STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: January 6, 2014]

TOWN OF NORTH KINGSTOWN **Plaintiff**	:	
vs.	:	**C.A. No. PC 13-4261**
RHODE ISLAND STATE LABOR RELATIONS BOARD by and through its Chairman, WALTER J. LANNI, and its Members, MARCIA B. REBACK, GERALD S. GOLDSTEIN, ELIZABETH S. DOLAN, BRUCE A. WOLPERT, FRANK J. MONTANARO, and SCOTT G. DUHAMEL; and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1651, AFL-CIO; RAYMOND FURTADO, in his official capacity as President of IAFF, Local 1651, AFL-CIO; and CHRISTOPHER BEATTIE, in his official capacity as Secretary of IAFF, Local 1651, AFL-CIO **Defendants**	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD **Plaintiff**	:	
vs.	:	**C.A. No. WM 13-0516**
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, KERRY McKAY, RICHARD WELCH, CAROL H. HUESTON, and KEVIN MALONEY **Defendants**	:	

DECISION

STERN, J. The Town of North Kingstown (Town) appeals the Rhode Island State Labor Relations Board's (Labor Board) Decision and Order of September 27, 2013 (Decision and

Order) in which the Labor Board found that the Town violated G.L. 1956 § 28-7-13(6) of the State Labor Relations Act (SLRA) by engaging in bad faith bargaining with the International Association of Firefighters, Local 1651, AFL-CIO (Union) during negotiations over a new collective bargaining agreement (CBA); that the Town violated the Fire Fighters Arbitration Act (FFAA), §§ 28-9.1-1, et seq., by unilaterally implementing a restructuring plan that affected the terms of employment of the Union's members without submitting that plan to interest arbitration; and that the Town's unilateral implementation of the restructuring plan constituted an unfair labor practice under § 28-7-13(6) and (10) of the SLRA. The Labor Board ordered the Town, inter alia, to immediately restore the firefighters' schedules, hours of work, and hourly rates of pay to the terms that existed at the expiration of the 2010-2011 CBA between the parties; to make the firefighters monetarily whole; to participate in interest arbitration for the 2011-2012 fiscal year; to restore and maintain the status quo on all terms and conditions of employment that existed in the 2010-2011 CBA; and to cease and desist from unilaterally implementing any changes to the firefighters' terms and conditions of employment. The Town argues that the Decision and Order should be overturned for a number of reasons, falling into three categories: First, the Town argues that the Labor Board lacked jurisdiction to consider the underlying labor dispute between the Town and Union. Second, the Town argues that the Labor Board's procedure was fundamentally flawed, and therefore, the Decision and Order was clearly erroneous in light of the reliable, probative, and substantial evidence on the whole record. Third, the Town argues that the Labor Board misapplied and/or disregarded the applicable law.

I

Facts and Travel

The Town and the Union have long been partners to collective bargaining pursuant to the FFAA. The most recent CBA between the parties was effective from July 1, 2007 to June 30, 2010. When the 2007-2010 CBA expired, the parties were unable to reach an agreement on a new CBA, and therefore, they submitted their unresolved issues to interest arbitration in accordance with the requirements of the FFAA.[1] The arbitration panel issued an award on August 9, 2011, which extended the terms of the expired CBA, from July 1, 2010 to June 30, 2011, albeit with certain amended terms and conditions.[2]

On February 23, 2011—before the arbitration panel issued its award—the Union wrote to the Town Manager to request collective bargaining negotiation for a new CBA that would be effective July 1, 2011. Under the FFAA,[3] the parties had ten days from the date of that request to begin collective bargaining of a successor agreement. However, the parties did not meet for the first time until October 28, 2011 to negotiate. Subsequent negotiations of a successor agreement

[1] In this particular interest arbitration, the arbitration panel considered the issue of the platoon structure.

[2] The interest arbitration panel rejected the Town's request to change the platoon structure because (1) the Town's financial situation did not warrant such a drastic departure from the current organization; (2) none of the comparable communities had proposed the same kind of shift schedule; (3) the proposed changes would bring significant change to the way that the firefighters interacted with their families because they would have been required to work longer hours; and (4) the proposed changes would have meant a drastic departure from the present schedule, thereby impacting the firefighters' lifestyles as functioning on a four day on, four day off kind of regiment. (Arbitrator Kinder, dissenting)

[3] Sec. 28-9.1-6 provides, in pertinent part, that "[i]t 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 notice from the bargaining agent of the request for a meeting for collective bargaining purposes."

took place in November and December 2011. The parties did not reach an agreement by the end of December 2011.

The Town was interested in changing the platoon structure of the fire department from four platoons to three; in changing the average working hours of the firefighters' workweek from forty-two to fifty-six; and in changing the length of the firefighters' work shifts. Having failed to reach agreement with the Union over this proposed restructuring plan, the Town sought to introduce an ordinance that would give effect to the restructuring plan, whether the Union agreed to the terms of that plan or not. The first reading of the ordinance occurred at a Town Council meeting on December 19, 2011, the day before the parties were scheduled to meet to continue negotiating. The parties did meet on December 20, 2011, and a subsequent negotiation session took place on January 28, 2012, but the parties remained in disagreement over the terms of the plan. The Town Council amended the proposed ordinance and ultimately passed it by a three-to-two vote. Thereafter, the Town notified the Union that it intended to implement the ordinance, which would take effect March 4, 2012. One final negotiation session took place on February 23, 2012, but the parties were not able to reach an agreement on the unresolved issues in this final meeting.

