STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 6, 2014)

RHODE ISLAND COUNCIL 94, AFSCME, AFL-CIO, LOCAL 2870	:	
	:	**C.A. No. PC-11-6305**
V.	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD and STATE OF RHODE ISLAND, DEPARTMENT OF HEALTH	:	

DECISION

CARNES, J. Rhode Island Council 94, AFSCME, AFL-CIO, Local 2870 (Local 2870) appeals from a decision of the Rhode Island State Labor Relations Board (the Board), finding that the State of Rhode Island, Department of Health (the DOH) had not violated chapter 7 of title 28 of the R.I. General Laws, known as the Rhode Island State Labor Relations Act (the Labor Relations Act). The Board held that the DOH did not commit an Unfair Labor Practice when it permitted third-party inspectors, instead of Local 2870 inspectors, to conduct food safety inspections at Rhode Island elementary and secondary schools. Jurisdiction is pursuant to G.L. 1956 § 28-7-29.

I

Facts and Travel

The instant controversy stems from an unfunded federal statutory mandate known as the Child Nutrition and WIC Reauthorization Act of 2004 (the Act). (Board R., Ex. D, USDA Mem., Dec. 16, 2004.) The Act pertains to food safety inspections required in schools that

participate in the National School Lunch or School Breakfast Programs.[1] Id. Prior to the Act's reauthorization, schools were required to obtain a minimum of one food safety inspection per school year. Id. Following the reauthorization, the minimum number of inspections was raised to two per school year beginning in July of 2005. Id. The United States Department of Agriculture (the USDA) oversees the implementation of the Act, and the individual state departments of education are responsible for ensuring the inspections occur and reporting back to Congress through the USDA each year. (Board R., Ex. B, Hr'g Tr. at 133-34, Jan. 21, 2010.) In advising the departments of education about the new inspections, the USDA stated, "We encourage State agencies to contact their State and/or local agencies responsible for food safety inspections to help facilitate schools' compliance with the new requirements." (Board R., Ex. E, USDA Q&E, July 12, 2005.)

In Rhode Island, the DOH's Office of Food Protection is the state agency responsible for food safety inspections.[2] Therefore, upon the release of the USDA Memorandum regarding implementation of the Act, multiple discussions occurred between and among the Rhode Island Department of Education (the RIDE), the DOH, represented by Dr. Ernest Julian, Director of the Office of Food Protection, and the USDA. At these meetings, the USDA agreed that the requirement for food safety inspections could be met through the utilization of third-party inspectors, instead of existing state-employed inspectors. (Board R., Ex. B, Hr'g Tr. at 137-38, Jan. 21, 2010.) The Office of Food Protection would remain involved by providing criteria for the third-party inspectors, and its staff would be called in should a third-party inspector discover a problem at a school. Id. at 141.

[1] The School Breakfast and the National School Lunch Programs assist states in providing free and low-cost meals to school children. http://www.fns.usda.gov/school-meals/child-nutrition-programs.

[2] See http://www.health.ri.gov/programs/foodprotection (last visited Oct. 31, 2014).

On March 2, 2006, Mr. Peter McWalters, the Commissioner of Education, issued a memorandum to Rhode Island school officials informing them of the new USDA food inspection requirement. Id. at 138-39. Mr. McWalters also indicated that the inspection requirement could be satisfied by the use of approved third-party inspectors at the expense of the local school districts. Id. at 141. These inspectors would be required to file electronic reports on the day of inspection and to report any imminent health hazards to the DOH, which could then send state-employed inspectors to the site.[3] Id. at 141, 147-48.

Local 2870 is the labor organization representing health code inspectors employed by the DOH. Upon learning during a staff meeting that third-party inspectors were to be used to perform school food inspections, Local 2870 filed an Unfair Labor Practice charge[4] with the Board in December of 2006. Local 2870 contends that the DOH had a duty to bargain with it before using non-bargaining third-party inspectors to perform food inspections at schools.

After much delay and the case being placed in abeyance at the request of Local 2870, the formal hearing in front of the Board occurred on October 15, 2009 and was completed on January 21, 2010. (Board R., Ex. A, Board Decision at 2, Oct. 12, 2011.) Representatives from both Local 2870 and the DOH were present at the hearings. Id. Doreen Beck, an Environmental Health Food Specialist, and Rosa Morales, a Senior Environmental Health Food Specialist, both from the Office of Food Protection, testified on behalf of Local 2870.

