STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 17, 2022)

CITY OF PAWTUCKET,	:	
	:	
Petitioner,	:	
	:	
v.	:	**C.A. No. PC-2014-3560**
	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD, by and through its Chairman, WALTER J. LANNI, and its Members FRANK J. MONTANARO, GERALD S. GOLDSTEIN, ELIZABETH S. DOLAN, MARCIA B. REBACK, SCOTT G. DUHAMEL, and BRUCE A. WOLPERT; and RHODE ISLAND COUNCIL 94, AFSCME, AFL-CIO, LOCAL 1012, AUGUST VENICE in his official capacity as President of LOCAL 1012	:	
	:	
Respondents.	:	

DECISION

NUGENT, J. Before the Court for decision is Petitioner City of Pawtucket's (Petitioner) Complaint appealing from the June 19, 2014 Decision and Order issued by the Rhode Island State Labor Relations Board (Board) in Case No. ULP-6099. The Court's jurisdiction over this matter is pursuant to G.L. 1956 §§ 28-7-29 (judicial appeal provision of Rhode Island State Labor Relations Act (RISLRA)) and 42-35-15, the Administrative Procedures Act (APA).

I

Facts and Travel

Petitioner timely filed its Complaint in Superior Court appealing the Decision and Order on July 17, 2014. (Docket, PC-2014-3560.) Respondent Board filed its Answer to the Complaint

on September 4, 2014. *Id.* Respondent Rhode Island Council 94, AFSCME, AFL-CIO, Local 1012 (Union) filed its Memorandum of Law in Opposition to Petitioner's Administrative Appeal on June 23, 2016 (hereinafter Union Mem.). *Id.* Petitioner filed its Memorandum of Law in Support of its Administrative Appeal (hereinafter City Mem.) on August 31, 2018. Respondent Board filed its Memorandum of Law in Opposition to Petitioner's Administrative Appeal and its Petition to Enforce the Board's Decision and Order on February 12, 2021. *Id.*

A

The Board's Unfair Labor Practice Proceedings against Petitioner

On December 17, 2012, the Union filed an Unfair Labor Practice Charge with the Board, alleging that:

> "[Petitioner] unilaterally eliminated a Local 1012 bargaining unit position (Police CD/Secretary) and created a new non-Union position (Police Administrative Assistant). The new non-Union position of Police Administrative Assistant performs the same functions and tasks as the eliminated Police CD/Secretary. The City failed to negotiate and bargain regarding the elimination of the position in violation of R.I.G.L. 28-7-13." Decision and Order at 1, No. ULP-6069 (R.I. Labor Relations Bd. June 19, 2014) (hereinafter Decision).

In response to this charge, the Board issued a complaint alleging:

> "That the Employer violated R.I.G.L. 28-7-13 (6) and (10) when it passed a proposed ordinance on September 5, 2012, which removed the Union position of Police/CD Secretary from the bargaining unit and replaced it with a non-bargaining unit position of Police Administrative Secretary, without prior bargaining with the exclusive bargaining representative. That the Employer violated R.I.G.L 28-7-13 (6) and (10) when it assigned bargaining unit work to a non-bargaining unit employee." *Id.*

A formal hearing was held on October 10, 2013, with representatives of Petitioner and the Union present to submit evidence and examine witnesses. *Id.* at 2.

1. The Parties' Positions

The Union argued that the Secretary position was a unit position, that Petitioner acted unilaterally, and that Petitioner assigned bargaining-unit work to the newly created non-bargaining-unit Administrative Assistant position. (Decision 5.) Petitioner argued that the Secretary position had never been formally accreted to the bargaining unit. *Id.* Petitioner also argued that it had bargained with the Union prior to deleting the Secretary position. *Id.* Finally, Petitioner contended that the Administrative Assistant was "confidential" and, therefore, removing it from the bargaining unit was consistent with the Pawtucket City Charter, its Code of Ordinances, state law, and was within Petitioner's "managerial prerogative." *Id.* at 6.

2. Summary of Testimony and Facts

The Union is the certified bargaining representative of "all employees of the City of Pawtucket except those excluded under Chapter 9.4-2 of Title 28 of the General Laws of R.I." (Decision 2.) The Secretary position was created in 1995. *Id.* When the individual holding the position retired in December 2011, the position was filled on a temporary basis, and Petitioner did not post this position to the bargaining unit, nor provide notice of its intention to delete the position. *Id.*

August Venice, President of the Union, testified that he became aware of the position's deletion only by happening to see an entry on the Pawtucket Personnel Board meeting agenda. *Id.* Mr. Venice attended three meetings where the position's abolition was discussed and voiced his objections. *Id.* at 3. Petitioner did not contact Mr. Venice to negotiate over the position. *Id.* Although the Personnel Board rejected the proposal to delete the Secretary position, Police Chief Paul King brought the same proposal to the City Council, which ultimately approved the proposal and enacted it in two ordinances. *Id.* On May 24, 2012, Petitioner began negotiations with the

Union for a new contract. *Id.* Although the position's deletion was discussed, the parties agreed to hold the issue in abeyance to work out finances. *Id.* Having never resolved the financial issue, Petitioner declared an impasse, which began arbitration procedures. *Id.* at 3–4.

