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- THE TOWN OF NORTH KINGSTOWN	CASE NO: ULP-6071

AMENDED
DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board"), as an Unfair Labor Practice Complaint (hereinafter "Complaint"), issued by the Board against the Town of North Kingstown (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated January 3, 2012 and filed on January 6, 2012 by the International Association of Firefighters, Local 1651 (hereinafter "Union").

The Charge alleged violations of R.I.G.L. 28-7-13 (6) and (10) and (11) as follows:

SUMMARY OF BASIS OF CHARGE

> Since on or about December 19, 2011, the Employer has failed and refused to bargain in good faith and failed to abide by an arbitration award.
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> On December 19, 2011, the Employer sent a letter to the Union (attached), which advised, in pertinent part, that it intended to implement by ordinance a revised staffing procedure effective February 1, 2012, unless the Union proposed, and the Employer agreed to, alternate terms, which provide "equal or greater savings." This ultimatum fails to allow a meaningful opportunity to bargain in good faith by failing to identify the claimed savings, failing to allow sufficient time or opportunity to investigate the claim of any savings, and failing to investigate alternatives.
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> The December 19th letter also advises that section 3.26 of the Collective Bargaining Agreement "will not be renewed". This constitutes a refusal to bargain terms and conditions of employment relating to staffing, and further violates the terms of the Interest Arbitration Award, dated August 12, 201 which prescribed that section.
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> The December 19th letter further claims that "other provisions of the contract...cannot be continued in their present form...include[ing] but... not limited to [sections 3.22, (BO), 3.25 (a), 3.27, 4.1.4.4 and 4.6." The letter offers no basis for this contention, or for the unilateral repudiation of these provisions.
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> The Employer's threat to implement terms unilaterally violates the Labor Relations Act, which requires bargaining until a successor contract is reached, Rhode Island State Labor Relations Board and Warwick School

Committee, No ULP-4647 (RISLRB No 10, 1992) aff'd, C.A. No. 92-1199 (1993) or at the very least until impasse resolution procedures have been exhausted, East Providence School Committee v East Providence Education Association, 2010 WL 1004479 (RI Super.). In addition, because the Fire Fighters Arbitration Act prohibits the Employer from unilaterally implementing new terms of employment, the threat to implement these terms constitutes bad faith bargaining.

The Employer made the foregoing threats for the illegal purpose of attempting to coerce the Union to waive its rights under the Labor Relations Act and the Fire Fighters Arbitration Act.

As a remedy, the Union requested that the Employer be restrained and enjoined from violating the terms of the Interest Arbitration Award, from failing to bargain in good faith, and from implementing any new terms of employment pending interest arbitration or a successor agreement.

Following the filing of the Charge, the Administrator notified the Town in writing of the charge and provided a copy of the same on January 9, 2012.[1] In accordance with R.I.G.L. 28-7-8 and Board Rule 9.01.7, and R.I.G.L. 28-7-9 (d), the Board's Administrator directed both parties to submit written statements for the informal hearing process by January 20, 2012 with any replies to the initial statements to be filed by January 27, 2012.

Upon request made by the Employer, the parties were granted an extension of time, in which to file their statements and replies, to February 3, 2012 and February 10, 2012, respectively. On February 13, 2012, the Employer filed a motion for recusal with the Board seeking the Board's removal of Board Member Frank J. Montanaro from participation in the within proceedings. On February 20, 2012, the Union filed its objection to the Town's motion.

After the informal hearing process conducted by the Administrator, the Board reviewed the matter, including the written statements submitted by both parties and issued a complaint on March 22, 2012. The Board's complaint alleged: "The Employer violated R.I.G.L. 28-7-13 (6) (10) and (11) since December 19, 2011 by failing and refusing to bargain in good faith, by threatening to repudiate contractual provisions, and by threatening to unilaterally implement terms and conditions of employment without first exhausting all statutory resolution impasse procedures, with the intention of coercing the certified bargaining representative to waive statutory rights."

The Employer filed an answer on March 28, 2012. The matter was then scheduled for a formal hearing on April 26, 2012. At the Employer's request, the matter was then

[1] Also of January 9, 2012, Board Member Elizabeth S. Dolan filed a recusal with the Board and the Rhode Island Ethics Commission, citing a conflict of interest preventing her participation in the matter.

re-scheduled to May 3, 2012 and June 19, 2012. On May 31, 2012, the Union filed an extensive amended charge, incorporating therein, the result of a Superior Court decision issued on May 23, 2012, in the case of International Association of Firefighters, Local 1651, AFL-CIO v Town of North Kingstown, WC 12-0127. On June 5, 2012, the Employer filed an objection to the amended charge. Also on June 5, 2012, the Union filed a letter with the Board seeking an expedited hearing on the matter. On June 11, 2012, the Employer filed a Memorandum in support of its objection. On June 12, 2012, the Board reviewed the amended charge and determined that the charge was not appropriate as an amendment to the existing charge and that the Board would not amend the existing Complaint. The Board advised that should the Union still want to press the issue, it must be filed as a separate charge.[2] At the request of the Employer, the formal hearing that was scheduled for June 19, 2012 was re-scheduled to September 27, 2012. On September 14, 2012, the Union filed a letter requesting that the hearing scheduled for September 27, 2012 for the within matter (ULP-6071) be postponed; and for ULP-6088 to be substituted for hearing instead. That letter was amended on September 24, 2012 to correct a typographical error. The September 24, 2012 letter also requested that the matter in ULP 6071 be held in abeyance, until such time as ULP-6088 is concluded. On September 24, 2012, the Board granted the Union's request to hold ULP-6071 in abeyance until ULP-6088 was concluded. On January 2, 2013, the Union filed a status update indicating that the parties would be meeting in January 2013, in an effort to try and resolve the matters in both ULP-6071 and ULP-6088. In May 2013, the Union further notified the Board that it would like to remove ULP-6071 from abeyance status and place it back on the formal hearing calendar, with the caveat, however, that it would prefer to use available formal hearings first to conclude the matter in ULP-6088. On May 13, 2013, the matter was set down for a Formal Hearing on June 4, 2013. On June 10, 2013, the Employer filed a motion to dismiss the matter and on June 17, 2013 the Union filed its objection to the Employer's Motion. The Motion to Dismiss was scheduled for consideration at the Board's meeting on July 31, 2013 and was denied and the Board established a briefing schedule. Both the Union and the Employer filed briefs on

[2] On June 14, 2012, the Union filed a second charge against the Town (the same charge as it had attempted to file as the amended charge) and that matter was assigned Case No ULP 6088. At the time of this decision, that matter has been decided by the Board (September 27, 2013) and appealed to the Superior Court of Rhode Island. A final judgment in that matter is presently pending.