Ms. Beck testified about her work as an inspector and, in particular, regarding how inspections are prioritized based on a variety of factors.[5] (Board R., Ex. B, Hr'g Tr. at 17-19,

[3] The third-party inspectors have no legal authority to enforce the food code. (Board R., Ex. B, Hr'g Tr. at 141, Jan. 21, 2010.)
[4] See §§ 28-7-13(6) and (10).
[5] Prioritization occurs according to the population's risk level; "For example, a nursing home has a highly susceptible population. Schools do, too, so they're considered high risk." (Board R.,

Oct. 15, 2009.) She maintained that even though the department had only seven inspectors, they would have been able to perform all the newly-required school inspections; the schools would have been assigned higher priority, and the Local 2870 inspectors would have done those inspections in lieu of going to other, lower-risk facilities. Id. at 26.

Ms. Morales, who is also the president of Local 2870, agreed with Ms. Beck's testimony that the use of the prioritization system would allow them to inspect all the required schools. Id. at 94. She contended that although she did not have a number, the new school inspections would not add up to 1000 as proposed by Dr. Julian. Id. at 87-88. While Ms. Morales did admit there would be 500 schools in Rhode Island that would result in 1000 inspections, she testified that not all of these schools were licensed by the Office of Food Protection, so it would not be their responsibility to perform every inspection. Id. Both parties stipulated to the fact that the DOH inspectors performed 181 school inspections in the 2005-2006 school year, and that number included reinspections. Id. at 85. Ms. Morales maintained that this number would be divided among the ten inspectors—including supervisors—resulting in eighteen inspections per person, and that the result would be not doing eighteen Dunkin' Donuts or eighteen Cumberland Farms. Id. at 94. Ms. Morales did state that the third-party inspectors do not have the same authority as the state-employed inspectors, but she testified that having read the third-party reports online, she observed that the inspectors were not reporting violations to the Office of Food Protection.[6] Id. at 82. However, she made it clear that it was not her job to address these violations, and that

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Ex. B, Hr'g Tr. at 17, Oct. 15, 2009.) Another factor the inspectors consider is how many people are being served. Id. at 18.

[6] It is unclear whether the filing of the reports that included a "critical violation" was sufficient to notify the state inspectors that follow-up was required. Ms. Morales testified that she would check to see if the local inspector had followed up, and she was able to see that the state did not send anyone to the location of the "critical violation," leaving an unsafe situation in existence. (Board R., Ex. B, Hr'g Tr. at 83-84, Oct. 15, 2009.)

the third-party supervisor, Tom Nerny, was responsible for following up on the third-party inspections. Id. at 82-83. Ms. Morales also testified regarding the many conversations she had with Dr. Julian regarding the required increase in school inspections, as well as a meeting with the Chief of Staff at the DOH, Lenny Green; she maintained that Mr. Green failed to respond to Local 2870 and properly address the issue. Id. at 58-59, 63.

The Board did not incorporate Ms. Beck or Ms. Morales's testimony in the Findings of Fact. Dr. Julian testified on behalf of the DOH regarding the need for using third-party inspectors, instead of state-employed inspectors. This need arose in part because Dr. Julian determined that the Act would result in approximately 1000 new food safety inspections per year, but, at the time, approximately 18,000 required food safety inspections were not being done by state-employed inspectors due to severe staffing shortages. (Board R., Ex. B, Hr'g Tr. at 159-61, Jan. 21, 2010.) There was also a state hiring freeze, so Dr. Julian was not permitted to hire new inspectors, regardless of whether the RIDE could provide his office with additional funding. Id. at 162. The DOH, however, did not contract with any third-party inspectors; that was left up to the individual schools. The Board issued its decision on October 12, 2011. (Board R., Ex. A, Board Decision.) In that decision, the Board concluded that Local 2870 failed to establish by a preponderance of the credible evidence in the record that the DOH had committed an Unfair Labor Practice. Id. at 8. On November 1, 2011, Local 2870 filed a timely notice of appeal to this Court.

II

Standard of Review

This Court's review of the Board's decision is governed by chapter 35 of title 42, entitled the Administrative Procedures Act. See Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007). G.L. 1956 § 42-35-15(g) 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 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."

