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-6088

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 June 13, 2012 and filed on June 14, 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

1. The Union and the Town are parties to a Collective Bargaining Agreement ("CBA") governing the period of July 1, 2007-June 30, 2010.

2. The most recent CBA between the parties is the result of interest arbitration award dated August 9, 2011, governing the period of July 1, 2010 through June 30, 2011.

3. By operation of law, the 2007-2010 CBA remains in effect, as amended by the interest arbitration award.

4. Starting in or about October, 2011, the parties met to bargain over the terms of a successor Collective Bargaining Agreement.

5. The Town, however, did not bargain in good faith, and threatened to pass an ordinance unilaterally changing the terms and conditions of employment if the Union did not accede to demands. *See Rhode Island State Labor Relations Board and Town of North Kingstown, Case No ULP 6071.*

6. On or about January 30, 2012, while the parties were still engaged in negotiations, (albeit, not "good faith" negotiations as required by State law) the Town adopted Ordinance 12-02 ("the Ordinance") which unilaterally changed the terms and conditions of employment as set forth in the parties' most recent CBA.

7. On February 28, 2012, the Union filed a Complaint in the Superior Court against the Town of North Kingstown, through its Town Manager and Town Council, seeking a declaration that (1) the Ordinance is invalid because it is in violation of the Town Charter and the Fire Fighters' Arbitration Act ("FFAA") and (2) that the Town's failure to maintain the status quo constitutes a violation of the FFAA and the State Labor Relations Act ("SLRA"). The Union also sought to enjoin implementation of the Ordinance and to enjoin the Town from unilaterally changing the terms and conditions of employment.

8. On or about March 6, 2012, the Town implemented the Ordinance, unilaterally changing the terms and conditions of employment in violation of the CBA, as amended by an interest arbitration award dated August 9, 2011, and State law.

9. The Ordinance, among other things, increases firefighters' workweeks from the contractual forty-two hours per week to fifty-six hours per week; changes firefighters' shifts from ten and fourteen hour days to twenty-four hour days; and decreases firefighters' hourly pay rates.

10. In or about March, 2012, after the Town declared impasse, the Union filed a demand for interest arbitration for the 2011-2012 contract year. Arbitration is pending.

11. On May 23, 2012, the Court issued a Decision, attached hereto and incorporated herein, finding:

(1) "the Ordinance is invalid because it was passed in violation of the Town Charter,"
(2) "the Ordinance is invalid because it conflicts with the FFAA by imposing changes to wages, hours, and terms and conditions of employment without first bargaining to agreement or following the FFAA's statutory arbitration procedures; and
(3) "the Union's request to enjoin implementation of the Ordinance is moot because there is no Ordinance to enjoin."

12. This Board is bound by the Court's holding that the Town violated the FFAA by unilaterally changing the terms and conditions of employment "without bargaining to agreement or following the FFAA's statutory arbitration procedures."

13. Given the Court's clear ruling, the Union submits that a formal hearing is unnecessary and this Board must find that the Town's actions, as aforesaid, constitute a violation of R.I.G.L. § 28-7-13 (6) (10) and (11).

REMEDY

The Union requests that:

1) the Town be ordered to restore the status quo ante as it existed upon the expiration of the parties' collective bargaining agreement;
2) the Town be ordered to compensate the Union and its members for all damages incurred as a result of the Town's failure to maintain the status quo as aforesaid;
3) the Town be ordered to participate in statutory arbitration proceedings; and
4) that the Board order such other relief as it deems proper.

Following the filing of the Charge, the Administrator notified the Employer in writing of the charge and provided a copy of the same. In accordance with R.I.G.L. § 28-7-8 and Board Rule 9.01.6, 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 July 2, 2012, with any replies to the initial statements to be filed by July 9, 2012.

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 August 2, 2012. The Board's Complaint alleged: The Employer violated R.I.G.L. § 28-7-13 (6) and (10) when, on March 6, 2012, the Employer unilaterally changed terms and conditions of

employment, including hours and wages, without bargaining to impasse and without exhausting all statutory dispute resolution mechanisms under the Firefighters Arbitration Act. [1]

On August 10, 2012, the Employer filed an answer to the Board's Complaint, denying the charges and asserting twenty-one affirmative defenses. The affirmative defenses are as follows:

1) The Complaint fails to state a claim upon which relief may be granted.

2) The Labor Relations Board lacks jurisdiction over the subject matter of the Complaint.

3) The Union waived bargaining.

4) The Union waived arbitration.

5) The Union has unclean hands.

6) The Union elected its remedies.

7) The terms and conditions which the Town is alleged to have implemented are not lawful subjects of bargaining and/or arbitration.

8) The sovereign cannot be estopped from taking action to protect the citizenry.

9) The sovereign cannot be estopped from acting to avoid debt.

10) The Labor Relations Act and/or the Firefighters' Arbitration Act are superseded by more specific statutes.

11) The Labor Relations Act and/or the Firefighters' Arbitration Act are superseded by more special laws.

12) The Labor Relations Board has acted on unlawful process and denied the Town due process of law.

13) To the extent that the Labor Relations Act and/or the Firefighters' Arbitration Act prohibits the Sovereign from implementing terms and conditions of employment as alleged, the Act(s) violate the Rhode Island Constitution.

14) The allegations in the Complaint are barred by the doctrine of laches.

15) The allegations in the Complaint are barred to the extent they were not filed within the applicable statutory limitations period(s).

16) The Union is estopped by operation of its own conduct.

17) The allegations in the Complaint are barred by the doctrine of ratification.

18) The allegations in the Complaint are barred to the extent that the Union did not exhaust its arbitral remedies.

19) The allegations in the Complaint are barred by the doctrine of collateral estoppel.

20) The allegations in the Complaint are barred by the doctrine of res judicata.

[1] On August 6, 2012, the complaint was amended to add the name of Charles Brennan which had been inadvertently omitted from the initial complaint.

21) The Town at all times has acted in good faith.

The matter was then scheduled for formal hearings which commenced on September 11, 2012. At the first formal hearing, the Employer filed a copy of a "Verified Complaint and Petition to Stay Arbitration styled Town of North Kingstown v. International Association of Firefighters Local 1651, AFL-CIO, C.A. No. WC 2012-0542. In addition, the Employer made three oral motions: (1) Recusal of Board Member, Frank J. Montanaro; (2) Motion for stay (while the Superior Court Case 2012-0542 was pending; and (3) Motion to dismiss the case. In accordance with Board Rule 7.04.4, the Employer was directed to submit its motions in writing to the Board and the hearing commenced. On or about September 27, 2012, at the commencement of the third formal hearing, the Employer submitted the written motions and the hearing continued. The Union was provided with an opportunity to respond to the written motions and did so on or about October 3, 2012.

At the October 9, 2012 monthly meeting, the Board voted as follows: (1) To deny the motion to recuse Member Frank Montanaro on the basis that the Board does not have subject matter jurisdiction to address said motion; (2) To deny the motion for stay on the basis that the Board has proper subject matter jurisdiction to proceed; and that the within matter is sufficiently different from the East Providence case to follow a different course of action; and (3) To deny the motion to dismiss on the basis that the Board has proper subject matter jurisdiction to proceed. A letter informing the Employer of the outcome of its motions was sent on October 22, 2012.

Formal hearings were opened for the introduction of evidence and examination of witnesses and were held on September 11, 2012, September 13, 2012, September 27, 2012, November 29, 2012, January 29, 2013, February 14, 2013, March 7, 2013, April 23, 2013 and May 7, 2013. Representatives from the Union and the Employer were present at the evidentiary hearings and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. [2] Transcripts of the testimony adduced at these hearings totaled 615 pages. Extensive briefs were filed on or about June 28, 2013. The Employer's brief was fifty-four pages and had an appendix a few inches thick. The Union's brief totaled fifty-five pages and similarly was accompanied by an Appendix. On July 22, 2013, the Employer submitted a

[2] The Board's efforts to hear this matter expeditiously were hampered by the unavailability of counsel for the parties, due to both approved Court excusals (which were then the basis for excusal requests from appearing before the Board) and scheduling conflicts with other matters. In addition, one of the formal hearings was cancelled, due to a funeral for one of the Union members. The record will reflect that as far as court excusals, during the pendency of this case, the two Union attorneys were excused for a total of 28 business days. The Town's attorney was excused for a total of 107 business days. While the Board doesn't normally specify attorney absences in a decision, this issue was recently highlighted in collateral litigation that was filed to prevent the issuance of this written decision. Town of North Kingstown v Rhode Island State Labor Relations Board, et al. PC 2013-4261. Moreover, it is discussed to establish that the Board complied with the statutory mandates of RIGL 28-7-25 to handle this matter with expedience.

ten page motion to strike the Union's brief, with an appendix containing an order from the Rhode Island Supreme Court. On July 23, 2013, the Union filed its nine page objection to the motion to strike, together with additional documents. On July 30, 2013 at 3:54 p.m., the Employer filed a reply to the Union's objection to the motion to strike. On July 31, 2013, the Board met to consider the case. In doing so, the Board first denied the Employer' motion to strike the Union's brief, in part because this motion was in actuality, a reply brief, which was not authorized by the Board and in part because the Board does not find the relief requested to be appropriate. In addition, the Board decided to not consider the Employer's reply, filed on July 30, 2013, as it was not timely filed for consideration by the Board, in advance of the July 31, 2013, 9:00 am meeting. In arriving at the Decision and Order herein, all participating Board members have reviewed and considered the transcripts, documentary evidence, oral arguments and written briefs submitted by the parties.

FACTUAL SUMMARY

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. 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. Within that arbitral process, the Employer had sought to change the platoon structure of the fire department from four platoons to three and to change the working hours of the employees from an average workweek of forty-two hours to one of an average of fifty-six hours. The Employer's proposal would have changed the working hours of the firefighters from four days on (two ten hour shifts, followed by two fourteen hour shifts) followed by four days off to one twenty-four hour shift, followed by forty-eight hours off. For the period October 28, 2010 - February 8, 2011, the parties engaged in the interest arbitration process for the 2010-2011 fiscal year. The interest arbitration panel in that proceeding conducted thirteen days of hearings and reviewed 172 exhibits and 357 pages of post-hearing briefs. (Union Exhibit #4) 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; and (4) None of the comparable communities being compared had the same shift schedule being proposed. (See Union Exhibit #4)

The parties commenced negotiation for a successor agreement for the 2011-2012 fiscal year a little more than two months later on October 28, 2011. At the commencement of these negotiations, the Employer indicated that unless the Union could find a way to make a 1.2 million dollar structural cut in the upcoming CBA, then the Employer was prepared to pass an ordinance that would unilaterally change the terms and conditions of employment, including changing the shifts and increasing the total number of hours that firefighters must work each week. At the initial meeting on October 28, 2011, the parties exchanged initial proposals. The Union's initial proposal for hours and wages was to remain at the forty-two hour work-week (on average), with a five percent wage increase. The Employer's initial proposal for hours and wages was to increase the work-week to fifty-six hours (on average) with no increase in wages and to re-organize the platoon structure from four platoons to three platoons. (See Union Exhibit #8, pgs. 20-21) (This is the very structure that two months earlier had been rejected by the prior year's interest arbitration panel.) [3]

At the next bargaining session on November 29, 2011, the Union proposed increasing the average work-week from forty-two hours to forty-eight hours and withdrew its request for the five percent wage increase. On December 5, 2011, the parties met again. The Union again offered a forty-eight hour work-week, for only forty-five hours of compensation, with the overtime rate to remain the same. The Union lowered its initial demands in regard to other financial items as well. The Employer continued to seek the fifty-six hour work-week with what purported to be a "raise", but which still resulted in the firefighters working more hours overall for less pay per hour.

The Union President and the Town Manager exchanged email communications on December 5th, 12th, and 13th concerning future bargaining sessions and agreed to meet on December 20, 2011 at 2:30 pm in the Town Hall. (Union Exhibits #13 & #14) However, on December 19, 2011 the Employer delivered an ultimatum in the form of a proposed ordinance to the Union. The letter accompanying the proposed ordinance indicated for the first time that the Employer was no longer planning to bargain over ***the decision*** to change the platoon structure and hours of work, but was only willing to negotiate the ***"effects"*** of such of this decision. (Union Exhibit #15) (Underlining and emphasis added herein) In addition, the Employer adopted an entirely new legal position claiming "section 3.26 of the contract will not be renewed, as it

[3] Both the Union's and Town's proposals also addressed a number of other terms and conditions of employment.

unlawfully restricts the constitutional and statutory authority and duties of Town officials." [4] Id. (Underlining and emphasis added herein) In addition, the letter stated "other provisions of the expired contract are either unlawful or require negotiation, in whole or in part, as they cannot be continued in their present form. Among them are included, but are 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 that a meeting can be scheduled promptly." Id [5]

Despite the fact that the Employer added to the issues in dispute *after* the initial thirty days of bargaining had passed without an agreement, and then proceeding with the ordinance, the Union's representatives still met with the Employer's representatives on December 20, 2011, as scheduled. At the December 20, 2011 session, the Union proposals were modified in regard to minimum manning and the Employer proposed that the fifty-six hour work-week be imposed only on new hires and current firefighters' work-weeks would increase to forty-eight hours. Upon conclusion of this meeting, the parties were still not in agreement. On December 27, 2011, the Town Manager inquired of the Union as to its availability for "another negotiating session." (Union Exhibit #17)

On January 3, 2012, the Union notified the Town Manager that the Union's Executive Committee was "on board" and that "if the Council approves, we can finalize the small details later this week and move for ratification on my end soon. Should help with the budget prep on your end; keep me posted." (Union Exhibit #18) The Manager indicated that he thought he had "3" (implying Council members on board) and agreed to keep the Union posted. (Union Exhibit #18) He also indicated that he planned to "sell" the Union's proposal to the Council. Id. On Wednesday, January 4, 2012, the Manager sent the Union an email stating: "Hold off on bringing proposal to the body. It's going to take some time to work numbers out and present a few tweaks." Id. The Union President replied, "OK, I wasn't going to take anything to the body unless I know it has the support of the Council and will constitute an agreement if ratified. Talk to you soon." Id.

On Wednesday, January 11, 2012, the Town Manager sent an email to the Union President stating: "Let me know when you can meet- this week or next. We have costed out all of the items and we have an offer that Dan is finishing that we should meet and discuss." Id. The Union President replied that he was available any day Jan. 17-20, starting at 10:00 am and that he would need to be back in Warwick by 3 p.m. each day, as well. He stated: "let me know

[4] Section 3.26 of the expired contract is entitled "Minimum Manning."
[5] Section 3.22 is Platoon Assignments, Section 3.25 (a) Vacancies in Fire and Rescue Officer Ranks, Section 3.27, Vacancies, Section 4.1 Hours of Work and Regular Hourly Rates, Section 4.4 Call-back pay, Line Members, Section 4.6. Overtime Pay- Non-Holiday Line Members and Staff Members.

what works for you and Dan and we can go from there." Id. The Manager replied: "Thanks, I will get back to you." Id.

The parties met again on January 18, 2012 and the Employer's proposal on hours was again *back to* a fifty-six hour workweek for *all* members, plus a series of other items. This written document was entitled "Final Proposal to Union." (Union Exhibit #20) The Employer characterizes its proposal as being a twenty percent pay increase and the Union characterizes it as a thirteen percent decrease. That's because the increase in the number of average hours is not accounted for in the Employer's description of a twenty percent increase. On January 27, 2012, the Union membership met and voted to reject the Employer's January 18, 2012 offer. On January 29, 2012, the Union President met with the Town Manager to review a document entitled "NKFFA Annual Savings Estimate through 6/30/15", which purported to clarify the Union's prior offer. This document estimated that the structural savings to the Town for the balance of FY 2011-2012 would be $215,212.00. The projected savings in 2012-2013 would be $749,539.00 and the projected savings for 2013-2014 were estimated at $711,540. The annual savings for 2014-2015 were projected at $510,149.00. The projected structural savings was projected to be $780,544.00. The Union President testified that the Manager's response to this document was that "he and Trish would...take a look at the numbers and get back to me." (TR. p.87)

The next day, January 30, 2012, the Employer passed the proposed ordinance, with an effective date of March 11, 2012. On February 14, 2012, the Union President emailed the Manager to "touch base." He stated: "I'm not sure if you are waiting for me to get back to you, but I thought you were going to review the numbers with Trish and get back to me. Not a big deal, but with everything going on, I wanted to make sure we were on the same page." (Union Exhibit #22) The Manager replied: "Waiting for you. I will check with my folks and get back." Id. On February 15th-17th, the parties exchanged additional scheduling emails. (Union Exhibit #23) In these emails, *the Employer* offered the dates of February 23rd, March 5th, March 8th, and March 9th.

The parties met again on February 23, 2012. The Union submitted a written proposal that would provide for a forty-eight hour work-week, for only forty-two hours pay, as well as other concessions. (Union Exhibit #24) The parties did not come to an agreement at this session. The next session was scheduled for March 5, 2012. On March 1, 2012, the Union notified the Manager of a scheduling conflict for Monday the 5th. The Union acknowledged in that email that the Employer's attorney was in Europe. The Manager responded that "Dan's in contact" with him daily. (Union Exhibit #25) In addition, since the Ordinance was scheduled to

go into effect, the Union filed its action in Superior Court (North Kingstown I) seeking injunctive relief to prevent the implementation of the ordinance. The Court held the first hearing on this matter on or about March 6, 2012. On March 9, 2012, the Union filed a demand for interest arbitration for fiscal year 2011-2012 with the American Arbitration Association. (Union Exhibit #27) In the cover letter accompanying that demand, the Union stated that on Tuesday March 6, 2012, Dan Kinder, acting on behalf of the Town, declared impasse in the contract negotiations for the contract year 2011-2012. On March 11, 2012, the Employer implemented the ordinance and unilaterally changed the terms and conditions of employment for the North Kingstown Firefighters, including hours and wages. After the Court issued its decision on May 23, 2012, the Union then filed the within unfair labor practice charge on June 14, 2012. As noted supra, The Board issued its Complaint against the Employer on August 2, 2012.

DISCUSSION OF CONTEXT OF DECISION & ORDER

It is important to note that this matter does not come before this Board free of other limiting factors and that the Board does not address this matter in a vacuum or write this decision on a blank slate. Indeed, labor discord between the Town of North Kingstown and Local 1651 is widely known and has been publicly discussed and reported on the front pages of the Providence Journal and other news outlets for the better part of the last two years. While the Board takes no stock in or notice of anecdotal evidence or discussions in the press, there *are* Superior and Supreme Court proceedings which have occurred that affect our decision-making ability, pursuant to the doctrines of collateral estoppel and res judicata. There are issues that are still being raised by the parties in this proceeding that have already been decided by the Courts, (albeit some of those issues are on appeal). We will endeavor to carefully weave our way through the myriad of issues and discuss them each within the context of this decision. In doing so, we must provide procedural information pertaining to judicial actions, which were made part of the Board's record.

COLLATERAL COURT PROCEEDINGS

On February 28, 2012, the Union filed a three count verified complaint in the Washington County Superior Court seeking: (1) a declaratory judgment that a recently-enacted Town of North Kingstown ordinance, reorganizing the fire department, was invalid due to procedural defects at the meeting at which it was adopted (Count I); (2) a declaratory judgment that the Town's failure to maintain the status quo violates the Firefighters Arbitration Act ("FFAA") and the State Labor Relations Act ("SLRA"), and that the ordinance is preempted by the FFAA and/or the SLRA to the extent they are in conflict (Count II); and (3) injunctive relief preventing the Town from changing the terms and conditions of employment (Count III). North Kingstown

Firefighters, Local 1651 v Town of North Kingstown, WC 12-0127 (hereinafter referred to as "North Kingstown I") [6]

According to the thirty-six page decision issued on May 23, 2012, the North Kingstown Town Manager testified before the Court that the Town could unilaterally implement any change to the firefighter workforce and could do so by ordinance. (See Court decision at p.11 also submitted as Union Exhibit #1, Attached, hereto, as *Appendix I* to this decision.) The Town also maintained that all other changes flowing from that management right to reorganize may be implemented immediately upon passage of the reorganization ordinance, free of any requirement to successfully bargain over wages, hours, and working conditions or to engage in interest arbitration. (See Court decision at pgs. 11-12, Union Exhibit #1, also Appendix I to the decision) The Employer challenged the Court's jurisdiction as to Counts I and III and filed a motion to dismiss. The Court, Justice Stern presiding, granted the Employer's motion to dismiss part of Count II, citing Warwick School Committee v Warwick Teachers' Union No 916, 613 A.2d 1273, 1274 (R.I. 1992). Judge Stern held that the Superior Court did not have original jurisdiction to require parties to a labor dispute to enter into any particular agreement and that justices of the Court may not set out the terms and conditions of employment. The Superior Court reiterated the Supreme Court's holding in Warwick School Committee that the Rhode Island State Labor Relations Board is the tribunal to make determinations as to whether or not the terms and conditions of an expired agreement should be controlling pending the negotiation and execution of a new collective bargaining agreement. (See Court decision at pgs. 15-16, Union Exhibit #1, also Appendix I to this decision.) The Superior Court also determined that both the Union and the Town (corporate authority) have the obligation under R.I.G.L. § 28-9.1-7 to submit unresolved issues to arbitration. The Court specifically stated:

> "In this Court's view, R.I.G.L. § 28-9.1-7 unambiguously imposes a mandatory burden of submitting unresolved issues to arbitration on each party who wishes that those issues be arbitrated, or either party may waive them. This provision does not anticipate allowing either the Town or the Union to simply wait the thirty (30) days to expire to implement unilateral terms and conditions of employment."

The Court, in so holding, specifically declined to accept the Town's interpretation of the Supreme Court's holding in Lime Rock Fire District v Rhode Island State Labor Relations Board, 673 A.2d 51, 54 (R.I. 1996) as intending to place the burden of submitting issues to arbitration soley upon the Union.

As to whether the Employer's ordinance conflicted with the FFAA, the Court held: "this Court finds that the platoon structure of the Fire Department is a management right that may be properly asserted at the expiration of the CBA. Going forward the parties may agree to a new

[6] The Superior Court issued its decision in "North Kingstown I" on May 23, 2012.

CBA that addresses the effects of this management change on mandatory bargaining subjects or proceed to interest arbitration, solely to determine the effects on mandatory bargaining subjects and not the management decision itself." (Decision at p. 31) In rejecting the Employer's contention that it did not have to bargain over the wages and hours of employment because the decision to reorganize was a non-delegable management right and that any conflicts between the FFAA and the Town's ordinance must be resolved in favor of the Ordinance, the Court stated: "this Court finds that the FFAA supersedes the Ordinance insofar as the Ordinance attempts to regulate those issues subject to mandatory bargaining under the Act, including wages, hours and all terms and conditions of employment, and that the Ordinance is, therefore, invalid." (Decision at p. 34)

The second lawsuit that involves these parties was filed by the Employer on September 5, 2012. At the first formal hearing, the Employer submitted a copy of its "Verified Complaint and Petition to Stay Arbitration, styled Town of North Kingstown v. International Association of Firefighters Local 1651, AFL-CIO, C.A. No. WC 2012-0542. (hereinafter, referred to as "North Kingstown II") This complaint was later amended, seeking stay of interest arbitration proceedings, as well as seeking a stay of the Board's processing of the within complaint, ULP-6088, alleging that the Board did not have subject matter jurisdiction. (Respondent's Exhibit #21) [7] In that suit, the Employer alleged that the Union had not requested bargaining at least one hundred twenty days in advance of the latest date under which monies could be appropriated by the town; and therefore, the Union had waived its right to bargaining and to interest arbitration for the 2011-2012 fiscal year. The Employer also alleged that the parties had not been able to come to an agreement within thirty days from and including the date of their first meeting and that the Employer had not agreed to any extension of the thirty-day period; and therefore, the Union had waived its right to request interest arbitration thereafter. In addition, the Employer alleged that pursuant to the Superior Court's decision in North Kingstown I, the Employer had a right to proceed to interest arbitration to determine the "effects" of the its management right to re-organize the fire department and that the Union was refusing to submit to such arbitration.

In December 2012, the Superior Court issued a lengthy decision on this suit, which is attached hereto as Appendix #2. The Court held:

(1) The Town's actions in implementing unilateral changes to the wages, hours, and terms and conditions of employment, were unlawful, as in violation of the doctrine of election or (sic) remedies and the terms of the FFAA.

[7] We note at this point that despite the request for the Court to limit the Board's jurisdiction in that case, the Board was never named as a party to that proceeding.

(2) This Court finds that the SLRB, and not this Court, has jurisdiction over the subject matter of the Complaint in ULP-6088 insofar as it is necessary to determine which terms and conditions have existed between the parties since the expiration of the previous CBA.

(3) The arbitration panel does not have jurisdiction to determine the effects of said unilateral changes, as those changes are invalid and must be undone.

(4) Both the Union and the Town waived their rights to submit unresolved issues to interest arbitration under the FFAA, pursuant to R.I. Gen. Laws § 28-9.1-7.

(5) The interest arbitration panel has no jurisdiction to decide any unresolved issues existing between the Town and the Union because interest arbitration—pursuant to the terms of the FFAA—was waived by the parties for the fiscal year **2011-2012.**

In that decision, the Court also ordered the Employer to "un-ring the bell" as it pertained to the unilateral implementation of the terms and conditions of the departmental organization and ordered the Employer to return the firefighters to the terms and conditions of employment that existed upon the expiration of the 2009-2010 contract. The Employer subsequently appealed the Superior Court's decision and sought a stay from the Rhode Island Supreme Court of the implementation of the Superior Court's order to "un-ring the bell." (Joint Exhibits #4, #5, #6, & #7) The Supreme Court granted the stay, finding that the Employer had met its burden of the likelihood of success on the merits of its appeal pertaining to the Court's order to "un-ring the bell" and revert to the prior terms and condition of employment, in part because the Superior Court did not possess subject matter jurisdiction to determine the terms and conditions of employment when there is an expired collective bargaining agreement. The Court noted that such jurisdiction lies with the Rhode Island State Labor Relations Board. (See Exhibit #1 to Town's Motion to Strike Union's Brief.)

A third suit was filed on or about August 25, 2013 by the Town of North Kingstown against this Board, alleging that we had wholly failed to provide it with an informal hearing, as required by law and that the timeframe for issuance of this decision and order had passed, as a matter of law. The Town sought injunctive relief from the Superior Court, trying to prevent the issuance of this written decision and order. After written memos and oral argument, the Court, Justice Procaccini presiding, denied the Town's prayers for relief. He specifically found that the statutory timeframe for the issuance of this decision had not yet expired, as the proceedings in this matter did not conclude until July 31, 2013, when the Board decided pending motions on the case, issued its preliminary determination and referred the matter to legal counsel for drafting.

