STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: July 3, 2014]

TOWN OF WEST GREENWICH	:	
	:	
VS.	:	**C.A. No. KC 10-1723**
	:	
RHODE ISLAND LABOR RELATIONS BOARD, RI LABORERS' DISTRICT COUNCIL LOCAL 1332	:	

DECISION

STERN, J. The Town of West Greenwich (Town) appeals an order of the Rhode Island State Labor Relations Board (Labor Board) accreting the position of Animal Control Officer (ACO) into the collective bargaining unit represented by the Rhode Island Laborers' District Council Local 1332 (Union). Jurisdiction is pursuant to G.L. 1956 §§ 28-7-29 and 42-35-15.

I

Facts and Travel

In 2006, the Labor Board certified the Union to represent all full-time and part-time police dispatchers employed by the Town—thus creating a bargaining unit of police dispatchers within the Union (Bargaining Unit). The Union had attempted to organize the dispatchers together with the ACO position; a Records Clerk position; and an Administrative Assistant to the Chief position as part of a single bargaining unit, but ultimately removed the non-dispatcher positions from the petition they submitted to the Labor Board after the employees holding the Records Clerk and the Administrative Assistant positions expressed that they did not wish to be part of a broader bargaining unit at that time. Apparently, it was important to the Union that it achieved an uncontested election.

In 2007, the Union attempted to accrete the ACO position into the Bargaining Unit by filing a unit clarification request with the Labor Board. After the parties submitted written statements, the Labor Board conducted an investigation, issued a report, and held formal hearings on the matter. Ultimately, the Labor Board issued a decision and order on October 20, 2010 (Decision and Order) through which it accreted the ACO position to the bargaining unit of police department dispatchers. This Decision and Order is the subject of the present appeal.

II

Standard of Review

This Court's review on appeal from a decision of an administrative agency is governed by the Rhode Island Administrative Procedures Act, §§ 42-35-1, et seq. See Rossi v. Employees' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). This Court may reverse or modify an agency's decision if:

> "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> "(1) In violation of constitutional or statutory provisions;
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> "(2) In excess of the statutory authority of the agency;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error or law;
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> "(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." Sec. 42-35-15(g).

This Court's review of an agency decision is, in essence, "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 484 (R.I. 1994).

In reviewing an agency decision, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Sec. 42-35-15(g). This Court will defer to an agency's factual determinations so long as they are supported by legally competent evidence. Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007). Our Supreme Court has defined legally competent evidence as "some or any evidence supporting the agency's findings." Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (citation omitted). "[I]f 'competent evidence exists in the record, [this] Court is required to uphold the agency's conclusions.'" Auto Body Ass'n, 996 A.2d at 95 (quoting R.I. Pub. Telecomms. Auth., 650 A.2d at 485). Thus, this Court may reverse the factual conclusions of the Labor Board "'only when they are totally devoid of competent evidentiary support [in the record],'" Baker v. Dep't of Emp't and Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)), but "[q]uestions of law . . . are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts." Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

III

Analysis

A

The Accretion Doctrine Under the Law

Under the so-called "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." R.I. Pub. Telecomms. Auth., 650 A.2d at 486 (citing N.L.R.B. v. Stevens Ford, Inc., 773 F.2d 468, 472-73 (2d Cir. 1985); Kaynard v. Mego Corp., 633 F.2d 1026, 1030

(2d Cir. 1980); N.L.R.B. v. Horn & Hardart Co., 439 F.2d 674, 682 (2d Cir. 1971); N.L.R.B. v. Security-Columbian Banknote Co., 541 F.2d 135, 140 (3d Cir. 1976)) (internal quotations omitted). 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." R.I. Pub. Telecomms. Auth., 650 A.2d at 486 (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 Security-Columbian Banknote Co., 541 F.2d at 140). Courts have admonished that the accretion doctrine "should be employed restrictively, with close cases 'being resolve[d] . . . through the election process'" in light of the fact that accretion imposes on employees a bargaining representative without their say-so. Stevens Ford, Inc., 773 F.2d at 473 (citing Westinghouse Electric Corp. v. N.L.R.B., 440 F.2d 7, 11 (2d Cir.), cert. denied, 404 U.S. 853 (1971)).