When reviewing a decision under the Administrative Procedures Act, this Court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Assocs., Inc. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).

However, "[q]uestions of law determined by the administrative agency are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." Dep't. of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. R.I. Conflict of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986)). Thus, "[a]lthough this Court affords the factual findings of an administrative

agency great deference, questions of law—including statutory interpretation—are reviewed de novo." Heritage Healthcare Servs., Inc. v. Marques, 14 A.3d 932, 936 (R.I. 2011) (quoting Iselin v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008)).

III

Analysis

The Labor Relations 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 Labor Relations Act has been repeatedly interpreted using federal case law as a guide. See Town of Burrillville, 921 A.2d at 120 (citing DiGuilio v. R.I. Bhd. of Corr. Officers, 819 A.2d 1271, 1273 (R.I. 2003) ("[The Supreme Court has] consistently looked to federal law for guidance in the field of labor law.")). Thus, this Court will be guided by state and federal case law in determining whether the Board erred in concluding that the DOH did not commit an unfair labor practice when it did not bargain with Local 2870 before approving schools' use of third-party inspectors to conduct federally-mandated food inspections.

In this matter, Local 2870 asserts there was not a scintilla of evidence to support the Board's decision, and it should be vacated. Local 2870 argues that whether or not the food inspection work was bargaining unit work is not dependent on the federal law, and, as there was nothing in this mandate requiring the state to allow private persons to perform the work, DOH could not be excused from its statutory obligation to its unionized employees under the Labor Relations Act. They also argue that the evidence showed the work at issue had never been performed by private employees before, so it is impossible to conclude that the inspection work was not exclusively bargaining unit work.

The DOH maintains that the evidence on the record supports the Board's determination because it shows that the Act[7] required schools to obtain the food safety inspections, and the DOH did not have sufficient state-employed personnel to perform the newly-required inspections. As such, the DOH argues that there is no evidence to suggest that it took any actions requiring negotiation with Local 2870 inspectors or that affected their rights under the Labor Relations Act.

The Board also maintains that there is factual evidence in the record to support its conclusion that the type of inspection required under the Act is not exclusively bargaining unit work, and that the use of private inspectors for "triage" inspections does not violate the Labor Relations Act. Furthermore, the Board emphasizes that the USDA specifically approved third-party inspections, and because these third-party inspectors have no regulatory authority or enforcement powers, their work does not rise to the level of bargaining unit work. Both the Board and the DOH assert that the Board's decision should be upheld.

A

The Board's Decision Should be Upheld

In Lummus Co. v. N.L.R.B., 119 U.S. App. D.C. 229, 237-38, 339 F.2d 728, 736-37 (1964), the United States Court of Appeals for the District of Columbia held that "[l]abor relations are practical matters. They are not finespun legalistic theories. Their basic premise is the bargaining table. . . . The conclusion must be realistic in the circumstances." Under both the National Labor Relations Act and Rhode Island's Labor Relations Act, it is an unfair labor practice for an employer to "[r]efuse to bargain collectively with the representatives of

[7] The Act is an unfunded federal mandate. See discussion, infra, Sec. III, Part A.

employees. . . ." Sec. 28-7-13(6); see also 29 U.S.C.A § 158(a)(5). This refusal can apply only where the work at issue is bargaining unit work.

It is well established in statutory construction that "shall" is a mandatory term. See DIRECTV, Inc. v. Brown, 371 F.3d 814, 817 (11th Cir. 2004); Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010) ("The use of the word 'may' rather than the world 'shall' indicates a discretionary rather than a mandatory provision.) (internal citations omitted)). The Act at issue here is not a permissive statute but rather it is mandatory: "Schools shall obtain a minimum of two food safety inspections during each school year conducted by a State or local governmental agency responsible for food safety inspections." 7 C.F.R. § 210.13. (Emphasis added.) The Act is a federally unfunded mandate, and, as such, puts state agencies in a difficult position of carrying out the newly-required inspections without any increase in financial support.

The Office of Food Protection, as authorized by the DOH, has a responsibility to inspect and license food establishments, including schools.[8] The DOH:

> "shall take cognizance of the interests of life and health among the peoples of the state . . . and do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health, and adopt proper and expedient measures to prevent and control diseases . . . ." Sec. 23-1-1.