Chief King testified that Petitioner wished to save money by reclassifying the position and had some concerns about the future of the position. *Id.* at 4. The new Administrative Assistant position performed the same set of duties performed by the Secretary, with some additional duties that had previously been handled by the now-deleted Police Accountant position. *Id.*

3. The Board's Decision against Petitioner

On June 19, 2014, the Board issued its Decision, which included its findings of fact and conclusions of law. *See generally id.* The Board found that the Police/CD Secretary position was originally created in 1995, had been recognized as a bargaining-unit position by Petitioner and the Union since its creation, and had been included in every Collective Bargaining Agreement in effect between the parties since the position's creation in 1995. *Id.* at 12. The Board also found that the position was held by a bargaining unit member from 1995 until December 2011, when the position holder retired. *Id.* After this employee's retirement, Chief King made a decision to rename, reclassify, and modify this position. *Id.* at 13.

Chief King initiated a process to eliminate this position and to create a new position of "Police Administrative Assistant." *Id.* Prior to May 2012, Petitioner did not negotiate with the Union regarding the elimination of the Police/CD Secretary position. *Id.* In May 2012, Petitioner began negotiations with the Union for a successor Collective Bargaining Agreement and proposed the deletion of the Police/CD Secretary position. *Id.* The parties held "one (1) or two (2)" meetings and agreed to hold the deletion issue in abeyance until they had finished negotiating finances, but

never held further negotiations regarding deletion of the position. *Id.* The parties did not reach an agreement on finances, and Petitioner declared an "impasse." *Id.*

In September 2012, the Pawtucket City Council passed an ordinance to delete the Secretary position from the bargaining unit and passed an ordinance to create the new Administrative Assistant position as a non-union position. *Id.* The new Administrative Assistant position is a non-union position that performs the same bargaining-unit work that was previously assigned to the Secretary position. *Id.* The Board concluded that the Union had proven by a preponderance of the evidence that Petitioner had violated §§ 28-7-13(6) and (10) when it failed to negotiate with the Union prior to deleting the Union position of Secretary and replacing it with the non-Union Administrative Assistant position. *Id.* The Board also concluded that the Union had proven by a preponderance of the evidence that Petitioner had violated §§ 28-7-13(6) and (10) by assigning bargaining-unit work to non-bargaining-unit personnel. *Id.*

B

Applicable Law

RISLRA provides, in pertinent part, that:

> "It shall be an unfair labor practice for an employer to:
>
> " . . .
>
> "(6) Refuse to bargain collectively with the representatives of employees, subject to the provisions of §§ 28-7-14–28-7-19, except that the refusal to bargain collectively with any representative is not, unless a certification with respect to the representative is in effect under §§ 28-7-14–28-7-19, an unfair labor practice in any case where any other representative, other than a company union, has made a claim that it represents a majority of the employees in a conflicting bargaining unit.

> " . . .
>
> "(10) Do 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." Section 28-7-13.

Furthermore, the Municipal Employee's Arbitration Act (MEAA) provides that "[i]t shall be the obligation of the municipal employer to meet and confer in good faith with the representative or representatives of the negotiating or bargaining agent," and that a failure to do so shall be handled by the state labor relations board as an unfair labor practice. G.L. 1956 § 28-9.4-5. MEAA also provides that if issues arise during a contract negotiation which cannot be resolved, the parties must follow the statutory processes of mediation, conciliation, and arbitration. Section 28-9.4-10.

C

Petitioner's Arguments

Petitioner argues that the Secretary position was never "formally accreted" to the Union's bargaining unit, and that the Board's finding that the position was a bargaining unit position was either contrary to state law or in excess of the Board's statutory authority. (City Mem. 5.) Next, Petitioner contends that the Board ruled contrary to state law when it ruled that deleting the Secretary position and adding the Administrative Assistant position was outside the City's authority under the Pawtucket City Charter and Code of Ordinances. *Id.* at 7–8. Finally, Petitioner argues that the Board ruled contrary to state law in finding that Petitioner's decision to delete and replace the contested positions was not within the City's "managerial prerogative." *Id.* at 9.