The Union filed suit in this Court against the Town on February 28, 2012, requesting a temporary restraining order and preliminary injunction to restrain the Town from implementing the ordinance. Through its Verified Complaint, the Union sought: (1) a declaratory judgment invalidating the ordinance; (2) a declaratory judgment that the Town had violated the FFAA and the SLRA and that the ordinance was preempted by those acts; and (3) injunctive relief. During the pendency of the consideration of the Temporary Restraining Order the Town agreed to delay the implementation of the Ordinance. This Court subsequently denied the Union's request for a

temporary restraining order and scheduled the matter for a hearing on the preliminary injunction. The ordinance took effect on March 11, 2012. The Town filed a Motion to Dismiss the Verified Complaint on March 15, 2012 under Rule 12(b)(6)—for failure to state a claim—and Rule 12(b)(1)—for lack of subject matter jurisdiction.[4]

After hearing witness testimony, reviewing documentary evidence, and entertaining briefs and oral arguments from each side, this Court on May 23, 2012 denied the Town's motion to dismiss on both the Rule 12(b)(1) and 12(b)(6) grounds. See Int'l Ass'n of Firefighters v. Town of N. Kingstown, C.A. No. WC-2012-0127, 2012 WL 1948338 (R.I. Super. Ct. May 23, 2012) (hereinafter North Kingstown I). However, this Court did find that the Town's ordinance was invalid. This Court found that the ordinance had been passed in violation of the Town Charter, and found that even if the ordinance had been properly passed, it was still 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. Since the ordinance had been invalidated, there was nothing for this Court to enjoin; therefore, the Union's request for a preliminary injunction was denied as moot. Id.

Notwithstanding this Court's decision in North Kingstown I, the Town maintained the organizational changes it had unilaterally implemented under the now-invalidated ordinance. The Town's rationale was that it had an inherent right to unilaterally change the relationship

[4] Also on March 15, 2012, the Union filed a series of grievances with the Town pursuant to the grievance procedure set forth in the expired 2007-2010 CBA. Through these grievances, the Union challenged the Town's implementation of the changes to the firefighters' workweek and organizational structure, sought to undo the changes the Town implemented through the ordinance, and requested that the Town make the affected firefighters whole. The Town filed a Motion to Stay the Arbitration of Certain Firefighter Grievances on June 26, 2012. See C.A. WM-2012-0368.

between the Town and the Union—even without an ordinance—in light of the Union's failure to request interest arbitration of unresolved issues within the time frame specified in § 28-9.1-7 of the FFAA and because the CBA had expired.[5] The Town also asserted that the Union had forfeited its right to collectively bargain over the restructuring plan because the Union had also failed to abide by the time frame specified in § 28-9.1-13 of the FFAA.

On June 14, 2012, the Union filed an unfair labor practice charge with the Labor Board in which it sought to have the Labor Board order the Town to (1) restore the status quo ante as it existed upon the expiration of the parties' collective bargaining agreement; (2) compensate the Union and its members for damages; and (3) participate in FFAA interest arbitration. Subsequently, the Labor Board issued a complaint against the Town on August 2, 2012, alleging that the Town violated state statutes when it "unilaterally changed terms and conditions of employment, including hours and wages, without bargaining to impasse and without exhausting all statutory dispute resolution mechanism under the [FFAA]." The Town filed an answer denying the charges and asserting twenty-one affirmative defenses. The Town filed a Verified Complaint and Petition to Stay Arbitration with this Court in C.A. No. WC-2012-0542 on September 5, 2012, and filed an Amended Complaint and Petition to Stay Arbitrations on September 24, 2012.

In Int'l Ass'n of Firefighters v. Town of N. Kingstown, C.A. No. WC-2012-0542, 2012 WL 6638703 (R.I. Super. Ct. Dec. 14, 2012) (hereinafter North Kingstown II), this Court held that:

> "(1) The Town's actions in implementing unilateral changes to the wages, hours, and terms and conditions of employment, were unlawful, as in

[5] It is unclear if the Town's reference to the "expired CBA" refers to the expiration of the 2007-2010 CBA, the expiration of the 2010-2011 arbitration award, or both.

violation of the doctrine of election [of] remedies and the terms of the FFAA.

"(2) This Court finds that the [Labor Board], 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 [2010]-2011." Id.

With respect to the unilateral implementation of the changes to the employer/employee relationship, this Court further ordered the Town to "unring the bell" and to "go back to the state that existed pre-unilateral implementation" of wages, hours, and other terms and conditions of employment. Id.