The case law outlines a set of core factors that the Labor Board must apply to determine if a "community of interest" exists among a group of employees and an existing bargaining unit.[1]

[1] As set forth in R.I. Pub. Telecomms Auth., these factors are:

> "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

R.I. Pub. Telecomms. Auth., 650 A.2d at 486. In determining whether a community of interests exists, the Labor Board "is not required to choose the most appropriate bargaining unit but only an appropriate bargaining unit." Id. (citing Wil-Kil Pest Control Co. v. N.L.R.B., 440 F.2d 317, 375 (7th Cir. 1971) (emphasis in original). Once it has been determined that a community of interests exists, the case law prescribes certain "additional" factors that must be taken into account to determine whether a particular group of employees should be accreted into a particular bargaining unit. Id. at 486-87; Stevens Ford, Inc., 773 F.2d at 473-74. One of these additional factors is "whether the group of employees to be accreted constitutes an appropriate unit on its own."[2] Stevens Ford, Inc., 773 F.2d at 473. Other factors that must be considered include the size of the group to be accreted relative to the size of the unit that is absorbing it;[3] whether the group to be accreted was in existence when the existing bargaining unit was recognized;[4] whether the existing unit is the result of prior accretions; and, whether the employees subject to accretion approve or not of the accretion into the existing unit. Id.

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12. Extent of the union organization." R.I. Pub. Telecomms. Auth., 650 A.2d at 486 (citing N.L.R.B. v. Saint Francis College, 562 F.2d 246, 249 (3d Cir. 1977)).

[2]If a group of employees does not constitute an appropriate unit on its own, a group should become part of the existing unit, unless the majority status of the bargaining representative is cast into doubt when the new group is accreted. Stevens Ford, Inc., 773 F.2d at 473. When a group of employees does constitute an appropriate unit on its own, the employees should be permitted the option of "'going it alone' with or without a bargaining representative," so that an election "registers the preferences of the group to be accreted and insures that its addition does not destroy the majority status of the union in the enlarged unit. Id.

[3] "[T]he larger the . . . group relative to the unit, the more doubt there is as to the wishes of the employees in the enlarged unit." Stevens Ford, Inc., 773 F.2d at 474.

[4] This is often a dispositive factor. Stevens Ford, Inc., 773 F.2d at 474. Accretion should not normally be permitted if the group to be accreted was in existence and excluded from an election. Id. This is because public policy favors the free choice of employees. Id. It is also consistent with the underlying rationale of the accretion doctrine, which is to preserve industrial stability "by allowing adjustments in bargaining units to accommodate new conditions." R.I. Pub. Telecomms. Auth., 650 A.2d at 486 (emphasis added).

B

Application of the Accretion Factors to the Decision and Order

In its Decision and Order, the Labor Board made express findings of fact relevant to some of the accretion factors prescribed by the case law. For instance, the Labor Board found that the dispatchers and ACOs "interact extensively with members of the public, answer phone calls from the public, complete written reports and forms . . . work within the same small offices in the same small Police Department offices," and "report to the Chief of Police." Decision and Order at 7. The Labor Board also found that there exists a "clear commonality of supervision and relationship to the administrative organization" between the dispatchers and the ACOs. Id. It found that the non-dispatcher positions had been removed from the Union's 2006 petition to unionize Town employees in order to achieve an uncontested election because the Records Clerk and the Administrative Assistant did not want to be part of the proposed bargaining unit. Id. And, it found that at least one of the two part-time employees who hold the ACO position in fact desires to be part of the Bargaining Unit. Id. The Labor Board concluded that "[t]he position of Animal Control Officer shares a sufficient community of interest with the bargaining unit to warrant inclusion of the position," id., and ordered that "[t]he position of Animal Control Officer shall be accreted to the bargaining unit." Id.