September 16, 2013. On November 26, 2013, the Board met and voted to uphold the charge and referred the matter to legal counsel for drafting. On March 3, 2014, the Board issued the original Decision and Order, which was appealed by the Employer. On March 19, 2014, the Union filed a Motion to reconsider the Board's decision, seeking a revision to number three (#3) of the Board's Order. The Employer did not object to the Motion. On April 29, 2014, the Board considered the Union's request and granted the Motion to revise the Board's original Decision and Order.

SUMMARY OF FACTS

The Employer and Union have long been collective bargaining partners, pursuant to the authority and requirements vested under the FFAA. The most recent long-term Collective Bargaining Agreement ("CBA") was for the period 2007-2010. (Union Exhibit #2) The contract for fiscal year 2010-2011 was the result of protracted interest arbitration proceedings, which produced an award on August 9, 2011 – ***after*** the expiration of the effective contract year. (Union Exhibit #3)[3] Within that arbitral process, the Employer had sought to change the platoon structure of the fire department from four (4) platoons to three (3) and to change the working hours of the employees from an average workweek of forty-two (42) hours to one of an average of fifty-six (56) hours. The Employer's proposal would have changed the working hours of the firefighters from four (4) days on (two (2) ten (10) hour shifts, followed by two (2) fourteen (14) hour shifts) followed by four (4) days off to one twenty-four (24) hour shift, followed by forty-eight (48) hours off.

The parties commenced the interest arbitration process for the 2011-2012 fiscal year on October 28, 2011. At that first meeting, the Employer submitted a bargaining proposal for the revised platoon structure and the fifty-six (56) hour work-week. (TR. pg. 22) In addition, the Employer indicated that unless the Union could come up with structural savings of 1.2 million dollars, purportedly equivalent to the structural savings

[3] The interest arbitration panel in that proceeding conducted thirteen days (13) of hearings, reviewed 172 exhibits and 357 pages of post-hearing briefs. The interest arbitration Award for the 2010-2011 fiscal year issued on August 9, 2011, after the conclusion of the fiscal year it governed. The panel in that proceeding denied the Employer's proposal to change the platoons and working hours as requested for a variety of reasons, including: (1) it would be a drastic departure from the current schedule, thereby impacting the lifestyles of employees who have come to function on a four-day on, four-day off type of regimen. (2) it would bring significant change to the way that employees interact with their families by increasing the average number of hours worked per week from forty-two to fifty-six. (3) The Town's financial situation did not warrant such a drastic change. (4) None of the comparable communities being compared had the same shift schedule being proposed.

under the platoon/shift change, then the parties were not going to be able to come to an agreement. (TR. pg. 22)

A little less than two (2) months later, on the afternoon of December 19th, the Employer hand-delivered a letter to Raymond Furtado, Union President; accompanying the letter was a proposed ordinance, amending Chapter 14, Personnel, of the Town's Code of Ordinances. According to the letter, the Town Council was planning to vote on the ordinance that very evening, on December 19, 2011 and also, on January 9, 2012. The letter further stated:

> "The Town Council intends to implement a three-division structure for line firefighting/rescue personnel in the Fire Department effective February 1, 2012. If you would like to discuss the effects of this decision on members of your Union, or if you believe that the Union can provide structural savings equal to or greater than the three-division structure provides, and therefore you would like to discuss the decision itself, please let me know, and we will set up a mutually convenient time to meet. The Town is prepared to discuss these issues at our meeting tomorrow, as we have told you.
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> In the absence of a different agreement, effective February 1, 2012, the Town intends to implement a schedule in which each line firefighting/rescue division will be on duty for one 10 hour day shift followed by one 14 hour night shift, followed by 48 hours off; the number of hours of sick, vacation, and other time off will not change; overtime pay will be provided in accordance with the Federal Fair Labor Standards Act, 29 U.S.C. §207 (k) and; annual base salaries will not change.
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> Section 3.26 of the contract will not be renewed, as it unlawfully restricts the constitutional and statutory authority and duties of the Town's officials. It is our expectation and plan, however, that the number of firefighters on duty at all times will be greater than before, as the Town does not intend to layoff personnel.
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> Other provisions of the contract are either unlawful or require renegotiation, in whole or in part, as they cannot be continued in their present form. Among them are included, but not limited to, the following: Sections 3.22 (B), 3.25 (a), 3.27, 4.1, 4.4 and 4.6. If you would like to discuss any of this, please contact me so a meeting can be scheduled promptly."

POSITIONS OF THE PARTIES

The Union contends that the Employer violated the State Labor Relations Act (hereinafter "SLRA") by threatening to unilaterally implement terms and conditions of employment without bargaining to impasse, by threatening to repudiate contractual provisions, with the intention of coercing the exclusive bargaining representative to waive statutory rights. [4]

The Employer argues that the issues presented in this case are: (1) Whether it is an unfair labor practice for the Town to inform the Union that the Town was considering

[4] The Union noted that the Board has already found the unilateral implementation of the terms and conditions of employment, as threatened herein, in an unfair labor practice. (Referencing ULP-6088, issued September 27, 2013)

the enactment of legislation as an alternative plan of action, in the event that the parties were not able to reach a successor agreement after months of negotiations? (2) Whether the SLRA can operate to restrict the Town Council from considering the enactment of legislation pursuant to its legislatively ratified Home Rule Charter? The Employer also argues that the letter amounts merely "hardball bargaining" which is not prohibited. Further, the Employer argues that the SLRA does not "trump" the Town's Home Rule Charter.