After unsuccessfully moving this Court for a stay of its North Kingstown II Decision on February 6, 2013, the Town appealed the Decision to the Rhode Island Supreme Court, seeking a stay of the Court's mandatory injunction to "unring the bell." See Town of N. Kingstown v. Int'l

Ass'n of Firefighters, 65 A.3d 480 (R.I. 2013). On May 10, 2013, the Supreme Court found that the Town had made sufficient showing that it would succeed on the merits of its appeal of this Court's mandatory injunction order; that the Town had "adequately demonstrated that it will suffer irreparable harm if the stay is not granted," id. at 482; that the Town had also "sufficiently demonstrated that the [U]nion will not suffer substantial harm if the stay is granted," id. at 483; and that the public interest would not be harmed by granting the stay. Id. Although acknowledging the Union's contention that firefighters under the terms of the unilateral changes were "forced to work increased hours at a decrease in hourly pay," id., the Court was impressed with the Town's assurances that if a stay were granted, "no firefighter stands to suffer a layoff and no firefighter will suffer a reduction in salary or benefits," and that, "[i]n fact, . . . each firefighter will continue receiving the 10% salary increase that went into effect on March 11, 2012." Id. The Court expressly stated that it "expect[ed] the [T]own to remain compliant with that affirmation made to this Court." Id. The Supreme Court explained that granting the Town's motion for a stay "essentially maintains the status quo between the parties since the implementation of the ordinance in March 2012." Id. Taking into account these considerations, the Court concluded that granting the Town's motion for a stay was warranted.

Contemporaneous with this Court's Decision in North Kingstown II and the Supreme Court's order granting a stay of the mandatory injunction contained in that Decision, the Labor Board held formal hearings on the allegation that the Town had committed unfair labor practices by unilaterally implementing the organizational changes on March 11, 2012, in violation of the SLRA.[6] The Labor Board heard from representatives of the Town and the Union, and afforded

[6] Formal hearings of evidence and examination of witnesses were held on September 11, 2012; September 13, 2012; September 27, 2012; November 29, 2012; January 29, 2013; March 7, 2013; April 23, 2013; and May 7, 2013. Decision and Order at 4.

both parties the opportunity to examine and cross-examine witnesses. On August 26, 2013, the Town filed a Motion for a Temporary Restraining Order against the Labor Board in Providence Superior Court, seeking to enjoin the Labor Board from issuing a decision and order on the unfair labor practice complaint on due process grounds. That court, Procaccini, J. presiding, denied the Town's motion on August 29, 2013, finding that the Labor Board had complied with all relevant procedural requirements when it conducted the hearings, and that the statutory time frame for the Labor Board's issuance of its decision had not yet expired. See Town of N. Kingstown v. R.I. Labor Relations Board, C.A. No. PC-2013-4261 (R.I. Super. Ct. Aug. 29, 2013).

The Labor Board issued its Decision and Order on the unfair labor practices complaint against the Town on September 27, 2013. The Labor Board concluded that the Town had committed unfair labor practices by failing to bargain in good faith and unilaterally implementing its restructuring plan in violation of the FFAA's requirement that the parties pursue binding arbitration. The Labor Board ordered the Town, inter alia, to "immediately restore the firefighters' schedule[s], hours of work, and hourly rate[s] of pay to that which existed upon the expiration of the 2010-2011 contract year"; to issue back pay to affected firefighters, with interest; to restore all contractually bargained-for benefits to the Union that the Town had unilaterally terminated and to make affected firefighters whole; to participate in interest arbitration for the 2011-2012 fiscal year; to "restore and then maintain the status quo on all terms and conditions of employment that existed in the 2010-2011 collective bargaining agreement"; and to cease and desist unilaterally implementing changes to Union members' terms and conditions of employment. The Town amended its complaint in C.A. No. PC-2013-4261 to appeal the Labor Board's Decision and Order, adding two counts alleging that the Labor Board

violated the Open Meetings Act with respect to its August 2, 2012 and July 31, 2013 meetings. The Town also moved to stay enforcement of the Labor Board's Decision and Order pending appeal. Also on September 30 2013, in Washington County, the Labor Board filed with the Superior Court a Petition to Enforce the Labor Board's Decision and Order pursuant to § 28-7-26 of the SLRA. See R.I. State Labor Relations Board v. Town of N. Kingstown, C.A. No. WM-2013-0516. Then, on October 1, 2013, the Superior Court, Gibney, P.J. presiding, issued an Administrative Order consolidating the instant action with PC-2013-4261, WM-2013-0516, and WM-2012-0368, referenced supra; and three other matters related to the dispute between the Town and the Union, and assigning those cases to this Court. See Administrative Order No. 2013-07. The three other cases are: WC-2012-0126; WC-2012-0127; and WM-2012-0453. The Town then filed a series of motions, including a Motion to Stay the Labor Board's Decision and Order, which was based upon the language contained in the Supreme Court's Order staying this Court's mandatory injunction to "unring the bell" in North Kingstown II on May 10, 2013. After entertaining oral argument on the Town's Motion for a Stay of the Labor Board's Decision and Order, this Court found on November 8, 2013 that there was a question raised under a fair reading of the Supreme Court's May 10, 2013 Order that the Stay ordered by the Supreme Court in its review of North Kingstown II affected the Superior Court's jurisdiction to determine and potentially order changes to the status quo between the parties. After the parties conferenced this matter with a duty justice of the Supreme Court, the Union filed a Motion with the Supreme Court to decide this issue. The Supreme Court denied the Union's request, but ordered the consolidation of the cases containing the Labor Board's Petition to Enforce and the appeal of the Labor Board's Decision and Order with the other related cases currently before the Supreme Court on appeal. This Court continued the Stay in effect until these cases could be heard on the

merits by the Superior Court, and scheduled briefing on the underlying administrative appeal and Petition to Enforce. Those two motions are presently before this Court for decision.

II

Standard of Review

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

> "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error or law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. § 42-35-15(g).