The Labor Board's findings leading it to conclude that the ACO position and the Bargaining Unit share a community of interest are supported by competent evidence in the record. Indeed, although the Labor Board acknowledged—and this Court agrees—that "not all accretion factors have been fully satisfied or established," Decision and Order at 7, the record is certainly not "totally devoid of competent evidentiary support" to reverse the Labor Board's conclusion to this point. Baker, 637 A.2d at 363. For example, although the Labor Board found

that the ACO and the dispatchers did not share a close similarity of pay scales and manner of determining earnings to indicate a community of interest in this respect, Decision and Order at 4, it did find a similarity in the kind of work performed in the qualifications, skills and training required of both kinds of workers. Decision and Order at 4-5. This finding is supported by competent evidence in the record.[5] So, too, is the Labor Board's finding that the ACO and the dispatchers frequently engage in contact with each other, perform similar kind of work, and work in close proximity with each other.[6] The Labor Board's finding that the ACO and the dispatchers share commonality of supervision and relationship to the administrative organization (in this case, the Town Council) is also supported by competent evidence,[7] as is its finding that at least one of the two part-time employees who hold the ACO position in fact desire joining the Bargaining Unit.[8]

[5] See, e.g., Hr'g Tr. 40, May 5, 2009 (Police Chief's testimony that both the dispatchers and the ACO are considered part of the same police department and that both ACOs and dispatchers positions require interacting with the public and communicating with people); Hr'g Tr. 43 (Police Chief's testimony that ACOs and dispatchers have overlapping duties to communicate with the public).

[6] See, e.g., Hr'g Tr. 20-21, May 5, 2009 (ACO's testimony that her office is located in the same building as the dispatchers; and that she lets the dispatchers know when she is in the building so that she can respond to calls); Hr'g Tr. 24-25 (ACO's testimony that she and a dispatcher would occasionally trade shifts with each other to accommodate each other's schedules; and that the dispatchers handle calls from the public and relay assignments to the ACO); Hr'g Tr. 38-39 (Police Chief's testimony respecting the frequency of contact between ACO and dispatchers); Hr'g Tr. 41 (Police Chief's testimony that the ACO is required to call the police station and find out from the dispatchers whether or not a call has come in to the Police Department requiring the ACO to respond; and that the ACO is responsible for providing dispatchers with a list of dog licenses in the Town).

[7] See, e.g., Hr'g Tr. 23-25, May 5, 2009 (ACO's testimony to the effect that her immediate supervisor is a police department Captain; that historically, she answers to the Chief of Police; that the Chief of Police and the police Captain set her schedule; and that the Town provides the ACO with a vehicle, uniforms, cell phone, and other equipment); Hr'g Tr. 27 (Police Chief's testimony that he supervises both the dispatcher and ACO positions).

[8] See, e.g., Hr'g Tr. 63, May 5, 2009 (Town Manager's testimony that the ACO desired to be in the Bargaining Unit at the time the Union was certified in 2006).

Although the Labor Board's conclusion that the ACO and the dispatchers share a community of interest is supported by competent evidence in the record, the Labor Board did not make any findings based on competent evidence in the record to allow it to conclude that the community of interest shared by the ACO and the dispatchers is sufficient to warrant inclusion of the ACO position in the Bargaining Unit. Specifically, the Labor Board did not make any findings as to certain "additional" factors prescribed by the case law that must be taken into account to determine whether a particular group of employees that share a community of interest with the employees in a bargaining unit should be accreted into that particular bargaining unit in the first place. R.I. Pub. Telecomms. Auth., 650 A.2d at 486-87; Stevens Ford, Inc., 773 F.2d at 473-74.