In addition to the arguments raised in its post-hearing brief, the Employer also filed an earlier motion to dismiss, arguing that the Board had no authority to hear the matter because R.I.G.L 28-7-9 (b) (5) sets forth an expedited schedule for the resolution of unfair labor practice charges.[5] The Town alleges that the Board cannot "sit on a charge for more than a year, in contravention of deadlines and spirit of R.I.G.L 28-7-9 (b) (5).

DISCUSSION

The first issue that the Board shall address herein, is that the Board lacks "authority" to hear the matter. The Employer argues that holding complaints in abeyance is tantamount to keeping them "on ice" and is not permitted by the State Labor Relations Act. The Employer also accuses the Union of switching course by claiming at one point that it was vital for the Board to hear the charge as soon as possible and later claiming that it was important to place the matter in abeyance. The Employer argues that the deadlines under the State Labor Relations Act are analogous to the six (6) month statute of limitations under Section 10 (b) of the NLRA, which the NLRB has strictly construed. The Employer also argues that the Board does not have the authority to grant abeyances in excess of the deadlines set by the Labor Relations Act, citing State Department of Corrections v Rhode Island State Labor Relations Board, 703 A.2d 1095 (R.I. 1997) and Winer Motors, Inc., 265 N.L.R.B. 1457 (N.L.R.B. 1982) in support, thereof.

The Union responds by arguing that the Winer case is completely irrelevant to the issue at hand because that case dealt with the withdrawal of a charge before a complaint issued, only to be resurrected sua sponte by the NLRB Regional Director eight (8) months later. The Union also argues that much of the time delay on completing the hearing in this

[5] All charges of unfair labor practices and petitions for unit classification shall be informally heard by the board within thirty (30) days upon receipt of the charges. Within sixty (60) days of the charges or petition the board shall hold a formal hearing. A final decision shall be rendered by the board within sixty (60) days after the hearing on the charges or petition is completed and a transcript of the hearing is received by the board.

matter was specifically requested by and caused by delays of the Employer's counsel. The Union also argues that the timeframes of R.I.G.L. 28-7-9 (b) (5) are directory and not mandatory, and that R.I.G.L 28-7-2 (e), which provides that all provisions of the chapter shall be liberally construed for the accomplishment of the chapter, is in essence, controlling, when it comes to time frames.

THE BOARD'S ISSUANCE OF A COMPLAINT AGAINST THE EMPLOYER ON MARCH 22, 2012 DOES NOT EXCEED THE BOARD'S AUTHORITY, AS THE TIMEFRAMES SET FORTH UNDER 28-7-9 (B) (5) ARE DIRECTORY.

The first argument we will address under this issue is that of the timeframes of R.I.G.L. 28-7-9 (b) (5). Despite the use of the word "shall", many statutes have been determined to be directory and not mandatory. More importantly, at least one Superior Court judge has previously determined that the timeframes of R.I.G.L. 28-7-9 (b) (5) are directory. State Dep't of Admin. v. RI State Labor Relations Bd., 97-4890, 1999 WL 47186 (R.I. Super. Jan. 22, 1999, Cresto, J.) [6] The public policy of the State Labor Relations Act is set forth at R.I.G.L 28-7-2. Further statutory support for the position that the timeframes set forth in R.I.G.L 28-7-9- (5) are directory and not mandatory is found in R.I.G.L 28-7-2 (4)(e) and R.I.G.L 28-7-2 (4)(f) as well as R.I.G.L 28-7-25. R.I.G.L 28-7-(4)(e) provides: "All of the provisions of this chapter shall be liberally construed for the accomplishment of this chapter." R.I.G.L 28-7-2 (4)(f) provides: "This chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state." R.I.G.L 28-7-25 provides: "The Board shall conduct all complaints or petitions filed with it and conduct all proceedings under this chapter with all possible expedition." These three (3) statutes make it abundantly clear that the over-arching public policy of labor peace is paramount when construing the proceedings undertaken pursuant to this Act.

In the present case, the very first request for an extension of time came from none other than the Employer, which requested and was granted an extension of time in which to file initial statements and replies. In addition, the Employer also filed a motion to recuse

[6] After reviewing § 28-7-9(b)(5) and relevant case law, this Court finds that the time frame provisions of § 28-7-9(b)(5) are directory and not mandatory. As in *Providence Teachers,* the time frame provisions of § 28-7-9(b)(5) are clearly meant "to secure order, system and dispatch." *Providence Teachers,* 319 A.2d at 364. There is no language demonstrating intent to make compliance a prerequisite to action, which serves to invalidate a tardy hearing. *Id.; See also, Washington Highway,* 576 A.2d 116. Furthermore, the statute does not contain a limiting provision. *See Cabana v. Littler,* 612 A.2d 678 (R.I.1992) (statute containing an affirmative direction followed by a limiting provision, *but not later than,* makes the affirmative direction mandatory). In conclusion, plaintiff's substantial rights have not been prejudiced by the non-compliance with the time-frame provisions of § 28-7-9(b) (5).

a Board member, which had to be addressed by the Board and its members and not the administrator. Once the matter was scheduled for formal hearing the Employer requested a continuance and was granted the same, moving the hearing from April 26, 2012 to May 3, 2012 and June 19, 2012. At the conclusion of the Union's case on May 3rd, the Employer cross-examined the Union's sole witness, but was not prepared to begin its case and requested a continuance of hearing until June 19th.[7] Finally, at the request of the Employer, the formal hearing that was scheduled for June 19, 2012 was re-scheduled, again, to September 27, 2012.