II

Standard of Review

When reviewing the decision of an administrative agency, the Court "sits as an appellate court with a limited scope of review." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259

(R.I. 1993). The Court's review is governed by the Rhode Island Administrative Procedures Act (APA), G.L. 1956 chapter 35 of title 42. *See Iselin v. Retirement Board of Employees' Retirement System of R.I.*, 943 A.2d 1045, 1048 (R.I. 2008) (citing *Rossi v. Employees' Retirement System of R.I.*, 895 A.2d 106, 109 (R.I. 2006)); *see also Vito v. Department of Environmental Management*, 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides, in pertinent part:

> "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 of 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 exercise of discretion." Section 42-35-15(g).

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Publication Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 484 (R.I. 1994)). When reviewing a decision under the APA, the Court may not substitute its judgment for that of the agency on questions of fact. *See Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 805 (R.I. 2000). The Court defers to the administrative agency's factual determinations if they are supported by legally competent evidence. *See Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its

findings of fact for those made at the administrative level." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977).

Accordingly, the Court will '"reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record."' *Baker v. Department of Employment and Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 272 (R.I. 1981)). The Court is free to conduct a *de novo* review of determinations of law made by an agency. *See Arnold*, 822 A.2d at 167 (citing *Johnston Ambulatory Surgical Associates*, 755 A.2d at 805). The Court is limited to the certified record in its determination as to whether legally competent evidence exists to support the agency's decision. *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

A

Accretion

Under the "accretion doctrine," "groups of new employees, or present employees in new positions[ ] can be added to [an] existing [bargaining] unit without a vote on their representation[.]" *Rhode Island Public Telecommunications Authority.*, 650 A.2d at 486 (citing *N.L.R.B. v. Stevens Ford, Inc.*, 773 F.2d 468, 472–73 (2d Cir. 1985)). The underlying rationale for the accretion doctrine is the "preserv[ation of] [industrial] stability by allowing adjustments in bargaining units

to accommodate new conditions without requiring an adversary election every time new jobs are created or industrial routines are altered*." Id.* (citing *Stevens Ford, Inc.*, 773 F.2d at 473). The accretion doctrine "has been used sparingly because it denies the accreted employees a vote on their choice of bargaining representative." *Id.* at 487 (citing *N.L.R.B v. Security-Columbian Banknote Co.,* 541 F.2d 135, 140 (3rd Cir. 1976)). Courts have admonished that the accretion doctrine "should be employed restrictively, with close cases being 'resolve[d] … through the election process'" because accretion imposes on employees a bargaining representative without their say-so. *Stevens Ford, Inc.*, 773 F.2d at 473 (quoting *Westinghouse Electric Corp. v. N.L.R.B.*, 440 F.2d 7, 11 (2d Cir.), *cert. denied,* 404 U.S. 853 (1971)).

In *Rhode Island Public Telecommunications Authority*, our Supreme Court laid out the following twelve factors to determine if a "community of interest" exists to justify accretion:

> "1. Similarity in scale and manner of determining earnings,
> "2. Similarity of employment benefits, hours of work, and other terms and conditions of employment,
> "3. Similarity in the kind of work performed,
> "4. Similarity in the qualifications, skills, and training of the employees,
> "5. Frequency of contact or interchange among employees,
> "6. Geographic proximity,
> "7. Continuity or integration of production processes,
> "8. Common supervision and determination of labor relations policy,
> "9. Relationship to the administrative organization of the employer,
> "10. History of collective bargaining,
> "11. Desires of the affected employees, and
> "12. Extent of the union organization." *Rhode Island Public Telecommunications Authority*, 650 A.2d at 486.

Petitioner argues that there was no evidence that the Secretary position ever accreted to the Union, and therefore the Board exceeded its authority and acted in violation of statutory provisions. (City Mem. 5–6.) The Board found that the evidence in the case established that the Secretary position was within the bargaining unit for nearly twenty years by agreement of the

parties. (Decision 7.) The Board rejected Petitioner's argument as an "eleventh-hour declaration, in the face of a charge of an unfair labor practice[.]" *Id.*

Petitioner contends that accretion did not occur because the formalities of filing a petition, consent agreement, and affidavit had never been completed to ratify the accretion. *See* Rhode Island State Labor Relations Board General Rules and Regulations 465 RICR 10-00 1.16(I), (J). Although Petitioner is technically correct that the Secretary position was never formally accreted to the bargaining unit, Petitioner provided no evidence that it had taken this position prior to the issuance of the unfair labor practice complaint contested in this appeal. For nearly twenty years, the Union operated in good faith with the understanding that the Secretary position was within the bargaining unit, without any corrective actions taken by Petitioner during this time period. Furthermore, the voluntary accretion rules cited were not in place when the Secretary position was originally created. To credit this argument would effectively reward Petitioner for a failure to comply with statutory procedures. Petitioner has waived this argument due to laches and is estopped from making the argument due to its own acquiescence. *See generally Bonnet Shores Beach Club Condominium Association, Inc. v. Rhode Island Coastal Resources Management Council*, No. PC00-3255, PC01-4615, 2003 WL 22790826 (R.I. Super. Oct. 28, 2003) (applying laches and equitable estoppel in coastal land use administrative appeal).