DISCUSSION

SUMMARY: POSITIONS OF THE PARTIES

The Employer argues that the Board need not reach the merits of the complaint it issued and must dismiss the same because the Union, on March 15, 2012, filed numerous grievances challenging the reorganization of the Fire Department, seeking the same remedies as sought from the Board. Thus, the Employer argues, the Union has elected its remedy and the Board does not have subject matter jurisdiction over the matter. The Employer also alleges that the Union is barred from seeking a remedy from the Board because the dispute may only be resolved through arbitration pursuant to the Fire Fighters Arbitration Act (FFAA). The Employer further argues that even if the Board did have jurisdiction over the matter, the Employer did not commit an unfair labor practice because the Employer had no duty to bargain with the union over the reorganization of the fire department. The Employer also argues that it did not commit an unfair labor practice because the Employer and the Union had bargained to impasse and had exhausted the dispute resolution procedure of the FFAA as of March 11, 2012. Finally, the Employer also argued before the Board that because Superior Court Justice Stern's December 14, 2012 decision has been appealed by the Employer and stayed by the Rhode Island Supreme Court, that the same has no force or effect or law and that the Labor Board is not bound by it.

The Union argues that the Employer's unilateral change in terms and conditions of employment violated the duty to bargain in good faith which requires the parties to maintain the status quo until impasse. In addition, the Union argues that impasse cannot occur until the expiration of all statutory impasse procedures has been exhausted and that if statutory impasse procedures do not begin, they cannot be exhausted. The Union also argues that strict compliance with timelines for negotiations are not mandated, when the parties have agreed to continue negotiating; and that the evidence shows that the parties herein had agreed to continue negotiations until at least March 5, 2012. The Union also argues that the application of private sector impasse law (which is not even appropriate) will establish that impasse had not been reached when the Employer unilaterally imposed terms and conditions of employment. Finally, the Union argues that none of the Employer's affirmative defenses have merit and should be rejected.

THE DUTY TO BARGAIN IN GOOD FAITH & IMPASSE

The duty not to effect unilateral changes in terms and conditions of employment is derived from the statutory command to bargain in good faith. Litton Financial Printing Division, v NLRB, 501 U.S. 190, 203 (1991). The Employer claims that the evidence has and will continue

to show that the parties were at impasse at all relevant times during these negotiations, including March 11, 2012 when the reorganization went into effect. (TR. pgs. 569-570) The Employer claims that all of its participation in negotiations, including the very first meeting, was simply its efforts to "break impasse."

What is impasse? One treatise defines "impasse", as an elusive concept denoting the time when a stalemate has been reached, such that it may be said that further bargaining in the future would be unlikely to produce progress. National Labor Relations Act: Law & Practice, N. Peter Lareau, 12.04 (7) (a). When impasse is reached, under federal labor law for *private sector parties*, there is a temporary suspension of the duty to bargain. Id. There is no fixed definition of an impasse or deadlock that can be applied mechanically to all factual situations, nor is there a rigid formula for assessing so subtle an issue as the precise time as to when an impasse occurs. Id, citing Dallas Gen. Drivers, Warehouseman and Helpers, Local Union No 745 v NLRB, 355 F.2d 842, 61 LRRM 2065, 52 LC 16817 (D.C. Cir. 1966) The NLRB utilizes five criteria in determining whether impasse has occurred under federal private sector law: (1) Bargaining history; (2) Good faith of the parties in negotiations; (3) Length of negotiations; (4) The importance of the issue or issues to which the parties disagree; and (5) The contemporaneous understanding of the parties as to the state of negotiations. Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386, 1967 (1967) enforced sub nom., Television & Radio Artists v NLRB, 395 F.2d 622. (D.C. Cir 1968). Under the NLRB's regulations, the party asserting an impasse must establish: (1) The actual existence of a good faith bargaining impasse; (2) the issue as to which the parties are at impasse is a critical issue; (3) the impasse on this issue led to a breakdown in the overall negotiations; in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. National Labor Relations Act: Law & Practice, N. Peter Lareau, 12.04 (7) (a).

In the event that impasse is reached, a private sector employer under federal labor law employer is permitted to unilaterally implement changes in terms and conditions of employment reasonably comprehended by its pre-impasse proposals that the parties have had a reasonable opportunity to bargain. Id. at 12.04 (7) (b). If the breakdown in negotiations is brought about by bad faith bargaining or other unfair labor practices, no impasse exists and the employer is not free to unilaterally implement is proposals. Industrial Union of Marine & Shipbuilding Workers v NLRB, 320 F.2d 615, (3rd Cir. 1963), cert denied, 375 U.S. 984, 84 S.Ct. 516, 11 L. Ed. 2d 472 (1964).

In this case, the parties began negotiating at the end of October, 2012, just two months after an arduous and expensive interest arbitration proceeding where the Employer had not

been awarded the change in platoon schedules and hours that it was again seeking in the 2011-2012 contract. At that initial meeting, the Employer announced that it had to secure 1.2 million dollars in structural savings and that in the absence of the same, it would implement the changes that it was proposing. Indeed, less than two months later, the Employer published its proposed ordinance and set a time frame by which it would be implementing the same, all while collective bargaining, supposedly in good faith, was taking place. This arbitrary date, selected by the Employer, is evidence of its bad faith, by selecting a date at which it says definitely that "impasse" will occur. In essence, the Employer is saying, "cave to us by then, or else." This is bad faith bargaining.

In addition, the Employer did not introduce any evidence in the record as to why 1.2 million was the amount it "needed" to save per year in the upcoming contract. The Union President testified at the first hearing on September 11, 2012 that at the first meeting, the Employer's representatives indicated that it had determined that if the firefighters went to a fifty-six hour work-week, the Employer would save 1.2 million dollars, so that was the amount of concessions they would have to have from the Union if the Union did not want a fifty-six hour work-week. (TR. pgs. 59-60.) So, the "need" to save money is driven solely by its desire to secure a fifty-six hour work-week. Indeed, the Town Manager testified as follows concerning the first bargaining session:

> "The message was that long-term structural change, attaining that by moving to the three platoon system for a savings of 1.2 million dollars, and it was also related to the Union that, if there was another alternative or alternative means of attaining that type of savings and long- term structural change, that the Town would be open to considering them." (TR. p. 581)

There has never been any explanation by the Employer as to where this 1.2 million dollar figure came from. There were no documents submitted into the record documenting any financial stress on the Employer. There were no documents that supported why the Employer "needed" 1.2 million dollars in structural savings, as opposed to simply wanting the same. As noted by the Union in its brief, an asserted inability to pay, if important enough to raise, is important enough to require some sort of proof as to its accuracy. citing Nat'l Labor Relations Board v Truitt Mfg. Co., 351 U.S. 149, 152-53, 76 S.Ct. 753, 755-56, 100 L. Ed. 1027 (1959) While the Employer claims that it desired from a management perspective to adopt a new platoon structure, the Town Manager readily acknowledged that unless the hourly wage rate for the firefighters was decreased, there would be no way for the fifty-six hour work-week to achieve savings. In fact, he testified: "If implementing the three-platoon system and keeping the hourly rate the same, in spite of the fact that the employees are salaried employees, it would have been cost prohibitive, absolutely cost-prohibitive." (TR. pgs. 604-605) Thus, what was really being bargained was the

wage rate, without any supporting documentation from the Employer as to why the wage rate must be reduced for the Employer's well-being.

We believe that making an unsubstantiated demand for a *significant wage reduction* is unreasonable and evidences a refusal to enter into good-faith bargaining about wages. Moreover, to claim that the parties were at "impasse" at the meeting at which bargaining proposals were first exchanged, evidences a mind-set that there was no intent to engage in good-faith bargaining. Such a mind-set is more indicative of "surface bargaining" in a pre-determined effort to get to impasse; to claim justification for unilateral implementation of proposals, which, in Rhode Island, has never previously been permitted under the FFAA.

We find, therefore, that since the Employer's "bargaining" was tainted by bad faith, "impasse" could not occur. This finding however does not end our inquiry into the impasse issue. We will now address the issue of "impasse" within the context of the FFAA and whether the same can ever occur and whether an Employer may ever unilaterally implement terms and conditions of employment.

IMPASSE: PRIVATE SECTOR VS PUBLIC SECTOR COLLECTIVE BARGAINING

We begin our discussion by reviewing this Board's long-established position concerning the status of terms and conditions of employment for public sector employees, after the expiration of a prior collective bargaining agreement. Twenty-one years ago, this Board decided Case No ULP-4647, SLRB v Warwick School Committee. That case examined the issue of unilateral implementation of terms and conditions of employment imposed by a school committee, during the negotiations of a successor CBA. [8] This Board held: "We conclude that unilateral departure from the terms of an expired contract, prior to the exhaustion of all available statutory dispute resolution procedures, violates the obligation under R.I.G.L. § 28-7-13 to bargain collectively." (ULP-4647 Decision p.10) In that case, the Board discussed the significant differences between private sector disputes and public sector disputes. We noted that the School Committee had urged the Board to adopt the federal model for dealing with *private sector disputes* which would allow the Employer to unilaterally impose terms upon the reaching of an impasse in negotiations for a successor CBA, without regard to the distinct character of *public sector* bargaining. We declined to do so and instead joined with other jurisdictions - notably New York, Triborough Bridge & Tunnel Authority, 5 PERB §4505, Aff'd, 5 PERB §3037 (1972); California, Moreno Valley United School District v PERB, 142 Cal. App. 3rd, 1991 Cal. Rptr. 60 (1983); and Oregon, Wasco County v AFSCME Local No 2752, 30 Ore. App. 863, 569

[8] Prior ULP 4518, which found the Warwick School Committee had committed an unfair labor practice by refusing to execute a negotiated agreement, was overturned by the Superior Court in the basis that the negotiators for the school committee lacked actual authority to bind the committee.

P.2d 15 (1977), opinion following remand, 46 Ore. App. 859, 613 P.2d 1067 (1980) that had rejected the same approach. (ULP-4647 Decision p. 11)

In our discussion in ULP-4647, we noted that the private sector model of collective bargaining contemplated the use of economic warfare.

> "In the private sector, unlike the public sector, it is anticipated, in fact, customary- that a union will exercise its right to strike for the purpose of obtaining leverage at the bargaining table. The threat of a strike, and the strike itself, are legitimate economic weapons. Section 13 of the National Labor Relations Act, 29 U.S.C. 163 provides, in relevant part, that the NLRA shall not 'be construed so as to either interfere with or impede or diminish in any way, the right to strike.' Private sector theory embraces the position that the strike weapon 'supports the principles of the collective bargaining system' by balancing the power of labor and management. NLRB v Erie Resistor Corp. 373 U.S. 221, 235 (1963)." (ULP-4647 Decision p. 12)

In ULP-4647, we went on to discuss the fact that Rhode Island, to the contrary, adopts a different model for public sector bargaining, within the context of collective bargaining for teachers. The same discussion that was applicable then to teachers continues to be applicable to the public employees at issue in this case, the firefighters. The public policies in the Fire Fighter Arbitration Act are set forth at R.I.G.L. § 28-9.1-2, which is printed in full herein ***(with our underlining added herein)***, to provide a fuller backdrop to understanding the Board's ultimate decision in this case.

§ 28-9.1-2. Statement of policy

(a) The protection of the public health, safety, and welfare demands that the permanent uniformed members, rescue service personnel of any city or town, emergency medical services personnel of any city or town, and all employees of any paid fire department in any city or town not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to these municipal employees of other well recognized rights of labor such as the right to organize, to be represented by a labor organization of their choice, and the right to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment.

(b) It is declared to be the public policy of this state to accord to the permanent uniformed members, rescue service personnel of any city or town, emergency medical services personnel of any city or town, and all employees of any paid fire department in any city or town all of the rights of labor other than the right to strike or engage in any work stoppage or slowdown. To provide for the exercise of these rights, a method of arbitration of disputes is established.

(c) The establishment of this method of arbitration shall not, in any way be deemed to be a recognition by the state of compulsory arbitration as a superior method of settling labor disputes between employees who possess the right to strike and their employers, but rather is solely a recognition of the necessity to provide some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike.

In Rhode Island, our legislative leaders have determined that strikes by public employees, in this case, firefighters, are quite simply unacceptable. That prohibition appears in the FFAA as set forth above, but derives in part from the findings set forth in the State Labor

Relations Act that strikes, lockouts, and other forms of industrial strife and unrest are inimical to the public safety and welfare, and frequently endanger the public health. R.I.G.L. § 28-7-2(b).

We wrote in ULP-4647 that "among commentators," there is unanimity of opinion that the private sector collective bargaining model is not transferable to public sector. The articles mentioned were all authored well after the establishment of the FFAA. It appears then, that Rhode Island was clearly on the forefront of the labor relations models by recognizing very early on that for reasons of public policy and safety, firefighters should be denied the right to strike. This Board continues to embrace and appreciate the wisdom of those who realized this factor early on and who did not attempt to include private sector elements of "warfare" into the public sector collective bargaining model. The continuing prohibition of strikes, which makes sense, must be balanced for the employees who do not have this right. The "Legislative denial of the right to strike should not be allowed to reduce collective bargaining to collective begging." (ULP-4647, Decision p.16) The Employer's counterbalancing prohibited activity is "self-help" in the form of unilaterally imposing terms and conditions of employment. As stated by the Court in Moreno Valley United School District v PERB, 142 Cal. App. 3rd, 1991 Cal. Rptr. 60 (1983): "Unilateral imposition of terms by an Employer signals an end to the mutual dispute resolution process regarding those terms. The Employer loses any incentive to participate in the dispute resolution process because it has imposed terms it deems satisfactory." Id. In deciding ULP-4647, we wrote:

> "We join those jurisdictions which hold that an employer's implementation of bargaining proposals is per se an unfair labor practice. In *Wasco County*, 569 P.2d 15, aff'd, 613 P.2d 1067, the Court of Appeals of Oregon approved a SLRB decision squarely on point. There, the employer implemented the Union's wage proposal prior to exhaustion of dispute resolution procedures. Citing the SLRB decision, the Court acknowledged the dichotomy between federal and state impasse resolution procedures, even though Oregon employees have a limited right to strike. It seems to us the case even more compelling when public employees have no right to strike whatsoever. See also, *Gresham Grade Teachers v Gresham Grade School*, 630 P.2d 1304 (Ore. 1981).
>
> We observe that this rule will likely have a stabilizing impact on labor relations. Neither party will be subject to a term or condition of employment that it had not previously agreed to. We believe that this will contribute to the maintenance of good relations...between teaching personnel and school committees. G.L. 28-9.3-1."

The Employer argues in its brief, that in addition to unilateral implementation being allowed under federal law with private sector employers, several other states permit public employers to unilaterally implement contract proposals upon impasse. The Employer argues therefore, the law and/or policy should be the same in Rhode Island. In the public sector, impasse resolution procedures in collective bargaining disputes vary widely from state to state. Some states utilize mediation and fact-finding (conciliation), some utilize interest arbitration for all issues, some utilize interest arbitration for only some issues, some states permit employee

strikes and some prohibit strikes, in whole or in part, some states permit "final" offer arbitration. See Public Sector Impasse Resolution Procedures, Charles B. Craver, 60 Chi.-Kent L. Rev. 779 (1984)

The Employer points to Massachusetts, Maine and Alaska as three states, which allow the unilateral imposition of terms and conditions of employment upon an impasse and, in theory, argues that Rhode Island should follow this approach as well. In actuality, the Employer uses federal law and the law from these other states, as justification for what it has already done. In Massachusetts Organization of State Engineers & Scientists v Labor Relations Commission, 452 N.E.2d 1117, 1121-22 (Mass 1983) the Court upheld the Commission's ruling that permitted the Employer to unilaterally implement "work rules" after a formal declaration of impasse and prior to the conclusion of fact-finding. However, in that case, the prior CBA specifically provided for that result: "[s]hould a successor agreement not be executed by July 1, 1980, this Agreement shall remain in full force and effect until a successor agreement is executed or an impasse in negotiations is reached." Id at 921. Thus, the parties themselves agreed in advance when unilateral implementation may occur. This is not the case here.

The Employer also cites Mountain Valley Education Association v Maine School Administrative District, 655 A.2d 348, 353 (ME. 1995) in support of its argument that unilateral implementation should be permitted by public sector employers after reaching impasse. In that case, the parties had engaged in mediation, fact-finding, and arbitration, which was non-binding as to some issues. After the arbitration panel issued its recommendation, the Employer made a "last best offer", which was not in accord with the arbitration recommendation and then implemented. The Maine Labor Board found that the Employer had violated the state law in part, but upheld the Employer's actions in part. The Court upheld the Board's decision and described the evolution of Maine's adoption of the "impasse exception" to general prohibition against unilateral implementation of terms and conditions of employment. The Court stated:

> Maine law as well as federal law imposes the obligation to bargain in good faith as part of the statutory definition of collective bargaining. 26 M.R.S.A. §965(1)(C); 29 U.S. C.A. § 158(d) (1973 & Supp.1994). The National Labor Relations Act (NLRA) requires employers and employees' representatives in the private sector to bargain in good faith with respect to the mandatory subjects of bargaining; namely, "wages, hours, and other terms and conditions of employment." 29 U.S. C.A. § 158(d). In order to support the bargaining process and prevent it from being circumvented or disparaged, federal law has long been interpreted to prevent either party from unilaterally changing wages, hours or working conditions. See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198, 111 S.Ct. 2215, 2221, 115 L.Ed.2d 177 (1991); NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111-12, 8 L.Ed.2d 230 (1962); NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1157, 1161-62 (D.C.Cir.1992). Thus, while bargaining, and before impasse, a private employer is prevented from "going over the head" of the bargaining agent by unilaterally increasing or decreasing wages. The parties are required to maintain the status quo while bargaining, and this principle applies both to negotiations before an initial contract and to post-expiration

negotiations for a new contract. See Litton Fin., 501 U.S. at 198, 111 S.Ct. at 2221.

Here, in Maine, the Board adopted the rule against unilateral changes with respect to public sector bargaining, see, e.g., Easton Teachers Ass'n v. Easton Sch. Comm., No. 79-14, at 3-5 (Me.L.R.B. March 13, 1979), and we have upheld the Board's use of this rule. See Lane v. Board of Dir. of Me. Sch. Admin. Dist. No. 8, 447 A.2d 806, 809-10 (Me.1982); State v. Maine Labor Relations Bd., 413 A.2d 510, 515 (Me.1980).

In 1978, the Board adopted from federal labor law the impasse exception to the rule against unilateral change. Maine State Employees Ass'n v. State, No. 78-23, at 4 (Me.L.R.B. July 15, 1978), aff'd sub nom. State v. Maine Labor Relations Bd., 413 A.2d 510 (Me.1980). This exception allows a party to unilaterally implement its last best offer when negotiations have reached a bona fide impasse. [3] See Litton, 501 U.S. at 198, 111 S.Ct. at 2221; McClatchy Newspapers, 964 F.2d at 1157, 1164-65; Easton, No. 79-14, at 4-5. Once the parties have in good faith exhausted the prospects of reaching an agreement, unilateral change that is reasonably comprehended within the pre-impasse proposals no longer violates the Act. After impasse, however, the duty to bargain is not extinguished. Rather it is temporarily suspended until changed circumstances indicate that the parties are no longer inalterably deadlocked. See Auburn Firefighters Ass'n Local 797 v. City of Auburn, No. 89-01, at 23 (Me.L.R.B. March 31, 1989); see also McClatchy Newspapers, 964 F.2d at 1164-65.

Notwithstanding the similarities with federal law, Maine law differs in at least one respect--impasse cannot occur until specified forms of intervention have been exhausted. Public employees in Maine, unlike employees in the private sector, do not have the right to strike or engage in work stoppages, 26 M.R.S.A. § 964(2)(C). Having eliminated the most common form of impasse resolution procedure, Maine law adds to the definition of good-faith bargaining the obligation to participate in mediation, fact finding, and arbitration procedures. 26 M.R.S.A. § 965(1)(E). These "peaceful" third-party intervention procedures are intended as substitutes for strikes and work stoppages and are designed to provide escalating pressure on both parties to produce a voluntary settlement." (Underlining added herein)

Thus, even in Maine, impasse cannot occur until such time as the parties have *exhausted* all specified forms of dispute resolution-mediation, etc.

The Employer also cites Alaska Public Employees Association v State, 776 P.2d 1030, 1033 (Ala. 1989) in support of its argument. That case is strikingly different than the facts presented herein, because the parties stipulated when they were at impasse; and the employees at issue (Class II and Class III) also had a right to strike. This case did not examine what would have happened with Class I employees (which included police and fire) who do not have a right to strike. Thus, the case is not persuasive to this Board to adopt such a standard here in Rhode Island.

In Rhode Island, we do not have one public employee bargaining statute, but rather a patchwork of statutes, each addressing a separate category of public employees. In Title 28 of the General Laws, we have:

(1) Chapter 28-9.1. Firefighters' Arbitration (§§ 28-9.1-1 - 28-9.1-17)

(2) Chapter 28-9.2. Municipal Police Arbitration (§§ 28-9.2-1 - 28-9.2-17)

(3) Chapter 28-9.3. Certified School Teachers' Arbitration (§§ 28-9.3-1 - 28-9.3-16)

(4) Chapter 28-9.4. Municipal Employees' Arbitration (§§ 28-9.4-1 - 28-9.4-19)

(5) Chapter 28-9.5. State Police Arbitration (§§ 28-9.5-1 - 28-9.5-17)

(6) Chapter 28-9.6. 911 Employees' Arbitration (§§ 28-9.6-1 - 28-9.6-16)

(7) Chapter 28-9.7. Correctional Officers Arbitration (§§ 28-9.7-1 - 28-9.7-17)

In addition, under Title 36, we have:

(8) Chapter 36-11. Organization of State Employees (§§ 36-11-1 - 36-11-13)

Interestingly, here in Rhode Island, the dispute resolution mechanisms vary from Act to Act. For both the Firefighters Arbitration Act and the Municipal Police Arbitration Act, the parties' unresolved issues must be submitted to interest arbitration which is *binding on all issues*. The only right of review of an interest arbitration panel's decision is by petition for certiorari. (*See* 28-9.1-7 and 28-9.1-15 and 28-9.2-7 and 28-9.2-15)

Under the Certified School Teachers' Arbitration Act, unresolved issues go first to compulsory mediation and/or conciliation and then to arbitration. Issues submitted to arbitration, except those requiring the expenditure of funds shall be binding, with a limited right of appeal to the Superior Court. There is no specific reference to the Supreme Court in this Act.

Under the Municipal Employees Arbitration Act, the parties have the *option* to submit unresolved issues to mediation and/or conciliation. They may choose to go directly to arbitration. Issues submitted to arbitration, except those requiring the expenditure of funds shall be binding, with a limited right of appeal to the Superior Court. There is no specific reference to the Supreme Court in this Act.

Under the State Police Arbitration Act, the parties' unresolved issues must be submitted to interest arbitration which is *binding on all issues*. The only right of review of an interest arbitration panel's decision is by petition for certiorari. (*See* 28-9.5-7 and 28-9.5-14) Similarly, both the 911 Employees Arbitration Act and the Correctional Officers Arbitration Act also operate on the basis of binding arbitration on all issues; with a right of review only by petition for certiorari to the Supreme Court. (*See* 28-9.6-7 and 28-9.6-14 and 28-9.7-7 and 28-9.7-14)

Under the State Employees Arbitration Act, the parties have the *option* to submit unresolved issues to mediation and/or conciliation. They may choose to go directly to arbitration. Issues submitted to arbitration, except those concerning *wages* shall be binding, with a limited right of appeal to the Superior Court. There is no specific reference to the Supreme Court in this Act.

Our General Assembly has, therefore, clearly determined that there shall be a distinct difference between the dispute resolution mechanisms to be used in collective bargaining disputes with public safety personnel (firefighters, police, 911 employees, state police and

correctional officers) and other types of public sector employees (teachers, municipal employees and state employees).

All of these statutes contemplate an initial, short period of bargaining, after which the *impasse* (unresolved issues) resolution procedures should be initiated. In the instant case, the FFAA provides for a short period of bargaining (thirty days) after which a party *could* declare impasse and then move onto interest arbitration for the unresolved issues. The parties are able to explicitly extend this thirty-day period by a written document evidencing that intent (Lime Rock) and each party bears an equal responsibility for submitting its unresolved issues to the arbitral process. (North Kingstown II) Although Judge Stern has apparently come to a conclusion that any extension of the thirty-day period must have an explicit writing evidencing the mutual agreement to extend, this Board does not believe that the same should be necessary. We believe that the mutual actions of the parties could establish an agreement to extend the time for negotiations before impasse procedures must be used or waived. This is the only logical interpretation on how best to balance the bargaining power between the competing interests in the public sector.

Therefore, after considering the Employer's arguments, and in re-reviewing and re-examining the public policy considerations we discussed in 1992, we find no reason today to depart from the position we took then. To the extent that any of our decisions in the past twenty-one years have deviated or appeared to deviate from this precedent, we hereby reject the same and re-affirm our 1992 holding: "we conclude that unilateral departure from the terms of an expired contract, prior to the exhaustion of all available statutory dispute resolution procedures, violates the obligation under R.I.G.L. § 28-7-13 to bargain collectively." In addition, for the reasons discussed supra, we agree with Judge Stern and hereby find that the mandates of the Fire Fighters Arbitration Act ("FFAA") do not permit unilateral implementation of terms and conditions of employment under *any circumstances*, whether or not impasse has been reached and/or statutory dispute mechanisms have been exhausted. [9] The sole avenue of resolving "unresolved issues" or impasse is interest arbitration with review via certiorari to the Rhode Island Supreme Court.

[9] While not before us, the Municipal Police Arbitration Act (MPAA), the Correctional Officers Act, the State Police Arbitration Act and the 911 Employees Arbitration Act all have similar statutory schemes as the FFAA and we would treat issues arising under these statutes in the same manner.

