

filed a Petition for Unit Clarification relating to Hays' own position with the College, and (2) refusing to remove Hays from the negotiating team. In its Decision, the Board concluded that the College's appointment of Hays to the negotiating team constituted an unfair labor practice pursuant to § 28-7-13(10), but that its refusal to remove Hays did not, pursuant to § 28-7-13(6).

The Employer appealed the Board's Decision that it had violated § 28-7-13(10); the Union appealed the Board's Decision that the Employer had not violated § 28-7-13(6). For the reasons set forth herein, the Board's Decision is affirmed in its entirety.

I

Facts and Travel

From 1987 until 2001, Patricia Hays worked at the College continuously as a full-time employee for information services, during which time she was a member of the Union. In October of 2001, she was promoted to Director of User Support Services. As Director of User Support Services, Hays is responsible for planning, organizing, and maintaining information technology to faculty, staff, and students at the College. She supervises twelve part-time employees and approximately fifty part-time student employees. In her position, Hays delivers direct technology support, meets with staff members and members of the College community, and updates and manages computer servers. Although her responsibilities shifted when she began work as Director of User Support Services, her salary and benefits package remained substantially the same.

In January 2002, the Union filed a Unit Clarification Petition with the Board, seeking to accrete the position of Director of User Support Services. In doing so, the Union had intended to establish that the position of Director of User Support Services

was not a supervisory position, that it shared a community of interest with the positions held by other members of the Union, and that, therefore, the position should be included within the collective bargaining unit. The following Spring, in anticipation of the June 30, 2003 expiration of the existing three-year collective bargaining agreement and the College's 150th Anniversary, the Union began preparations for upcoming contract negotiations for a successor collective bargaining agreement. In March 2003, the Union notified the College of its desire to begin negotiations. The parties established July 18, 2003 as the first day to begin negotiations.

On May 13, 2003, after an informal hearing on the Petition for Unit Clarification, the Board made a preliminary determination that the position of Director of User Support Services should be accreted to the bargaining unit. The Board scheduled a formal evidentiary hearing for August 8, 2003.¹ While the formal hearing on that matter was pending, however, the Union's President, Robert Bower ("Bower"), learned from the College's President, John Nazarian ("Nazarian"), that the College had placed Hays on the College's negotiating team for the upcoming collective bargaining negotiations with the Union. Bower thereafter met with the College's Vice President, Lenore DeLucia, and Chief Negotiator, Anne Marie Coleman, and requested that Hays be removed from the College's negotiating team; the College refused. The Union then filed its charge of unfair labor practices, asserting that the College acted in bad faith by appointing Hays to

¹ The August 8, 2003 hearing was rescheduled to September 20, 2003, at which time the Board did commence a formal evidentiary hearing on the Petition for Unit Clarification relating to the position of Director of User Support Services. The formal hearing was then continued to and concluded on November 25, 2003. By decision dated February 10, 2005, the Board determined that Hays' position was supervisory in nature and therefore should not be included in the bargaining unit. The Union appealed that decision to this Court. See PSA @ RIC, Local 3302, AFT/RIFT, AFL-CIO v. Rhode Island State Labor Relations Board, et al., PC 05-1243 (consolidated with Rhode Island Board of Governors for Higher Education, et al. v. PSA @ RIC, Local 3302, AFT/RIFT, AFL-CIO, PC 05-1199). This Court's decision therein is filed contemporaneously herewith.

its negotiating team in the first instance and by refusing to remove her from the negotiating team.

The Board conducted a formal hearing on the Union's unfair labor complaint on November 18, 2003. Bower testified before the Board, and the parties submitted memoranda to the Board. Bower stated that he had served on three prior negotiating teams on behalf of the Union and was familiar with the high-level positions held by members of the College's negotiating teams in the past. He testified that even during negotiating periods in which major technological initiatives were being considered, such as the period preceding "Y2K", the College had not elected to include a representative from the information services area at the negotiating table. Indeed, in the three past contract negotiations in which Bowers participated, the College's negotiating team was comprised of vice presidents, assistant vice presidents, the director of affirmative action, and the director of human resources; no other director-level representatives served on any College negotiating team prior to Hays.