B

Authority Under City Charter and Code of Ordinances

Next, Petitioner argues that its actions to revise the contested position was within its authority, and the Board therefore misapplied the law or overstepped its authority. *See* City Charter § 1-100, ("complete powers of legislation and administration in relation to its municipal functions"); § 2-307, ("may by ordinance add new powers and new duties"); *see also* Pawtucket

R.I. Code § 88-6 (1994).[1] Petitioner relies on *Borromeo v. Personnel Board of the Town of Bristol*, 117 R.I. 382, 367 A.2d 711 (1977). There, our Supreme Court noted:

> "We have stated previously that ordinances are inferior in status and subordinate to the laws of the state; an ordinance that is inconsistent with a state law of general character and state-wide application is invalid. Similarly, town ordinances are subordinate to the provisions of the respective town charters. The provisions of a town charter are the organic law of the town with respect to municipal affairs. Since the state statutes and the state constitution constitute the organic law of the state and ordinances inconsistent therewith are invalid, it follows that ordinances that are inconsistent with provisions of the charter are illegal and inferior to the provisions of the charter." *Borromeo*, 117 R.I. at 385, 367 A.2d at 713 (internal citations omitted).

However, following this reasoning does not lead to a conclusion that the Board misapplied the law or exceeded its authority. It is well settled that a provision in a city charter or ordinance is inferior to state statutes and constitutional provisions. Therefore, such a provision that conflicts with state law is invalid and unenforceable. When state-wide law conflicts with a municipal provision, the state law is superior and is construed to modify or limit the municipal provision. Operating with state-level statutory authority, the Board has the legitimate power to constrain municipal authority in accordance with state law. For this reason, the Board applied the correct law and acted within its legitimate authority to adjudicate unfair labor practice complaints.

[1] The Pawtucket Code of Ordinances provides that:

> "Whenever there is to be the establishment of a previously nonexisting salaried position or the abolishment of a previously existing salaried position, the Personnel Board shall make a preliminary and nonbinding recommendation to the Council relative to the necessity of the creation of a new position, or the reasons for the abolition of an existing position, and its fiscal impact on the municipal budget." Pawtucket R.I. Code § 88-6 (1994).

C

Managerial Prerogative

Lastly, Petitioner argues that its decision to amend the contested positions was within the City of Pawtucket's "managerial prerogative," was consistent with the management rights clause of the Collective Bargaining Agreement, and was consistent with our Supreme Court's "labor-nexus" test.

In *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126 (R.I. 1992), our Supreme Court held that "to preserve the integrity of the collective bargaining process, confidential employees must be excluded from membership in a collective bargaining unit." *Barrington School Committee*, 608 A.2d at 1136. Under the labor-nexus test, there are two categories of employees that may be excluded from collective bargaining: The first category comprises "those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Id.* (quoting *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 173 (1981)) (internal quotation marks omitted). "The second category consists of those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations." *Id.* (quoting *Hendricks*, 454 U.S. at 173) (internal quotation marks omitted). The *Barrington* Court stated that

> "the labor-nexus test strengthens the practice of collective bargaining in line with the objectives of the Rhode Island Labor Relations Act. In its usual application it is premised upon denying labor unfair access to management's confidential labor-relations strategies and data when management would not have similar access to labor's sensitive labor relations material. As a consequence it

> tends to encourage equitable collective bargaining between labor and management." *Id.*

Here, Petitioner provided testimony that the Administrative Assistant fits into both categories of "confidential" employee. First, as assistant to the Chief of Police, the Administrative Assistant works directly with the Chief to develop and manage ongoing labor policy. (Pet'r's Post-Hr'g Br. 14.) Second, the Administrative Assistant has a confidential work relationship with the Chief and regularly has access to confidential information regarding collective bargaining negotiations. *Id.* Therefore, although Petitioner committed an unfair labor practice violation by unilaterally deleting the Secretary position, the Administrative Assistant position is a confidential position that Petitioner may properly exclude from the collective bargaining unit, and therefore, Petitioner was within its legal authority to do so. Accordingly, the Board misapplied the governing law to the facts of this case.

IV

Conclusion

For the reasons stated herein, the Court sustains Petitioner's appeal. Counsel shall prepare an order for entry consistent with this opinion.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**City of Pawtucket v. Rhode Island State Labor Relations Board, et al.**
CASE NO:	**PC-2014-3560**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 17, 2022**
JUSTICE/MAGISTRATE:	**Nugent, J.**
ATTORNEYS:	
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For Defendant:	**Michael J. McAtee, Esq.** **Jeffrey W. Kasle, Esq.**