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

In reviewing an agency decision, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Sec. 42-35-15(g). This Court

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

It is well established in Rhode Island that "when a statute is free from ambiguity and expresses a clear and definite meaning, the court must accord to the words of the statute such clear and obvious import without adding to or detracting from the plain everyday meaning of the words contained in the statute." Rhode Island Fed'n of Teachers, AFT, AFL-CIO v. Sundlun, 595 A.2d 799, 802 (R.I. 1991) (citing Providence Journal Co. v. Kane, 577 A.2d 661,664 (R.I. 1990); Wilson v. Krasnoff, 560 A.2d 335, 339 (R.I.1989); State v. Calise, 478 A.2d 198, 200 (R.I.1984); Kastal v. Hickory House, Inc., 95 R.I. 366, 369, 187 A.2d 262, 264 (1963)). Administrative agencies, like the Labor Board, are creatures of statute and possess no inherent common-law powers of their own. Little v. Conflict of Interest Comm'n, 397 A.2d 884, 886-87 (R.I. 1979). Accordingly, this Court will review questions of statutory interpretation under a de

novo standard of review. Henderson v. Henderson, 818 A.2d 669, 673 (R.I. 2003) (citing Pier House Inn, Inc. v. 421 Corporation, Inc., 812 A.2d 799, 804 (R.I. 2002)). This Court will look first "to the plain and ordinary meaning of the statutory language," id. (citing Fleet Nat'l Bank v. Clark, 714 A.2d 1172, 1177 (R.I. 1998)), and "[i]f the language is clear on its face, then the plain meaning of the statute must be given effect and this Court should not look elsewhere to discern the legislative intent." Id. (citing Gilbane Co. v. Poulas, 576 A.2d 1195, 1196 (R.I. 1990) (internal quotation marks omitted)); see also Henderson, 818 A.2d at 673 (finding it "a canon of statutory construction" to presume that the General Assembly "intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause, or sentence, whenever possible"); State v. Bucci, 430 A.2d 746, 748 (R.I. 1981) (finding that "it is not the function of this court to add to or detract" from the plain and unambiguous language of a statute); State v. Feng, 421 A.2d 1258, 1264 (R.I. 1980) (Supreme Court holds that it "shall not interpret a statute to include a matter omitted unless the clear purpose of the legislation would fail without the implication" (internal citation omitted)). This Court will defer to the Labor Board's statutory interpretation and the legal conclusions derived from them even if the Labor Board's interpretation of a statute "is not the only permissible interpretation that could be applied." Pawtucket Power Associates Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993) (citing Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986)).

III

Analysis

A

The Labor Board's Jurisdiction

As an initial matter, before reaching the merits of the Town's administrative appeal, this Court considers whether or not the Labor Board had jurisdiction to hear the dispute between the parties and issue its Decision and Order in the first place. The Town offers three arguments in support of its contention that the Board lacked jurisdiction to issue the Decision and Order. First, the Town argues that the Labor Board was barred from considering the dispute between the Town and the Union under the election of remedies doctrine because the Union had pursued similar claims and sought essentially the same relief by filing grievances with the Town pursuant to the terms of the expired CBA prior to filing the unfair labor practice complaint that is the subject of the current litigation. Second, the Town contends that the Labor Board did not have jurisdiction to consider the parties' dispute because, under § 28-9.1-3(3) of the FFAA, disagreement over the implementation of the Town's restructuring plan was an "unresolved issue," which must have been resolved through interest arbitration, not through the Labor Board's adjudication of an unfair labor dispute. The Town avers that our Supreme Court's holding in Lime Rock Fire Dist. v. Rhode Island State Labor Relations Bd., 673 A.2d 51 (R.I. 1996), clearly identifies interest arbitration as the exclusive means of resolving the type of dispute at issue in this case. Finally, the Town asserts that its Charter permits the Town to implement the restructuring plan unilaterally, without having to engage in collective bargaining, and precludes the Labor Board from ordering the Town to undo the unilateral changes. The Town argues that the Charter and the FFAA are in conflict with one another and that therefore the provisions of the Charter, which purport to provide the Town with the unilateral authority to implement the unilateral changes, should prevail and control.

In considering the issue of the Labor Board's jurisdiction, this Court remains cognizant of the General Assembly's policy considerations in enacting the SLRA, §§ 28-7-1, et seq. In

implementing the SLRA, the General Assembly explicitly considered that "[i]t is in the public interest that equality of bargaining power be established and maintained." Sec. 28-7-2(a) (emphasis added). The General Assembly sought to "protect[] by law . . . the right of employees to organize and bargain collectively" in order to "remove[] certain recognized sources of industrial strife and unrest"; "encourage[] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions"; and "restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees." Sec. 28-7-2(c) (emphasis added). The SLRA directs the Labor Board—and by extension, this Court—to "liberally construe[]" the provisions of the SLRA for the accomplishment of those purposes. Sec. 28-7-2(e). See Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1133 (R.I. 1992) (finding that certain case consolidation procedures that promote "equitable, expeditious, and efficient" collective bargaining between two parties accord with the objectives of the SLRA).