ELECTION OF REMEDIES

The first substantive defense proffered by the Employer in response to the Board's complaint herein, to be addressed, is that of the "election-of-remedies" as that doctrine has been developed to date in labor relations in Rhode Island. The Employer has argued forcefully and repeatedly throughout these proceedings that the Board has no subject matter jurisdiction to hear the Union's request for relief, because the Union has "elected its remedies" by filing a series of individual grievances on or about March 15, 2012, relating to the same subject matter, seeking the "same remedies." (Employer brief p.1 and pgs.18-22 and Employer motion to dismiss, pgs. 4-6) The Employer argues that the Rhode Island Supreme Court's holding in Department of Environmental Management v Rhode Island State Labor Relations Board, 799 A.2d 274, 277-279 (R.I. 2002) is controlling on this issue and that the Board simply does not have subject matter jurisdiction to hear the matter. The Employer argues:

> "The DEM case involved a union that initially elected to file a grievance under a collective bargaining agreement that called for arbitration on unresolved grievances. Rather than actually proceeding to arbitration, however, the union instead filed a complaint with the Labor Board. ...Pursuant to the CBA's grievance procedures, the union could further pursue the matter through binding arbitration. The Rhode Island Supreme Court held that the matter was improperly before the Labor Board because, by first initiating the grievance process, the Union had elected its remedy. In the present case, the Union also chose first to file grievances and indeed pressed them on to arbitration. Thus the present matter is improperly before the Board and must be dismissed." (Employer brief p. 20)

In response, the Union argues that the doctrine of election-of-remedies only applies "when one party to a CBA attempts to take advantage of a statutorily-prescribed remedy and **loses**, or vice versa." *citing* School Committee of North Kingstown v Crouch, 808 A.2d 1074, 1080 (R.I. 2002).[10] The purpose of the doctrine of election-of-remedies is to prevent one party from getting two bites at one apple. Id. The Union argues that because the ***Employer has moved to stay all the grievance arbitrations***, it cannot seek to prevent this Board from hearing these charges, because the same would leave the Union with "no bites and no apple." Finally, the Union argues that it is not seeking double recovery. If the Board issues relief herein, then many of the grievances will become moot, although some factual finding may still need to be made by an arbitrator, and the Board should order the Employer to participate in the arbitrations. The Employer argues in rebuttal that there is no evidence of a motion to stay the pending arbitration hearings in either Union Exhibit #28 (cited by the Union) or elsewhere in the record of this case.

[10] School Committee of North Kingstown v Crouch, 808 A.2d 1074, 1080 (RI 2002) was decided by the Rhode Island Supreme Court five months after State Department of Environmental Management v State Labor Relations Board, 799 A.2d 274 277 (RI 2002)

The Rhode Island Supreme Court's development of the doctrine of election-of-remedies within the field of labor relations has a long history, summarized as follows by the Court in Martone v Johnston School Committee, 824 A.2d 426 (R.I. 2003):

> "This Court has long adhered to the election of remedies doctrine to 'mitigate unfairness to both parties by preventing double redress for single wrong. State Department of Environmental Management v State Labor Relations Board, 799 A.2d 274 277 (RI 2002) (DEM). Pursuant to the election of remedies doctrine, 'when one party to a CBA attempts to take advantage of the grievance procedure and loses,***that party [is prohibited] from pursuing the same dispute in the courts of this state.' Id at 278 (quoting *Cipolla v. Rhode Island College, Board of Governors for Higher Education*, 742 A.2d 277, 281(R.I. 1999)). Similarly, when one party to a CBA attempts to take advantage of a statutorily-prescribed administrative remedy and loses, the election-of-remedies doctrine prohibits that party from pursuing the same dispute through a grievance procedure." *School Committee of North Kingstown v Crouch*, 808 A.2d 1074, 1080 (R.I. 2002).
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> Recently, this Court reaffirmed the force and breadth of the election of remedies doctrine in DEM. DEM, 799 A.2d at 278. In that case, DEM employees learned that DEM was posting a part-time job opening for a 'principal forester.' *Id* at 276. The employees' union contended that the posting violated its CBA with DEM. *Id* The Union then also filed a grievance with DEM pursuant to the CBA requesting that the posting be lifted and that DEM create an opening for a full-time position. Id. After DEM rejected its request, the Union appealed to the Department of Administration's Office of Labor Relations, which also denied the union's request. Id Pursuant to the CBA's grievance procedures, the union could further pursue the matter only through binding arbitration. Id At that point, the union complained to the state Labor Relations Board which heard the case pursuant to G.L. 1956 28-7-9- (b)(5). DEM 799 A.2d at 276. The board ultimately granted a cease and desist order forbidding DEM to create the part-time position, Id at 279. This Court held that the matter was improperly before the board because by first initiating the grievance process, the union selected its remedy and 'should have pursued that remedy to conclusion.'" (Martone at 429-430 citing DEM)
>
> "Martone contends that the election of remedies doctrine does not apply to this case because his grievance and demand for a 16-13-5 hearing were designed to challenge different actions taken by the committee. ... However, as described in DEM, the doctrine of election-of-remedies has at its core, the salient purposes of preventing unfairness to the parties. DEM, 799 A.2d at 278. We believe that the remedies Martone sought through his grievance and request for a 16-13-5 hearing are sufficiently similar to trigger the equitable doctrine of election-of-remedies....Accordingly, we conclude that it would be unfair to force the committee into duplicative litigation to defend its actions." Martone at 430.

The Employer herein, argues that this case falls squarely within the doctrine-of-election of remedies; that the doctrine is dispositive and the Board does not have subject matter jurisdiction to proceed. If the facts herein, were as simple as the Employer alleges and if the Superior Court had not already ruled on this issue, then the Employer's argument might be more persuasively credible and accurate. However, the facts in this case and collateral travel of the issues are anything but simple. The Employer herein has persistently and consistently tried to thwart any and all avenues of relief that the Union has sought. Regardless of what action the Union attempts, whether it is in Superior Court, before the American Arbitration Association, or before the State Labor Relations Board, the Employer springs up like a Jack-In-The-Box, squeaking "no jurisdiction, no jurisdiction." This modus operandi of treating labor relations like a

chess game, in an effort to simply out-maneuver the Union from seeking relief or exercising its rights to collective bargaining, is not one that is consistent with one of the core principles or policies of the Labor Relations Act, which is to restore equality of bargaining power between and among employers and employees. *See* R.I.G.L. § 28-7-2(c).

That having been said, in all of the cases that the Supreme Court has dealt with to date concerning the election-of-remedies doctrine, an alternative remedy, whether it be a statutory hearing before a school committee, department of education or a contractual remedy such as arbitration, was in fact *available*, and had been previously sought or begun and abandoned by either an individual plaintiff or union. The Employers did not challenge the Unions' right to proceed in those alternative, original forums. In State Department of Environmental Management v State Labor Relations Board, 799 A.2d 274 277 (R.I. 2002), the Union had filed a grievance over the posting of part-time positions and then *decided* not proceed to arbitration but instead sought redress before this Board. The Court held: because Council 94 elected and later abandoned its remedy, the case was not appropriately before the Labor Board, nor was the dispute ripe for judicial review. *Id* at 278.[11]

In an earlier case, Cipolla v Rhode Island Board of Governors for Higher Education, 742 A.2d 277 (R.I. 1999), the plaintiff sought retroactive inclusion in the pension system through a grievance. When the grievance was denied, rather than proceed to arbitration, the plaintiff sought injunctive relief in the Superior Court. The Court held: "when one party to a CBA attempts to take advantage of the grievance procedure and loses, the election of remedies doctrine prevents that party from pursuing the same dispute in the court of this state." Id at 281.

In Martone v Johnston School Committee, 824 A.2d 426 (R.I. 2003), the plaintiff, a school principal who had admitted to stealing a student's prescription medication, had been through months of hearings before the school committee on whether his license to teach could be revoked. The Union then filed a demand for arbitration on the same subject. The Court barred the arbitration under the doctrine of election-of-remedies and held: "differences in the remedies sought will not necessarily foreclose application of the election-of-remedies doctrine, provided the remedies are sufficiently similar." Id at 430-31.

None of the election-of-remedies cases decided by our Supreme Court have dealt with the type of factual circumstances presented in the case. Here, the Employer has consistently

[11] When that matter was before the Board, the Employer claimed that the Board was required to adopt the federal Collyer doctrine, which required deferral of unfair labor practice action when an arbitration was pending on the same set of facts, but seeking relief under the parties' contract. When this issue proceeded to the Rhode Island Supreme Court, the matter was converted to an "election-of-remedies" issue.

maintained the position that the prior CBA ***has expired and is of no force and effect.*** At page 33 of its brief, the Employer states:

> "At the time that the Reorganization was implemented, there ***was no valid, enforceable collective bargaining agreement between the Town and the Union.*** The last collective bargaining agreement between the parties expired on June 30, 2010 (Union Exhibit #3). ***Neither that agreement nor any clause contained therein could lawfully extend beyond the Agreement's three year term.*** See R.I. Gen Laws 28-9.1-6 ('in no event shall the contract exceed the term of three (3) years.') Similarly, the interest arbitration agreement lasted one year, and expired on June 30, 2011. (Union Exhibit # 4) Applicable law prevents it from extending any longer than that one year. § 28-9.1-12 R.I.G.L. Therefore, there was ***no collective bargaining agreement in place*** at the time that the Town implemented the Reorganization. Because the collective bargaining agreement had been removed by statute, the Town was free to implement the Reorganization. Firefighters are public employees who are excepted from the protection of Federal Law on concerted activities, union activity and unfair labor practices relating to such. The FFAA permits firefighters to join unions and obtain recognition of such unions via elections***, but the FFAA requires that the Town do no more that bargain in good faith with the Union***, which the Town has done and will continue to do until the parties reach agreement on a contract. While the firefighters had been protected by a written agreement, when that expired and the Union waived its right to request interest arbitration, the firefighters ***were left at the discretion of the Town and its implementation of the Reorganization was controlling.***"
>
> "The FFAA contains no prohibition on the Town's ability to implement such a change. This is likely because the FFAA provides firefighters with the right to timely invoke binding interest arbitration, which is designed to resolve all unresolved bargaining issues, thereby obviating the need for any unilateral action on the part of the municipality in most circumstances." (See Employer brief p. 34)
>
> ***(Bold and italic emphasis added herein.)***

In fact, the Employer took the position that since (in its opinion) only the Union had waived its right to interest arbitration, the Employer possessed the right, as a matter of law, to implement the Reorganization without bargaining with the Union because the same was within the Employer's "sovereign power." (Employer's brief p. 33)

In its brief, the Union had argued that the Employer had refused to engage in grievance arbitration. (Union brief at p. 15) The Employer claimed, in its motion to strike the Union's brief, that there was no evidence *anywhere in the record* to support the Union's claim that the Employer had filed a motion to stay grievance arbitrations. (See motion to strike p. 2, par 3 & 4) The Employer pointed out that the Union's reference to Union Exhibit #28 was merely a petition to stay the 2011-2012 interest arbitration and that it made no reference at all to grievance arbitrations. The Employer's response to Union Exhibit # 28 is indeed correct. That document, filed on September 5, 2012, was a "Verified Complaint and Petition to Stay Arbitration" (W.C. 2012-0542) and sought to enjoin *interest* arbitration. However, the decision that ultimately issued from that later amended verified complaint was submitted to the Board at the commencement of the hearing on January 29, 2013. (See TR. p. 343) On page one of that

decision, the Court, in referring the matter being presented stated: "These petitions include both Plaintiff's Motion to Stay the 2011-2012 Interest Arbitration in C.A. WC-2012-0542, **Plaintiff's Motion to Stay the Arbitrations of Certain Firefighter Grievances in C.A. No. 2012-0368."** (Emphasis added) The Court ultimately limited its decision to the "Plaintiff's Motion to Stay Interest Arbitration" in C.A. WC- 2012-0542 and the declaratory relief relative to those issues. The record before for the Board does not indicate that the "Motion to Stay the Arbitrations of Certain Firefighter Grievances in C.A. No. 2012-0368" has ever been decided or dismissed. However, based upon the Employer's continued insistence that no collective bargaining agreement, or any clause from the expired collective bargaining agreement, can be in effect, as a matter of law, then there is clearly no *agreement* to arbitrate the disputes. So, without an agreement to arbitrate, the Union is obviously precluded from "electing" an alternative remedy.

This Board finds that the doctrine of election-of-remedies, which our Supreme Court has repeatedly held is "grounded in equity and is designed to mitigate unfairness to both parties by preventing double redress for a single wrong" does not bar the Board from exercising jurisdiction over the within unfair labor practice charge. The Union has not been permitted to *successfully elect* an alternative remedy, because the Employer maintains that there is no contract in existence and has brought an action in Superior Court on that very issue. The election-of-remedies contemplates that a party is entitled to at least *one* avenue of relief. Under the facts presented, the Employer wants the fact that the Union *attempted* to seek relief by filing grievances to be held against the Union. The Employer urges this result despite the fact that the union was and is thwarted by the Employer's claim that there is no grievance mechanism because there is no contract. The mere filing of the grievances, under the circumstances presented, does not, in this Board's opinion, bar the Union's ability to seek relief before this Board; because the Employer has made it perfectly clear that it does not agree there is an arbitration clause, because there is no contract. Moreover, the record reflects that none of the grievances have been heard to date by any arbitrators.

In reaching this determination, the Board is aided by the Superior Court's decision in Coventry Fire District v State Labor Relations Board, C.A. No PC 04-5950, issued October 31, 2005 by Justice Gibney. In that case, the Employer filed an unfair labor practice against a firefighter union for allegedly refusing to execute an agreed upon CBA. The Board, after a full hearing on the merits, with one member recused, was deadlocked (3-3) on the issue presented. The Board, therefore, had no choice but to dismiss the case procedurally. The Employer appealed and named both the Union and the Labor Board as Defendants in that

proceeding. On appeal, the Union maintained the position that once it (the Union) had submitted the issue of the contract to arbitration, the District was barred from bringing a ULP claim under the election-of-remedies doctrine. The Court, while upholding the Board's dismissal, found the DEM election-of-remedies case was readily distinguishable on two grounds: (1) unlike the parties in DEM, the District and Union had no collective bargaining agreement in place. "Thus, when the Union applied for arbitration, ***it was not electing a remedy available to it through a CBA because there was no CBA***." (emphasis added); (2) That the doctrine was to prevent the same party from seeking relief in two venues, not to prevent one party when the other has filed in a different venue.

In this case, the Employer has insisted most vociferously that there was no CBA and that the Union was at the mercy of the "sovereign." Therefore, the Union, when it filed its various grievances in March 2012, could not be "electing a remedy" because there was no governing CBA. Fundamental fairness and equity dictate that the Employer doesn't get to have the facts swing both ways for it. It cannot argue on the left hand that there is no CBA, so the Union's grievances must be stayed, while at the same time arguing on the right hand, that the union "elected its remedy" when it filed the grievances under the contract and therefore, foreclose the union from any remedies whatsoever. The Board finds that to interpret the doctrine of election-of-remedies in the manner presented and argued in this case would be a perversion of the intent and purposes of both the State Labor Relations Act and the Firefighters Arbitration Act; both which seek to foster equality of bargaining power, and would be entirely inconsistent with the Supreme Court's prior holdings and the Superior Court's application of the doctrine of election-of-remedies. Therefore, we find specifically that we have subject matter jurisdiction to hear and decide this matter and that subject matter jurisdiction is not foreclosed by any rational or fair application of the doctrine of the election-of-remedies.

FIREFIGHTERS ARBITRATION ACT & LIME ROCK

The Employer also insists that the Board does not have subject matter jurisdiction over the within complaint because the Reorganization is an unresolved issue and that the Firefighter Arbitration Act (FFAA) requires submission of the issue to arbitration. The Employer argues that the Union is barred from seeking a remedy with the Labor Board under the Rhode Island Supreme Court's decision in Lime Rock Fire District v R.I. State Labor Relations Board, 673 A.2d 51 (R.I. 1996) The Employer argues that the facts in this case are indistinguishable from Lime Rock and that Lime Rock controls. (Employer's briefs p. 25)

The Union argues that Lime Rock explicitly holds that the parties themselves may agree to extend the period of negotiations, thereby extending the timeframe to submit unresolved issues to interest arbitration. (Union brief. p. 31) The Union also argues that the Board should decline to interpret Lime Rock as permitting a Union to involuntarily waive its right to interest arbitration. In support of this argument, the Union notes that at the time Lime Rock was decided, when the Union had refused to participate in interest arbitration, the Employer had no remedy available to it before the Labor Board. It was not until the following year, 1993 that the General Assembly amended R.I.G.L. § 28-7-13.1, making it an unfair labor practice for a public sector employee organization (union) to "avoid or refuse to comply with any statutory impasse procedures as may be provided in chapters 29-9.1." Thus, the Union argues that the Employer's remedy for any alleged "refusal" by the Union to comply with the FFAA is to file an unfair labor practice charge, not a waiver of statutory impasse procedures. The Union also argues: (1) that Lime Rock is distinguishable on other grounds. In Lime Rock the Union refused to submit unresolved issues to arbitration and filed with the Labor Board instead. In this case, the Union has in fact filed for interest arbitration, but the filing was challenged by the Employer as being untimely and the Employer is the one that has refused to participate in interest arbitration. (2) There is no evidence that the Union intended to waive its rights to arbitrate and that the opposite is true. (3) Even if the deadlines in R.I.G.L. § 28-9.1-7 are mandatory, the thirty-day period does not begin while the parties have agreed to continue negotiating and there is no specific requirement that an agreement to continue negotiations be separately reduced to writing. (4) The parties did continue negotiating until at least March 5, 2012.

The Employer's insistence that Lime Rock is indistinguishable from the facts in this case rings hollow. In Lime Rock, the parties had a written agreement concerning future bargaining sessions. Prior to the expiration of those scheduled sessions, the electorate (not the District's negotiating team) of the fire district voted, at the annual meeting, to de-fund the fulltime firefighters. After the vote took place, the Union refused to attend the next scheduled bargaining session, ceased bargaining, and submitted a claim of unfair labor practice to this Board. In holding that the Board did not have subject matter jurisdiction to hear the complaint, the Supreme Court stated that the issue of funding was an "unresolved issue" that should have been submitted by the Union to interest arbitration, not to the Labor Board. The Court said that the Union failed to exhaust its remedy under the FFAA, namely, to seek arbitration for unresolved issues. It is important to distinguish that in Lime Rock, it was the actions of the electorate (not the Employer) that created the unresolved issue; and in this case, it was the Employer, through the Town Council, and not the third-party electorate.

After the decision in Lime Rock was issued, the General Assembly amended the State Labor Relations Act and afforded the right to employers to file unfair labor practice charges against unions. In this case, the parties engaged in continuous negotiations, even after the Employer adopted the ordinance pertaining to the Reorganization. (See Union Exhibits #22, #23, & #24) The Union then sought interest arbitration for the unresolved issues. (Union Exhibit #26 & #27) The Court, in North Kingstown II, eventually determined that the Union's filing for interest arbitration was untimely because the parties had not mutually agreed to extend the timeframe for submission to arbitration. However, the Court found that the Town had *also* waived its right to resolution of the unresolved issues because it too failed to submit the unresolved issues to arbitration. In addition, the Town had the right to file an unfair labor practice over the Union's alleged "refusal" to submit the matters to arbitration and failed to do so. Therefore, the Court ruled that neither party could make unilateral changes to terms and conditions of employment and that the parties must wait for the collective bargaining window to re-open.

The key provision of the FFAA implicated herein is R.I. Gen Laws § 28-9.1-7 which provides:

> " **Unresolved issues submitted to arbitration.** In the event that the bargaining agent and the corporate authorities are unable, within thirty (30) days from and including the date of their first meeting, to reach an agreement on a contract, any and all unresolved issues shall be submitted to arbitration."

In Lime Rock, the court specifically found that this statute permitted parties to agree to extend the thirty-day period of negotiations by mutual consent, thus permitting a timely submission to interest arbitration at a date later than the thirty days contemplated by the statute. Lime Rock at 54. Lime Rock did not specifically find that the extension of negotiations by mutual consent *must* be documented in writing, although in that case, there was a document to that effect. [12]

In this case, despite the fact that this Board believes the facts readily and overwhelmingly establish that the parties collectively agreed, as evidenced by their mutual actions and multiple negotiating sessions, to extend the time for negotiations and thereby, extended the thirty-day period for submission of unresolved issues to interest arbitration, this issue is *res judicata* because it has already been decided by Judge Stern in Town of North Kingstown II (as referenced herein supra). The most we can do here is to respectfully disagree

[12] The Union highlights in its brief that the original thirty days had long since expired when the parties in Lime Rock executed their written document memorializing the extension of time. Thus, the Union argues that no rigid application of the statute, within the context of labor reality, should be required or makes sense. We agree.

with the Judge's findings, while reluctantly adopting the same as our own.[13] Judge Stern found in this case that:

> "...there is no evidence that the parties expressly agreed to either a particular time frame for negotiations or an extension of such a time frame to a particular point. Thus, without an express agreement to create- and subsequently to alter- a specific timeframe for negotiations, this Court is unable to extend the deadline imposed by the FFAA, as interpreted in Lime Rock. Therefore, the Court finds that the Union has waived its rights to interest arbitration."

The Court, however, did not stop at finding that the Union had waived its right to interest arbitration. The Court went on to carefully analyze the statute to determine if the statutory burden of submitting issues to arbitration was borne solely by the Union or equally by the Union and Employer and found that both parties had an equal obligation under the statute. (See North Kingstown II, pgs. 13-15. The Court concluded:

> "Based on such an application of the statute's plain meaning, this Court holds that R.I. Gen Laws § 28-9.1-7 is equally applicable to both the Union and the Town. Such an application means that, under the Rhode Island Supreme Court's holding in Lime Rock, both the Union and the Town were required to submit unresolved issues to arbitration within thirty (30) days of the parties' first meeting on October 28, 2011. See Lime Rock, 673 A.2d at 54. However, neither the Union nor the Town submitted those unresolved issues to arbitration. Therefore, this Court holds that ***both parties have waived their rights to engage in interest arbitration related to their collective bargaining negotiations***. See Id. As such, both the Union and the Town must now wait until the "window opens again" for interest arbitration. If interest arbitration is properly requested during the statutory time period, in accordance with the FFAA, the process will go forward." (Emphasis added herein)

The Court, therefore, prohibited both parties from seeking relief from this Board, ***due to their waivers of their rights to pursue interest arbitration*** under the FFAA. (Decision at 19) However, the Court went on to find that neither party is prohibited from filing with this Board to determine the effects of the failure to enter into a new agreement and ***whether or not the terms and conditions of an expired contract should be controlling pending the***

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[13] Were we deciding this case without prior judicial action, we would have no problem concurring with several of the Union's arguments. The evidence in this record overwhelmingly established to this Board's satisfaction that the parties continually agreed to extend the period of negotiations. (See Union Exhibits 13, 14, 15 17, 18, 19, 22 and 23). Moreover, the evidence also shows that the parties had long worked "cooperatively" with each other, informally extending timelines contained in the FFAA. In fact, on February 23, 2011, the Union President sent the Town Manager a letter requesting the opportunity to meet and confer to negotiate a successor agreement. Pursuant to R.I.G.L. 28-9.1-6, the Town was required to meet and confer within 10 days of receipt of the notice. The Town Manager failed to respond to the request within the requisite ten days. (See Union Exhibit #6) At that point, the Union could have immediately submitted its proposals to interest arbitration or filed an unfair labor practice. Ultimately recognizing the tardiness of his response, the Manager sent the Union a communication stating: "I hope we don't have a problem with timeliness on the letter I just sent. Since we do work as cooperatively as possible together." The Union President responded: "I don't have any issue with the timeliness of the response letter. (Union Exhibit #7) The Manager responded: "one of my "favorites" brought it up and I assured him you and I were on the same page."(Union Exhibit #7) In addition, there is no evidence whatsoever that the Town and Union did not agree to the many bargaining sessions they held. Thus, had this matter been presented to us in the first instance, we would have held that the parties mutually agreed to extend the thirty-day period referred to in § 28-9.1-7 for negotiations, as evidenced by their clear and unmistakable actions and that they both retained the right to submit issues to interest arbitration. We do however agree with Judge Stern's decision that each party bears the obligation under the statute to submit their unresolved issues to arbitration.

negotiation and execution of a new agreement. (Decision at 20 and 21) In reaching its conclusion that the SLRB has jurisdiction to determine what, if any, agreement is in force between the parties, the Court cited to the Rhode Island Supreme Court as follows:

> "If a dispute should arise between the parties concerning the effect of the failure to enter into a new agreement and whether or not the terms and conditions of an expired agreement should be controlling pending the negotiation and execution of a new agreement, the tribunal to make such a determination is the State Labor Relations Board...*If the union should contend that the terms of an expired agreement should apply until a new agreement should be reached, its remedy would be to file an unfair labor practice complaint with the State Labor Relations Board, pursuant to the terms of §28-7-13.*The Superior Court would have jurisdiction only to review the decision of the State Labor Relations Board pursuant to §42-35-15. In short, the Superior Court does not have original jurisdiction of the question to determine what, if any, agreement is in force between the committee and the union." Warwick Sch. Comm. v. Warwick Teachers' Union Local 915, 613 A.2d 1273, 1276 (R.I. 1992) (emphasis added by Judge Stern)

In granting the Employer's motion for a stay of the mandatory injunction in North Kingstown II (restoring the prior terms and conditions of employment to the NK firefighters), our Supreme Court itself made reference to this same case:

> "The hearing justice likely erred in issuing the following mandatory preliminary injunction: "By February 13, 2013, the [t]own is ordered to reinstate wages, hours, and other terms and conditions of employment that exi[s]ted pre-lateral implementation [], i.e. prior to March 11, 2012. At this stage, we deem the issuance of this injunction to be improper for several important reasons: (1) neither party requested it (FN4) (2) it directly contravened this Court's well-settled precedent established in *Warwick School Committee v Warwick Teachers' Union, Local 915*, 613 A.2d 1273, 1276 (R.I. 1992) in which we stated that 'the Superior Court does not have original jurisdiction of the question to determine what, if any, agreement is in force between [management] and [a] union' and may not require the parties to enter into any particular agreement; and it was ordered absent the requisite findings (FN5) and without notice to the Town., as required by Rule 65 (a) (1) of the Superior Court Rules of Civil Procedure."

In addition, R.I.G.L. § 28-9.1-6 (Obligation to bargain) specifically provides: "An unfair labor practice charge may be complained of by either the employer's representative or the bargaining agent to the state labor relations board which shall deal with the complaint in the manner provided in chapter 7 of this title." Therefore, based in part upon the holding in North Kingstown II and upon the stay issued by the Rhode Island Supreme Court, as well as R.I.G.L. § 28-9.1-6, this Board finds that it has jurisdiction under the FFAA and the State Labor Relations Act to both hear and decide this controversy.

DUTY TO BARGAIN

The Town argues that it had no duty to bargain for three distinct reasons:

(1) The Town's Home Rule Charter vested in the Manager and Council, the supervening right to implement the Reorganization.

(2) The Town's authority and duty to implement the reorganization cannot be contractually abdicated.

(3) The Reorganization falls into the category of management rights which is not a mandatory subject for bargaining.