Bowers further testified that the College's conduct in appointing Hays to and refusing to remove her from the College's negotiating team caused a strain in the relationship between the Union and the College. By the time of the November 18, 2003 hearing before the Board, there had been no negotiating sessions between the Union and the College, despite the fact that the contract expired on June 30, 2003. Bowers also revealed that the Union was concerned that Hays' presence on the negotiating team would allow the College to establish a track record that she was involved in labor negotiations, which in turn would impact the Board's determination of the pending Petition for Unit Clarification; in other words, the Board may be more inclined to find

that the position of Director of User Support Services was supervisory in nature and therefore should be excluded from the bargaining unit if there were such evidence that this position had a role in contract negotiations on behalf of the College.

In its written submission to the Board, the Union argued that by appointing Hays to the negotiating team and refusing to remove her interfered with and was a restraint on both the Union's right to proceed with the Petition for Unit Clarification and the Union's right to successor contract negotiations. The Union also maintained that because the College did not demonstrate why it could not assemble a capable negotiating team without Hays' participation or why there was a marked departure in the composition of past negotiating teams that had not included Hays' position, then the College's placement of Hays on the team amounts to bargaining in bad faith, and therefore constitutes a refusal to bargain.

The Board concluded in its Decision that the College had committed an unfair labor practice under § 28-7-13(10) and "interfere[d] with employees in the exercise of rights guaranteed by . . . § 28-7-12" by appointing Hays to serve on the Employer's negotiating team after the position had become the subject of a Petition for Unit Clarification, but that the College had not "refused to bargain" with the Union by refusing to remove Hays from the bargaining team, and therefore did not violate § 28-7-13(6). (Decision, at 5, 6.)

II

Standard of Review

The Superior Court's review of an appeal of a decision by the Board is governed by § 42-35-16 of the Administrative Procedures Act (APA), which provides:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error or [sic] law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted use of discretion.”

This Court may not substitute its judgment for that of the Board with regard to the credibility of witnesses or the weight of the evidence about questions of fact. Ctr. for Behavioral Health v. Barros, 710 A.2d 680, 684 (R.I. 1998); Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Rather, it “is confined to a determination of whether there is any legally competent evidence to support the agency’s decision.” Env’tl Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). If the Board’s decision was based on sufficient competent evidence in the record, the reviewing court is obliged to affirm the agency’s decision. Johnston Ambulatory Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). An agency’s decision may be reversed, however, when “the conclusions and the findings of fact are ‘totally devoid of competent evidentiary support in the record’ or from the reasonable inferences that might be drawn from such evidence.” Bunch v. Bd. of Review, R.I. Dep’t of Emp’t & Training, 690 A.2d 335, 337 (R.I. 1997) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

III

Analysis

The Rhode Island State Labor Relations Act (the “Act”), codified at § 28-7-1, et seq., mirrors its federal counterpart, the National Labor Relations Act, 29 U.S.C. § 1 et al. Accordingly, the Act has been repeatedly interpreted using federal case law as a guide. See Macquattie v. Malafronte, 779 A.2d 633, 636 n.3 (R.I. 2001) (citing Belanger v. Matteson, 115 R.I. 332, 338, 346 A.2d 124, 129 (1975)) (“Because Rhode Island’s labor relations laws parallel federal statutes, this Court has adopted federal case law when appropriate.”). This Court will be guided by federal case law in determining whether the Board erred in concluding that the College committed an unfair labor practice by appointing Hays to serve on the College’s negotiation team in the first instance after the Union had filed a Petition for Unit Clarification and that the College did not refuse to bargain in violation of the Act by refusing to remove Hays from the negotiating team. See Barrington Sch. Comm. v. RISLRB, 388 F.2d 1369, 1374 (R.I. 1978).