1

Election of Remedies

The Town contends that the Labor Board did not have jurisdiction to consider the parties' present dispute under the election of remedies doctrine. The Town argues that when the Union filed grievances regarding the Town's implementation of the unilateral changes on March 15, 2012—pursuant to the terms of the then-expired CBA—the Union at that point had elected its remedy, and the Union was thereafter bound to pursue that remedy to its culmination and to the exclusion of all others—including filing with the Labor Board a charge that the implementation of the restructuring plan was an unfair labor practice. The Town points to the fact that the Union

filed at least eight separate grievances pursuant to the expired CBA's grievance procedure and that the grievances challenged the same alleged wrong (i.e., the implementation of the restructuring plan) and sought essentially the same remedies (i.e., the implementation of the terms of the expired CBA) as the Union now seeks through the Labor Board in the instant action. The Town contends that the remedies the Union sought through the grievance procedure were essentially the same—if not exactly the same—as the remedies it now seeks through the unfair labor practice complaint, and thus the Union is barred from pursuing the instant unfair labor practice complaint with the Labor Board.

It is well settled that "[t]he doctrine of election of remedies is one that is grounded in equity and is designed to mitigate unfairness to both parties by preventing double redress for a single wrong." State, Dep't of Envtl. Mgmt. v. State, Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002); see also Dean v. Garland, 779 A.2d 911, 915 (D.C. 2001). Thus, when a public employees' union initiates a grievance process pursuant to the terms of its CBA and ultimately abandons the process before exhausting its remedies on the grievance path, our Supreme Court has held that the election of remedies doctrine is violated and the Labor Board does not have jurisdiction to provide a remedial avenue to the union. Id. at 278-79. Our Supreme Court has also held, in Cranston Teachers' Ass'n v. Cranston Sch. Comm., 423 A.2d 69 (R.I. 1980), that when a teachers' union invokes a grievance procedure prescribed in its collective bargaining agreement with a school committee to resolve an issue of back pay, the union "is foreclosed from seeking redress in Superior Court" under the doctrine of election of remedies. Cranston Teachers' Ass'n., 423 A.2d at 71. When a plaintiff union member enters into a collectively bargained grievance process, loses, and fails to exhaust his remedies under that process by failing to proceed to arbitration, "the election of remedies doctrine prohibits that party from pursuing the

same dispute in the courts of this state." Cipolla v. Rhode Island Coll., Bd. of Governors for Higher Educ., 742 A.2d 277, 281 (R.I. 1999) (citing City of Pawtucket v. Pawtucket Lodge No. 4, Fraternal Order of Police, 545 A.2d 499, 502-03 (R.I. 1988)). The election of remedies doctrine applies to the pursuit of statutorily-prescribed administrative remedies, just as it does collectively bargained ones. Sch. Comm. of Town of N. Kingstown v. Crouch, 808 A.2d 1074, 1080 (R.I. 2002). After a party has selected its remedy, it is "barred from pursuing the matter in court until the remedy [it] initiated has been exhausted." Rhode Island Emp't Sec. Alliance, Local 401, S.E.I.U., AFL-CIO v. State, Dep't of Emp't & Training, 788 A.2d 465, 468 (R.I. 2002). The election of remedies doctrine prohibits one party from seeking a remedy through a collectively bargained administrative process and then seeking "essentially the same remedy" in a judicial forum after losing on the original remedial path. Cipolla, 742 A.2d at 281. Courts, however, must be careful to "limit the application" of the election of remedies doctrine, Coderre v. Zoning Bd. of Review of the City of Pawtucket, 105 R.I. 266, 274, 251 A.2d 397, 402 (R.I. 1969), "to cases clearly within its reason and spirit," Rhode Island Hosp. Trust Co. v. Rhode Island Covering Co., 95 R.I. 30, 36-37, 182 A.2d 438, 442 (R.I. 1962), in light of its "harsh character" and potential for "injustice and inequity." Id. (citing Adams v. Camden Safe Deposit & Trust Co., 121 N.J.L. 389, 2 A.2d 361 (N.J. 1938); First Nat'l Bank of Osakis v. Flynn, 190 Minn. 102, 250 N.W. 806 (Minn. 1933); Nat'l Transp. Co. v. Toquet, 123 Conn. 468, 196 A. 344 (Conn. 1937)). Courts are to limit the application of the doctrine "to cases where the plaintiff may be unjustly enriched[;] or the defendant has actually been misled by the plaintiff's conduct[;] or the result is otherwise inequitable[;] or res judicata can be applied," in order to prevent the doctrine from becoming "an instrument of injustice." Id. (citing Ricker v. Matthews, 94 N.H. 313, 53 A.2d 196 (N.H. 1947)).

The Union filed at least eight separate grievances against the Town in March 2012, and through these grievances has challenged the Town's implementation of the restructuring plan. Town's Formal Hearing Exs. 3, 6, 8, 9, 11, 12, 14, 15. The grievances alleged that all aspects of the restructuring plan were unlawful and sought, as remedies: first, the undoing of the unilateral changes; second, the implementation of the terms of the parties' expired CBA; and third, that the Town make affected firefighters whole. Id. These grievances do seek "essentially the same" remedies for the same alleged wrong. Cipolla, 742 A.2d at 281. However, the Town's contention that the Union elected a remedy by filing those grievances is unavailing. The instant case is distinguishable from the case law, referenced supra, in one crucial respect, which takes it out of the realm of the election of remedies doctrine's prohibitions. Unlike the cited cases from the Rhode Island Supreme Court, the grievance process the Union attempted to invoke in March 2012 was not a viable remedy that was actually available to the Union because it was not a remedy that it could successfully elect to pursue. It was a dead end. Unlike the plaintiffs in Dep't of Envtl. Mgmt, Cranston Teachers' Ass'n, or Cipolla—where the allegedly aggrieved plaintiffs were in fact able to pursue the collectively bargained grievance process—here the Union was prevented from seeking a remedy through the grievance process because there was a dispute about whether that grievance process even existed in light of the fact that the CBA had expired. The election of remedies doctrine "presupposes the knowledge of alternatives with an opportunity for choice." Eckstein v. Caldwell, 61 R.I. 142, ___, 200 A. 434, 437 (1938). The Town itself alleged that the grievance procedure did not exist by seeking from this Court a stay of the grievance procedures on the grounds that if the CBA itself did not exist, the grievance procedure—which was a component of that expired CBA—could not exist either. See Pl's Mem. In Supp. of Pet. to Stay Arbitrations of Certain Grievances, C.A. No. WM-2012-0368. The