Home Rule Charter: The Employer argues that its Home Rule Charter supersedes any general law, including those found under the Labor Relations Act and the FFAA, insofar as those general laws apply to the Town. The Employer claims that its charter permits it to "reorganize" any of its departments. (Town of North Kingstown Charter, Section 310.) The Employer relies upon a series of cases for its position, including: Town of Johnston v Santilli, 892 A.2d 123, 129 (R.I. 2006), International Association of Firefighters Local 799 v Napolitano, 516 A.2d 1347, 1349 (R.I. 1986), Town of West Warwick v Local 2045, 714 A.2d 613, (R.I. 1998), Retirement Bd. of Employees' Retirement System of the City of Providence v City Council of Providence, 660 A.2d 721, 727-28 (R.I. 1995). The Employer argues that since the Town Charter was adopted and specifically ratified after the adoption of the FFAA and State Labor Relations Act, the Town Charter controls and "trumps" those acts.

The Employer's citation to these cases, while technically correct for the recitation of the holdings, is, in this Board's opinion, misplaced. Those cases dealt with situations where *competing* statutes and charters were at odds with each other and determine which regulation "trumps" the other. In its brief, the Employer does not even attempt to view its rights under its charter and obligations under state law for collective bargaining as harmonious. Moreover, the Employer does not set forth any reason why it believes that its charter and the FFAA and the SLRA are in conflict with each other. The Employer simply argues from a legal perspective, that *if* they are in conflict, the charter prevails.

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. "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)). 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 or 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.

The FFAA confers a major benefit upon the Employer: its firefighters are prohibited from engaging in any work stoppage or slowdown and are specifically denied the right to strike. In exchange for that protection, the Employer is required to respect the employees' rights to bargain collectively concerning wages, rates of pay and other terms and conditions of employment. R.I. Gen. Laws § 28-9.1-2(a)

> The protection of the public health, safety, and welfare demands that the permanent uniformed members, rescue service personnel of any city or town, emergency medical services personnel of any city or town, and all employees of any paid fire department in any city or town not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to these municipal employees of other well recognized rights of labor such as the right to organize, to be represented by a labor organization of their choice, and the right to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment.

There is no conflicting provision in the FFAA that prohibits the Employer from re-organizing its fire department. Indeed, Judge Stern has already ruled on this issue in North Kingstown I and then clarified his position again in North Kingstown II. According to Judge Stern:

> "the FFAA represents a public policy decision made by our State's elected representatives in both the Legislative and Executive branches. From a public policy perspective, it provides for the uninterrupted provision of emergency services in the State, as it denies firefighters the traditional right to strike, which is generally afforded to unionized employees. See G.L. 1956 28-9.1-2. On the other hand, it significantly restricts the Town by not allowing it to implement changes to wages, hours, and other terms and conditions of employment outside of compliance with the FFAA or through a CBA. (Charles B. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L.Rev. 557,558 (1980) "Interest arbitration is, in fact, 'the most common public sector device for resolving bargaining disputes' where other solutions have proved ineffective.")

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). In addition, we note that R.I.G.L. § 28-7-44, under the SLRA, 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." Thus, even if the Charter and state statutes for bargaining were inconsistent, which we specifically do not find, the SLRA would appear to control.

No Contractual Abdication of Rights:

The Employer argues that statutory powers and obligations cannot be bargained away and that Sections 310 and 406 of its Charter permit it to reorganize the department into the organizational structure the Employer deems appropriate. (Brief p. 31) As such, the Employer argues that this Board is without authority to finds its reorganization into three divisions unlawful. The Employer argues that it had no duty to bargain with the Union over the reorganization because that would be an improper contractual restriction on the Employer's statutory powers. The Employer also argues that the Board is without authority, therefore, to order the Employer to organize the department back into the system requested by the Union.

As stated above, the Employer's ability to reorganize under its charter is not something that this Board sees as conflicting with the Employer's obligation to engage in bargaining with the Union concerning the effects of the decision on the wages, hours and other terms and conditions of employment. Although there is some disagreement as to the Board's authority to order the Employer to permanently organize the Department back "into the system requested by the Union," we do indeed have the power and authority to order the Employer to maintain a status quo that existed upon the expiration of the last CBA, until such time as all the statutory procedures in the FFAA have been exhausted, up to and including the obligation to file for certiorari after the issuance of an interest arbitration award. Indeed, it is our position, as well as Judge Stern's position, that under the FFAA, the only entity that may issue changes to the

terms and conditions of employment for firefighters is a duly authorized and convened interest arbitration panel.

Reorganization was a Management Right

We note that this issue is one that has also been addressed by Judge Stern. In North Kingstown I, Judge Stern held:

> "If the Town desires, it can, with notice to the Union, reassert its management right. Any binding arbitration can determine the effects on mandatory subjects of bargaining. In this case the Town, through Ordinance, may assert that those management rights permissively bargained in a CBA upon expiration are reasserted. This Court finds that the platoon structure of the Fire Department is a management right that may be properly asserted at the expiration of the CBA. Going forward the parties may agree to a new CBA that addresses the effects of this management change on mandatory bargaining subjects or proceed to interest arbitration, solely to determine the effects on mandatory bargaining subjects and not the management decision itself."

This holding was further clarified, later in the decision.

> "This Court is well aware that the Town is not required to bargain over every conceivable concession, and the ability to make managerial changes is certainly within its sovereign power. It is not convinced, however, that in this instance the changes to wages and hours are solely an effect of that management change from four (4) platoons to three (3) platoons. Instead, the Ordinance explicitly addresses changes to wages and hours. Thus, the Ordinance, on its face, affects subjects which are very clearly items which must be bargained for pursuant to the FFAA. See § 28-9.1-4."

We cannot say it any clearer than Judge Stern: the management right being asserted here, on its face, affects subjects which are very clearly items which must be bargained for pursuant to the FFAA.

We will also note, however, that apparently the Employer did not feel this was a "management right" that did not have to be bargained until sometime in December 2012; well after the issuance of the interest arbitration award from the preceding year and after the exchange of initial proposals for the 2011-2012 year. The Employer had readily bargained this issue, presumably at great expense to both parties, for more than one year. If the Employer was so sure this was an inherent "management right", then why did it litigate this very issue all the way to an interest arbitration award just a few months prior to commencing negotiations for the 2011-2012 year, especially when its negotiators were the same people? In addition, why wasn't the Employer's position of this as a "management right" asserted at the commencement of negotiations and the exchange of proposals?

This Board is very disturbed by the unfairness now visited upon the Union as a result of the Employer's late change of position on this issue and Judge Stern's decisions in

North Kingstown I and North Kingstown II, because the Judge overlooked the Employer's *failure to assert this issue in a timely manner.* The FFAA requires the parties to submit their proposals for changes in successor collective bargaining agreements within thirty days of the date of their first bargaining session. R.I.G.L. § 28-9.1-17. In this case, the Employer clearly believed in October 2012 that it had the obligation to bargain the issues of the firefighters' work-hours and rates of pay *because it offered to bargain these issues.* The Employer's package of contract proposals contemplates the implementation of the fifty-six hour workweek. (Union Exhibit #8, pgs. 21-22) The Employer's proposals did **not** state that it considers the issue of the platoon structure and hours of work as a "non-delegable" management right.

Based upon Judge Stern's interpretation of the FFAA, the thirty-day period contemplated for negotiations commenced on October 28, 2011 and concluded on November 27, 2012. In Judge Stern's opinion, after that initial thirty days, all unresolved issues had to be submitted to interest arbitration by the parties. When they failed to do so, both parties waived their rights to this method of resolving the issues and the bargaining window for 2011-2012 fiscal years closed. *However,* the Employer did not even claim that the platoon structure was a non-delegable management right that only required bargaining as to the "effects" of this decision until December 19, 2011. (See Union Exhibit #15) Thus, with Judge Stern's decision, the Employer was able to change a *fundamental issue of bargaining*, well after the thirty day period had expired and after the time in which the Union could have submitted that issue as an unresolved issue for bargaining.

IMPASSE RESOLUTION

The Employer argues that the essential elements of the Board's complaint have not been established because not only did impasse exist on March 5, 2012 when the ordinance was implemented, the "Union exhausted the statutory resolution procedures set forth in the FFAA." (Brief p. 39). The Employer alleges that the Union failed to exhaust the statutory resolution procedures by (1) failing to timely request interest arbitration within thirty days of the parties' first negotiation meeting, as required by R.I.G.L. § 28-9.1-7 and (2) by failing to timely notify the Employer of its intention to bargain wages, rates of pay, and other matters requiring the appropriation of money, as required by R.I.G.L. § 28-9.1-13.

The Union responds that participation in statutory impasse procedures is mandatory, regardless of whether one or both parties failed to strictly comply with statutory deadlines. *Rhode Island Council 94 v Carcieri*, 2008 WL 4824439. In addition, the Union argues that statutory dispute resolution mechanisms cannot possibly be exhausted because the Employer

has refused to participate in interest arbitration procedures; thus the procedures have not even begun.

We note that this too is an issue that has been specifically litigated between the Employer and the Union before the Rhode Island Superior Court in North Kingstown II and that Judge Stern has held that ***both*** parties have, by failing to submit the unresolved issues to interest arbitration within thirty days of their first meeting, waived their respective rights to interest arbitration. Thus, the window for interest arbitration for the contract year 2011-2012 is closed and the parties must wait until interest arbitration for the following year. Id. Although this Board is bound by the doctrine of res judicata on this issue, and *cannot* find differently than Judge Stern, we wish to note for the record that we respectfully do not agree with his ruling on this issue and that were this issue to come before us in another matter, we would not follow this ruling as precedent, since there are opposing Superior Court opinions on the issue of participation in statutory impasse procedures. *See* Rhode Island Council 94 v Carcieri, 2008 WL 4824439. In Carcieri, the Court stated:

> "Although the statutory framework contains tight timelines and anticipates "fast track" resolution of contract disputes, both parties are in default of these statutory timeframes...Irrespective of the timing of the proceedings, however, the language of the statutory scheme is mandatory and the parties may not ignore, and cannot waive, the requirement that they participate in...compulsory proceedings."[14]

The Board believes that the legislature's creation of a "method of arbitration of disputes", with the final word being vested within the province of a neutral arbitrator, is clear on its face. Nowhere within the FFAA is there any indication that either the municipality or the union could either knowingly or unknowingly waive the requirements of submitting contract negotiation disputes to an independent third party arbitrator. We understand that in Lime Rock, the Supreme Court did in fact hold that the Union had "failed to exhaust its remedy" under the FFAA in submitting unresolved issues to arbitration within the designated time period, and so it had waived its right to pursue that remedy. Id at 54. Thus, there is precedent in case law for finding that a Union can *knowingly* waive its rights to interest arbitration and be foreclosed from participation. Indeed, "waiver" is defined by Merriam Webster's dictionary as "the act of intentionally relinquishing or abandoning a known right, claim or privilege." We believe therefore, that the Lime Rock Court's holding was in direct response to the specific fact in that case, that the Union had refused to continue the mutually agreed-upon course of bargaining

[14] Also see: West Warwick School Committee v. West Warwick Teachers' Alliance, 1996 WL 936936 (R.I. Super. 1996), Town of West Warwick v Derosiers, 1998 WL 182633 (R.I. Super. March 31, 1998), and Rhode Island Council 94 v Rhode Island, 705 F.Supp. 2d 165 (D.R.I.) (Smith, J.)

and deliberately abandoned that process, in favor of proceeding before this Board on a ULP case.

The facts in this case are quite different. Here, the Union, after many months of continuous negotiation sessions, *agreed to by the Employer*, and after unilateral action by the Employer on mandatory subjects for bargaining (imposition of wages & hours), filed for interest arbitration under the FFAA. In addition, the Union sought relief in the Superior Court from the unilateral implementation (North Kingstown I) and sought an order directing the Employer to participate in interest arbitration proceedings.

We are aware of the multiple "fast track" timeframes set forth under the FFAA and note that the policy behind these timeframes is to achieve labor peace as quickly as possible, for the public's good. We are also aware however, from years of experience and more specifically, the record in this case, that interest arbitration under the FFAA, in the normal course of events, often takes several months to conclude the necessary hearings and then several more months before a decision is issued. The record in this case established that the interest arbitration proceeding that took place between these two parties for the prior contract year (July 1, 2010-June 30, 2011) spanned thirteen hearings held between October 28, 2010 and February 8, 2011. The parties submitted 172 exhibits, some of which contained multiple parts, and transcripts of the proceedings totaled 357 pages. (See Union Exhibit #4, Interest Arbitration Award) The decision was not issued until August 11, 2011, after the expiration of the contract year it covered! Thus, while the FFAA calls for a "fast-track" interest arbitration process, the practical reality is that in application, the process simply cannot and does not conclude within the contemplated timeframes.

In addition, following the Court's holding in Lime Rock, where it said that the failure to submit unresolved issues to arbitration was a *failure to exhaust remedies* under the FFAA, then the opposite cannot be true in this case, as argued by the Employer. The Employer argues at pgs. 48-51 of its brief that the Union "exhausted" the statutory dispute resolution procedures under the FFAA by voluntarily waiving its right to pursue interest arbitration. The Employer's argument, while seeking a similar result as Lime Rock, argues just the opposite of the Lime Rock holding. Here, the Employer and the Union both failed to exhaust remedies- according to Judge Stern's decision. Just as this failure to exhaust remedies under the FFAA did not permit the Union to strike, the Employer similarly, does not have a right to unilateral implementation of its proposals.

The doctrine of exhaustion of remedies requires a party to use all available procedures before resorting to the Courts and requires that the party not only raise the issue, but requires the party to proceed throughout the entire proceeding to a final decision on the merits of the controversy. See Blacks Law Dictionary 6th Ed. The FFAA contemplates this very process. Indeed, the only mention of any court proceedings in the FFAA is § 28-9.1-15 which provides:

> "The sole avenue of review of a decision of an arbitration panel issued pursuant to this chapter shall be by petition for writ of certiorari to the supreme court. In the event a decision of the arbitration panel is sought to be reviewed by writ of certiorari to the supreme court, the matter shall be given priority by the supreme court."

In this case, the facts and evidence readily establish that the statutory dispute resolution procedures *have not been exhausted* by the Employer. This is especially true because after the expiration of the original thirty days of bargaining, when the parties were still bargaining and neither had invoked interest arbitration, *the* Employer *added additional topics for bargaining and adopted an entirely new legal theory as to its obligations* (or lack thereof) over bargaining the platoon structure and work hours. How can it be fair or appropriate to allow the Employer to add new bargaining topics after the window for invoking interest arbitration has supposedly been closed for that bargaining year? We do not believe that this is what's contemplated by the FFAA at all because it would result in a completely unfettered balance of power in favor of the Employer.

Interest arbitration, while invoked by the Union, was thwarted by the Employer, and the Superior Court has held that each party has now waived their right to those procedures for the 2011-2012 contract year. The Union has argued to us that despite the Court's decision in North Kingstown II, both parties have now waived their right to interest arbitration for the 2011-2012 year, there remains a question as to whether either party can waive interest arbitration or whether it is mandatory. The Union submits then that it is this Board that has jurisdiction to determine whether the parties must proceed to interest arbitration. The Union argues that we derive this authority in part, from the amendment of R.I.G.L. § 28-7-13.1. While we agree that this Board *should* have jurisdiction and does have jurisdiction to order the parties to engage in interest arbitration over the unresolved issues, this matter has already been submitted to and decided by the Superior Court. This Board does not have the authority to overrule a Superior Court decision and we decline to do so here. We must reluctantly find that both parties have waived the opportunity to proceed to interest arbitration for the 2011-2012 year. However, if the Superior Court's decision is later overturned by the Supreme Court and the Supreme Court rules that this Board indeed possesses the authority to order

the parties to interest arbitration for the 2011-2012 year, then we direct that the same take place upon conclusion of those Court proceedings.

NOTICES UNDER R.I.G.L. § 28-9.1-13

The Employer argues that the Union exhausted the FFAA's statutory dispute resolution procedures when the Union failed to send a written notice to request bargaining at least one hundred twenty days prior to the last day on which money can be appropriated by the Employer. The Employer argues that the last day upon which it could appropriate money was May 4, 2011 and that the Union's deadline was, therefore, January 4, 2011.

The Union replies that the Tiverton case specifically stated that in order to give R.I.G.L. § 28-9.3-13 a reasonable interpretation, the "last day" as applied to Tiverton or any other municipality similarly situated, is the day on which the financial town meeting is ordinarily held. The Union argues that the Employer did not present any evidence of when its financial town meeting is "ordinarily held" or that North Kingstown is similarly situated to Tiverton. The Union notes that the date of a financial town meeting may coincide with the past day on which money can be appropriated like Tiverton, but may not. The Union argues that Mr. Embury, the Town Manager, testified that pursuant to Section 1008 of the Town's Charter (Employer's Exhibit #28) the Council has the authority to delay final budget approval until after a new fiscal year has begun and that the Council had the authority to appropriate money after May 4, 2011. (TR. p. 613)

The Union also argues that in Tiverton, the Employer protested the timeliness of the request, from the beginning and only participated in negotiations under protest. So, even if the resulting interest arbitration award in Tiverton should have been invalidated due to the untimely notice, in this case, the Employer did not protest the timeliness of the notice and did not protest participating in negotiations until now. Therefore, the Employer should not get to disavow its participation.

This again is an issue that the Superior Court considered and ruled on in North Kingstown II. There, Judge Stern held:

> "This Court finds that the Rhode Island Supreme Court's interpretation of the 120-day notice requirement in Town of Tiverton is conclusive on the issue of forfeiture. Based on a direct application of the holding in that case, it would seem as though the Union's failure to comply with the statute is fatal to the Union's ability to collectively bargain. See Id. At 166, 372 A.2d at 1276. Indeed, this Court finds that the Union's notice was defective under the plain language of R.I. Gen. Laws § 28-9.1-13. However, as the Court noted in Town of Tiverton, lack of timely notice means only that 'the town was not obliged to negotiate' on issues falling under the statute. Id. This language is not prohibitive of such negotiations. Here, by contrast, there is no dispute that the Town actually engaged in negotiations with the Union on a wide range of issues, all after receipt of the Union's defective notice." The Court, after analyzing similar cases held: "Under such analysis, this

> hCourt holds that '[b]ecause the parties initiated collective bargaining negotiations for the purposes of entering into a new agreement', the Union's defective request to engage in such negotiations is not fatal to the Union's ability to collectively bargain." See Lime Rock, 673 A.2d at 53."
>
> "In support of this holding, this Court notes that the purpose of the relevant provision is 'to afford the Town sufficient time to consider matters affecting town finances.' Town of Tiverton, 118 R.I. at 164, 372 A.2d at 1275. Here, the Town was not obligated to engage in collective bargaining with the Union following the union's defective request; however, the Town actually engaged in such negotiations. Thus, it is clear that the Town was not deprived of 'sufficient time to consider matters affecting town finances.'"

Judge Stern concluded: "Once the Town engaged in collective bargaining with the Union, it was bound to follow the other provisions of the FFAA, including those requiring unresolved issues to be submitted to interest arbitration. See G.L.1956 28-9.1-7." (Town of North Kingstown II, Decision at p. 10)

We concur with Judge Stern's finding in this matter. In addition to the matters discussed by the Court, we also note that the Employer again failed to assert this as being an issue until long after the bargaining process for the fiscal year 2011-2012 had ended. This issue was not raised until after the complaint in this case was issued and for those reasons, we believe that the Court could also have found that the Employer was guilty of laches in asserting this defense. If the Employer has a "defense" to its obligation to bargain, the duty to bargain in good faith requires that such defense be raised at the commencement of the proceedings and resolved under the FFAA, as in the Town of Tiverton. At the very least, had the Employer asserted this defense, the Union would have had the opportunity to ascertain the answer to this threshold question at that time. Given Judge Stern's decision, both parties would still be in the same position today, as it pertains to their inability of accessing interest arbitration for the 2011-2012 fiscal year, without agreement of the other, but each could have saved significant sums of money had this issue been raised in a timely manner. It is not fair to "sit" on a negotiating defense and later pull it out when things start to go the wrong way. We believe that the Employer's failure to raise this within the scope of its bargaining constitutes bad faith. An Employer that wants to raise the timeliness a Union's first request to bargain as a defense in an unfair labor practice proceeding is hereby advised that it must assert that defense when it first accrues.

The Employer, claims in its brief that the Union did not respond to the Employer's response to the Union's initial request to for negotiations for 2011-2012. (See brief p. 2) However, the Employer's assertion is simply false. The Union did indeed respond to the Town Manager on March 11, 2011, as follows:

> "Hi Mike: I don't have any issue with the timeliness of the response letter. We've had a few conversations regarding the situation with the 2011-2012 negotiations and I feel we are on the same page. I also know that the budget process is picking up, and that is going to consume a considerable amount of your time. However, if you think it would be productive to meet prior to the issue of the arbitration award, let me know and I'll be happy to set something up." (Union Exhibit #7)

The Employer's own cross-examination of Mr. Furtado, the Union President, made it abundantly clear that both parties were waiting for the interest arbitration award for 2010-2011 to come down before commencing negotiations for the following contract year. (See TR. p.157) This only makes common sense. How could the parties know from which point to negotiate without knowing the outcome of the prior year's arbitration award? The Employer also goes on to argue in its brief that as a result of the Union not requesting bargaining sessions, bargaining did not commence until October 28, 2011 and that in the intervening months, the Employer adopted its budget. (Brief p. 3) The implication being made by the Employer is that it is the Union's fault that the budget that was eventually adopted by the Employer was sufficient only to fund what the Employer wanted to fund and not what the Union seeks. The problem with that implication is that the evidence is clear that both parties were in fact waiting for the interest arbitration award for 2010-2011. Nothing of course, prohibited the Employer from budgeting adequately for what an interest arbitration panel for 2011-2012 might award. To the extent that the Employer did not prepare for such a contingency speaks only of the Employer's poor planning.

CONCLUSION

This Board is not happy with and regrets the amount of time it took to complete the hearings in this matter. It has always been the Board's policy to grant attorney excusals, when requested and especially when a party has a medical excuse. This case however, highlighted that the Board may have to set a new policy or rule on this issue. The hearings in this case took entirely far too long to conclude, especially when we know that the employees in this case were being forced to work twenty-four hour shifts that were unilaterally and unlawfully imposed upon them by the Employer. In addition, we believe that the Employer knew full well that it was engaging in an unlawful practice when it unilaterally changed the terms and conditions of employment and did so in an effort to "push the envelope" within the labor relations community. We are also concerned that despite two lengthy Superior Court decisions against it, on multiple grounds, the Employer continued to impose the unlawful terms and conditions of employment. We find that there was no valid reason, either based in statute or Rhode Island case law that would cause the Town's leaders or advisors to believe with any good faith, that the firefighters here were "at the mercy of the sovereign" and that the Town possessed the unilateral right to

impose its will on its employees, especially when the Town failed to avail itself of the statutory right and obligation to engage in interest arbitration on its unresolved issues.

The remedies that we set forth in this case are reflective of our feelings concerning the Employer's deliberate and unlawful behavior. In crafting our remedies, we recognize that we cannot give back to the firefighters the time that they have missed with their families or undo the stress that they have endured. We wish there was more we could have done about that and that we could have concluded these hearings far sooner than we did.

That having been said, it is our intent to make the firefighters as whole as we possibly can. Under the broad statutory grant set forth in R.I.G.L. § 28-7-22(b) to remedy unfair labor practices, we have crafted a "make whole" remedy herein, which includes not only all wages owed, but interest as well. In addition, our remedy is designed to serve as a warning to this Employer and all other Employers that the imposition of unilateral terms and conditions of employment is not justified, when there exists a mandatory statutory resolution for bargaining disputes.

FINDINGS OF FACT

1) The Respondent 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 Union and Employer have long been collective bargaining partners, with the last negotiated contract being for the period July 1, 2007- June 30, 2010.
4) The most recent CBA between the parties is the result of interest arbitration award dated August 9, 2011, governing the period of July 1, 2010 through June 30, 2011.
5) The Union gave notice to the Employer on February 23, 2011 that it desired to engage in collective bargaining for the 2011-2012 fiscal year.
6) On May 4, 2011, the Town Council adopted a budget for the 2011-2012 fiscal year.
7) On October 28, 2011, after the issuance of the 2010-2011 interest arbitration award was issued, the parties met for the first time to bargain over the terms of a successor collective bargaining agreement for fiscal year 2011-2012.
8) The parties exchanged contract proposals at the October 28, 2011 meeting. The Town proposed, in part, that the parties agree to a revised platoon schedule, which would

eliminate one platoon and would increase the average workweek for the firefighters from forty-two hours to fifty-six hours.

9) The Town Manager testified at hearing that he believed the parties were at "impasse" at this first negotiation meeting, but he did not ever say so to any member of the Union.

10) The parties did not reach an agreement within thirty days after the first bargaining session on October 28, 2011.

11) Neither the Union nor the Employer sought interest arbitration for unresolved issues immediately following the expiration of the thirty days following the first bargaining session and the parties continued to meet and negotiate.

12) On December 19, 2011, more than thirty days after the first negotiating session, the Employer issued a letter that changed its position on what it considered its bargaining obligation to be and added several new items to the bargaining list that were not contained on its original set of proposals. Instead of bargaining over the implementation of a new platoon structure and hours of employment, the Employer decided that it was only going to negotiate over the "effects" of implementing a new platoon structure and hours of employment. In addition, the Employer threatened to implement an ordinance mandating the new platoon structure, unless the Union could come up with 1.2 million dollars in structural savings.

13) Despite the Employer's threat, the Union still continued to meet with the Employer to try to negotiate a successor agreement.

14) On or about January 30, 2012, while the parties were still engaged in negotiations, the Employer adopted Ordinance 12-02 which unilaterally changed the terms and conditions of employment as set forth in the parties' most recent CBA.

15) On February 28, 2012, the Union filed a Complaint in the Superior Court against the Employer through its Town Manager and Town Council, seeking a declaration that (1) the Ordinance was invalid because it was in violation of the Town Charter and the Fire Fighters' Arbitration Act ("FFAA") and 2) that the Town's failure to maintain the status quo constitutes a violation of the FFAA and the State Labor Relations Act ("SLRA"). The Union also sought to enjoin implementation of the Ordinance and to enjoin the Town from unilaterally changing the terms and conditions of employment.

16) On or about March 6, 2012, the Employer implemented the Ordinance, unilaterally changing the terms and conditions of employment.

17) The Ordinance, among other things, increases firefighters' workweeks from the contractual forty-two hours per week to fifty-six hours per week; changes firefighters' shifts from ten and fourteen hour days to twenty-four hour days; and decreases firefighters' hourly pay rates.

18) In or about March, 2012, after the Employer finally "declared" impasse, the Union filed a demand for interest arbitration for the 2011-2012 contract year.

19) On May 23, 2012, the Rhode Island Superior Court, Justice Stern presiding, issued a Decision, attached hereto and incorporated herein, finding: (1) "the Ordinance is invalid because it was passed in violation of the Charter," (2) "the Ordinance is invalid because it conflicts with the FFAA by imposing changes to wages, hours, and terms and conditions of employment without first bargaining to agreement or following the FFAA's statutory arbitration procedures; and (3) "the Union's request to enjoin implementation of the Ordinance is moot because there is no Ordinance to enjoin"

20) On June 14, 2012, the Union filed the within charge.