A

Appointing Hays to Negotiating Team

Section 28-7-13(10) provides that it shall be an unfair labor practice to “[d]o any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12.”² Generally, to

² Section 28-7-12 provides in part:

“Rights of Employees. – Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid of protection free from interference, restraint, or coercion from any source.”

determine whether an unfair labor practice has occurred, a court will look to the entire transaction, including all the actions of the parties. See NLRB v. Stanton Enters., Inc., 351 F.2d 261 (4th Cir. 1965); NLRB v. Austin Co., 165 F.2d 592 (7th Cir. 1947). It is the tendency of an employer's conduct to interfere that is controlling. Welch Scientific Co. v. NLRB, 340 F.2d 199 (2nd Cir. 1965). Thus, an action that tends to chill or interfere with an employee's statutory rights can be considered an unfair labor practice under § 28-7-13. This Court will only reverse the Board's decision if there is no legally competent evidence to support the Board's conclusion that the College's action in appointing Hays after the Petition for Unit Clarification was filed had the effect of chilling or otherwise interfering with the employees' ability to exercise their protected rights.

Here, the Board placed Hays on the administration's bargaining team after the Union had filed a Petition for Unit Clarification. Furthermore, the Board issued a preliminary determination of accretion for Hays' position and scheduled a formal hearing. The Union also presented credible evidence that it concluded that proceeding with formal negotiations with Hays on the administration's bargaining team would unfairly influence and prejudice the pending Petition for Unit Clarification. According to Bower, the College and Board's behavior affected the ability of Union to engage in fair and complete negotiations. Specifically, he testified that it had been the objective of the Union to begin and to conclude its negotiations early, not only because of the College's upcoming 150th Anniversary, but also because of the parties' difficult and protracted last set of negotiations. Therefore, the Board's finding that the College's placement of Hays on the administration's bargaining team after the Petition for Unit Clarification was filed

chilled the climate for effective bargaining, thereby interfering with the Union's ability to proceed with their right to bargain collectively, is supported by legally competent evidence in the record. Accordingly, this Court concludes that Board was not clearly erroneous in finding that the College committed an unfair labor practice within the meaning of the Act.

B

Refusal to Bargain

Section 28-7-13(6) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of employees. The statute does not define, however, what conduct is sufficient to constitute a "refusal to bargain."

For conduct to constitute a refusal to bargain, the conduct must either constitute a literal refusal to sit down at the bargaining table, or cause, as its practical effect, an inability for the two parties to come together. In Overstreet v. El Paso Disposal, L.P., for example, the Fifth Circuit Court of Appeals concluded that the employer "refused to bargain" within the meaning of the federal labor law when it "did not meet at reasonable times, delayed the initial bargaining session for four months, and refused to negotiate for more than five hours a day." 625 F.3d 844, 854-55 (5th Cir. 2010). In that case, the Fifth Circuit reasoned that such tactics constituted a refusal to bargain because the employer's conduct had the practical effect of preventing all the parties to the negotiation from being present at the bargaining table. Id.

Absent specific conduct preventing the parties from negotiating, a court may find a refusal to bargain based on a party's entire course of conduct when the totality of the

circumstances show a lack of good faith. To constitute a refusal to bargain, however, those circumstances must “clearly indicate ‘a desire not to reach an agreement with the union.’” NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457, 466-67 (2d Cir. 1973) (quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953)).

In this case, the Union claims that the College refused to bargain in violation of the Act when it refused to remove Hays from its negotiating team. Yet that refusal, although it may have further strained the relationship between the parties, did not physically prevent the parties from meeting as was the case in Overstreet. See 625 F.3d at 854-55. Furthermore, the refusal to remove Hays did not “clearly indicate a desire not to reach an agreement with the union.” See Advanced Bus. Forms Corp., 474 F.2d at 466-67. The Union did not prove, by fair preponderance of the evidence, that the refusal to remove Hays had the practical effect of preventing the parties from coming together. Accordingly, this Court affirms the finding of the Board that the College’s refusal to remove Hays from the administration’s bargaining unit was not a refusal to bargain because there was not legally competent evidence to make a finding that the College had refused to bargain within the meaning of the Act. Accordingly, the Board’s finding was not clearly erroneous.

IV

Conclusion

For the reasons set forth above, this Court affirms the Board’s Decision in its entirety. There was legally competent evidence in the record to find that the College committed an unfair labor practice by appointing Hays to serve on the College’s

negotiation team after the Union filed its Petition for Unit Clarification. There was insufficient evidence in the record to support a finding that the College's refusal to remove Hays from the College's negotiation team constituted a refusal to negotiate under the Act.

Counsel for the Board shall submit a Judgment consistent with this Court's Decision.