In the meantime, the Union and the Employer had engaged in related litigation in the Superior Court, which concluded at the end of May 2012. In June of 2012, the Union attempted to amend the within Complaint to address the fact that the Employer had in fact implemented the ordinance that it threatened, which was the subject of the initial charge herein. The Board required the Union to file a new charge, which it did, resulting in a Complaint being issued by the Board on August 2, 2012. As a result of the implementation of the ordinance, ULP-6071 (the within charge) addressing the "threat" of the same, became critically less important than ULP-6088, the charge addressing the actual implementation of the threatened unilateral changes to terms and conditions of employment.

THE BOARD DOES NOT LACK AUTHORITY TO PLACE CASES IN ABEYANCE, ESPECIALLY WHEN SPECIFICALLY REQUESTED BY THE PARTIES.

On September 14, 2012, the Union filed a letter requesting that the hearing scheduled for September 27, 2012 for the within matter (ULP-6071) be postponed and for ULP-6088 to be substituted for hearing instead. That letter was amended on September 24, 2012 to correct a typographical error. The September 24, 2012 letter also requested that the matter in ULP-6071 (threat of unilateral changes to terms and conditions of employment) be held in abeyance, until such time as ULP-6088 (actual implementation of unilateral changes to terms and conditions of employment) is concluded. In order to effectuate the mandates of R.I.G.L. 28-7-2 (4) (e), R.I.G.L 28-7-2 (4) (f) and R.I.G.L 28-7-25, the Board's rules and regulations provide for the postponement of hearings for "good and sufficient" cause. Because the threat

[7] The Board sets its hearings for three hour blocks, commencing at 9:00 am and concluding at 12:00pm. The May 3rd hearing opened at 9:13 A.M. and concluded at 9:50 A.M. because the Employer was not prepared to begin its case.

complained of in ULP-6071 had ripened into actual implementation, as charged under ULP-6088, the Board granted the request to hold ULP-6071 in abeyance until ULP-6088 was concluded.

On January 2, 2013, the Union filed a status update indicating that the parties would be meeting in January 2013, in an effort to try and resolve the matters in both ULP-6071 and ULP-6088. In May, 2013, the Union further notified the Board that it would like to remove ULP-6071 from abeyance and place it back on the formal hearing calendar, with the caveat, however, that it would prefer to use available formal hearings first to conclude the matter in ULP-6088.

ULP-6071 was re-opened for a second hearing (previously postponed at the request of the Employer from June 2012 to September 2012) on June 4, 2013. This hearing day was reserved for the Employer to put on its case. This matter opened at 9:17 AM and concluded at 9:27 PM and consisted of the Employer questioning the same witness that it had cross-examined at the preceding hearing. The Employer asked this witness eight (8) questions and rested.

On or about June 10, 2013, the Employer filed a motion to dismiss. In its conclusion on pages 5-6 of that motion, the Employer stated:

> "If, however, the Board denies this motion, at the very least, the Town requests that the Board continue to hold this proceeding in abeyance until such time as the Board reaches a decision in ULP-6088, which, as the Union has already admitted, 'may obviate the need for a continued hearing in ULP 6071.'"

For the Employer to now complain of time delays, exceeded timeframes and the placement of ULP-6071 into abeyance, is nothing short of incredulous. The Employer simply has unclean hands when it comes to this issue.[8]

THE EMPLOYER'S LETTER DATED DECEMBER 19, 2011 IS NOT MERELY AN EXAMPLE OF "HARDBALL BARGAINING" BUT RISES TO THE LEVEL OF AN UNFAIR LABOR PRACTICE.

There is no dispute between the parties that they had been engaged in successor contract negotiations at the time the Employer issued its letter on the afternoon of

[8] The Employer's citation to Clarke v. Morsilli, 714 A.2d 597, 601 (R.I. 1998) is misplaced. That case had to do with a lengthy investigation that kept a target of investigation "in limbo", waiting for the results of an investigation. The Ethics Commission exceeded granted requests for extension of time and then failed to serve the target with an amended complaint concerning "new charges" it discovered during the course of it investigation. That case also was interpreting the language of the statute to determine whether completing an investigation meant a delineation of time in which to issue a probable cause finding. It is nothing like the facts on this case. The Board issued a complaint well within the six (6) month timeframe in which the ULP could have been filed. The Employer was not "in limbo" as to whether a charge would issue, such that any prejudice could come to the Employer.

December 19, 2011. In fact, the parties were pre-scheduled for a negotiating session the very next day. The Employer argues that the intent of the letter was to engage in "hardball bargaining" to "break the logjam" between the parties, "quite the opposite of a refusal to bargain." (Employer brief pg. 4) The Employer further argues:

> "Toward that goal, the Town's message to the Union was that if the parties failed to reach a negotiated agreement, then the Town would consider exercising the powers granted to it pursuant to its legislatively ratified Charter and consider legislation to reduce the number of divisions from four to three. If the Union failed to negotiate concomitant effects of this change, then the Town's letter told the Union would be implemented until an agreement was reached. That was a fair and legal tactic."

The Employer claims that the letter accomplished three things: (1) It notified the Union of the Town's intent to consider implementing a three-divisional structure and its bargaining positions with respect to the effects of that change; (2) it provided a copy of the proposed ordinance; (3) It described various bargaining positions of the Town and invited the Union to discuss them.