Under the Rhode Island Administrative Code, the DOH "shall prioritize, and conduct inspections based upon its assessment of a food establishment's history of compliance with this Code and the establishment's potential as a vector of foodborne illness. . . ." R.I. Admin. Code 31-3-11:8-4. "The director of health, or the director's authorized agents, shall enforce the provisions" of Rhode Island General Laws section 21, chapter 27, entitled Sanitation in Food Establishments. Sec. 21-27-11.13. Thus, there is much discretion left to the director and the director's agents in

[8] http://www.health.ri.gov/programs/foodprotection (last visited Oct. 31, 2014).

managing inspections and how they are performed. Furthermore, it is a "well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency." Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456 (R.I. 1993); see also Arnold v. Lebel, 941 A.2d 813, 820-21 (R.I. 2007). The DOH has been entrusted with not only ensuring food safety in schools but also in all other licensed food establishments.

Local 2870 maintains that the sole purpose of acquiring the third-party inspectors was to replace their state employees and not increase their workload. There is, however, little to no evidence of record to support this argument. Ms. Beck testified that her "office put together a group of inspectors that were allowed to go out . . . and inspect the schools," and that "we [the state inspectors] were told not to inspect the schools." (Board R., Ex. B, Hr'g Tr. at 23, Oct. 15, 2009.) She also stated that she had conducted several school inspections after the third-party inspectors reported problems. Id. at 24. Ms. Beck did ask Dr. Julian why she and her fellow state workers were not being given the jobs, and she reported that his reason was due to insufficient staffing. Id. at 25-26. Ms. Morales also testified that Dr. Julian had made clear to her that his staff would not be able to perform all the newly-required school inspections. Id. at 61. Dr. Julian testified that the Act would require approximately 1000 school inspections per year, including reinspections. (Board R., Ex. B, Hr'g Tr. at 120, Jan. 21, 2010.) He further explained that prior to the Act, his department distinguished between schools that prepare thousands of meals and schools that receive already-prepared meals when prioritizing inspections. Id. at 120-21. Dr. Julian testified that the Act, however, made no such distinctions, and the number of schools requiring biannual inspection would now include facilities that were

not licensed by the DOH and that the Office of Food Protection had never had any authority to inspect. Id. at 121-22.

Furthermore, in support of their argument that the DOH sought to replace Local 2870 inspectors, Ms. Beck and Ms. Morales testified that the state-employed inspectors could perform the additional school inspections simply by prioritizing them in lieu of other inspections. (Board R., Ex. B, Hr'g Tr. at 26, 94, Oct. 15, 2009.) Dr. Julian, however, as the Director of the Office of Food Protection, testified that, "We felt that we couldn't, in the department, inspect kitchen - - inspect schools that just serve kids, twice a year at the expense of other facilities where the potential for illness was tremendously higher." (Board R., Ex. B, Hr'g Tr. at 136-37, Jan. 21, 2010.) Thus, there is no evidence that the DOH sought to replace the Local 2870 inspectors. Rather, Dr. Julian and the Office of Food Protection determined that there were not enough inspectors to comply with the Act and still uphold the agency's responsibility to inspect other food establishments.

Dr. Julian emphasized further that the solution to this dilemma of a staff shortage, after many discussions including both RIDE and the USDA, "was that the schools were going to hire third-party inspectors to conduct the inspections. The people don't work for the health department. There is no contract with the third parties with the health department. The third parties are hired by the schools to do the inspections." Id. at 138. Local 2870 has offered no reason why Dr. Julian's decision, made in concert with the RIDE and the USDA, to permit the schools' hiring of third-party inspectors is not within his discretion as an agent of the DOH director.

Local 2870 further argues that there is no direct conflict between the state Labor Relations Act and the federal Act necessitating the use of third-party inspectors. In State Dep't.

of Admin v. R.I. Council 94, A.F.S.C.M.E., AFL-CIO, Local 2409, the Court found that while "there are circumstances in which a supervisor or director responsible for carrying out the state's responsibilities and 'empowered by clearly delineated state law,' must be free to perform those duties unhampered by contrary provisions of a [collective bargaining agreement]," these circumstances require there to be "a direct conflict between the statutory language and a competing contractual provision." 925 A.2d 939, 945 (R.I. 2007). In other words, where the employer can "comply with both the terms of the CBA and" the statute at issue, it should do so. Id. at 943. However, in the Local 2409 case involving the merger of the Rhode Island Sheriffs and Marshals, there was no question that the work at issue was bargaining unit work that was being assigned only to former marshals, resulting in overtime being unfairly distributed. Id. at 941-42. Upon the merger of the divisions, "the functions previously performed by the two units were combined by the merger statute," but there was some discretion granted to the director allowing him to postpone transferring functions as long as the merger was completed within three years. Id. at 941.

