Arrenegado and Carreiro) who were working with medical restrictions. In fact, the Employer had been content to let employees work so-called light duty for several years notwithstanding the fact that there was no light duty language in the collective bargaining agreement.[15] It was only after Marques filed the grievance in late December 2022 and was about to return from a reoccurrence of his injury suffered in January 2023 that Wheeler took action to prohibit employees with medical restrictions from working their jobs. In the Board's view, Wheeler had no legitimate explanation for making this abrupt and unilateral change. While Wheeler claimed that changing doctor's notes submitted by employees was "frustrating" and "operations" were impacted, he couldn't or didn't point to even a single event showing that DPW work wasn't being performed or that DPW operations were negatively affected due to employees working with medical restrictions. In fact, the evidence showed that Wheeler had no work-related issues with the employees who had medical restrictions. (Tr. at pages 92 – 94; 97).[16]

---

[13] Wheeler testified that he had been provided with information that Arrenegado was engaging in conduct in his off-work time that appeared to be inconsistent with the work restrictions in his medical note. (Tr. at pages 72 – 73; 77). However, the Employer took no action against Arrenegado. (Tr. at page 72).

[14] As previously noted, Wheeler claimed that two other grievances had been filed. (Tr. at page 102). However, the Employer did not introduce copies of those grievances during the hearing. Further, the Union presented testimony that at the time of the filing of the grievance on December 28, 2022, it was the first grievance the Union had filed during Wheeler's tenure. (Tr. at pages 26 – 27).

[15] Neither party presented evidence, positive or negative, regarding whether the Employer's action in allowing Marques and others to work with medical restrictions constituted a past practice in accordance with R.I.G.L. 28-9-27. Therefore, the Board takes no position in this decision as to whether a past practice existed.

[16] This included Arrenegado who apparently worked during the holiday season even though he had been injured in September 2022. (Tr. at pages 76 – 77; 106 – 107).

Thus, the Board's review of the evidence in the record before it demonstrates that the Employer's reasons for implementing the no work with medical restrictions policy was simply a pretext for punishing bargaining unit members for exercising their rights under the Act.

In addition to the above, the evidence presented to the Board demonstrated that even though Wheeler testified he wanted to change the policy regarding doctor's notes as early as September 2022, he took no action until May 24, 2023, the day before Marques was to return to work with restrictions. (Tr. at pages 107 – 109). Further, while Wheeler testified that he was frustrated with the whole doctor's notes situation, he did nothing to investigate what he alleged were "inconsistencies" in medical notes nor did he press for any disciplinary action to be taken when he learned an employee was engaged in activities off duty that were inconsistent with his work medical restrictions. (Tr. at pages 71 – 73; 92 – 93). It also appeared to the Board, based on the evidence before it, that Wheeler's application of the new policy was done in a disparate and discriminatory manner. First, while Wheeler sent Marques and Arrenegado home and placed them on Workers' Compensation on May 25, he let Carreiro work an additional week even though he also had medical restrictions.[17] (Petitioner Exhibits 10 – 12). Second, the implementation of the policy was a complete change from how things had previously operated even during Wheeler's tenure.

Finally, Wheeler testified a great deal about needing to reorganize DPW, how doctor's notes were lost or not kept in proper files, that he was receiving multiple notes with "competing" restrictions. (Tr. at pages 70 – 73). However, when he finally develops a policy to ostensibly correct the doctor's note issue, he doesn't put the policy in writing, he doesn't notify employees of what the policy says, he doesn't notify employees of how the policy changes how doctor's notes will be received and, in general, fails to communicate with the employees about the policy. (Tr. at pages 107 – 110). In addition, Wheeler provided no advance notice and, instead, made the policy effective immediately upon Marques return to work.[18] To the Board and based on the evidence it reviewed, there seemed to be no legitimate basis for the policy, no work-related reasoning except that a grievance had been filed and an arbitration was pending regarding Wheeler having given a benefit (a take home vehicle) to a bargaining unit employee without discussing it with the Union.

---

[17] Wheeler's explanation for this discrepancy was that Carreiro's medical note was not specific regarding his restrictions and, therefore, Wheeler wanted him to get an updated note, (Tr. at page 78). However, when confronted on cross-examination about the fact that the policy was "no restrictions at work", Wheeler could not present a coherent response for why he let Carreiro work the additional week. (Tr. at pages 96 – 99).