In this Board's opinion, the Employer's above description of the letter is nothing more than an attempt to "spin" the letter in clean light. However, the dark, adamant language of the letter itself belies this attempt. The Employer did not say it was "*considering the implementation* of a three divisional structure. The plain language of the letter stated: "The Town Council *intends to implement* a three-division structure for line firefighting/rescue personnel in the Fire Department effective February 1, 2012." (Union Exhibit #1) Additionally, the letter stated: "In the absence of a different agreement, effective February 1, 2012, the Town *intends to implement* a schedule in which each line firefighting/rescue division will be on duty for one ten (10) hour day shift followed by one 14 hour night shift, followed by 48 hours off". Finally, the Town also emphatically ruled, as if it were a judge or jury: "Section 3.26 of the contract will not be renewed, as it unlawfully restricts the constitutional and statutory authority and duties of the Town's officials (underlining added herein)." (Union Exhibit #1) "Other provisions of the contract are either unlawful or require renegotiation, in whole or in part, as they cannot be continued in their present form. Among them are included, but not limited to, the following: Sections 3.22 (B), 3.25 (a), 3.27, 4.1, 4.4 and 4.6." Id.[9] These judicial

[9] Section 3.26 is entitled "Minimum Manning", Section 3.25 (a) is entitled "Vacancies in Fire and Rescue Officers Ranks", Section 3.27 is entitled " Vacancies", Section 4.1 is entitled "Hours of Work and Regular Hourly Rates", Section 4.4 is entitled " Callback pay –Line Members", Section 4.6 is entitled "Overtime Pay-Non-Holiday Line Members and Staff Members."

pronouncements by the Employer were followed up at the end of the letter with the following statement: "If you would like discuss any of this, please contact me so that a meeting can be scheduled promptly." The Employer argues that this last sentence proves that this letter was not a "threat", but rather an "invitation" to bargain, albeit harshly written. The Employer argues that the Union continued to bargain after it received the letter and did not materially change its bargaining approach.

The Union President, Raymond Furtado, provided unrebutted testimony as follows: "My understanding from reading this letter is that we were being threatened and cornered into a position in the middle of our collective bargaining process." (TR. 5/3/12 pg. 17) He further testified, "I understood that the scope of our negotiations was significantly altered based on this letter. This letter was taken as a direct threat of unilateral action unless we essentially gave into the Town's demand of collective bargaining." Id. Mr. Furtado's statement is, in the Board's opinion, an understatement of the magnitude of the change in the Employer's bargaining position. The Employer went from being willing to bargain over all of these issues to declaring them off-limits for bargaining and only eligible for effects bargaining!

One of the other critical things to remember about this letter is its timing. The parties commenced collective bargaining for the successor contract on October 28, 2011. This was a scant two and one half months after the issuance of the interest arbitration award for the July 1, 2010 to June 30, 2011 year. (Union Exhibit #3) In that award, the arbitrator denied the Town's request to amend Sections 3.26, 3.25 (a), 3.27, 4.1, 4.4, and 4.6 of the Collective Bargaining Agreement. Thus, the provisions of the contract had been the subject of extensive collective bargaining between the parties. (See FN #3, supra) The parties were seven (7) weeks into the bargaining for the 2011-2012 contract when the Employer abruptly notified the Union that the Employer now had unilaterally decided and declared, with no one able to question the "sovereign", all of the cited sections as not permissible subjects for bargaining and further declared that one section impairs the Town's constitutional rights. These declarations by the Employer took place after the close of the first thirty (30) days of bargaining by the parties, in contravention of the terms of the Fire Fighters' Arbitration Act, R.I.G.L. 28-9.1-7. Additionally, all these provisions are ones that were in the 2007-2010

three (3) year negotiated contract (Union Exhibit #2). Thus, the Employer's declarations are indeed a repudiation of the contractual provisions that they had long agreed upon and which were included in prior contracts. In addition, these pronouncements were an unlawful disruption of the status quo ante required during negotiations for successor Collective Bargaining Agreements. See Litton Fin. Printing Div. v NLRB, 501 US 190, 198 (1991); 111 S.Ct. 2215, 115 L.Ed.2d 177, 59 USLW 4641, Laborers Health & Welfare Trust Fund v Advanced Lightweight Concrete Co., 484 U.S. 539, 544, n. 6 (1988), Case No ULP 4647, SLRB v Warwick School Committee, Case No ULP 6088, SLRB v Town of North Kingstown.

Additionally, the Employer's declaration of the status of various provisions was a sharp departure from the position that it previously took. In the prior arbitration proceeding, the Employer clearly believed these to be negotiable and therefore, arbitrable issues. The December 19th position was a complete departure from the accepted negotiated status of this provision in the 2001-2010 Collective Bargaining Agreement. (Union Exhibit #2) The Employer's completely unexpected change of position on this issues, in the middle of the bargaining process, after the window for submission of unresolved issues to arbitration has closed, constitutes bad faith bargaining.

This Board has previously determined that the Firefighters Arbitration Act (R.I.G.L. 28-9.1-1 et seq.) does *not* provide for unilateral implementation of terms and conditions of employment, especially wages and hours of work. (ULP-6088) The State Labor Relations Act (R.I.G.L. 28-7-1 et seq.) does *not* provide for unilateral implementation of terms and conditions of employment, especially wages and hours of work. Case No ULP-4647, SLRB v Warwick School Committee. In Rhode Island, the right to strike for public employees is noticeably absent and is in fact, prohibited to firefighters under § 28-9.1-2 (b). As a counter-balance to the prohibition against the right to strike, the FFAA provides for binding arbitration on *all* unresolved issues. § 28-9.1-7. The "specter" of binding arbitration serves as an incentive for firefighters and their employers to reach an agreement, as opposed to being forced to accept a resolution imposed by an arbitrator.

In the present case, the Employer threatened to undertake illegal acts, in order to convince the Union to "cave" to its demands. We find these threats of illegal acts, to be illegal as well. This Board's decision on this issue does borrow from federal (private sector) labor law as well. See Page Litho Inc and Graphic Communication International Union, 311 NLRB 881 (1993). "In Litho, the Employer sent a letter to the Union announcing that it would implement its final offer on September 25th, unless the Union reached agreement by September 22nd Id at 881. The Employer followed through with its threat by applying the terms and conditions of its final offer, rather than the terms of the expired collective bargaining agreement." (Union brief. pg. 10) The NLRB held:

> "It is well-settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. See NLRB v C&C Plywood Corp, 385 US 421, 430 fn 15 (1967) Here, the damage to the Union's authority as bargaining representative was accomplished by the threat and the actual implementation of the threat to set terms and conditions of employment unilaterally, thereby emphasizing to employees that there was no necessity for a collective bargaining agreement. J. Josephson Inc. 287 NLRB 1188, 1190 (1998). In sum, we agree with the judge that the Respondent threatened to implement and implement its final offer without reaching an impasse with the Union in violation of Section 8 (a) (5) of the Act."