As part of its case before the Board, Local 2870 submitted the job classifications for an Environmental Health Food Inspector, an Environmental Health Food Specialist, and a Senior Environmental Health Food Specialist, and these jobs are the bargaining unit work at issue in the instant matter. (Board R., Ex. C., Job Classifications.) For the Environmental Health Food Inspectors, the duties include "[t]o identify and eliminate conditions hazardous to life and health in food." Id. (Emphasis added.) They are to "embargo and oversee the disposal of food products found unfit for human consumption" and to "assist in instituting appropriate regulatory action when needed, including the preparation of regulatory correspondence, to maintain appropriate records of activities, and to follow up on violations to insure corrective actions have

been taken and public health hazards are eliminated." Id. This is the job that Local 2870 inspectors working as Environmental Health Food Inspectors have done and continue to do at schools. The third-party inspectors, however, do not have the same duties. Ms. Morales testified that the third-party inspectors do not have the same regulatory authority, and that the most a third-party inspector could do upon finding a violation is request a voluntary closing or recommend disposal of unsafe food and then file a report with the Office of Food Protection. (Board R., Ex. B, Hr'g Tr. at 80-81, Oct. 15, 2009.) Therefore, the work at issue was different than the work done by—and the responsibility given to—the Local 2870 inspectors, and it was not bargaining unit work. Thus, the Local 2409 case is not applicable in this situation, and notably, the statute at issue in that case was not a federal mandate.

Even if the work at issue in the instant matter was bargaining unit work, the Act is binding upon the RIDE and schools, not on the DOH. The Act states that "each school must obtain at least two food safety inspections each school year." 7 C.F.R. § 210.13. The Act does also state that "the inspections must be conducted by a State or local governmental agency responsible for food safety inspections," but the USDA made clear that "it is each school food authority's responsibility to obtain the required inspections." Id.; Board R., Ex. E, USDA Q&E, July 12, 2005. Furthermore, the USDA approved the use of third-party inspectors after Dr. Julian explained that the Office of Food Protection would be unable to perform all the required inspections. (Board R., Ex. B, Hr'g Tr. at 136-37, Jan. 21, 2010.) The USDA found that the DOH's training of third-party inspectors and the use of state-employed inspectors to follow up on any violations was sufficient involvement on the part of the DOH. Id. at 141. The goal of the Act and the goal of the DOH are to protect schools, and the use of third-party inspectors was found to be the best way to ensure food safety in Rhode Island Schools. Accordingly, the

decision of the Board, finding that the DOH did not commit an Unfair Labor Practice, is not in excess of the Agency's statutory authority.

IV

Conclusion

As the Board noted in its decision, "[t]he factual circumstances giving rise to this dispute illustrate an example of a negative local impact from a federally unfunded mandate." (Board R., Ex. A, Board Decision at 5.) Dr. Julian's approach to the problem of schools being required to have biannual inspections was "realistic in the circumstances" given the limited number of state-employed inspectors as well as the hiring freeze. Lummus Co. v. N.L.R.B., supra. The need for third-party inspectors arose out of necessity, not due to the DOH's intent to replace the Local 2870 inspectors. The Board in making its decision relied on the extensive and detailed testimony of Dr. Julian and the evidence submitted by the DOH detailing the number of inspections needed, the number that could actually be performed, and the number of inspections that would never be done. (Board R., Ex. F, DOH Inspection Spreadsheets.) The decision thus supported by the reliable, probative, and substantial evidence of the record is not clearly erroneous or arbitrary or capricious. See § 42-35-15(g). The substantial rights of Local 2870 have not been prejudiced. As such, this Court affirms the Board's decision. Counsel shall submit an appropriate order and judgment forthwith.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Rhode Island Council 94, AFSCME, AFL-CIO, Local 2870 v. Rhode Island State Labor Relations Board and State of Rhode Island, Department of Health**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 6, 2014**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
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