21) Following the filing of the Charge, the Administrator notified the Employer in writing of the charge and provided a copy of the same. In accordance with R.I.G.L. § 28-7-8 and Board Rule 9.01.6, 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 July 2, 2012, with any replies to the initial statements to be filed by July 9, 2012.

22) 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 August 2, 2012. The Board's complaint alleged: The Employer violated R.I.G.L. § 28-7-13 (6) and (10) when, on March 6, 2012, the Employer unilaterally changed terms and conditions of employment, including hours and wages, without bargaining to impasse and without exhausting all statutory dispute resolution mechanisms under the Firefighters Arbitration Act.

23) On August 10, 2012, the Employer filed an answer to the Board's Complaint, denying the charges and asserting twenty-one affirmative defenses.

24) The matter was then scheduled for formal hearing, which commenced on September 12, 2012. At the first formal hearing, the Employer filed a copy of a "Verified Complaint and Petition to Stay Arbitration styled *Town of North Kingstown v. International Association of Firefighters Local 1651, AFL-CIO*, C.A. No. WC 2012-0542.

25) At the first hearing the Employer made three oral motions: (1) recusal of Board Member, Frank J. Montanaro; (2) motion for stay (while the Superior Court Case 2012-0542 was pending); and (3) motion to dismiss the case.

26) In accordance with Board Rule, 7.04.4, the Employer was directed to submit its motions in writing to the Board and the hearing commenced. On or about September 27, 2012, at the commencement of the third formal hearing, the Employer submitted the written motions and the hearing continued. In accordance with Rule 7.04.4, the Union was provided with an opportunity to respond to the written motions and did so on or about October 2, 2012.

27) At the October 9, 2012 meeting, the Board voted as follows: (1) To deny the motion to recuse Member Frank Montanaro on the basis that the Board does not have subject matter jurisdiction to address said motion; (2) To deny the motion for stay on the basis that the Board has proper subject matter jurisdiction to proceed; and that the within matter is sufficiently different from the East Providence case to follow a different course of action; and (3) To deny the motion to dismiss on the basis that the Board has proper subject matter jurisdiction to proceed. A letter informing the Employer of the outcome of its motions was sent on October 22, 2012.

28) In December 2012, the Superior Court issued a lengthy decision Town of North Kingstown v. International Association of Firefighters Local 1651, AFL-CIO, C.A. No. WC 2012-0542 finding: (1) The Town's actions in implementing unilateral changes to the wages, hours, and terms and conditions of employment, were unlawful, as in violation of the doctrine of election of remedies and the terms of the FFAA. (2) The SLRB has jurisdiction over the subject matter of the Complaint in ULP-6088 insofar as it is necessary to determine which terms and conditions have existed between the parties since the expiration of the previous CBA. (3) The arbitration panel does not have jurisdiction to determine the effects of said unilateral changes, as those changes are invalid and must be undone. (4) Both the Union and the Town waived their rights to submit unresolved issues to interest arbitration under the FFAA, pursuant to R.I. Gen. Laws § 28-9.1-7. (5) The interest arbitration panel has no jurisdiction to decide any unresolved issues existing between the Town and the Union because interest arbitration, pursuant to the terms of the FFAA, was waived by the parties for the fiscal year 2011-2012.

29) Formal hearings were opened for the introduction of evidence and examination of witnesses and were held on September 11, 2012, September 13, 2012, September 27, 2012, November 29, 2012, January 29, 2013, February 14, 2013, March 7, 2013, April 23, 2013 and May 7, 2013. Representatives from the Union and the Employer were present at the evidentiary hearings and had full opportunity to examine and cross-examine witnesses and to submit documentary evidence.

30) The Board's efforts to schedule the hearings in this matter more tightly was thwarted by the extensive unavailability of the Employer's legal counsel who was court-excused for 107 days and who also had numerous scheduling conflicts when he was not court-excused. The Union's counsel (two attorneys) was also unavailable for a combined total of 28 days.

31) Transcripts of the testimony adduced at these hearings totaled 615 pages. Extensive briefs were filed on or about June 28, 2013. The Employer's brief was fifty-four pages and had an appendix a few inches thick. The Union's brief totaled fifty-five pages and similarly was accompanied by an Appendix.

32) On July 22, 2013, the Employer submitted a ten page motion to strike the Union's brief, with an appendix containing an order from the Rhode Island Supreme Court.

33) On July 23, 2013, the Union filed its nine page objection to the motion to strike, together with additional documents.

34) On July 30, 2013 at 3:56 p.m., the Employer filed a reply to the Union's objection to the motion to strike.

35) On July 31, 2013, the Board met to consider the case and closed the hearing process. In doing so, the Board first denied the Employer's motion to strike the Union's brief, in part because this motion was in actuality, a reply brief, which was not authorized by the Board and in part because the Board does not find the relief requested to be appropriate. In addition, the Board decided to not consider the Employer's reply, filed on July 30, 2013, as it was not timely filed for consideration by the Board, in advance of the July 31, 2013 9:00 a.m. meeting.

CONLUSIONS OF LAW

1) The Board properly held both informal and formal proceedings in compliance with the requirements of the State Labor Relations Act.

2) The Board's ability to decide this case is constrained by the doctrine of res judicata from collateral Court proceedings in the Rhode Island Superior and Supreme Courts.

3) The Board's subject matter jurisdiction to hear the within complaint of the unfair labor practice is not defeated by the doctrine of election-of-remedies, because of the Employer's insistence that no contract is in effect; and therefore, there is no agreement to arbitrate disputes.

4) The Board has subject matter jurisdiction to determine whether the terms of an expired collective bargaining agreement are controlling, pending the negotiation of a new collective bargaining agreement.

5) Wages, rates of pay, hours, working conditions, and other terms and conditions of employment are mandatory subjects for bargaining under both the Fire Fighters Arbitration Act and the State Labor Relations Act.

6) The Employer did not conclusively establish that May 4, 2011 was the last day that it could vote to appropriate money for the 2011-2012 fiscal year.

7) The Employer waived its defense under R.I.G.L § 28-9.1-17 to the obligation to bargain under R.I.G.L. § 28-9.1-1 by not timely asserting the same and by then subsequently commencing and participating in collective bargaining for months.

8) The Employer's obligation to bargain collectively with the firefighters, pursuant to the Fire Fighters Arbitration Act and the State Labor Relations Act may be readily harmonized with and is not contrary to the Town's right under its Charter to reorganize any of its departments.

9) The Employer's failure to state and reveal to the Union that the Employer believed the parties were "at impasse" at the end of the first bargaining session constitutes bad faith bargaining in violation of R.I.G.L. § 28-7-13 (6).

10) The Employer's change in theory on December 19, 2011, as to its obligation to bargain the platoon schedule, hours, and wages, occurred after its initial submission of contract proposals and after the thirty day period following the first bargaining session on October 28, 2011, constitutes bad faith bargaining in violation of R.I.G.L. § 28-7-13 (6).

11) The obligation to submit unresolved issues to interest arbitration, pursuant to R.I.G.L. § 28-9.1-7 is equally applicable to both the Union and the Employer and is required of a party in order to exhaust statutory dispute remedies.

12) Under the FFAA, an Employer may not unilaterally implement any terms or conditions of employment, even if the parties reach impasse, because the sole resolution to impasse is interest arbitration, with any subsequent review by petition for certiorari to the Rhode Island Supreme Court.

13) The Employer's unilateral implementation of changes to wages, hours and other terms and conditions of employment, without having availed itself of the required statutory remedy of interest arbitration, is a per se violation of R.I.G.L. § 28-7-13 (6) and (10).

ORDER

1) The Employer is hereby ordered to immediately restore the firefighters' schedule, hours of work, and hourly rate of pay to that which existed upon the expiration of the 2010-2011 contract year.

2) The Employer is hereby ordered, within sixty (60) days from the issuance of this order, to make all firefighters whole, monetarily, by paying to each and every firefighter, all wages that should have been paid at 2010-2011 regular, overtime, and holiday rates for all the hours the firefighters worked in excess of what they should have worked under the prior schedule of hours and rate of pay.

3) The funds owed to each firefighter under Paragraph 2 supra, shall bear interest at the rate of 12% per annum, running from the date of filing of this charge, to wit, June 14, 2012 through the date of payment.

4) The Employer is hereby ordered, within sixty (60) days from the issuance of this order, to make all firefighters whole, monetarily, by paying to each and every firefighter, any and all payments concerning clothing allowances, tuition reimbursement, or any other item that was contained in the 2010-2011 contract and that was unilaterally discontinued by the Town, if any.

5) The Employer is hereby ordered to participate in Interest Arbitration for the 2011-2012 fiscal year, provided however, that this requirement shall come into existence only if and when the Rhode Island Supreme Court overturns Judge Stern's decision finding a waiver of the Union's right to interest arbitration for the 2011-2012 year.

6) The Employer is hereby ordered to restore and then maintain the status quo on all terms and conditions of employment that existed in the 2010-2011 collective bargaining agreement, until such time as a change has either been mutually agreed to by the Employer and Union or until an interest arbitration panel's award for 2011-2012 or any subsequent year has been issued and not overturned by the Rhode Island Supreme Court, whichever comes first.

7) The Employer is hereby ordered to cease and desist from unilaterally implementing, at any time henceforth, any changes to the wages, rates of pay, hours, working conditions, or other terms and conditions of employment of the employees represented by the Union.

8) The Employer is hereby ordered to post a copy of this decision on all common area bulletin boards within its municipal buildings and on its website for a period no less than sixty (60) days; and to mail, via U.S. postal service, an actual physical copy of this decision to every firefighter employed by the Town of North Kingstown and any other employee represented by the Union in this case.

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: September 27, 2013

By: _____
ROBYN H. GOLDEN, ADMINISTRATOR

ULP- 6088

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- TOWN OF NORTH KINGSTOWN	CASE NO: ULP-6088

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 of the RI State Labor Relations Board, in the matter of Case No. ULP-6088, dated September 27, 2013, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 27, 2013**.

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

Dated: September 27, 2013

By: _____
Robyn H. Golden, Administrator

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC SUPERIOR COURT

(Filed: May 23, 2012)

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1651, AFL-CIO, on its own behalf and on behalf of its members, by and through its President, RAYMOND FURTADO, and its Treasurer, GREG PARISEAULT	:	
v.	:	C.A. No.: WC 12-0127
TOWN OF NORTH KINGSTOWN, by and through its Town Manager, MICHAEL EMBURY, and NORTH KINGSTOWN TOWN COUNCIL, by and through its members, ELIZABETH S. DOLAN, President, MICHAEL S. BESTWICK, CHARLES BRENNAN, CAROL H. HUESTON, and CHARLES H. STAMM	:	

DECISION

STERN, J. Before this Court are Defendants' Motion to Dismiss the Verified Complaint, Plaintiff's Motion to Consolidate and Plaintiff's Motion for a Preliminary Injunction arising out of the unilateral implementation of wages, hours and conditions of employment through the passage of a new town ordinance by the Town of North Kingstown. After an evidentiary hearing, oral arguments and the submission of extensive pre- and post-hearing memoranda, this Court issues the following decision. When issuing this Decision, the Court is mindful of its deference to the legislative branch which is "elected by the people" and enacts laws and public policy in our system of government. This is especially relevant here when a portion of the conflict involves the state legislature's statutory enactment and the duly elected Town Council of the Town of

North Kingstown's adopted Ordinance. This concept was eloquently expressed by United States Supreme Court Justice Felix Frankfurter in his dissent in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting):

> "It can never be emphasized too much that one's own opinion . . . of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law."

I

Facts and Travel

Plaintiff International Association of Firefighters, Local 1651, AFL-CIO ("Plaintiff" or "the Union") is the collective bargaining agent for all full-time firefighter employees of the Town of North Kingstown. The Union and Defendant Town of North Kingstown ("Town") were parties to a Collective Bargaining Agreement ("CBA") effective July 1, 2007, through June 30, 2010. Following the expiration of the CBA, the parties could not reach a new negotiated CBA and proceeded to interest arbitration in accordance with the Fire Fighters Arbitration Act ("FFAA"). Each party designated an arbitrator, and the third arbitrator was selected pursuant to the rules of the American Arbitration Association ("AAA"). The interest arbitration resulted in an award dated August 9, 2011, that extended the CBA from July 1, 2010, through June 30, 2011,[1] pursuant to certain amended terms and conditions.

[1] Sec. 28-9.1-12 of R.I. Gen. Laws provides that any agreements entered into after arbitration "shall not exceed one year." G.L. 1956 § 28-9.1-12.

In reaching this award, the arbitration panel heard testimony over a thirteen (13) day period and considered approximately two hundred (200) exhibits as well as post-hearing briefs. One of the central and contentious issues during the interest arbitration was the Town's proposal to increase the average workweek from forty-two (42) hours to fifty-six (56) hours and to change the schedule to include a twenty-four (24) hour shift followed by forty-eight (48) hours off-shift.

After the interest arbitration hearings concluded, the interest arbitration panel issued a decision which rejected many of the Town's proposals and specifically rejected the Town's proposal regarding hours of work, hourly rates, callback and overtime.[2] See Pl.'s Ex. 2, Decision and Award of the Arbitration Board, dated Aug. 9, 2011, at 54-58. Instead, the resulting interest arbitration award kept the terms of the prior CBA, which provided that "[t]he regular work schedule for Department members assigned to firefighting division and fire alarm operations shall be an average annual workweek of forty-two (42) hours." Def.'s Ex. B, Embury Aff., Ex. A, CBA, Art. IV, Sec. 4.1. In addition, the award provided that the work schedules and shifts include "[t]wo (2) consecutive ten (10) hour days, followed by twenty-four (24) hours off, followed by two (2) consecutive fourteen (14) hour nights, followed by ninety-six (96) hours off." Id.

On February 23, 2011, the Union wrote to the Town Manager requesting that collective bargaining negotiations commence for a new CBA in accordance with R.I.

[2] The Town's arbitrator was Daniel Kinder, Esquire, and the Union's arbitrator was Joseph Andriole. See Pl.'s Ex. 2, Decision and Award of the Arbitration Board, dated Aug. 9, 2011, at 2. Both the Town's and the Union's arbitrators filed concurring opinions in support of the interest arbitration decision and award. See Stipulation, dated March 1, 2012, Pl.'s Ex. 2A, Concurring Opinion of the Town's arbitrator; Pl.'s Ex. 2B, Concurring Opinion of the Union's arbitrator.

Gen. Laws § 28-9.1-6. See Pl.'s Ex. 3, Letter from Michael Embury to Raymond Furtado, dated March 11, 2011 (acknowledging receipt of the Union's letter). The Town did not commence the collective bargaining negotiations within the ten-day period required by R.I. Gen. Laws § 28-9.1-6. See id. On October 27, 2011, the Town and the Union met to bargain for a successor agreement. According to the Union, the main item of contention preventing an agreement involved the twenty-four (24) hour shifts and the fifty-six (56) hour workweek. The parties met for negotiating sessions on November 14, 18, 29, 30, and December 5, 2011. No agreement was reached, and neither the Town nor the Union submitted issues to interest arbitration. The parties disagree as to whether impasse had been reached by the end of the December 5th meeting.

On December 19, 2011, the Town wrote to the Union expressing that it intended to introduce an ordinance changing the structure of the Fire Department. The first reading of the ordinance occurred at a Town Council meeting on December 19, 2011. The ordinance as first read provided, in pertinent part, as follows:

> "Sec. 14-26. Organization of the Fire Department
>
> (a) Introduction
>
> (1) The Town of North Kingstown stands in fiscal crisis and has incurred over $3.44 Million in structural losses of state aid since FY2008, not including reductions in unrestricted state aid to the School Department.
>
> (2) The Town incurred over $2.1 Million of losses in state aid in FY2012 alone, and it anticipates having to expend upwards of $375,000 from its general fund balance in FY2012 to balance the budget.
>
> (3) The Town's unfunded liability arising out of the other post employment benefits ("OPEB") it is obligated to provide to current and future retirees is $34,510,724 and growing, and $10,718,289 (or 31%) of that unfunded debt is attributable to the Town's Fire Department.
>
> (4) Municipal services have been cut to minimize costs, yet taxes have consistently increased by levels that residents cannot and should not have to endure. Most paid

fire departments in America operate with a 3-division structure for line firefighting and rescue personnel.

(5) The Town can realize an estimated reduction in costs of $1.2 Million in its first full year of implementation by changing to a 3-division structure in its line fire/rescue operations without any layoffs or reductions in salaries, with even greater savings expected through anticipated reductions in overtime costs and the Town's annual required OPEB contribution.

(6) All available scientific studies show that a 3-division structure, operating in conjunction with a shift schedule in which firefighters are on-duty for twenty-four consecutive hours followed by forty-eight hours off-duty, enhances public safety and improves firefighter health and safety as compared with the division structure and shift schedule the Town's firefighters currently follow.

(7) Paid firefighters would reduce their work days, on average, to 100 days per year on a 3-division structure operating in conjunction with a twenty-four consecutive hours duty schedule.

(8) The Town can increase the number of firefighters on duty by over thirty percent (30%) by having a 3-division structure, and still eventually realize an estimated savings of over $1.2 Million per year.

(9) Similar savings can only be realized by effecting drastic and unacceptable cuts in public safety and other essential Town services, contrary to the public good and welfare.

(10) The same savings, efficiencies and level of protection to the Town could only be realized in the Fire Department by changing the nature of fire/rescue operations in the Town, including changing from an all-professional Fire Department to one that includes volunteers, call persons and private contractors. The continuation of a professional fire/rescue department is in the public's interest, provided essential services of the Town need not be cut as a result.

(11) The citizens of North Kingstown already bear a property tax burden that is among the highest in the State per capita and cannot afford another large tax increase.

(**b**) Effective January 1, 2012, the North Kingstown Fire Department shall convert and reorganize into a 3-division organizational structure for all full-time, paid line personnel, including the positions of Deputy Chief, Fire and Rescue Captain, Fire and Rescue Lieutenant, Rescue Driver, Firefighter/Rescueman/EMT-C,

> Firefighter/Rescueman, and Fire Alarm Operator. Each of the three fire/rescue divisions shall consist of approximately one-third (1/3) of the Department's line firefighting and rescue personnel. Individuals who are not permanently assigned to a position within a division shall act as floaters pursuant to the parties' collective bargaining agreement. The Department shall maintain a separate Fire Prevention Bureau, Training Division, Fire Alarm Division and Automotive Repair Division, which may or may not be staffed with full-time personnel as determined by the Town Council and/or the Town Manager from time to time. The Department will continue to provide fire/rescue services twenty-four hours per day, seven days per week.
>
> **(c)** Effective January 1, 2012, unless a different arrangement is incorporated into an agreement with the collective bargaining representative of affected employees, the same annual salaries shall be provided; the same number of hours of paid sick leave, paid vacation leave and other paid time off shall accrue to firefighters per week or month or year of service or event as currently is provided by the parties' collective bargaining agreement; and, overtime pay shall be given as prescribed by the federal Fair Labor Standards Act.
>
> **(d)** Effective February 1, 2012, unless otherwise agreed between the Town of North Kingstown and the collective bargaining representative of affected employees, the three line firefighting/rescue divisions will operate on a regular schedule consisting of one 10-hour day tour on-duty followed by one 14-hour night tour on-duty, followed by one 48-hour period off-duty.
>
> **(e)** The Town Manager is urged and supported in exploring options and seeking bids for privatization of any or all functions of the Fire Department and for developing call and volunteer forces to perform some or all fire/rescue services." Defs.' Ex. C, Ordinance No. 12-.

After the introduction of this proposed ordinance, the parties continued to negotiate at two additional negotiating sessions on December 20, 2011, and January 18, 2012.

On January 30, 2012, the Town Council approved a motion to amend the ordinance. The amendment was first made public at this Town Council meeting. After limited public comment and discussion, the Town Council voted three-to-two to pass the

Ordinance ("Ordinance") inclusive of its amendments. The amended portions, not including date changes, of the Ordinance provide as follows:

> "(2) The Town incurred over $2.1 Million of losses in state aid in FY2012 alone, and it anticipates having to expend upwards of $721,000 from its general fund balance in FY2012 to balance the budget.
> (3) The Town's unfunded liability arising out of the other post employment benefits ("OPEB") obligates the Town to provide to current and future retirees is $34,510,724 and growing, and $10,718,289 (or 31%) of that unfunded debt is attributable to the Town's Fire Department.
> (6) Scientific studies show that a 3-division structure, operating in conjunction with a shift schedule in which firefighters are on-duty for twenty-four consecutive hours followed by forty-eight hours off-duty, enhances public safety and improves firefighter health and safety as compared with the division structure and shift schedule the Town's firefighters currently follow.
> (10) The same savings, efficiencies and level of protection to the Town could only be realized in the Fire Department by changing the nature of fire/rescue operations in the Town, including changing from an all-professional Fire Department to one that includes volunteers, call persons and private contractors.
> **(c)** Effective March 1, 2012, unless a different arrangement is incorporated into an agreement with the collective bargaining representative of affected employees, the same annual salaries increased by ten (10) percent shall be provided; the same number of hours of paid sick leave, paid vacation leave and other paid time off shall accrue to firefighters per week or month or year of service or event as currently is provided by the parties' collective bargaining agreement; and, overtime pay shall be given as prescribed by the federal Fair Labor Standards Act." Defs.' Ex. D, Ordinance No. 12-02.

On February 21, 2012, the Town notified the Union that it intended to implement the Ordinance, including its three-platoon system with the hour and shift changes, on March 4, 2012. The Town and the Union held one additional negotiating session on February 23, 2012 but failed to reach an agreement.

A

The Instant Action

The Union filed suit in the instant matter on February 28, 2012, asserting three counts in its Verified Complaint: a declaratory judgment pursuant to the Uniform Declaratory Judgment Act that the Ordinance is invalid because it was passed at the same meeting at which its final amended version was introduced in violation of the Town Charter (Count I); a declaratory judgment that the Town's failure to maintain the status quo constitutes a violation of the Firefighters Arbitration Act ("FFAA") and the State Labor Relations Act ("SLRA"), and that the Ordinance is preempted by the FFAA and/or the SLRA to the extent that they are in conflict (Count II); and finally injunctive relief (Count III). In essence, the Union asks this Court to declare the Ordinance void because it violates the Town Charter and conflicts with the FFAA, to mandate that the Town continue to abide by the most recent Collective Bargaining Agreement until a new agreement is reached or a new interest arbitration award is granted, to enjoin the implementation of the Ordinance, and to enjoin the Town from unilaterally changing the terms and conditions of employment.

After the parties conferenced this matter with the Court, the Town agreed to postpone implementation of the Ordinance until March 11, 2012, to allow the Court the opportunity to hold a hearing and decide the Union's application for a temporary restraining order. See Stipulation, dated March 1, 2012. After extensive pre-hearing briefs were filed regarding the Union's Motion for a Temporary Restraining Order, the Court heard argument on the temporary restraining order on March 6, 2012. The Court denied the Union's Motion for a Temporary Restraining Order on March 20, 2012, and

ordered the parties to engage in mediation.[3] The parties, after mediation sessions failed to result in an agreement, appeared for further hearings on the preliminary injunction on March 28 and 29, 2012.

In the interim, on March 15, 2012, the Town filed a Motion to Dismiss the Verified Complaint, arguing that the Court does not have subject matter jurisdiction over Counts II and III and that Counts I and III fail to state a claim upon which relief may be granted.

B

Hearing

At the hearing, the Town argued in support of its Motion to Dismiss, and the Court reserved decision on the Motion based upon the overlap of issues between both the Motion to Dismiss and the hearing. The Union also moved to consolidate the hearing with a trial on the merits pursuant to Rule 65(a) of the Superior Court Rules of Civil Procedure. The Town objected, and the Court reserved decision on the Motion to Consolidate until the close of the hearing.

During the hearing, the Court heard testimony from Michael Embury, the Town Manager for the Town of North Kingstown. Mr. Embury testified that the approval process for setting firefighter salaries is determined through collective bargaining. Once a tentative agreement is reached, that agreement is then subject to the approval of the Town Council. See Hr'g Tr., Mar. 28-29, 2012, at 10. Mr. Embury also testified that he received a request to bargain from the Union for the time period subsequent to the

[3] The Court appointed Bruce Kogan, Professor of Law and Acting Director of Clinical Programs at Roger Williams University School of Law, to serve as mediator.

interest arbitration award. He did not recall meeting with the Union within the statutorily prescribed time frame and did not feel that he had to because the representative from the Union and the Town Manager tended to work together "cooperatively." See id. at 12-15. At the time of the hearing, Mr. Embury also stated that he was not certain that the Town ever made a final proposal to the Union because they had "still been exchanging options and proposals." Id. at 18.

Mr. Embury then explained the process the Town undertakes to pass an ordinance. See id. at 23-25. According to Mr. Embury, ordinances are first presented by the Town Council at a first reading, and the second reading includes a public hearing before an ordinance is voted on or passed. See id. He testified about how the version of the ordinance presented at the first reading differed from the Ordinance amended at the second reading and then passed by the Town Council. See id. at 26-29. The Ordinance, in its amended form, included an increase in annual salary that actually decreased the hourly salary for the firefighters. See id. at 31. Mr. Embury specifically testified that the ten percent (10%) increase in salaries was not made or disclosed prior to the Town Council meeting at which the Ordinance was passed. See id. at 32. Additionally, Mr. Embury accepted that the Ordinance in its final adopted form was not published by the town clerk because the Ordinance was not amended prior to the evening of passage on January 30, 2012. See id. at 32-34.

Mr. Embury then testified about the unfair labor practices claim filed by the Union before the State Labor Relations Board. The Town's position was that the Labor Board had no jurisdiction because the only avenue by which the Union can seek relief is through interest arbitration. See id. at 37. Mr. Embury further testified that it is the

Town's position that it could unilaterally implement any change to the structure of the firefighter's workforce, and that it could do so by ordinance. See id. at 38-40. Mr. Embury also discussed previous collective bargaining negotiations between the Town and the Union, including signed ground rules, which did not exist in the most recent negotiation sessions. See Pl.'s Ex. 13, Ground Rules.

Finally, the Union offered the affidavit of Raymond Furtado pursuant to Rule 65 of the Superior Court Rules of Civil Procedure. See Pl.'s Ex. 14, Furtado Aff. The Town similarly offered the affidavit of Michael Embury pursuant to this rule. See Defs.' Ex. B, Embury Aff. The parties subsequently stipulated to additional exhibits, including certified copies of the originally introduced ordinance, the amended and passed Ordinance, and the Town Charter.