The Union also points to the case of J. Josephson, Inc, 287 NLRB 1188 (1998) as support for a finding of an unfair labor practice charge on this case. There, the Employer issued a threat that it would make unilateral changes to terms and conditions of employment if the parties had not reached agreement by February 1, 1986. The parties did not reach agreement and the company implemented its proposal. The Board held that the company's announcement at the third bargaining session that it would make unilateral changes on 1 January 1986 was a failure to bargain in good faith, in that it was not predicated on actual impasse having been reached by that date." Id at 1190.

Here, after seven (7) weeks of bargaining, the Employer issued a letter unilaterally declaring portions of the prior agreement unconstitutional and unlawful and provided a copy of an ordinance that it was prepared to pass by a date certain, February 1, 2012.[10] In essence, the Employer substituted lawful process with a demand that unless the Union caved to its demands by February 1, 2012, then it would unilaterally implement terms and

[10] While the actual date of the implementation of the ordinance was postponed, the Employer did unilaterally enact terms and conditions of employment, an unfair labor practice, as this Board previously determined in ULP-6088. Our decision in ULP 6088 has been upheld by the Superior Court.

conditions of employment. We find these actions to be in violation of the duty to bargain in good faith.

Additionally, as argued by the Union, not only did the Employer set an arbitrary date for impasse, it gave the Union a mere few hours to even review the letter before taking the action of its first reading that very evening. Giving the Union such a ridiculously short amount of "warning time" before the first shot is fired across the bow is also indicative of bad faith bargaining. See Farmers Coop. Compress, 169 NLRB 290, 295 (1968), affirmed in relevant part by United Packinghouse, Food & Allied Workers Int'l Union, AFL-CIO v NLRB, 416 F2d. 1126,1131 (D.C. Cir.1969).

As highlighted by the Union, if these actions amount to bad faith bargaining in the private sector, where the employees have the right to strike, then such actions are surely even more indicative of bad faith bargaining in the public sector where the employees do not possess the right to strike. (Union brief pg. 13) (See R.I.G.L 28-9.1-2) We agree.

Finally, also as argued by the Union, the Employer's threats were not only illegal and amounted to bad faith bargaining, the threatened changes were declared by an arbitration panel just a few months earlier as not necessary: "It is clear that North Kingstown is not currently in a dire financial situation as are some other communities in the state....Such a change is not financially warranted at this time." (Union Exhibit # 3 at pg. 19).

As a remedy for the Employer's actions, in our original Decision and Order, we ordered the parties to return to bargaining as of December 19, 2011, which was the date that the Employer notified the Union of its change in position as to the Employer's duty to bargain. In its post-decision motion for reconsideration, the Union rightly points out that ordering the parties to re-wind the clock and re-commence bargaining as of December 19, 2011 does not provide the Union with effective relief. To truly remedy the unfair labor practice, the effective date for renewed bargaining should be and is now, hereby, ordered to be October 28, 2011, which is the date of the parties' first meeting. It was on this date that the Employer's Representative should have stated that the Employer was no longer willing to bargain over the forty-eight hour work-week; and that it was taking the position that management did not have any lawful obligation to bargain over this issue. The amended order, issued pursuant to R.I.G.L. 28-7-33, herein restores

the status quo between the parties to what it should have been during the first thirty (30) days of bargaining.

THE SLRA AND THE EMPLOYER'S RIGHT TO ENACT LEGISLATION DO NOT CONFLICT AND THERFORE, THE ISSUE OF WHICH LAW "TRUMPS" THE OTHER IS INAPPLICABLE.

The Town argues that the Labor Board has chosen to construe the provisions of the State Labor Relations Act (SLRA) as to prohibit the Town Council's consideration of legislation pertaining to a reorganization of its fire department. (Town's brief pg. 8)

The Town argues that the Supreme Court has held that when a conflicting charter provision has been legislatively ratified, the conflicting charter provision is a special act that takes precedence over any inconsistent provision of the general laws. The Town cites Town of Johnston v Santilli, 892 A.2d 123, 129 (R.I. 2006), Town of West Warwick v Local 2045, 714 A.2d 613, 614 (R.I. 1998) and Retirement Board of the Employees' Retirement System of the City of Providence v City Council of Providence, 660 A.2d 721, 727-28 (R.I. 1995) in support of its argument that the SLRA must yield to the Town's constitutional authority to consider the enactment of any local legislation. The Town further argues that "the Labor Board may not decide that the Town Council's notice to the Union that it would exercise its authority pursuant to Charter was illegal under the SLRA". To hold otherwise would unconstitutionally bar the Town's democratically elected Town Council from proposing, discussing and voting on draft legislation that it deems to be in the best interests of its citizens.

In the present case, it must first be noted that the threat that was issued came from Mr. Michael Embury, Town Manager, and not the Town Council itself. Second, there is no prohibition for the Town to propose, discuss and vote on drafted legislation. Third, the letter did not "convey to the Union the Town Council's "intention to consider enacting legislation" as so euphemistically described by the Employer's brief at page 12. The letter was a threat of illegal action, as previously discussed. Fourth, the Town's Charter was not placed into evidence in the present matter, so it is impossible to refer to and reference the same in this decision, as it pertains to the right of the Town to enact legislation. The Board did have the occasion in ULP-6088 to review the Charter and the SLRA and found as follows:

"It is well-settled under the rules of statutory construction that statutes which are not inconsistent with each other and relate to the same subject matter are *in pari materia* and should be considered together so that they will harmonize with each other and be consistent with their general object and scope." Berthiaume v. School Committee of Woonsocket, 121 R.I. 243, 249, 397 A.2d 889, 893 (1979) (quoting Providence Teachers Union, Local 958 v. School Committee, 108 R.I. 444, 449, 276 A.2d 762, 765 (1971)). In this case, we see no conflict whatsoever and find that the charter's provisions for reorganization are *in pari materia* with the requirements of both the FFAA and the SLRA. The Employer's Charter and the State Labor Relations Acts both deal with the employment of public employees in the Town of North Kingstown. The Charter specifically provides that the town may "re-organize" any of its departments and the Town Manager may make such assignment of powers and duties as he/she may consider advisable, unless otherwise provided by charter or ordinance. The Charter is silent on the issue of hours of work, wages and other benefits or emoluments of employment. In addition, the Charter itself contemplates that "the laws of the state not inconsistent with this Charter, except those superseded by or declared inoperative by ordinance or resolution of the Council, shall have the force and effect of ordinances of the Town". We understand that provision to mean that the statutory requirements for bargaining in good faith found in the FFAA and the SLRA are considered by the Employer to have the same force and effect of a Town ordinance. Thus, we read these laws together and find that the Employer's right to reorganize its fire department in no way conflicts with its statutory obligations for collective bargaining as set forth by the FFAA and the SLRA." (ULP-6088, Decision and Order pg. 33-34)

"There is no conflicting provision in the FFAA that prohibits the Employer from re-organizing its fire department....In this case, the charter and statute are readily harmonized and permit the Employer to exercise its right to reorganization, provided however, that prior to implementation, it collectively negotiates in good faith, the impact to the firefighters' wages, rates of pay and other terms and conditions of employment. The SLRA similarly states: "Experience has proved that protection by law of the right of employees to organize and bargain collectively removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees." R.I.G.L. 28-7-2. Thus, it is clear that the Employer retains the right to reorganize its department, but in doing so, the Employer still must bargain collectively with the Union concerning wages, hours, or other working conditions and cannot impose unilateral changes to these mandatory subjects for bargaining. There is no reason why the two provisions should be read as inconsistent or at odds, especially when the SLRA is to be construed liberally and is an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state. See R.I.G.L. 28-7-2 (f)." (ULP-6088, Decision and Order pgs. 34-35)

In Town of Johnston v Santilli, 892 A.2d 123, 129 (R.I. 2006), the education act in question specifically had a statutory provision that yielded to local, special acts. See §16-2-26. "Except as provided in this section, the provisions of this chapter are subject to the provisions of any special statutes respecting any particular city or town, none of which are repealed by this chapter."

In Town of West Warwick v Local 2045, 714 A.2d 613, 614 (R.I. 1998) there was a conflict between the language of the charter, which prohibited town employment to persons with felony convictions and provided for an automatic suspension and removal

from employment and the language of the Collective Bargaining Agreement, which is subject to the provisions of the Municipal Employees Arbitration Act G.L.1956 § 28-9.4-1 (MEAA). There, the Court found that the Charter, as a Special Act, controlled. There was no specific statute in the MEAA that would override the Town's Charter. In Retirement Board of the Employees' Retirement System of the City of Providence v City Council of Providence, 660 A.2d 721, 727-28 (R.I. 1995), the City's Home Rule Charter, enacted in 1981, specifically superseded all prior acts pertaining to the Providence Retirement Board.

In this case however, the SLRA, which is considered a police power of the state, (§ 28-7-2) provides: "Insofar as the provisions of this chapter are inconsistent with any other general, special or local law, the provisions of this chapter shall be controlling." See § 28-7-44 [11]

THE UNION DID NOT ESTABLISH A FAILURE TO IMPLEMENT AN ARBITRATOR'S AWARD.

The Complaint charges the Employer with a violation of R.IG.L. 28-7-13 (11) - failure to implement an arbitration award.[12] This charge refers to the 2010-2011 arbitration award. The evidence in this case established that the arbitration award was for the period July 1, 2010-June 30, 2011 and was not issued until August 2011, after its effective dates of operation. There is no evidence that the Employer did not implement the award. The evidence is such that that Employer certainly made unilateral changes to the status quo that existed upon the expiration of the 2010-2011 arbitration award. Although, for all the reasons stated herein, we find this to be an unfair labor practice under R.I.G.L 28-7-13 (6) and (10), we cannot say that it amounts to a violation of R.I.G.L 28-7-13 (11). That aspect of the Complaint is hereby dismissed.

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[11] The Supreme Court has consistently held that municipalities may not enact legislation that conflicts with the FFAA. *See* City of Cranston v. Hall, 116 R.I. 183, 354 A.2d 415 (1976) (holding that conflict between city charter and Fire Fighters Arbitration Act (FFAA) must be resolved in favor of FFAA because FFAA applies equally to all cities and towns and does not affect form of city government); Town of Narragansett v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977) (holding minimum manpower requirements for specific stationhouse affects workload and therefore term and condition of employment and must be bargained over pursuant to Fire Fighters Arbitration Act); East Providence v. Local 850, Int'l Ass'n of Fire Fighters, AFL-CIO, 117 R.I. 329, 366 A.2d 1151 (1976) (citing *Hall* to affirm that MPAA and FFAA superseded home rule charter); F.O.P. v. Providence, 730 A.2d 17 (R.I. 1999) (recognizing MPAA and FFAA supersede ordinances enacted pursuant to the city charter).

[12] R.I.G.L 28-7-13 (11) It is an unfair labor practice to: "Fail to implement an arbitrator's award unless there is a stay of its implementation by a court of competent jurisdiction or upon the removal of the stay."

FINDINGS OF FACT

1) The Town of North Kingstown 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 Employer and Union have long been collective bargaining partners, pursuant to the authority and requirements vested under the FFAA. The most recent long-term Collective Bargaining Agreement ("CBA") was for the period 2007-2010. (Union Exhibit #2) The contract for fiscal year 2010-2011 was the result of protracted interest arbitration proceedings, which produced an award on August 9, 2011 – ***after*** the expiration of the effective contract year. (Union Exhibit #3)

4) Within the 2010-2011 arbitral process, the Employer had sought to change the platoon structure of the fire department from four (4) platoons to three (3) and to change the working hours of the employees from an average workweek of forty-two (42) hours to one of an average of fifty-six (56) hours. The Employer's proposal would have changed the working hours of the firefighters from four (4) days on (two (2) ten (10) hour shifts, followed by two (2) fourteen (14) hour shifts) followed by four (4) days off to one twenty-four (24) our shift, followed by forty-eight (48) hours off.