Town cannot now in good faith argue that the grievance procedure was a remedy that was actually available to the Union, and that, therefore, the Union had elected its remedy. As the Labor Board correctly points out, the election of remedies doctrine, having its roots in equity, is designed to prevent a party from having "two bites at the same apple"—essentially to foreclose a party from relitigating an issue in a different forum, through a different process, when its initial choice has yielded an unsatisfactory result. This public policy consideration is not offended by the Labor Board's exercise of jurisdiction over the underlying unfair labor practice complaint. There is no threat here of the Union obtaining double redress for a single wrong. The Union has not attempted to pursue a remedy through the grievance procedure, beyond merely attempting to file the grievances.[7] Instead, the Union has pursued its remedy, effectively and exclusively, through the instant unfair labor practice charge with the Labor Board. This Court must carefully limit the application of the election of remedies doctrine. The Union was not unjustly enriched by filing the grievances, nor was the Town actually misled by the Union's conduct. This Court must not permit the doctrine of election of remedies to become an instrument for injustice. This case is not "clearly" within the reason and spirit of unfairness that the doctrine of justice was designed to prevent. Accordingly, the doctrine of election of remedies is not a basis for finding that the Labor Board did not have jurisdiction to consider the parties' dispute.[8]

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[7] The record shows that the grievance arbitrator has not even heard the Union's complaints.

[8]The Town's position that the Union elected its remedy is further weakened by the fact that the Union filed suit against the Town in this Court on February 28, 2012 to request a temporary restraining order and preliminary injunction to restrain the Town from implementing the ordinance—the action that culminated in North Kingstown I. The North Kingstown I action was filed fifteen days before the Union filed its grievances with the Town. If the election of remedies doctrine does apply, a strong argument could be made that it would preclude the Union from pursuing the grievances, not the current court action—for the current litigation stems from the Town unilaterally implementing the terms of the ordinance after this Court invalidated the ordinance in North Kingstown I.

"Unresolved Issues" and the FFAA

Next, the Town makes the argument that the Labor Board does not have jurisdiction to consider the merits of the unfair labor practice complaint because the unfair labor practice complaint arises out of "unresolved issues" between the Town and the Union that, under the FFAA, must be submitted to interest arbitration. The Town refers to our Supreme Court's ruling in Lime Rock as standing for the proposition that the Labor Board does not have jurisdiction to hear a complaint on an alleged unfair labor practice that arises out of "an unresolved issue that could have been discussed" during the parties' negotiation. The Town argues that according to this "clear and unambiguous mandate" by the Supreme Court, the Labor Board was without jurisdiction to consider the dispute.

Lime Rock involved a dispute between a firefighters' union and a fire district, and, like the instant matter, concerned an expired CBA between the parties and a unilateral action taken by the fire district employer. In Lime Rock, the fire district laid off all of the district's firefighters after the fire district's voters voted to withdraw funding for the firefighters' salaries at the fire district's annual financial meeting. Id., 673 A.2d at 52. Days after the fateful vote, the budget for paying the firefighters' salaries was exhausted, and the fire district laid the firefighters off. Id. In Lime Rock, the vote at the financial meeting, the exhaustion of funds, and, ultimately, the layoffs all took place within the time frame that the union and the fire district had expressly contemplated as the negotiation window for agreeing on a new collective bargaining agreement.[9] The Supreme Court found that since the status of the firefighters' employment arose

[9] Although the FFAA provides for a thirty day negotiating window from the date of the parties' first negotiation meeting to reach an agreement on a contract before "any and all unresolved issues shall be submitted to arbitration," § 28-9.1-7, the Court in Lime Rock found that the parties had expressly agreed to extend the negotiation window so that the crucial events in

during this statutory bargaining period, it was an "unresolved issue" according to the FFAA, and the parties were required to submit this unresolved issue to arbitration, under the terms of § 28-9.1-7. Id. at 54. The Court held that arbitration is the "specific mechanism" for resolving disputes under the FFAA and that the firefighters' union had ignored the FFAA mandate by seeking relief from the Labor Board instead of submitting the unresolved issue to arbitration. Id. The Court specifically found that the status of the firefighters' jobs at the point when the voters voted to eliminate their salaries from the budget "was clearly an unresolved issue" that could have been discussed at a future negotiation session—which had been previously scheduled by the parties, and would have taken place before the eventual layoffs were implemented.[10]

The instant dispute between the Union and the Town is factually distinguishable from Lime Rock, and also involves a dispute of a wholly different nature than that of the dispute at issue in that case. First, in Lime Rock, the Court found that the record was "devoid of evidence" that the parties had failed to comply with the provisions of § 28-9.1-17, which directs "either the bargaining agent or the corporate authority" to "propose a change in any contractual provision . . . within the thirty (30) day period referred to in § 28-9.1-7." Id. at 53 (citing § 28-9.1-17). In Lime Rock, since the parties were still temporally within the § 28-9.1-7 bargaining window, the fire district's "unilateral change"—i.e., its laying off of the firefighters—was assumed, by the Court, to have been a contractual provision that had been proposed in accordance with the requirements of § 28-9.1-17. Id. By contrast, in this case, the parties were well beyond the

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question took place within the statutorily prescribed negotiation period. Lime Rock, 673 A.2d at 54.