Following the hearing, each side submitted extensive briefings on the issues and requested oral argument, which the Court entertained on April 24, 2012. At oral argument the Union reiterated that the parties did not agree as to whether impasse had occurred, that the Court could retain jurisdiction, and that the Town does not have the right to unilaterally implement changes to employment terms and conditions. The Town asserted that there has been no showing of irreparable harm and again opposed consolidation of the preliminary injunction hearing with a trial on the merits. Essentially, the Town argued that the Ordinance simply and solely implemented the Town's clear right as the Sovereign to reorganize pursuant to the Charter. Moreover, the Town maintained that all other changes flowing from that management right may be implemented immediately upon passage of the Ordinance without any requirement to

first successfully bargain over wages, hours, and working conditions or to engage in interest arbitration.

The Union responded that the reorganization argument becomes dangerous precedent in labor relations when it affects mandatory bargaining subjects such as wages, hours, and terms and conditions of employment. Additionally, the Town and the Union disagreed over whose burden it was–the Union's or the Town's, or both–to submit unresolved issues to arbitration.

II

ANALYSIS

A

Town's Motion To Dismiss

The Court culls the grounds for the Town's Motion to Dismiss from three separate memoranda: Defendants' Motion to Dismiss Plaintiffs' Verified Complaint, Defendants' Memorandum of Law in Opposition of Plaintiffs' Motion for Temporary Restraining Order, and Defendants' Supplemental Memorandum of Law in Opposition of Plaintiffs' Motion for Temporary Restraining Order. The Town first argues that Count I fails to state a claim upon which relief may be granted because, as a matter of law, the Ordinance was passed in compliance with the Town Charter. Count II must be dismissed, according to the Town, because the Court does not have jurisdiction over the subject matter of the Count. The Town also asserts that Count III must be dismissed because the Court has no subject matter jurisdiction, nor does the Count state a claim upon which relief can be granted.

1

Subject Matter Jurisdiction

The Town asserts that our Supreme Court's decisions in Warwick School Committee v. Warwick Teachers' Union, Local No. 915, 613 A.2d 1273, 1274 (R.I. 1992), and Arena v. City of Providence, 919 A.2d 379, 391-92 (R.I. 2007), preclude this Court from exercising subject matter jurisdiction over Counts II and III of the Verified Complaint. Count II provides, in pertinent part, as follows:

> "56. The Town is statutorily required to bargain with the Union over all terms and conditions of employment, including work hours, schedules and wages.
>
> 57. Wages, hours of employment and work schedules are terms and conditions of employment within the meaning of the FFAA.
>
> 58. The parties are currently engaged in negotiations over wages, hours of employment and work schedules, among other things.
>
> 59. The FFAA, § 28-9.1-7, requires that if the Union and Town are unable to reach an agreement, any and all unresolved issues shall be submitted to arbitration.
>
> 60. In the likely event the Union submits the foregoing issues, among others, for interest arbitration, the Town has a statutory duty to engage in interest arbitration.
>
> 61. The Town has promulgated an Ordinance instead of engaging in negotiations over the foregoing issues.
>
> 62. State law requires that the Town maintain the status quo pending agreement of a successor contract, or an arbitration award.
>
> 63. The Town's failure to maintain the status quo constitutes a violation of the FFAA and the State Labor Relations Act ("SLRA"), R.I.G.L. § 28-7-13.

64. To the extent the Ordinance conflicts with the FFAA and/or the SLRA, it is preempted." Ver. Compl.

By inference, the requested relief for this Count is found in the prayer for relief that this Court "[i]ssue a declaratory judgment that the Ordinance is void because it violates the FFAA, § 28-9.1-1 et. seq." Ver. Compl. at 12. Additionally, the Union requests that this Court "[i]ssue a declaratory judgment that Defendants must continue to abide by the most recent collective bargaining agreement until the parties either reach agreement or receive an interest arbitration award." Id. Count III of the Verified Complaint seeks injunctive relief and states, in pertinent part, as follows:

"66. As a direct and proximate result of the Town's violation of its Charter, the SLRA, and the FFAA, the Union will suffer irreparable harm in that the ongoing collective bargaining and interest arbitration processes will be compromised.

67. Absent intervention by this Court, the Town will be free to unilaterally change any provision of the CBA it wishes to change without resorting to the collective bargaining and/or interest arbitration processes.

68. Absent intervention by this Court, the Town will be free to pass ordinances in violation of its charter.

69. Firefighters will suffer irreparable harm. . . .

. . .

73. Because the Town has bypassed the collective bargaining and statutory interest arbitration processes by passing an ordinance that unilaterally changes the terms and conditions of employment, Plaintiffs have no adequate remedy at law.

. . .

76. If Defendants are not enjoined from unilaterally implementing changes to the terms and conditions of the

> employment until an arbitrator renders a decision, the collective bargaining and the interest arbitration processes will be rendered ineffective and meaningless." Ver. Compl.

Again, this Court infers that this Count seeks injunctive relief in the form of preliminarily and permanently enjoining the Town from implementing the Ordinance and from unilaterally changing the terms and conditions of employment. See Ver. Compl. at 12.

Our Supreme Court "has declared, that 'subject-matter jurisdiction is 'an indispensable requisite in any judicial proceeding.'" Long v. Dell, Inc., 984 A.2d 1074, 1079 (R.I. 2009) (quoting Newman v. Valleywood Associates, Inc., 874 A.2d 1286, 1288 (R.I. 2005) (quoting Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1256 (R.I. 2003))). "Subject-matter jurisdiction is the very essence of the court's power to hear and decide a case." Id.

Certainly this Court has jurisdiction to issue declaratory relief as well as injunctive relief. See §§ 9-30-1 et seq.; Super. R. Civ. P. 65. At issue in the instant Motion to Dismiss is whether the Court's original jurisdiction ceases at a particular point when it comes into conflict with statutory restrictions over labor disputes and issues. See generally §§ 28-7-1 et seq. and 28-9.1-1 et seq.

In Warwick School Committee, our Supreme Court explicitly stated that the Superior Court "may not require [the parties to a labor dispute involving public employees] to enter into any particular agreement, nor may the justice set out the terms and conditions of employment." Warwick Sch. Comm., 613 A.2d at 1276 (citation omitted). The Court went on to explain that "[i]f a dispute should arise between the parties concerning the effect of the failure to enter into a new agreement and whether or not the terms and conditions of an expired agreement should be controlling pending the

negotiation and execution of a new agreement, the tribunal to make such a determination is the State Labor Relations Board."[4] Id. Essentially, "[i]n short, the Superior Court does not have original jurisdiction of the question to determine what, if any, agreement is in force between the committee and the union." Id. This limitation, however, does not prohibit the Superior Court sitting as a court of equity from issuing injunctive relief, or taking action incidental to issuing injunctive relief, such as "requir[ing] that the parties engage in good-faith bargaining and [. . .] appoint[ing] one or more special masters or mediators to assist in the implementation and facilitation of such negotiations." Id. at 1275-76. Although this limitation certainly precludes this Court from exercising jurisdiction to determine the terms of any agreement, the Supreme Court's holding in Warwick School Committee does not prevent this Court from exercising jurisdiction over other matters which are clearly within its power.

Applying our Supreme Court's holding in Warwick School Committee to the Union's requested relief, it is clear that this Court does not have original jurisdiction to "[i]ssue a declaratory judgment that [the Town] must continue to abide by the most recent collective bargaining agreement until the parties either reach agreement or receive an interest arbitration award." Ver. Compl. at 12. To do so would be to act in direct contravention of the law of this State by determining the terms, if any, of any agreement between the parties. See Warwick Sch. Comm., 613 A.2d at 1276.

Thus, insofar as Count II requests declaratory judgment requiring this Court to declare that Defendants must abide by the expired CBA, that Count is dismissed for lack

[4] The Union filed an unfair labor practices claim arising out of the issues in this case which is currently pending before the SLRB. See Pl.'s Ex. 11, Complaint, dated March 22, 2012 (Case No. ULP-6071).

of subject matter jurisdiction. See id. The remainder of Count II, however, deals with the enactment of the Ordinance and whether the Ordinance conflicts with the FFAA and/or the SLRA and is therefore pre-empted. As this Court has jurisdiction pursuant to the Uniform Declaratory Judgments Act to "determine[] any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise," this Court denies the Town's Motion to Dismiss as it pertains to the remainder of Count II. Sec. 9-30-2. This Court similarly denies the Town's Motion to Dismiss Count III for lack of subject matter jurisdiction because it is clear that this Court may exercise its jurisdiction to issue injunctive relief or take action incidental to issuing injunctive relief. See Warwick Sch. Comm., 613 A.2d at 1275-76.

2

Failure to State a Claim

The Town additionally argues that Count I and Count III of the Verified Complaint fail to set forth claims for which relief can be granted. "[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint." Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (citing Rhode Island Affiliate, Am. Civil Liberties Union, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). The Court is "confined to the four corners of the complaint and must assume all allegations are true, resolving any doubts in plaintiff's favor." Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011) (citing Laurence v. Solitto, 788 A.2d 455, 456 (R.I. 2002) (citing Bernasconi, 557 A.2d at 1232)). Granting such a motion to dismiss is appropriate "if it 'appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set

of facts[.]'" Id., 21 A.3d at 278 (quoting Estate of Sherman v. Almeida, 747 A.2d 470, 473 (R.I. 2000) (quoting Bernasconi, 557 A.2d at 1232)).

As a motion to dismiss for failure to state a claim solely tests the sufficiency of the complaint, this Court must view all allegations as true. In doing so, this Court cannot dismiss Count I or Count III for failure to state a claim because, if true, the Ordinance may be in violation of the Town Charter, and therefore, Count I has stated a claim for relief. See Tucker Estates Charlestown, LLC v. Town of Charlestown, 964 A.2d 1138, 1140 (R.I. 2009) (vacating a grant of a motion to dismiss and noting that "[a] dismissal of a declaratory-judgment action before a hearing on the merits, under Rule 12(b)(6), is proper only when the pleadings demonstrate that, beyond a reasonable doubt, the declaration prayed for is an impossibility.") (Citing Perron v. Treasurer of Woonsocket, 121 R.I. 781, 786, 403 A.2d 252, 255 (1979); Redmond v. Rhode Island Hosp. Trust Nat'l Bank, 120 R.I. 182, 187, 386 A.2d 1090, 1092 (1978)). Moreover, the Union may indeed be entitled to injunctive relief based upon what has been pled. Thus, this Court also denies the Town's Motion to Dismiss Counts I and III. The Town is ordered to file an answer responsive to those remaining portions of the Verified Complaint within twenty (20) days of the entry of an Order consistent with this Decision.

B

Consolidation

At the preliminary injunction hearing, the Union moved to consolidate the preliminary injunction hearing with a trial on the merits pursuant to Rule 65(a)(2) of the

Superior Court Rules of Civil Procedure. See Super. R. Civ. P. 65(a)(2).[5] The Town objected, unsure whether additional discovery would be needed, and this Court reserved on the issue of consolidation pending post-hearing briefings and, subsequently, oral argument.

"The procedure under Rule 65(a)(2) is quite flexible." Oster v. Restrepo, 448 A.2d 1268, 1270 (R.I. 1982). Whether or not to grant such a motion to consolidate, or even whether to raise it sua sponte, "is left to the sound discretion of the trial justice." Id. The only limiting factor to ordering consolidation is that any order doing so must "protect[] the parties' rights to a full hearing on the merits." Id. (citing J. Moore & J. Lucas, 7 Moore's Federal Practice ¶ 65.04[4] at 65-68-9 (Second ed. 1980)). Additionally, "[t]he parties are not prejudiced if they have received adequate notice and sufficient time to prepare for consolidation and advancement." See Richards v. Halder, 853 A.2d 1206, 1211 (R.I. 2004) (per curiam) (citing Pucino v. Uttley, 785 A.2d 183, 188 n.1 (R.I. 2001) (per curiam)).

This Court is well aware of the timeline of events in this case, and acknowledges the expedited briefing schedule regarding the temporary restraining order and preliminary injunction. The travel of this case, however brief, concerns a rather narrow set of facts and legal arguments regarding the Ordinance, its passage, and the Court's jurisdiction over certain labor matters. The Court allowed for extensive briefings both pre- and post-hearing, and it accommodated the parties' request for oral argument. The two days of

[5] Rule 65(a)(2) states, in pertinent part, that "An application for a preliminary injunction shall be heard on evidence or affidavits or both at the discretion of the court. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Super. R. Civ. P. 65(a)(2).

hearing included one witness, Town Manager for the Town of North Kingstown Michael Embury, and a number of exhibits. By stipulation, the parties submitted five additional (5) exhibits after the hearing concluded. Subsequent to the hearing and post-hearing briefings, the Town filed a Motion for Leave to File a Reply to Plaintiff's Post-Hearing Brief along with the proposed Reply Brief, which the Court granted on May 10, 2012. See Order, dated May 10, 2012 (Stern, J.).

Including its most recent brief, the Town has failed to substantively object to the Union's Motion to Consolidate at either oral argument or in its materials submitted after the motion was made. Thus, this Court is satisfied that the parties received sufficient notice of the possible consolidation of issues and that the parties are not prejudiced by consolidation of the counts for declaratory judgment because they concern matters of pure law and very limited factual determinations. See Richards v. Halder, 853 A.2d at 1211 (citations omitted). In fact, both parties have acknowledged that the challenges to the Ordinance are purely legal in nature. The Union's Motion to Consolidate is therefore granted as to Counts I and II. Mindful of the concerns of notice and of prejudice, this Court, however, denies the Union's Motion as to Count III because it is based on factual issues that the parties may not have fully addressed or rather that they may not have had adequate notice to examine the factual predicate prior to a final determination on the merits. See id. Therefore, this Court will only assess the Motion for a Preliminary Injunction instead of considering a permanent injunction to account for any prejudice that may have occurred given the necessarily expedited nature of the travel of this case.

C

Declaratory Judgment

The Uniform Declaratory Judgments Act ("UDJA") allows this Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. In addition, it allows this Court to "determine[] any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise" and to declare the "rights, status, or other legal relations thereunder." Sec. 9-30-2.

It is "well settled that the Superior Court has broad discretion to grant or deny declaratory relief under the UDJA." Tucker Estates Charlestown, LLC, 964 A.2d at 1140 (citing Rhode Island Orthopedic Society v. Blue Cross & Blue Shield of Rhode Island, 748 A.2d 1287, 1289 (R.I. 2000)). "This power is broadly construed, to allow the trial justice to 'facilitate the termination of controversies.'" Bradford Associates v. Rhode Island Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (quoting Capital Properties, Inc. v. State, 749 A.2d 1069, 1080 (R.I. 1999) (quoting Fireman's Fund Ins. Co. v. E.W. Burman, Inc., 120 R.I. 841, 845, 391 A.2d 99, 101 (1978))). Additionally, "despite the existence of other avenues of relief, [our Supreme Court has] recognized that a party is not precluded from proceeding under the UDJA, particularly when 'the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers.'" Tucker Estates Charlestown, LLC, 964 A.2d at 1140 (quoting Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978); Berberian v. Travisono, 114 R.I. 269, 273, 332 A.2d 121, 123 (1975)). In this instance, Counts I and II of the Union's verified complaint arise pursuant to the UDJA and seek a declaration that the

Ordinance at issue is void because it either was passed in violation of the Town Charter and/or because it is superceded by the FFAA.

1

Whether the Ordinance Was Passed in Accord with Town Charter

In Count I of its Verified Complaint and associated prayer for relief, the Union asserts that the Ordinance violates the Town Charter because substantial changes were disclosed and made to the Ordinance on the evening it was passed. The Union contends that this passage was unlawful and therefore not in compliance with the Charter. The Town counters that the Union's challenge is baseless because the Town has complied with "both the letter and spirit" of the Town Charter.

The Town Charter provides that the Town Council "shall have authority to enact ordinances and resolutions for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the town and for the protection of persons and property. The council may provide reasonable penalties for the violation of any ordinance." Defs.' Ex. E, Town of North Kingstown's Home Rule Charter ("Town Charter") § 309. Additionally, "[n]o ordinance shall be passed by the council at the meeting at which it is introduced, but is [it] shall be referred to a subsequent regular or special meeting for a vote theron." Id. at § 311.

This Court is unaware of any instance where our Supreme Court has explicitly addressed whether a proposed ordinance can be modified or changed to an extent that renders the initial introduction ineffective, even if introduced at a prior meeting. Courts in other jurisdictions, however, have developed a test that this Court now adopts to analyze this situation.

In Drummond v. Oregon Department of Transportation, 730 P.2d 582, 584-85 (Or. Ct. App. 1986), a proposed ordinance was substantially changed by an amendment that covered items that were not in the ordinance as originally introduced. The Court of Appeals' analysis examined the differences between the original ordinance and the amended ordinance to determine whether two readings of the amended version of the proposed ordinance were required in accordance with the statute. See id. at 584-85. While the Court would not decide that mere editorial changes constitute a substantial change, the Court found that the purpose of the statute is to require public notice and to allow public comment regarding proposed ordinances. See id. The Court went on to explain that if a substantial change is made and passed at that meeting interested parties might not have an opportunity to comment on the revisions that may affect them. See id. at 585. In many cases, if the original ordinance did not affect them, they might have no reason to attend either meeting. In Drummond, the amended ordinance, which subjected certain things to taxation that were not covered in the ordinance as originally introduced, was therefore held invalid. See id.

The substantial change test was also adopted in Gilman v. City of Newark, 180 A.2d 365 (N.J. Super. Ct. App. Div. 1962). The Court found that not every amendment is required to be republished, but those that substantially change the ordinance are required to be republished prior to passage. Id. at 369 (citing Manning v. Borough of Paramus, 118 A.2d 60 (N.J. Super. Ct. App. Div. 1955)). The Court noted that "[t]he inquiry involves a mixed question of law and fact. The words of the amendment are to be assessed in the context of the provision of which they are a part and the basic policy of the legislative enactment. 'Substance' in the statutory intendment has reference to the

essential elements of the legislative act and the public policy of acts In pari materia." Id. (quoting Wollen v. Fort Lee, 27 N.J. 408, 420, 142 A.2d 881 (1958)). In other words, an amendment's altering the manifest objective intent and materiality of the proposal would constitute a substantial change.

The Rhode Island Supreme Court has had the opportunity to discuss a substantial or material change in the context of administrative finality. In Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799, 811 (R.I. 2000), our high court discussed what constitutes a material change in an application pursuant to the doctrine of administrative finality. The Court noted that the determination of whether a change is material "depend[s] on the context of the particular administrative scheme and the relief sought by the applicant and should be determined with reference to the statutes, regulations, and case law that govern the specific field." Id. Black's Law Dictionary defines "material", in part, as "Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary (9th ed. 2009).

In this case, the changes that the Union suggests are substantial, requiring another meeting, include a ten (10%) percent annual pay increase for firefighters and the elimination of the importance of a paid fire department in the original ordinance. This Court disagrees with the Union that the removal of a reference to the importance of a paid fire department is a substantial or material change to the Ordinance. See Drummond, 730 P.2d at 584-85; Gilman v. City of Newark, 180 A.2d at 369. The expression of the Town's position at the time of passage of its public policy view about the importance of a paid department does not affect the operative provisions of the Ordinance. The elimination of the public policy statement does not, in any way, bind the Town going

forward. Therefore, this Court finds that deleting the provision expressing the importance of a paid fire department is not a substantial or material change that would require another meeting before a vote could take place.

The Court will examine, however, the change in compensation that was inserted into the ordinance at the final reading. The insertion increased the compensation paid to the firefighters by ten percent, the monetary equivalent of more than $500,000 per year to the Town's budget. This Court finds that an additional expense to the taxpayers of the Town of more than $500,000 without notice and the opportunity for considered public comment prior to the final vote is a substantial and/or material change. See Drummond, 730 P.2d at 584-85; Gilman v. City of Newark, 180 A.2d at 369. The taxpayers of the Town of North Kingstown that may have wanted input or the right to be heard about the expenditure of their tax dollars had no prior notice that such an additional financial commitment was being made. The union employees also did not have prior notice of this change to perform their own due diligence before the ordinance was passed at the same meeting. An expenditure of more than a half a million dollars this fiscal year and all fiscal years going forward is not an inconsequential change. It is not the equivalent of a grammatical error. The size of the expenditure and that it binds future Town Councils unless the Ordinance is repealed goes to the very essence of that which the taxpayers have the right to prior notice. These taxpayers, union members, and other interested parties should have the ability to inform members of the Town Council, so they can make thoughtful, considered, and informed decisions prior to voting on the ordinance.

Therefore, this Court finds that this amendment was a substantial and material change that had the effect being a new Ordinance introduced at the second meeting.

Under the Town Charter, the Town was required to defer a vote in accordance with the Charter provision "[n]o ordinance shall be passed by the council at the meeting at which it is introduced, but is [it] shall be referred to a subsequent regular or special meeting for a vote theron." Town Charter at § 311. Accordingly, this Court declares that the Ordinance was passed in violation of the Town Charter and is therefore invalid.

2

Whether the Ordinance is Invalid Pursuant to the Fire Fighters Arbitration Act

Also at issue in this case is whether the Ordinance conflicts with the Fire Fighters Arbitration Act, R.I. Gen. Laws §§ 28-9.1-1 et seq., and is therefore invalid. The FFAA explicitly states its purpose and policy, in pertinent part, as follows:

> "(a) The protection of the public health, safety, and welfare demands that the permanent uniformed members, rescue service personnel of any city or town, emergency medical services personnel of any city or town, and all employees of any paid fire department in any city or town not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to these municipal employees of other well recognized rights of labor such as the right to organize, to be represented by a labor organization of their choice, and the right to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment.
>
> (b) It is declared to be the public policy of this state to accord to the permanent uniformed members, rescue service personnel of any city or town, emergency medical services personnel of any city or town, and all employees of any paid fire department in any city or town all of the rights of labor other than the right to strike or engage in any work stoppage or slowdown. To provide for the exercise of these rights, a method of arbitration of disputes is established.

> (c) The establishment of this method of arbitration shall not, in any way be deemed to be a recognition by the state of compulsory arbitration as a superior method of settling labor disputes between employees who possess the right to strike and their employers, but rather is solely a recognition of the necessity to provide some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike."

Sec. 28-9.1-2. The Act also defines a number of terms, including "unresolved issues," which:

> "means any and all contractual provisions which have not been agreed upon by the bargaining agent and the corporate authorities within the thirty (30) day period referred to in § 28-9.1-7. Any contractual provision not presented by either the bargaining agent or the corporate authority within the thirty (30) day period shall not be submitted to arbitration as an unresolved issue; provided, that if either party or both parties are unable to present their respective proposals to the other party during the thirty (30) day period, they shall have the opportunity to submit their proposals by registered mail by midnight of the 30th day from and including the date of their first meeting." Sec. 28-9.1-3(3).

Section 28-9.1-7 mandates that "[i]n the event that the bargaining agent and the corporate authorities are unable, within thirty (30) days from and including the date of their first meeting, to reach an agreement on a contract, any and all unresolved issues shall be submitted to arbitration."

A

Waiver

The Town preliminarily argues that the Union, in failing to submit any unresolved issues to arbitration, has waived their right to the sole remedy provided under the FFAA and therefore, that the Town may unilaterally implement any changes by ordinance. The Union argues not only that the Union has not waived its right to interest arbitration, but

also that even if it has, that waiver does not allow the Town to unilaterally implement changes by Ordinance.

In this Court's view, this preliminary issue hinges on whether the FFAA places the burden of submitting unresolved issues to interest arbitration on any particular party to labor negotiations. See § 28-9.1-7. Our Supreme Court has recently addressed the standard to use when interpreting a statute. See McCain v. Town of North Providence ex rel. Lombardi, -- A.3d --, 2012 WL 1134814, at *4 (R.I. 2012). The Court stated:

> "[T]he "ultimate goal" [is to give] effect to that purpose which our Legislature intended in crafting the statutory language. Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001); see also DaPonte v. Ocean State Job Lot, Inc., 21 A.3d 248, 250 (R.I. 2011). We have acknowledged that in ascertaining and effectuating that legislative intent, "the plain statutory language" itself serves as "the best indicator." DeMarco v. Travelers Insurance Co., 26 A.3d 585, 616 (R.I. 2011) (quoting State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005)). When that statutory language is "clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." State v. Gordon, 30 A.3d 636, 638 (R.I. 2011) (quoting Tanner v. Town Council of East Greenwich, 880 A.2d 784, 796 (R.I. 2005))."

Id. Section 28-9.1-7 states, in pertinent part, as follows:

> "In the event that the bargaining agent and the corporate authorities are unable, within thirty (30) days from and including the date of their first meeting, to reach an agreement on a contract, any and all unresolved issues shall be submitted to arbitration."

The Town asserts that, because unresolved issues have yet to be submitted to arbitration, the Union has waived its right to do so because the thirty (30) day time limit has concluded. Further, the Town argues that this provision of the FFAA places the burden of submitting "any and all unresolved issues . . . to arbitration" squarely on the Union's

shoulders. Id. In contrast, the Union argues that this provision applies to each party, and that they have not waived their right to submit issues to interest arbitration.

Although this Court need not yet decide factually whether the Union has waived the thirty (30) day time period, and may not have the authority to so decide pursuant to Warwick School Committee, this Court finds that this statute is clear and unambiguous. Section 28-9.1-7 does not place the burden specifically on either the bargaining agent or the corporate authorities. Instead, the act of submitting "any and all unresolved issues" to arbitration is mandatory, and both "the bargaining agent and the corporate authorities" are mentioned within the same sentence of this provision. Sec. 28-9.1-7; see also Lime Rock Fire District v. Rhode Island State Labor Relations Board, 673 A.2d 51, 53-54 (R.I. 1996) (discussing the "specific and unmistakable directive of § 28-9.1-7" as mandating submission of issues to arbitration). In this Court's view, § 28-9.1-7 unambiguously imposes a mandatory burden of submitting unresolved issues to arbitration on each party who wishes that those issues be arbitrated, or either party may waive them. This provision does not anticipate allowing either the Town or the Union to simply wait for the thirty (30) days to expire to implement unilateral terms of employment.