5) The parties commenced the interest arbitration process for the 2011-2012 fiscal year on October 28, 2011. At that first meeting, the Employer submitted a bargaining proposal for the revised platoon structure and the fifty-six (56) hour work-week. In addition, the Employer indicated that unless the Union could come up with structural savings of 1.2 million dollars, purportedly equivalent to the structural savings under the platoon/shift change, then the parties were not going to be able to come to an agreement.

6) On the afternoon of December 19th, the Employer hand-delivered a letter to Raymond Furtado, Union President. Accompanying the letter was a proposed ordinance, amending Chapter 14, Personnel, of the Town's Code of Ordinances. According to the

letter, the Town Council was planning to vote on the ordinance that very evening, on December 19, 2011 and also on January 9, 2012. The letter further stated:

> "The Town Council intends to implement a three-division structure for line firefighting/rescue personnel in the Fire Department effective February 1, 2012. If you would like to discuss the effects of this decision on members of your Union, or if you believe that the Union can provide structural savings equal to or greater than the three-division structure provides, and therefore you would like to discuss the decision itself, please let me know, and we will set up a mutually convenient time to meet. The Town is prepared to discuss these issues at our meeting tomorrow, as we have told you.
>
> In the absence of a different agreement, effective February 1, 2012, the Town intends to implement a schedule in which each line firefighting/rescue division will be on duty for one 10 hour day shift followed by one 14 hour night shift, followed by 48 hours off; the number of hours of sick, vacation, and other time off will not change; overtime pay will be provided in accordance with the Federal Fair Labor Standards Act, 29 U.S.C. §207 (k) and; annual base salaries will not change.
>
> Section 3.26 of the contract will not be renewed, as it unlawfully restricts the constitutional and statutory authority and duties of the Town's officials. It is our expectation and plan, however, that the number of firefighters on duty at all times will be greater than before, as the Town does not intend to layoff personnel.
>
> Other provisions of the contract are either unlawful or require renegotiation, in whole or in part, as they cannot be continued in their present form. Among them are included, but not limited to, the following: Sections 3.22 (B), 3.25 (a), 3.27, 4.1, 4.4 and 4.6. If you would like to discuss any of this, please contact me so a meeting can be scheduled promptly."

7) The letter threatened to unilaterally change terms and conditions of employment, during a period of collective bargaining.

8) The letter was intended to coerce the Union into concessions.

9) The letter was understood by the Union President, Raymond Furtado, as "significantly" altering the scope of bargaining and was taken as a direct threat of unilateral action unless the Union gave into the Town's demand of collective bargaining.

10) The scope of collective bargaining was in fact altered by the "declarations" in the letter about the unconstitutional and unlawful nature of various provisions of the contract, over which the Employer had decided in the middle of negotiations that it was no longer going to bargain.

11) The letter caused the breakdown of good faith within the overall bargaining process.

12) The demands and threats in the letter came after the first thirty (30) days of bargaining under the Fire Fighter's Arbitration Act and beyond the window for the Union to submit these matters to the arbitration process.

13) The Employer's declaration of the status of various provisions was a sharp departure from prior positions that these issues were both negotiable and arbitrable, and constitutes bad faith bargaining.

CONLUSIONS OF LAW

1) The issues of wages, call back pay, vacancies, hours of work, and minimum-manning are all mandatory issues for bargaining.
2) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (6) and (10) by failing and refusing to bargain in good faith, by threatening to repudiate contract provisions, and by threatening to unilaterally implement terms and conditions of employment without first exhausting all statutory impasse procedures, with the intention of coercing the certified bargaining representative to waive statutory rights.
3) The Union has not proven by a fair preponderance of the credible evidence that the Employer committed a violation of R.I.G.L. 28-7-13 (11).

AMENDED ORDER[13]

1) The charge of violation of R.I.G.L. 28-7-13 (11) is hereby dismissed.
2) The Employer is hereby ordered to cease and desist from threatening unilateral changes to terms and conditions of employment, including wages, call back pay, vacancies, hours of work, and minimum-manning.
3) The Employer is hereby ordered to re-commence collective bargaining with the Union within thirty (30) days of the issuance of this order. Negotiations shall commence from ~~the point in time in which the unlawful activity took place, to wit, December 19, 2011~~. October 28, 2011.
4) The Employer is hereby ordered to post a copy of this Decision and Order on all common area bulletin boards within the Town's municipal buildings for a period no less than sixty (60) days; to provide an actual physical copy of this decision to every firefighter in the North Kingstown Fire Department; and to place a link on the home page of its website to the SLRB's published decision. Said electronic link shall remain active for a period of ninety (90) days.

[13] Pursuant to R.I.G.L. 28-7-23.

5) The Employer is hereby ordered to pay the Union's costs and expenses, including reasonable Attorney's fee for the prosecution of ULP-6071.

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- THE TOWN OF NORTH KINGSTOWN	CASE NO: ULP-6071

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 and Order of the RI State Labor Relations Board, in the matter of Case No. ULP-6071, originally dated March 3, 2014 and amended on May 7, 2014, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **May 7, 2014**.

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

Dated: May 7, 2014

By: _____
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

WALTER J. LANNI, CHAIRMAN

FRANK MONTANARO, MEMBER

GERALD S. GOLDSTEIN, MEMBER

MARCIA B. REBACK, MEMBER

SCOTT G. DUHAMEL, MEMBER

BOARD MEMBER ELIZABETH S. DOLAN RECUSED HERSELF IN THIS MATTER.

BOARD MEMBER BRUCE A. WOLPERT DID NOT PARTICIPATE IN THIS MATTER.

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

Dated: MARCH 3, , 2014

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 6071