[10] The Supreme Court made a finding that the Union negotiator did not show up at that previously scheduled negotiation session after the voters cast their votes to eliminate the firefighters' salaries. Lime Rock, 673 A.2d at 54.

§ 28-9.1-7 bargaining window when the Town implemented its restructuring plan on March 11, 2012, because, unlike the parties in Lime Rock, here the Union and the Town had not expressly agreed to extend the § 28-9.1-7 bargaining window beyond the FFAA's thirty day prescription. The Town did indicate that it intended to pass an ordinance to effectuate the restructuring plan unilaterally if the Union would not accede to the Town's demands—but this ultimatum was delivered during discussions that took place well outside the § 28-9.1-7 bargaining window. Moreover, actual implementation of the restructuring plan through the ordinance—unlike the layoffs in Lime Rock—also took place at a time when the parties were no longer negotiating.[11] In Lime Rock, the changes that the fire district imposed were part of the conversation; here, the Town's implementation of the changes through the ordinance took place after the conversation was over. In fact, it was because the negotiations were over that the Town implemented the ordinance at all—it was following through on its ultimatum. Unlike in Lime Rock, here, there was no previously scheduled meeting after the ordinance was implemented for the Town and the Union to potentially discuss the changes that the Town implemented through passage of the ordinance. Thus, the Town's conduct is incompatible with the terms of § 28-9.1-7. Lime Rock makes it clear that a party can affirmatively create an unresolved issue in the waning hours of a § 28-9.1-7 negotiation window. But that case does not stand for the proposition that after that negotiation window has closed, a party may create an unresolved issue that must at that point be funneled through arbitration. Timing—and not the nature of the bottom-line "unresolved issue"—was the dispositive factor for the Supreme Court in Lime Rock.[12]

[11] Settlement discussions that may have taken place during the pendency of these proceedings do not constitute bargaining under the FFAA.

[12] Of course, although the Town threatened to implement the restructuring plan unilaterally through an ordinance as a way of gaining leverage in negotiations with the Union, the Town was barred from actually implementing such a change without bargaining with the Union over the

More importantly, what Lime Rock stands for is completely inapplicable to the case at bar and Lime Rock does not preclude the Labor Board from exercising jurisdiction over the parties' dispute. Lime Rock involved the question of whether the Labor Board has jurisdiction to hear a complaint on an unresolved issue when neither the public employer nor the firefighters' union submitted that unresolved issue to arbitration in accordance with § 28-9.1-7.[13] In this case, the Labor Board did not hear a complaint on an unresolved issue that should have been submitted to arbitration. The Labor Board was not deciding what a term of the future collective bargaining agreement between the parties should be. The Labor Board heard a complaint that the Town committed an unfair labor practice by implementing certain restructuring changes without negotiating over them with the Union, and after the negotiation window prescribed by the FFAA had closed. Having determined that the Town's conduct did amount to an unfair labor practice, the Labor Board then determined what the terms of the relationship between the Union and the Town should be, in light of the parties' waiver of the right to participate in interest arbitration (further discussed, infra), and only until the parties reached a full agreement on the terms of a successor to the expired CBA. That process was specifically prescribed by the Supreme Court in Warwick Sch. Comm. v. Warwick Teachers' Union, Local 915, 613 A.2d 1273 (R.I. 1992). In Warwick Sch. Committee, after finding that the "Superior Court does not have original

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effects that such a change would have had on the terms and conditions of the firefighters' employment—unlike the fire district in Lime Rock, which did in fact have the capability of following through on an ultimatum to terminate the firefighters' positions, because such is a public employer's inherent right of management. See discussion infra. The fact that the Town laced its ultimatum with a promise it was incapable of fulfilling—i.e., by making an empty threat against the union—weighs against it on the ledger for assessing its good faith in bargaining. See infra.

[13] The "unresolved issue" in Lime Rock was the status of the firefighters' jobs—although not the fire district's right to terminate them. As the Supreme Court noted in its decision, the firefighters had not yet been laid off following the April 20, 1992 financial meeting or by the time of the previously scheduled negotiation session on April 21, 1992—but the voters' virtual elimination of the firefighters' salaries at that meeting meant the clock was ticking.

jurisdiction of the question to determine what, if any, agreement is in force between the committee and the union," 613 A.2d at 1276, the Supreme Court held that "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." Id. This is, in fact, precisely the procedural posture of the present dispute. At heart, the instant case involves a determination of the respective rights of the Town and the Union during an interim period of negotiation over the terms of a successor to an expired collective bargaining agreement. Lime Rock did not reach the question of what happens between the parties in the vacuum that emerges after mutual waiver of the right to interest arbitration. Warwick Sch. Committee does reach that question, and answers it. This case does, too. The Town's reliance on Lime Rock for the proposition that the parties were required to submit their disputes to arbitration as an unresolved issue is without merit.