Accordingly, this Court declines to accept the Town's interpretation of our Supreme Court's holding in Lime Rock Fire District v. Rhode Island State Labor Relations Board, 673 A.2d 51, 54 (R.I. 1996), as intending that the burden of submitting issues to arbitration is placed squarely on the Union. In Lime Rock, the Supreme Court found that the Union failed to seek arbitration within a specific time frame after it failed to attend a negotiating session and thus waived its sole remedy under the FFAA – arbitration. See id. The parties in Lime Rock had explicitly extended the time frame for

negotiations, and the Court construed the statute to allow the parties to submit unresolved issues to arbitration within thirty (30) days of the end of any agreed-upon extended period. See id. This Court acknowledges that parties, including the Union, may indeed waive their statutory right to interest arbitration. See id. This Court does not agree, however, as the Town urges, that such possibility of waiver places the burden solely on the Union in every instance. See id.; see also Arena, 919 A.2d at 388-89 (reiterating the holding in Lime Rock that "a union subject to the FFAA must exhaust its statutory remedy-mandatory arbitration-before filing an unfair labor practices claim with the State Labor Relations Board."). In this instance, the Town's emphasis on whether the Union has waived its right to interest arbitration is inapposite to the issue of whether the Union can challenge the Ordinance on its face because it conflicts with the FFAA.

B

Conflict with the FFAA

While the Union argues that the Ordinance unilaterally implements changes to mandatory bargaining subjects–such as wages, hours, and terms and conditions of employment–and is therefore void, the Town counters that the reorganization from four (4) platoons into three (3) platoons is solely a function of their management right, and all additional changes are subject to bargaining only as effects of that change. Further, it is the Town's position that when exercising a management right, they can change mandatory bargaining areas (i.e. wages, hours) and need not reach an agreement with the Union on those mandatory areas prior to implementation. The Town also argues that the

Ordinance, because it was passed pursuant to the Town Charter, supersedes any conflicting provisions of the FFAA based on the home rule charter doctrine.

The FFAA very clearly intends that firefighters have the right to bargain collectively concerning "wages, rates of pay, hours, working conditions, and all other terms and conditions of employment." Sec. 28-9.1-4. In order to maintain this right, and based upon the public safety aspect of their employment, firefighters are denied the statutory right to strike. See § 28-9.1-2(b). The right to bargain, however, is not boundless. Certainly there are decisions outside the realm of bargaining, such as pure management rights. In Town of N. Providence v. Drezek, 2010 WL 2642652 (R.I. Super. 2010) (Stern, J.), this Court dealt with the status of management rights that were permissively bargained into a CBA after the agreements expiration. The Court held that these management rights permissively bargained do not become the subject of binding arbitration automatically. If the Town desires, it can, with notice to the Union, reassert its management right. Any binding arbitration can determine the effects on mandatory subjects of bargaining. In this case the Town, through Ordinance, may assert that those management rights permissively bargained in a CBA upon expiration are reasserted. This Court finds that the platoon structure of the Fire Department is a management right that may be properly asserted at the expiration of the CBA. Going forward the parties may agree to a new CBA that addresses the effects of this management change on mandatory bargaining subjects or proceed to interest arbitration, solely to determine the effects on mandatory bargaining subjects and not the management decision itself.

This Court is well aware that the Town is not required to bargain over every conceivable concession, and the ability to make managerial changes is certainly within its

sovereign power. It is not convinced, however, that in this instance the changes to wages and hours are solely an effect of that management change from four (4) platoons to three (3) platoons. Instead, the Ordinance explicitly addresses changes to wages and hours. Thus, the Ordinance, on its face, affects subjects which are very clearly items which must be bargained for pursuant to the FFAA. See § 28-9.1-4.

The Town's argument is similar to the City of Cranston's argument in City of Cranston v. Hall, 116 R.I. 183, 354 A.2d 415 (R.I. 1976). Although in Hall, the City sought review of an arbitration order following unsuccessful negotiations, the Court noted that "[a]t the outset the city appears to argue that how a fire fighter shall be promoted is not a bargainable issue but is instead a management prerogative." Id., 116 R.I. at 185, 354 A.2d at 417. Similarly, in this case, the Town asserts that organizing from four (4) platoons to three (3), as well as the subjects that make up the rest of the Ordinance, are purely management rights. However, our Supreme Court has found that "[a] brief reference to [the FFAA] will suffice to dispose of that contention. Those sections clearly recognize that fire fighters, although not entitled to strike or to engage in any work stoppages or slowdowns, should not be denied such other well-recognized rights of labor as those of . . . bargaining collectively with their employers concerning '* * * wages, rates of pay, hours, working conditions and all other terms and conditions of employment.'" Id. (quoting § 28-9.1-4). Therefore, it is clear that the attempts to change wages and shift schedules are not purely management decisions and instead are subject to bargaining pursuant to the FFAA. See id.; see also Borough of Ellwood City v. Pennsylvania Labor Relations Board, 998 A.2d 589 (Pa. 2010) (holding, in part, that an ordinance that affected terms and conditions of employment was invalid because those

terms had not first been the subject of mandatory bargaining); Local 1383 of the Int'l Ass'n of Fire Fighters v. City of Warren, 311 N.W.2d 702 (Mich. 1981) (finding that normal subjects of bargaining such as terms and conditions of employment may not be removed from bargaining by local charter provisions because the state's public employment negotiations statute takes precedence).

By addressing wages, hours and shift schedules that were not the result of mandatory bargaining, the Ordinance clearly conflicts with the FFAA. The Town asserts that this conflict must be resolved in favor of the Ordinance. The Union, in contrast, argues that the FFAA clearly preempts any conflicting Town Ordinance. Our Supreme Court dealt with a conflict between a town charter and the FFAA as regarded promotion procedures in Hall. See 116 R.I. at 185-86, 354 A.2d at 417. In Hall, "[t]he conflict [was] between the charter, which prescribes a particularized method for making promotions, and the Fire Fighters' Act, which makes promotion procedures a bargainable issue in a labor dispute." Id. Although the arbitration board had awarded a different promotion procedure than provided in Cranston's Town Charter, the Court found that "[t]he critical fact is that the enabling legislation [of the FFAA] applies equally to all cities and towns and is, therefore, an act of general application that supersedes a controverting home rule charter provision." Id.; see also City of East Providence v. Local 850, Int'l Ass'n of Firefighters, AFL-CIO, 117 R.I. 329, 339, 366 A.2d 1151, 1156 (1976) (noting that Hall controls and finding that the FFAA "take[s] precedence over any inconsistent provisions of the East Providence City Charter.").

The question then becomes whether the Firefighters Arbitration Act supersedes the Ordinance in the event of a conflict. Our Supreme Court has explicitly addressed the

issue of whether an Ordinance is of equal heft to a Town Charter provision, and answered the question in the negative. "Ordinances are inferior in status and subordinate to the laws of the state; an ordinance that is inconsistent with a state law of general character and state-wide application is invalid." Borromeo v. Personnel Board of Bristol, 117 R.I. 382, 385, 367 A.2d 711, 713 (1977) (citing Wood v. Peckham, 80 R.I. 479, 482, 98 A.2d 669, 670 (1953))). Accordingly, this Court finds that the FFAA supersedes the Ordinance insofar as the Ordinance attempts to regulate those issues subject to mandatory bargaining under the Act, including wages, hours and all terms and conditions of employment, and that the Ordinance is therefore invalid.

Although this Court recognizes the delicate balance required to protect not only the arbitral process, but also the collective bargaining process prior to arbitration, this Court finds that the unilateral implementation of changes to wages, hours and terms and conditions of employment by the Ordinance directly conflicts with both the intent and explicit mandates of the FFAA. Moreover, although this Court has discussed the terms of the Ordinance, it recognizes that it is not in a position to determine what terms and conditions of employment currently exist for the Union. It is easy to imagine a situation in which the Town could impose extraordinary conditions on the Union by passing an Ordinance with the same arguments that the Union has no remedy in any forum. Instead, the Town seeks to avoid arbitration altogether over the terms of the Ordinance, and in doing so evade its statutory duty to bargain or even arbitrate the unresolved issues with the firefighters. Allowing the Town to avoid this duty is, in this Court's view, to completely nullify the arbitral process provided for by the FFAA.

D

Preliminary Injunction

Whether to grant a preliminary injunction "rests within the sound discretion of the hearing justice." Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999) (per curiam) (citing Fund for Cmty. Progress v. United Way of Southeastern New England, 695 A.2d 517, 521 (R.I. 1997)). This discretion, however, is not unlimited, and this Court must consider whether the Union, the moving party in this case, "(1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." Id. (citing Fund for Cmty. Progress, 695 A.2d at 521).

Based upon this Court's determination that the Ordinance is invalid because it was passed in violation of the Town Charter and because it conflicts with the FFAA, the Court need not reach the issue of whether to issue a preliminary injunction. As the Ordinance is invalid, nothing remains to be enjoined at this point.

III

Conclusion

Based upon the foregoing, this Court declares that the Ordinance is invalid because it was passed in violation of the Town Charter. Moreover, this Court declares that the Ordinance is invalid because it conflicts with the FFAA by imposing changes to wages, hours, and terms and conditions of employment without first bargaining to agreement or following the FFAA's statutory arbitration procedures. The Union will submit an appropriate Order for entry.

APPENDIX #2

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. SUPERIOR COURT

(FILED: DECEMBER 14, 2012)

TOWN OF NORTH KINGSTOWN	:	
	:	
v.	:	
	:	**C.A. No. WC-2012-0542**
NORTH KINGSTOWN FIREFIGHTERS, LOCAL 1651, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO; RAYMOND FURTADO, in his official capacity as President of LOCAL 1651; and MICHAEL SCANLON, in his official capacity as Secretary of LOCAL 1651	:	

DECISION

STERN, J. Before the Court are a number of petitions filed by Plaintiff Town of North Kingstown, which seek, inter alia, to stay arbitration proceedings that are presently scheduled between Plaintiff Town of North Kingstown and Defendant International Association of Firefighters, Local 1651. These petitions include both Plaintiff's Motion to Stay the 2011-2012 Interest Arbitration in C.A. No. WC-2012-0542, Plaintiff's Motion to Stay the Arbitrations of Certain Firefighter Grievances in C.A. No. WC-2012-0368, and a number of requests for declaratory relief pursuant to the Uniform Declaratory Judgments Act, R.I. Gen. Laws §§ 9-30-1 et seq. Several other requests have been made relative to these related cases but only the two above-referenced issues have been fully briefed. However, for clarity, this Court limits this Decision to the merits of the Plaintiff's Motion to Stay the 2011-2012 Interest Arbitration in C.A. No. WC-2012-0542 and the declaratory relief requested relative to those issues.

I

Facts and Travel[1]

The Town of North Kingstown ("Plaintiff" or "the Town") and the International Association of Firefighters, Local 1651, AFL-CIO ("Defendant" or "the Union") have long been parties to collective bargaining agreements ("CBAs"). The most recent CBA was effective from July 1, 2007 to June 30, 2010. The parties, unable to reach an agreement, submitted their unresolved issues to interest arbitration in accordance with the Fire Fighters Arbitration Act ("FFAA"). This ultimately resulted in an arbitration award dated August 9, 2011, which extended the terms of the CBA from July 1, 2010 to June 30, 2011, pursuant to certain amended terms and conditions.

Prior to that award, the Union wrote the Town Manager requesting that collective bargaining negotiations commence for a new CBA that would be effective starting July 1, 2011. That request was made on February 23, 2011; however, the parties did not commence collective bargaining negotiations within the ten-day period required by R.I. Gen. Laws § 28-9.1-6. Rather, the parties first met on October 28, 2011[2] to negotiate a successor agreement. These negotiations continued on November 14, 18, 29, 30, and December 5, 2011. No agreement was reached by the end of the December 5, 2011 meeting.

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[1] For a more in-depth explanation of the factual underpinnings of this case, refer to this Court's previous Decision in C.A. No. WC-2012-0127 dated May 23, 2012. See Int'l Ass'n of Firefighters v. Town of N. Kingstown, No. WC-2012-0127, 2012 WL 1948338 (Super. Ct. May 23, 2012). That Decision invalidated an ordinance on the grounds that the ordinance (1) was passed in violation of the Town of North Kingstown's Town Charter and (2) conflicted with certain provisions of the Fire Fighters Arbitration Act, R.I. Gen. Laws §§ 28-9.1-1 et seq. Id.

[2] Certain documents filed with the Court in this case indicate that the parties first met to negotiate on October 27, 2011; however, the Motion to Stay Arbitration notes that "[t]he Union subsequently acknowledged that the first date of bargaining was October 28, 2011 rather than October 27, 2011." Mot. to Stay Arbitration at 13 n. 11.

The Town then sought to introduce an ordinance that would significantly change the firefighters' wages, hours, and terms and conditions of employment. The first reading of the ordinance occurred at a Town Council meeting on December 19, 2011. Following this first reading, two additional negotiation sessions took place between the parties—on December 20, 2011 and January 18, 2012. The ordinance was subsequently amended and passed by a three-to-two vote of the Town Council. After notice from the Town to the Union that it intended to implement the ordinance beginning March 4, 2012, the parties had one final negotiation session on February 23, 2012. However, the parties remained unable to reach an agreement on the unresolved issues.

A

The Former Action

As a result of the parties' inability to reach an agreement and the Town's imminent implementation of the ordinance, the Union filed suit on February 28, 2012.[3] The Union requested that this Court issue a Temporary Restraining Order and Preliminary Injunction restraining the Town from implementing the Ordinance. The Union's Verified Complaint sought: (1) a declaratory judgment invalidating the ordinance; (2) a declaratory judgment that the Town had violated the FFAA and the State Labor Relations Act ("SLRA") and that the ordinance was preempted by those acts; and (3) injunctive relief. After considering the Union's request, this Court denied the request for a temporary restraining order and scheduled the matter for a preliminary injunction hearing. The Town also filed a Motion to Dismiss the Verified Complaint on March 15, 2012. That motion was made pursuant to both Rule 12(b)(6) for failure

[3] That case was filed as C.A. No. WC-2012-0127.

to state a claim upon which relief can be granted and Rule 12(b)(1) for lack of subject matter jurisdiction.

At the preliminary injunction hearing, both the Town and the Union had witnesses testify and submitted documentary evidence over several hearing sessions. Each side subsequently submitted briefs and oral arguments were entertained by this Court on April 24, 2012. In its Decision dated May 23, 2012, this Court denied the Town's Motion to Dismiss on both the Rule 12(b)(1) and Rule 12(b)(6) arguments. See Int'l Ass'n of Firefighters, WC-2012-0127, 2012 WL 1948338 (Super. Ct. May 23, 2012). The Court did, however, find the Town's ordinance invalid for having been passed in violation of the Town Charter. See id. Furthermore, the Court found that, even if the ordinance had been properly passed, it was nonetheless invalid "because it conflict[ed] with the FFAA by imposing changes to wages, hours, and terms and conditions of employment without first bargaining to agreement or following the FFAA's statutory arbitration procedures." Id. The Court declined to issue a preliminary injunction because the ordinance had been invalidated, leaving nothing to be enjoined by the Court and, therefore, making the issue moot.

After the Court found the ordinance to be invalid, the Town did not return to the prior wages, hours, and terms and conditions of employment. Rather, the Town continued use of the terms and conditions unilaterally imposed by the invalidated ordinance. The Town's rationale for not returning to the pre-ordinance status was its position that an ordinance was not necessary to implement these unilateral changes. More specifically, the Town's position was that it has the inherent right to unilaterally change the relationship between the Town and the Union because the Union failed to request interest arbitration of unresolved issues within the time frame delineated by the FFAA—located at R.I. Gen. Laws § 28-9.1-7—and the CBA had expired.

Furthermore, the Town argued that the Union forfeited its right to collectively bargain in the first instance due to the Union's failure to comply with the forfeiture provision of the FFAA, located at R.I. Gen. Laws § 28-9.1-13.

B

The Instant Action

At the time, a request was pending by the Union for interest arbitration. The Town filed a Verified Complaint and Petition to Stay Arbitration in C.A. No. WC-2012-0542.[4] That Verified Complaint was filed on September 5, 2012. According to this Verified Complaint, the Union had filed an unfair labor practice charge with the SLRB on June 14, 2012. Verified Compl. ¶ 40. That charge sought "to order the Town to participate in statutory interest arbitration proceedings." Id. ¶ 42 (internal quotations omitted).

The SLRB issued a Complaint against the Town on August 2, 2012, alleging that the Town violated state statutes when it "unilaterally changes terms and conditions of employment, including hours and wages, without bargaining to impasse and without exhausting all statutory dispute resolution mechanisms under the [FFAA]." Id. ¶¶ 47-48. The Town, therefore, filed the Verified Complaint seeking a declaratory judgment of the parties' rights and the SLRB's jurisdiction (or lack thereof) as well as a stay of the arbitration proceedings. Id. ¶¶ 50, 74. The Town subsequently filed an Amended Complaint and Petition to Stay Arbitrations[5] on September

[4] This Verified Complaint and Petition dealt with the rights of the parties in interest arbitration. Interest arbitration is defined as "[a]rbitration that involves settling the terms of a contract being negotiated between the parties; esp., in labor law, arbitration of a dispute concerning what provisions will be included in a new collect-bargaining agreement." Black's Law Dictionary 100 (7th ed. 1999).

[5] The Petition to Stay Arbitrations was properly filed pursuant to R.I. Gen. Laws § 28-9-13, which states, in pertinent part:

24, 2012. Both the Union and the Town have filed substantial memoranda addressing the issues involved in these cases.

As there are multiple actions filed before this Court—containing more than thirty issues for which the parties requested declaratory relief, all involving the relationship between the Town and the Union—the Court held a conference. The purpose of the conference was, in accordance with Rule 16 of the Superior Court Rules of Civil Procedure, to simplify and clarify the issues and schedule a timeframe to resolve the major legal issues involved in these cases.[6] The Court ordered the parties to attempt to agree on the five most significant legal issues that will assist in resolving the cases before the Court. The parties agreed to the five legal issues and, in accordance with a scheduling order, the parties have fully briefed the first two issues. The first of these issues, as addressed by the Court in this Decision, is whether or not interest arbitration may proceed under the FFAA based on an interpretation of the FFAA's provisions.

> "If a notice has been personally served on the party of an intention to conduct the arbitration pursuant to the provisions of a contract or submission specified in the notice, *the issues specified in this subdivision may be raised only by a motion for a stay of the arbitration*, notice of which motion must be served within ten (10) days after the service of the notice of intention to arbitrate. . . . The arbitration hearing shall be adjourned upon service of the notice pending the determination of the motion. Where the opposing party, either on a motion for a stay or in opposition to the confirmation of an award, sets forth evidentiary facts raising a substantial issue as to the making of the contract or submission or the failure to comply with it, an immediate trial of the issue shall be had. In the event that the opposing party is unsuccessful he or she may, nevertheless, participate in the arbitration if the arbitration is still being carried on. Any party may, on or before the return day of the notice of application, demand a jury trial of the issue." G.L. 1956 § 28-9-13(2) (emphasis added).

[6] Rule 16 states that "the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider" things such as the "simplification of the issues" and any "other matters as may aid in the disposition of the action." Super. R. Civ. P. Rule 16.

II

Analysis

In analyzing the issues of forfeiture and waiver—as raised by the Town—when determining the availability of interest arbitration under the FFAA, the Court keeps in mind the public policy considerations that prompted the passage of the FFAA. Those policies are best captured in the purpose behind the FFAA as stated in the act itself. In pertinent part, R.I. Gen. Laws § 28-9.1-2 states:

> "The protection of the public health, safety, and welfare demands that . . . all employees of any paid fire department in any city or town not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to these municipal employees of other well recognized rights of labor such as the right to organize, to be represented by a labor organization of their choice, and the right to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment." G.L. 1956 § 28-9.1-2.

Thus, firefighters are accorded a right to interest arbitration to make up for their inability to effect change in other ways, such as the right to strike that is afforded to other workers. Furthermore, the general policy of the State of Rhode Island is "to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self organization, and designation of representatives of their own choosing for the purposes of collective bargaining, . . . free from the interference, restraint, or coercion of their employers." G.L. 1956 § 28-7-2. For this reason, this Court notes the sensitivity and importance of issues arising under the FFAA, both for the firefighters and for the towns they serve.

A

Forfeiture

The Town argues, in its supporting documents, that the Union forfeited its right to engage in negotiations with the Town for the purpose of creating a new CBA. On this topic, Rhode Island law states:

> "Whenever wages, rates of pay, or any other matter requiring appropriation of money by any city or town are included as a matter of collective bargaining conducted under the provisions of this chapter, it is the obligation of the bargaining agent to serve written notice of request for collective bargaining on the corporate authorities *at least one hundred twenty (120) days before the last day on which money can be appropriated by the city or town* to cover the contract period which is the subject of the collective bargaining procedure." G.L. 1956 § 28-9.1-13 (emphasis added).

Under the plain meaning of this provision, 120 days' notice must have been given by the Union of the request for collective bargaining. See id.

Here, the Court need not reach the issue of which day was "the last day on which money can be appropriated by the city or town to cover the contract period" because it is clear that the Union did not give the required notice prior to the 120-day time frame. The Town argues that this fact is fatal to the Union's case. In so arguing, the Town relies on Town of Tiverton v. Fraternal Order of Police Lodge 23, 118 R.I. 160, 372 A.2d 1273 (R.I. 1977).[7] In that case, the Rhode Island Supreme Court determined that the purpose of the 120-day notice requirement is "to afford the town sufficient time to consider matters affecting town finances." Town of Tiverton, 118 R.I. at 164, 372 A.2d at 1275. Ultimately, the Court determined that the 120-day

[7] The Court notes that this case was decided under the Municipal Police Arbitration Act, R.I. Gen. Laws § 28-9.2-1 et seq., rather than the provisions of the FFAA. However, as a practical matter, the relevant provision of the Municipal Police Arbitration Act is identical to § 28-9.1-13 of the FFAA. Therefore, this Court views the Rhode Island Supreme Court's interpretation of that statutory language—as found in Town of Tiverton—as controlling in the present case.

notice requirement is mandatory rather than directory "and failure to comply is judged fatal." Id. at 165, 372 A.2d at 1276.

This Court finds that the Rhode Island Supreme Court's interpretation of the 120-day notice requirement in Town of Tiverton is conclusive on the issue of forfeiture. Based on a direct application of the holding in that case, it would seem as though the Union's failure to comply with the statute is fatal to the Union's ability to collectively bargain. See id. at 166, 372 A.2d at 1276. Indeed, this Court finds that the Union's notice was defective under the plain language of R.I. Gen. Laws § 28-9.1-13. However, as the Court noted in Town of Tiverton, lack of timely notice means only that "the town was not obliged to negotiate" on issues falling under the statute. Id. This language is not prohibitive of such negotiations. Here, by contrast, there is no dispute that the Town actually engaged in negotiations with the Union on a wide range of issues, all after receipt of the Union's defective notice.

In a similar case under the FFAA, the Rhode Island Supreme Court determined that "[b]ecause the parties initiated collective bargaining negotiations for purposes of entering into a new agreement, we therefore assumed that bargaining was appropriately initiated in compliance with § 28-9.1-13." Lime Rock Fire Dist. v. R.I. State Labor Relations Bd., 673 A.2d 51, 53 (R.I. 1996). Other Rhode Island cases have followed this precedent, assuming that notice did not violate R.I. Gen. Laws § 28-9.1-13 where there was evidence of actual negotiation between the parties. See e.g., Town of Coventry v. State Labor Bd., Nos. PC-1992-0980 & PC-1996-0118, 1996 WL 936955 (Super. Ct. July 12, 1996). In Town of Coventry, the Superior Court noted:

> "Even though neither [of] the transcript[s] . . . contain documentation that such written notice was sent within the appropriate time period, Union Exhibit 3 dated October 5, 1990, which is part of the 1992 Hearing Record, purports to be the original 'Ground Rules for Contract Negotiations' containing eighteen provisions for conducting the negotiations, the dates for the negotiating period, the names of the Union and Town negotiating teams, and is signed by the Town and the Union,

supporting the conclusion that the Town and the Union were negotiating the terms of a new contract to cover the period July 1, 1990, through June 30, 1991, within the meaning of 28-9.1-13." Id. (emphasis added).

Under such an analysis, this Court holds that "[b]ecause the parties initiated collective bargaining negotiations for purposes of entering into a new agreement," the Union's defective request to engage in such negotiations is not fatal to the Union's ability to collectively bargain. See Lime Rock, 673 A.2d at 53.

In support of this holding, this Court notes that the purpose of the relevant provision is "to afford the town sufficient time to consider matters affecting town finances." Town of Tiverton, 118 R.I. at 164, 372 A.2d at 1275. Here, the Town was not obliged to engage in collective bargaining with the Union following the Union's defective request; however, the Town actually engaged in such negotiations. Thus, it is clear that the Town was not deprived of "sufficient time to consider matters affecting town finances." Once the Town engaged in collective bargaining with the Union, it was bound to follow the other provisions of the FFAA, including those requiring unresolved issues to be submitted to interest arbitration.[8] See G.L. 1956 § 28-9.1-7.

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[8] Although it was not raised in the parties' pleadings or supporting documents, this Court notes that further support of its holding on the issue of forfeiture can be found in the doctrine of estoppel. Estoppel is defined as a "bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." Black's Law Dictionary 570 (7th ed. 1999).

As discussed in subsequent sections of this Decision, parties must typically exhaust their chosen remedy. See Cipolla v. R.I. Coll., Bd. of Governors for Higher Educ., 742 A.2d 277, 282 (R.I. 1999) ("Once [the union] entered the grievance procedure, [it] had selected the remedy to adjudicate [its] claim, and [the union] should have pursued that remedy to its conclusion."). Therefore, the Town's actions by engaging in collective bargaining may have been sufficient to invoke that doctrine because the Union, in reliance on the Town's actions, ultimately forfeited its right to seek an alternative remedy. See id.

Indeed, the Rhode Island Supreme Court has noted that "in an appropriate factual context the doctrine of estoppel should be applied against public agencies to prevent injustice and fraud

B

Waiver

This Court has determined—in the preceding section of this Decision—that the Union did not forfeit its ability to engage in collective bargaining because the Town became bound by the provisions of the FFAA once it actually engaged in collective bargaining negotiations with the Union. Now, this Court must decide whether there was a violation of the terms of R.I. Gen. Laws § 28-9.1-7 that resulted in a waiver of the parties' rights to engage in interest arbitration on unresolved issues. This waiver issue arises solely based on the Rhode Island Supreme Court's holding in Lime Rock Dist. v. R.I. State Labor Relations Bd., 673 A.2d 51 (R.I. 1996). In that case, the Court held that a union had waived its right to pursue interest arbitration under the FFAA because it did not submit unresolved issues to arbitration within the proper time frame. See Lime Rock, 673 A.2d at 54.

1

Interpretation of R.I. Gen. Laws § 28-9.1-7

In Lime Rock, the Rhode Island Supreme Court interpreted R.I. Gen. Laws § 28-9.1-7 as creating a thirty (30) day time frame during which the union was required to submit its unresolved issues to arbitration. See id. The statute states:

> "In the event that the bargaining agent and the corporate authorities are unable, within thirty (30) days from and including the date of their first meeting, to reach an agreement on a contract, any and all unresolved issues shall be submitted to arbitration." G.L. 1956 § 28-9.1-7.