[18] It appears to the Board, based on the evidence in the record, that if Wheeler had been serious about the policy he would have told Arrenegado on May 24 not to report to work the next day due to the new policy. Instead, it was only in his conversation with Marques where Wheeler appears to remember that other employees besides Marques may be impacted by the policy and will have to be told they cannot work with restrictions. (Tr. at pages 33 – 39; Petitioner Exhibit 4).

For all of the above stated reasons, the Board finds that the Employer did retaliate and discriminate against bargaining unit members for engaging in protected, concerted activity in violation of the Act.

The Employer attempted to justify its actions by arguing that its conduct was authorized under the Management Rights clause contained in the collective bargaining agreement. (Joint Exhibit 1, Article I). While the Management Rights clause of the CBA would appear to support the contention that the Employer had the right to unilaterally implement a new policy, this authority does not supersede the provisions of the Act when, as here, the motivation for creating and implementing the policy was based on or due to protected and concerted union activity as discussed in more detail above. Thus, the Employer's attempt to justify its conduct through the Management Rights provision of the CBA is rejected by the Board.

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 Union and the Employer were, at all times relevant to the instant matter, subject to a collective bargaining agreement dated July 1, 2021 through June 30, 2024.

4. The Union represents employees in the Employer's Public Works Department (DPW).

5. At the time of the claimed unfair labor practice, the DPW was headed by Brian Wheeler who had been DPW Director since March 2022.

6. Stephen Marques is a member of the relevant bargaining unit and has been a Leadman in DPW for more than 10 years. Marques also served as a "Unit Griever" which is a position in the Union that is responsible for filing grievances based on alleged violations of the CBA.

7. In or around December 2022, Marques learned that DPW Director Wheeler was giving the Working Foreman (a bargaining unit position) a take home vehicle so that he (the Working Foreman) could respond to emergency calls whenever they arose.

8. In December 2022, Marques had a discussion with Director Wheeler in which Marques informed the Director that a take home vehicle was not part of the Working Foreman position and was a benefit to the position that was not negotiated with the

Union. The Director responded to Marques that he (the Director) "felt he was within his rights" to take the action he had.

9. On December 28, 2022, Marques filed a grievance against Director Wheeler's action of providing a take home vehicle to the Working Foreman.

10. The grievance filed on December 28, 2022 was the first grievance that Marques had filed since Wheeler became DPW Director in March 2022.

11. Director Wheeler denied the grievance on December 29, 2022.

12. The Union did not accept the Director's denial and filed for arbitration pursuant to the CBA. The Union's demand for arbitration was the first time such a demand had been made since Director Wheeler started his employment with the Employer. The Union also filed an unfair labor practice Charge regarding Director Wheeler's action of providing a take home vehicle to the Working Foreman.

13. Marques suffered a neck injury in 2017 while on the job. He required surgery and rehabilitation, but eventually was cleared to return to work with restrictions. When Marques returned to work in June 2020 from his injury, he presented a medical note to the DPW Director. The Employer accommodated his restrictions without any apparent problem.

14. During the winter of 2020 – 2021, Marques reinjured his neck and was out of work again and this time when he returned in February 2021 his restrictions included "no driving plow truck." The Employer was able to accommodate this further restriction.

15. Marques once again reinjured his neck in January 2023 and was out of work until he was cleared to return on May 25, 2023 with the same physical restrictions he had when he returned to work in February 2021.

16. On May 24, 2023 Marques notified the Employer's Worker's Compensation adjuster that he had been cleared to return to work with the same restrictions he had previously had in place.

17. Marques reported to work on May 25, 2023 and went to Director Wheeler's office to present his medical note and inform the Director of his work restrictions. Director Wheeler was aware of Marques's work restrictions as he had been informed by the Employer's Workers' Compensation adjuster the night before by email of the work restrictions.

18. Director Wheeler informed Marques that he was being placed back on Workers' Compensation and would not be allowed to work with restrictions. Marques questioned why he was being sent home since he had the same restrictions in place since his initial injury several years earlier. Wheeler told Marques that work restrictions "had become a problem."

19. Marques did not return to work until sometime in October 2023. During his time out of work, Marques contacted the Town on several occasions regarding his circumstances and though he was told someone would contact him, no one ever did. While he was out of work, Marques did not suffer a loss of pay or benefits.