The Labor Board stated in its decision that it "is not required to choose the most appropriate bargaining unit [for the ACO position], but only an appropriate bargaining unit," Decision and Order at 7, but it did not make a finding, one way or the other, as to "whether the group of employees to be accreted constitutes an appropriate unit on its own." Stevens Ford, Inc., 773 F.2d at 473.[9] If the ACO position constitutes an appropriate unit on its own, the case law indicates that the employees holding that position should be permitted the option of "'going it alone' with or without a bargaining representative," so that an election "registers the preferences of the group to be accreted and insures that its addition does not destroy the majority status of the union in the enlarged unit." Id. The Labor Board's finding that one of the two part-

[9] The Labor Board position, in fact, is a misstatement of the law: the Labor Board chooses an appropriate bargaining unit for the purpose of determining whether a community of interest exists between a group of employees and an existing bargaining unit. R.I. Pub. Telecomms. Auth., 650 A.2d at 486. Whether or not a particular group of employees should be accreted into a particular bargaining unit requires a separate analysis. Id. at 486-87; Stevens Ford, Inc., 773 F.2d at 473-74. Determining whether or not a position belongs as part of a bargaining unit is of paramount importance, and this determination may not be glossed over.

time employees who currently hold the ACO position "is desirous" of belonging to the Bargaining Unit is not enough to satisfy the requirement that the Labor Board determine whether or not the ACO constitutes an appropriate unit on its own. Indeed, the Labor Board's presumption—without proof—that the ACO position belongs in a bargaining unit undermines public policy preference respecting employees' freedom of choice. See Stevens Ford, Inc., 773 F.2d at 474.

Relatedly, neither did the Labor Board consider the importance of the fact that the ACO position was in existence at the time the Labor Board certified the Bargaining Unit when it determined that accretion of the ACO position into the Bargaining Unit was warranted. Indeed, the Union originally sought to join the ACO position, along with the dispatchers and two other positions, as part of a single bargaining unit within the Union before abandoning this tactic and organizing the dispatchers as a bargaining unit independently. Yet, other than stating this narrative as a finding of fact, the Labor Board's Decision and Order does not indicate that it took into consideration these circumstances when it determined that the ACO position should be accreted into the Bargaining Unit in the first place. Decision and Order at 7-8. Taking a fact into consideration requires more than merely stating the existence of such fact. Because accretion should not normally be permitted when the group to be accreted was in existence and excluded from an election for some reason, Stevens Ford, Inc., 773 F.2d at 474, the Labor Board was required to make a specific finding as to why accretion of the ACO position, in this case, should be allowed. The Labor Board made no such finding.

IV

Conclusion

This Court will defer to the Labor Board's factual determinations that are supported by legally competent evidence in the record. Town of Burrillville, 921 A.2d at 118. Although the Labor Board met this burden in finding that the ACO position shares a community of interest with the Bargaining Unit, its conclusion that the ACO position should be accreted into the Bargaining Unit in this particular context is not supported by findings based on legally competent evidence. Accordingly, the Labor Board's Decision and Order is hereby reversed.[10] Counsel shall prepare and submit an appropriate order for entry.

[10] The Court here is confining itself to a review of the facts as developed on the record. While §§ 42-35-1, et seq. require reversal of the Labor Board's Decision and Order because the Labor Board failed to make certain requisite findings of fact supported by competent evidence, the Court takes no position as to whether accretion of the ACO position to the Bargaining Unit is permissible as a matter of law in light of the fact that the ACO position actually existed at the time the Labor Board certified the Bargaining Unit and that Stevens Ford, Inc. suggests that accretion should not "normally" be permitted under such circumstances. Stevens Ford, Inc., 773 F.2d at 474.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of West Greenwich v. Rhode Island Labor Relations Board, RI Laborers' District Council Local 1332
CASE NO:	C.A. No. KC 10-1723
COURT:	Kent County Superior Court
DATE DECISION FILED:	July 3, 2014
JUSTICE/MAGISTRATE:	Stern, J.
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