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where the agency or officers thereof, *acting within their authority*, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his[, her, or its] detriment." Romano v. Ret. Bd. of Employees' Ret. Sys. of R.I., 767 A.2d 35, 39 (R.I. 2001) (quoting Ferrelli v. Dept. of Emp't Sec., 106 R.I. 588, 594, 261 A.2d 906, 910 (1970)) (internal quotations omitted). However, this Court need not make a final determination of these issues in this Decision and merely notes that these doctrines weigh in favor of this Court's present interpretation of R.I. Gen. Laws § 28-9.1-13.

Under R.I. Gen. Laws § 28-9.1-3, a separate provision of the FFAA, unresolved issues are defined as:

> "any and all contractual provisions which have not been agreed upon by the bargaining agent and the corporate authorities within the thirty (30) day period referred to in § 28-9.1-7. Any contractual provision not presented by either the bargaining agent or the corporate authority within the thirty (30) day period shall not be submitted to arbitration as an unresolved issue; provided, that if either party or both parties are unable to present their respective proposals to the other party during the thirty (30) day period, they shall have the opportunity to submit their proposals by registered mail by midnight of the 30th day from and including the date of their first meeting." G.L. 1956 § 28-9.1-3.

Here, there are a number of contractual provisions that were not agreed upon by the Union and the Town "within the thirty (30) day period referred to in § 28-9.1-7." Id. This is clear from the fact that the parties' first meeting in a series of negotiation sessions took place on October 28, 2011 and the last such meeting did not take place until February 23, 2012—well outside the thirty day period—and no unresolved issues were submitted to arbitration in the interim.

Additionally, it is important to note that this Court is bound by the precedential effect of Lime Rock and must, therefore, follow the interpretation applied to these statutes by the Rhode Island Supreme Court. Based on that interpretation of the FFAA's provisions, the Court holds that all unresolved issues were required to be submitted to arbitration within thirty (30) days from the first negotiation session between the parties. See Lime Rock, 673 A.2d at 54 ("[W]e construe the statute to provide that the parties could present unresolved issues to arbitration within thirty days of [their first meeting]."). Here, the first meeting between the parties took place on October 28, 2011 and, therefore the unresolved issues must have been submitted to arbitration within thirty (30) days from that date.

The Union argues that the parties mutually agreed to extend the period for negotiations. In Lime Rock, the Court extended the thirty (30) day deadline pursuant to R.I. Gen. Laws

§ 28-9.1-7 to thirty (30) days from the date to which the parties had expressly agreed to extend their negotiations. See Lime Rock, 673 A.2d at 54 (finding that the deadline for submitting issues was not until June 29, 1992 "[b]ecause the parties agreed by mutual consent to extend the period of negotiations to May 29, 1992"). Here, by contrast, there is no evidence that the parties expressly agreed to either any particular time frame for negotiations or an extension of such a time frame to a particular point. Thus, without an express agreement to create—and subsequently to alter—a specific timeframe for negotiations, this Court is unable to extend the deadline imposed by the FFAA, as interpreted in Lime Rock. Therefore, this Court finds that the Union has waived its rights to interest arbitration under the FFAA.

2

Application of R.I. Gen. Laws § 28-9.1-7

Having determined that there was a waiver of the Union's right to engage in interest arbitration based on the statutory interpretation found in Lime Rock, this Court must now determine whether that statutory burden is shouldered solely by the Union or equally by both the Union and the Town. This Court engages in the task of interpreting the statute based on the well-settled rules of statutory construction.

When interpreting a statute, the Court's "ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Ryan v. City of Providence, 11 A.3d 68, 70-71 (R.I. 2011) (quoting D'Amico v. Johnston Partners, 866 A.2d 1222, 1224 (R.I. 2005)) (internal quotations omitted). To determine the purpose of an act and the intent of the Legislature in enacting it, the Court must make "an examination of the language, nature, and object of the statute." Id. at 71 (quoting Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979)) (internal quotations omitted). In making such an examination of a statute,

the Court must "first attempt to see whether or not the statute in question has a plain meaning and therefore is unambiguous; in that situation we simply apply the plain meaning to the case at hand." Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007) (citing State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998); Pacheco v. Lachapelle, 91 R.I. 359, 361-62, 163 A.2d 38, 40 (1960)).

The plain meaning of a statute is found by giving the words of the statute their ordinary meaning "in the absence of statutory definition or qualification." Chambers, 935 A.2d at 961 (citing Pacheco, 91 R.I. at 362, 163 A.2d at 40). However, it is crucial to statutory interpretation that the Court "consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Ryan, 11 A.3d at 71 (quoting Sorenson v. Colibri Corp., 650 A.2d 125, 128 (R.I. 1994)). Only when a statute is found to be ambiguous is the Court required to "engage in a more elaborate statutory construction process, in which process [the Court] frequently employ[s] the canons of statutory construction." Chambers, 925 A.2d at 960 (citations omitted).

Here, this Court finds R.I. Gen. Laws § 28-9.1-7 to be unambiguous and, therefore, will apply the plain meaning of the statute to the facts of the cases presently before the Court. This plain meaning is ascertained only by an examination of the statute within the greater context of the FFAA. The statute itself states only that "any and all issues shall be submitted to arbitration." G.L. 1956 § 28-9.1-7. There is no indication in the wording of that provision as to which party is required to bear the burden of submitting unresolved issues to arbitration. Other provisions throughout the FFAA—including R.I. Gen. Laws §§ 28-9.1-6,[9] 28-9.1-8,[10] and

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[9] R.I. Gen. Laws § 28-9.1-6 states, in pertinent part:

> "*It shall be the obligation of the city or town*, acting through its corporate authorities, to meet and confer in good faith with the representative or representatives of the bargaining agent within ten (10) days after receipt of written

28-9.1-13[11]—explicitly state when only one party bears a particular burden. Thus, where the language of a statute within the FFAA does not place an obligation squarely on a single party, it can be inferred that the obligation found in that particular provision is meant to be placed equally on both parties.

Based on such an application of the statute's plain meaning, this Court holds that R.I. Gen. Laws § 28-9.1-7 is equally applicable to both the Union and the Town. Such an application means that, under the Rhode Island Supreme Court's holding in Lime Rock, both the Union and the Town were required to submit unresolved issues to arbitration within thirty (30) days of the parties' first meeting on October 28, 2011. See Lime Rock, 673 A.2d at 54. However, neither the Union nor the Town submitted those unresolved issues to arbitration. Therefore, this Court holds that both parties have waived their rights to engage in interest arbitration related to their collective bargaining negotiations. See id. As such, both the Union and the Town must now wait until the "window opens again" for interest arbitration. If interest arbitration is properly

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> notice from the bargaining agent of the request for a meeting for collective bargaining purposes." (Emphasis added.)

[10] R.I. Gen. Laws § 28-9.1-8 states, in pertinent part:

> "Within five (5) days from the expiration of the thirty (30) day period referred to in § 28-9.1-7, *the bargaining agent and the corporate authorities shall each select and name one arbitrator* and subsequently shall immediately notify each other in writing of the name and address of the person selected." (Emphasis added.)

[11] R.I. Gen. Laws § 28-9.1-13 states, in pertinent part:

> "Whenever wages, rates of pay, or any other matter requiring appropriation of money by any city or town are included as a matter of collective bargaining conducted under the provisions of this chapter, *it is the obligation of the bargaining agent to serve written notice of request for collective bargaining on the corporate authorities* at least one hundred twenty (120) days before the last day on which money can be appropriated by the city or town to cover the contract period which is the subject of the collective bargaining procedure." (Emphasis added.)

requested during the statutory time period, in accordance with the FFAA, the process will go forward. But what is the relationship between the Union and the Town pending the results of such interest arbitration? This is one of the questions answered by the subsequent sections of this Decision.

C

Practical Effects of Waiver

This Court has determined that both the Union and the Town waived their right to submit unresolved issues to interest arbitration. The Court is now faced with the task of outlining the practical effects of that holding on each party by analyzing what, if any, alternative remedies may be available to the parties. Then, it will be important for this Court to discuss what terms and conditions, if any, exist between the parties that have been carried over from their expired CBA while the parties pursue any available remedies.

1

Rights of the Parties

As this Court stated in the preceding sections of this Decision, both the Union and the Town have waived their rights to submit unresolved issues to interest arbitration. As such, both parties are drastically limited in the availability of alternative remedies. This is due to the doctrine of election of remedies and the FFAA. Election of remedies is defined as "[a] claimant's act of choosing between two or more concurrent but inconsistent remedies based on a single set of facts." Black's Law Dictionary 537 (7th ed. 1999). It is also said to "bar[] a litigant from pursuing a remedy inconsistent with another remedy already pursued." Id. "[T]he doctrine of election of remedies is equitable in nature and has at its core the salient purpose of preventing

unfairness to the parties." Accordingly, in a similar case to the one presently before this Court, the Rhode Island Supreme Court stated:

> "Once [the union] entered the grievance procedure, [it] had selected the remedy to adjudicate [its] claim, and [the union] should have pursued that remedy to its conclusion." State Dept. of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 278 (R.I. 2002) (quoting Cipolla, 742 A.2d at 282) (internal quotations omitted).

In finding that the union in that case was barred from seeking a remedy with the SLRB, the Court held that "the doctrine of election of remedies is applicable to actions taken and heard by the [SLRB] in the same manner as a complaint for judicial relief." Id. at 279.

This is particularly true in cases arising under the FFAA. In Lime Rock, the "union sought relief before the SLRB, alleging unfair labor practices . . . [but] the SLRB was without jurisdiction to consider the charge inasmuch as the specific mechanism for resolving disputes under the FFAA is through arbitration." Lime Rock, 673 A.2d at 54. In a separate Superior Court case arising under the FFAA, it was concluded that a particular issue was "an unresolved issue that arose during valid negotiations between the [u]nion and the [t]own within the meaning of 28-9.1-3(3), and therefore, *the [u]nion's exclusive remedy was to seek arbitration under G.L. 28-9.1-7 within thirty (30) days of the end of their negotiating period*." Town of Coventry v. State Labor Bd., Nos. PC-1992-0980 & PC-1996-0118, 1996 WL 936955 (Super. Ct. July 12, 1996) (emphasis added). In that case, "the Board was without jurisdiction to hear and adjudicate the dispute" because the union had not pursued its exclusive remedy to its conclusion. Id.

Thus, the Union's alternative remedies are limited not only by its failure to properly pursue interest arbitration to its conclusion but also by the fact that such interest arbitration is the exclusive mechanism for resolving disputes under the FFAA. See id.; see also Lime Rock, 673 A.2d at 54. The Union, therefore, is barred from pursuing its claim against the Town with the

SLRB, insofar as the claim arises out of the unresolved issues between the parties, as defined by R.I. Gen. Laws § 28-9.1-3.

Because R.I. Gen. Laws § 28-9.1-7 applies equally to both parties, however, the preceding determination that the Union is unable to seek resolution of the parties' unresolved issues by the SLRB does not end this Court's analysis. This Court must now determine the Town's ability to seek alternative remedies regarding the parties' unresolved issues. As with the Union, once the Town engaged in collective bargaining pursuant to the FFAA, the Town's available remedies were limited insofar as "the specific mechanism for resolving disputes under the FFAA is through arbitration." Lime Rock, 673 A.2d at 54.

The policy behind the passage of the Rhode Island State Labor Relations Act, R.I. Gen. Laws § 28-7-1 et seq., is the protection of employees and their ability to collectively bargain with their employers. See G.L. 1956 § 28-7-1 et seq. That statute, in pertinent part, states:

> "As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that *the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining substantially and adversely affect the interest of employees, other employers, and the public in general.*" G.L. 1956 § 28-7-2 (emphasis added).

Thus, it is typically only unions that would seek to file a claim with the SLRB against towns and not vice versa; however, either party is permitted to file such a claim with the SLRB. See G.L. 1956 § 28-7-21 (allowing charges to be brought that either "any employer or public sector employee organization" has engaged in unfair labor practices); G.L. 1956 § 28-9.1-6 ("An unfair labor practice charge may be complained of by either the employer's representative or the

bargaining agent to the state labor relations board.") Thus, it is not only the Union but also the Town that is barred from seeking a remedy with the SLRB due to the waiver of its right to pursue interest arbitration under the FFAA.

Here, in lieu of seeking a remedy with the SLRB, the Town has taken it upon itself to unilaterally change the terms and conditions of their ongoing relationship with the Union. The central legal argument by the Town is that when the Union waived interest arbitration under the FFAA, the FFAA ceased to apply and the Town could take whatever unfettered unilateral action it desired under its home rule charter.[12] This Court finds that the Town, also having the affirmative obligation of submitting unresolved issues to arbitration under R.I. Gen. Laws § 28-9.1-7, is similarly limited following the waiver of its right to pursue that remedy and cannot then pursue unilateral changes to the employer/employee relationship.

Aside from the election of remedies doctrine, the Town is incorrect in its interpretation of the FFAA. This Court is prohibited from endorsing such an argument based on "the principle that 'statutes should not be construed to achieve . . . absurd results.'" Ryan, 11 A.3d at 71 (quoting Berthiaume, 121 R.I. at 24, 397 A.2d at 892). The Town may not like the statutory

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[12] Art. I, Sec. 102 of the Town's Charter provides:

> "The town shall have all powers of local self-government and home rule and all powers possible for a town to have under the constitution of this state, together with all the implied powers necessary to carry into execution all the powers granted. The town shall have such additional powers as now or hereafter may be granted to the town by the laws of the state. All powers of the town shall be exercised in the manner prescribed by this Charter, or if not so prescribed, then in such manner as shall be provided by ordinance or resolution of the council."

However, despite this broad home rule language, this Court finds that the FFAA applies to the situation, regardless of the parties' waivers of their rights to submit unresolved issues to interest arbitration. See City of Cranston v. Hall, 116 R.I. 183, 186, 354 A.2d 415, 417 (1976) (The FFAA "applies equally to all cities and towns and is, therefore, an act of general application that supersedes a controverting home rule charter provision.").

scheme, as enacted by the Legislature; however, its options are limited to interest arbitration if the parties cannot agree on a new CBA, not dictating the terms going forward. If the Town waives its right to interest arbitration, as it did here, there must either be an agreement between the Town and the Union to go forward with interest arbitration—irrespective of the waiver—or the Town must wait until the interest arbitration opens again. In so holding, this Court notes that such a limitation is in line with the stated statutory purposes of both the FFAA and the State Labor Relations Act in protecting parties' ability to collectively bargain against the actions of employers who would seek to circumvent those rights in one way or another. See G.L. 1956 §§ 28-7-2, 28-9.1-2.

2

Which (If Any) Terms Apply

This Court has now determined that both the Union and the Town waived their ability to submit unresolved issues to interest arbitration and that such waiver limits either party's ability to seek alternative remedies—either from the SLRB or self-crafted—of those unresolved issues. However, the next question is as follows: What terms and conditions, if any, apply to the relationship between the parties following the expiration of their previous CBA? This Court now addresses that issue.

As previously discussed, the State Labor Relations Act was passed to provide employees with the ability to collectively bargain with their employers. See G.L. 1956 § 28-7-2. Accordingly, when parties fail to reach agreement on the terms of a new CBA following the expiration of a former CBA, the Rhode Island Supreme Court has stated:

> "If a dispute should arise between the parties concerning the effect of the failure to enter into a new agreement and whether or not the terms and conditions of an expired agreement should be controlling pending the negotiation and execution of a new agreement, the tribunal to make such a determination is the State Labor

> Relations Board . . . . *If the union should contend that the terms of an expired agreement should apply until a new agreement should be reached, its remedy would be to file an unfair labor practice complaint with the State Labor Relations Board pursuant to the terms of § 28–7–13.* The Superior Court would have jurisdiction only to review the decision of the State Labor Relations Board pursuant to § 42–35–15. In short, the Superior Court does not have original jurisdiction of the question to determine what, if any, agreement is in force between the committee and the union." Warwick Sch. Comm. v. Warwick Teachers' Union, Local 915, 613 A.2d 1273, 1276 (R.I. 1992) (emphasis added).

According to the language of Warwick Sch. Comm., the proper remedy "would be to file an unfair labor practice complaint with the [SLRB]." Id. This remedy can be pursued by either party. See G.L. 1956 § 28-7-21 (allowing charges to be brought that either "any employer or public sector employee organization" has engaged in unfair labor practices); G.L. 1956 § 28-9.1-6 ("An unfair labor practice charge may be complained of by either the employer's representative or the bargaining agent to the state labor relations board."); see also Coventry Fire Dist. v. R.I. State Labor Relations Bd., No. PC-2004-5950, 2005 WL 6063512 (Super. Ct. June 27, 2005) (reviewing a decision of the SLRB based on a charge against a union by the fire district). Thus, this Court does not have jurisdiction to determine "what, if any, agreement is in force between the [Town] and the [U]nion" in this case. Id.

This lack of jurisdiction requires submission of this issue to the SLRB. The parties' waiver of their right to interest arbitration, as discussed in this Decision, is not prohibitive of filing such a claim with the SLRB because the claim would be to determine "the effect of the failure to enter into a new agreement and whether or not the terms and conditions of an expired agreement should be controlling pending the negotiation and execution of a new agreement." Id. By contrast, the parties to this dispute have only waived their rights related to interest arbitration—or alternative remedies—of their "unresolved issues" that arose during their collective bargaining negotiation in late 2011, as defined by R.I. Gen. Laws § 28-9.1-3.

But what terms and conditions apply between the parties until the SLRB can make that determination and it can be enforced by the Superior Court? Can a Town unilaterally say—after the CBA has expired and while properly demanded interest arbitration is ongoing—that the firefighters will now work 30% more hours and receive a 20% cut in hourly pay? Can the Union refuse to work non-overtime shifts unless the firefighters are paid overtime pay, or tell the Town that the firefighters are taking four additional holidays this year? Of course not.

Ultimately, and hopefully quickly, the SLRB will determine whether or not the terms and conditions of the expired CBA remain in effect. However, this does not change the fact that both the Union and the Town waived the statutory interest arbitration process under the FFAA. As a result, neither the Union nor the Town has the ability to make changes to the employer/employee relationship until interest arbitration is completed and implemented. Through this Decision, the Court is not determining whether or not the terms and conditions of the prior CBA remain in effect. Rather, the Court—based on the parties' election of remedies and the terms of the FFAA—is prohibiting each side from making unilateral changes to the employer/employee relationship without proceeding through the statutory process as mandated by the FFAA.

III

Public Policy Considerations

> **"[J]udges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law."[13]**

The FFAA represents a public policy decision made by our State's elected representatives in both the Legislative and Executive branches. From a public policy perspective, it provides for the uninterrupted provision of emergency services in the State, as it denies firefighters the traditional right to strike, which is generally afforded to unionized employees. See G.L. 1956 § 28-9.1-2. On the other hand, it significantly restricts the Town by not allowing it to implement changes to wages, hours, and other terms and conditions of employment outside of compliance with the FFAA or through a CBA.[14] See id. § 28-9.1-6 (requiring the Town to bargain with the Union and memorialize any agreement in writing). In effect, without the agreement of a third party, in this case the arbitrators, many changes cannot be effectuated by the Town unilaterally. The Town and the Union are bound in perpetuity to the ultimate decision of an unelected arbitrator as to certain issues if a CBA cannot be reached.[15]

This process is markedly different than in the private sector, state employee collective bargaining, the Municipal Employees Arbitration Act,[16] and the School Teachers' Arbitration

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[13] State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 436 (quoting Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States; Hearing on S. 109-158 Before the S. Comm. on the Judiciary, 109th Cong. 66 (2005) (statement of Hon. John G. Roberts, Jr., United States Supreme Court Justice)).

[14] Interest arbitration is, in fact, the "most common public sector device for resolving bargaining disputes" where other solutions have proved ineffective. Charles B. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L. Rev. 557, 558 (1980).

[15] Id. at 557 (noting that the "intervention of outside neutrals" is often required where "parties are themselves unable to achieve a satisfactory accommodation of their competing interests").

[16] R.I. Gen. Laws §§ 28-9.4-1 et seq.

Act.[17] In other areas, the employer has the ability to implement changes to the employment relationship after proceeding through a statutory process, which may include bargaining, mediation, arbitration, or impasse procedures.

This lack of ultimate control over the economic terms of the employer/employee relationship presents a highly charged issue in tough economic times. In good economic times, parties are typically able to agree to a CBA that is advantageous to both parties in the short term. In tough economic times, when the Town believes it is only in a position to ask for concessions, it is far less likely that an agreement will be reached.

The actions of the Town in this case may seem extreme to some, as it is now effectively saying "I've had all I can stands, I can't stands no more."[18] The Town may not agree with the State that, from a public policy point of view, the prohibition of firefighter strikes is worth delegating—to unelected arbitrators—the Town's authority to enter into an agreement with its firefighters.

The only relief for the Town, other than challenging the constitutionality of the FFAA[19] or changing the state statute is for the Town to look to the Judicial branch of state government. "Judge, if you agree with our interpretation of the FFAA, we can disregard it and do whatever we believe is necessary." The problem is that the interpretation the Town asks the Court to give to the FFAA is inconsistent with the clear precedent relating to the rules of statutory construction. See Ryan, 11 A.3d at 71 ("statutes should not be construed to achieve . . . absurd

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[17] R.I. Gen. Laws §§ 28-9.3-1 et seq.

[18] Popeye (the sailor man) who occasionally proclaimed: "That's all I can stands, 'cause I can't stands no more." See http://www.youtube.com/watch?v=h97kbv4mbsc.

[19] The Rhode Island Supreme Court has previously held that the appointment of an arbitrator pursuant to the FFAA does not constitute an "unconditional delegation" of power but rather a delegation that is "confined by reasonable norms or standards" sufficient to meet this State's constitutional requirement. City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 118, 256 A.2d 206, 211 (1969).

results") (internal quotations omitted). It is not the role of the Judicial branch to issue an interpretation because the Judge may agree or disagree with the public policy implications of a statute duly passed by our State's elected representatives.[20]

If the Town believes that the FFAA is an incorrect expression of public policy, it must go back to the State's Legislative and Executive branches and amend or repeal the statute. Times change and public policy perspectives change. The FFAA became law in 1961, almost 52 years ago. There have been some amendments to the FFAA, but for the most part it remains the same. Is it a good idea to revisit a statute like this after fifty plus years? That may or may not make perfect sense to our elected leaders. However, at the end of the day, our State's elected officials are the appropriate individuals to make this public policy determination.

IV

Declaratory Relief

The Uniform Declaratory Judgments Act, R.I. Gen. Laws §§ 9-30-1 et seq. gives this Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." G.L. 1956 § 9-30-1. "The decision to grant or to deny declaratory relief under the Uniform Declaratory Judgments Act is purely discretionary." Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997) (quoting Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket Sch. Comm., 694 A.2d 727, 729 (R.I. 1997) (internal quotations omitted)). However, if granted, "[t]he declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." G.L. 1956 § 9-30-1.

[20] The Court is bound by the law and can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us. Indeed, the Rhode Island Supreme Court has stated that the judiciary's "duty [is] to determine the law, not to make the law." City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995).

Here, the parties have requested a declaration regarding the nature of their relationship and their available rights based on the surrounding circumstances, as previously discussed in this Decision. More specifically, the Town seeks declaratory relief that: (1) the SLRB is without subject matter jurisdiction over the Complaint in ULP-6088; (2) the Town's actions in implementing unilateral changes to the structure of the employer/employee relationship were lawful; (3) the arbitration panel has exclusive jurisdiction to determine the effects of said unilateral changes; (4) the Union waived its right to submit unresolved issues to interest arbitration under the FFAA; and (5) the interest arbitration panel has no jurisdiction to decide any unresolved issues existing between the Town and the Union.

This Court has already addressed these requests for declaratory relief within the context of this Decision; however, for the sake of clarity, this Court will address these requests directly. Thus, in response to the Town's five requests for declaratory relief in this case—and in light of the Court's analysis of each of the issues involved—this Court now makes the following declarations, pursuant to R.I. Gen. Laws § 9-30-1, regarding the "rights, status, and other legal relations" between the parties:

(1) The Town's actions in implementing unilateral changes to the wages, hours, and terms and conditions of employment, were unlawful, as in violation of the doctrine of election or remedies and the terms of the FFAA.

(2) This Court finds that the SLRB, and not this Court, has jurisdiction over the subject matter of the Complaint in ULP-6088 insofar as it is necessary to determine which terms and conditions have existed between the parties since the expiration of the previous CBA.

(3) The arbitration panel does not have jurisdiction to determine the effects of said unilateral changes, as those changes are invalid and must be undone.[21]

(4) Both the Union and the Town waived their rights to submit unresolved issues to interest arbitration under the FFAA, pursuant to R.I. Gen. Laws § 28-9.1-7.

(5) The interest arbitration panel has no jurisdiction to decide any unresolved issues existing between the Town and the Union because interest arbitration—pursuant to the terms of the FFAA—was waived by the parties for the fiscal year 2011-2011.

As previously stated, "such declarations shall have the force and effect of a final judgment or decree." G.L. 1956 § 9-30-1.

V

Conclusion

The Court is fully aware of the ramifications of this Decision, especially as it relates to the Town. The Town, prior to obtaining a declaratory ruling from this Court, unilaterally implemented sweeping changes to the employer/employee relationship. These changes included increasing the length of firefighters' shifts from twelve (12) to twenty-four (24) hours, increasing the number of hours each firefighter works per week, and decreasing the firefighters' hourly pay. The Town now will be required to "unring the bell" and—as to wages, hours, and other terms

[21] As noted in this Court's previous decision in C.A. No. WC-2012-0127 dated May 23, 2012, "the platoon structure of the Fire Department is a management right that may be properly asserted at the expiration of the CBA." Int'l Ass'n of Firefighters, No. WC-2012-0127, 2012 WL 1948338 (Super. Ct. May 23, 2012). Therefore, that right does not fall within scope of this declaration. By contrast, however, this Court restates its determination that the changes to wages and hours made by the Town were not "solely an effect of that management change from four (4) to three (3) platoons." Id. Accordingly, all unilateral changes to wages, hours, and other terms and conditions of employment do fall within the scope of this declaration and are, therefore, invalidated and must be undone.

and conditions of employment—go back to the state that existed pre-unilateral implementation. This Court recognizes that this process will be a large and costly undertaking. Furthermore, the Town may also be required to compensate the firefighters for the period since those unilateral changes were made.

This Court is also fully aware that the issue of unilateral implementation of changes to terms and conditions under the FFAA is one of first impression. Therefore, this Court will stay this Decision for thirty (30) days to give both the Union and the Town the opportunity to either consent to an Order implementing this Decision or request a stay, or other appropriate relief as may be appropriate from the Rhode Island Supreme Court.