20. On May 24, the day before Marques was to return to work, Director Wheeler met with several Employer representatives to develop a policy to prevent anyone with medical work restrictions from returning to work.

21. The policy was not in writing and was not posted on any communal bulletin boards or in places where employees would normally congregate. The policy was to be communicated only by word of mouth. The policy was effective immediately.

22. On May 25 when Marques was sent home there were two other bargaining unit members who were working with medical restrictions. One of the employees, Vincent Arrenegado, was sent home on May 25 for the same reasons Director Wheeler had told Marques. The other employee, Marco Carreiro, was told to get his work restrictions note updated and was allowed to continue to work with restrictions for another week, until June 1, before he was eventually sent home as well.

23. Neither Arrenegado nor Carreiro suffered a loss of pay or benefits due to their being out of work.

24. The collective bargaining agreement does not contain a light duty clause or provision.

25. The Employer had allowed bargaining unit members in DPW to work with medical restrictions for between three to six years without concern or objection before the change on May 25, 2023.

26. The Employer was aware that Marques was a member of the bargaining unit.

27. The Employer was aware that Marques filed a grievance on December 28, 2022, pursuant to the collective bargaining agreement challenging Director Wheeler's act of providing a take home vehicle to the Working Foreman.

28. The Employer's reasons for implementing the no work with medical restrictions policy were a pretext for punishing bargaining unit members for exercising their rights under the Act.

CONCLUSIONS

1. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(8) and (10) when it unilaterally altered the light duty work assignments of bargaining unit members based on the Union filing a grievance pursuant to the collective bargaining agreement.

2. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(8) and (10) when it retaliated and discriminated against bargaining unit members for engaging in protected and concerted activity by altering the light duty work assignments of bargaining unit members based on the Union filing a grievance pursuant to the collective bargaining agreement and bargaining unit members exercising their rights under the CBA.

ORDER

1. The Employer is hereby ordered to cease and desist from making unilateral changes to working terms and conditions of employment, without first notifying the Union and giving it the opportunity to bargain over any proposed changes.

2. The Employer is hereby ordered to cease and desist from discriminating against bargaining unit members by denying employees the ability and opportunity to work with medical restrictions.

3. The Employer is hereby ordered to cease and desist from retaliating against bargaining unit members for exercising their rights under the collective bargaining agreement by denying employees the ability and opportunity to work with medical restrictions.

4. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than sixty (60) days in each building where bargaining unit personnel work, said posting to be in a location where other materials designed to be seen, read and reviewed by bargaining unit personnel are posted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

ARONDA R. KIRBY, MEMBER

HARRY F. WINTHROP, MEMBER

STAN ISRAEL, MEMBER

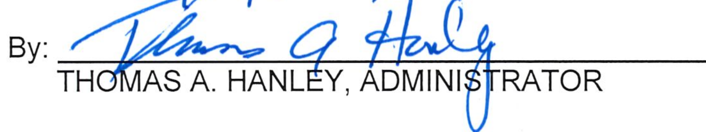
LAWRENCE PURTILL, MEMBER

BOARD MEMBER KENNETH B. CHIAVARINI WAS NOT IN ATTENDANCE FOR THE VOTE ON THE MATTER.

BOARD MEMBER SCOTT DUHAMEL WAS NOT IN ATTENDANCE FOR SIGNING.

ENTERED AS AN ORDER OF THE
RHODE ISLAND STATE LABOR RELATIONS BOARD

Dated: 6/18/2024, 2024

By: 
THOMAS A. HANLEY, ADMINISTRATOR

ULP-6371

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

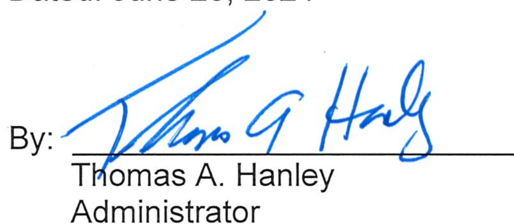
IN THE MATTER OF TOWN OF WARREN -AND- UNITED STEELWORKERS, LOCAL 14845	CASE NO. ULP- 6371

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- 6371, dated June 18, 2024, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **June 26, 2024.**

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

Dated: June 26, 2024

By: 
Thomas A. Hanley
Administrator