The question of the propriety of the Town's implementation of the restructuring plan was not clearly an unresolved issue that could have been resolved through interest arbitration, and the circumstances surrounding Lime Rock are sufficiently different so as to prevent that case from providing a basis for finding that the Labor Board does not have jurisdiction over the parties' dispute with regards to the unfair labor practice complaint. [14] This Court finds that Lime Rock

[14] This Court reiterates here that its decision in North Kingstown II has no binding effect on it in its contemplation of the instant matter. Irrespective of any conclusions this Court may have reached in previous adjudications between these same parties on the same issues, this Court harbors no preconceptions and considers the merits of the parties' arguments on a clean slate—even though such consideration may involve the exercise of substantially similar—or even identical—legal analysis, which might yield substantially similar—or even identical—legal conclusions.

does not preclude the Labor Board from exercising jurisdiction over the parties' dispute. This conclusion is buttressed by the Supreme Court's holding in Warwick Sch. Committee.[15]

3

Town Charter

Finally, the Town contends that the Labor Board lacks jurisdiction to issue its order directing the Town to restore the firefighters' schedule and restore and maintain the status quo on all terms and conditions of employment that existed in the expired CBA on the grounds that it alone has the authority to unilaterally restructure the composition of the fire department—i.e., the authority to both implement and undo the unilateral changes—under the terms of the Charter of the Town of North Kingstown (Charter). The Town asserts that the Charter supersedes any conflicting general law in the State of Rhode Island, including the SLRA[16] and the FFAA, insofar as those laws apply to the Town, because the Charter, having been legislatively ratified, takes precedence over any inconsistent provision of the general laws. The Town claims that the SLRA and the FFAA, which were enacted long before the effective date of the ratified Charter, are specifically modified or repealed to the extent that they are inconsistent with the Charter, pursuant to the language codified within the Charter itself and within the General Assembly's legislation ratifying the Charter.[17] Moreover, the Town claims that since the Charter is a more

[15] In fact, the Supreme Court referenced Warwick School Committee in its May 10, 2013 Order granting the Town's motion for a stay of this Court's mandatory injunction. See Town of N. Kingstown, 65 A.3d at 483. The Supreme Court cited Warwick School Committee in the context of emphasizing "that the Superior Court was without authority to affirmatively set the terms and conditions of employment," id., suggesting that, while this Court may not have had the authority to set the terms and conditions of employment, the Labor Board, pursuant to Warwick School Committee, did—through its power to adjudicate unfair labor practice disputes.

[16] Secs. 28-7-1, et seq.

[17] Sec. 1303 of the Charter calls for "all laws and ordinances or parts thereof inconsistent with its provisions shall be superseded insofar as they relate to the town." Charter art. XIII, § 1303. P.L.

"specific" statute, it controls and trumps the more general provisions of the SLRA and the FFAA if there is a conflict, pursuant to G.L. § 43-3-26.[18] The Town claims that the Town, through the Town Council and the Town Manager/Director of Public Safety, properly implemented the restructuring plan pursuant to express authority under the Charter. The Town claims that the Town Director of Public Safety exercised his authority under § 406 of the Charter to keep the terms of the ordinance in place after it was struck down by this Court in North Kingstown I, and that the Town, therefore, properly relied on the Charter's authority when it implemented the restructuring plan that is subject to the unfair labor practice complaint in the present action. The Town asserts that the Labor Board has determined, in effect, that the SLRA and FFAA conflict with the Charter by concluding that the Town is not allowed to exercise its authority under the Charter by implementing the unilateral changes, and that this determination is contrary to settled state and local laws calling for the opposite result.

The General Assembly may pass laws that impact cities and towns as long as the laws do not affect the cities' or towns' form of government. See R.I. Const. art. XIII, § 4. Under the Home Rule Amendment to the Rhode Island Constitution, "cities and towns are permitted to control local government," Town of Johnston v. Santilli, 892 A.2d 123, 128 (R.I. 2006), but a city or town charter seeking to regulate a statewide concern must be expressly validated by an act of the General Assembly. Id. (citing Royal v. Barry, 91 R.I. 24, 30, 160 A.2d 572, 575 (1960)). An expressly validated act becomes a special act that takes precedence over an inconsistent

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1980, Ch. 47 provides that "[t]his act shall take effect upon its passage and all acts and parts of acts inconsistent herewith . . . are hereby modified or repealed as the case shall be."

[18]This section, in, relevant part states that "[w]her ever a general provision shall be in conflict with a special provision relating to the same or to a similar subject, the two (2) provisions shall be construed, if possible, so that effect may be given to both; and in those cases, if effect cannot be given to both, the special provision shall prevail and shall be construed as an exception to the general provision." Sec. 43-3-26.

provision of the general laws. Local No. 799, Int'l Ass'n of Firefighters AFL-CIO v. Napolitano, 516 A.2d 1347, 1349 (R.I. 1986). If the approved charter provision clearly and unambiguously conflicts with inconsistent provision of general laws, a Court should treat the charter as a special act taking precedence over the general laws. Id. Inconsistent laws which relate to the same subject matter are in pari materia and should be considered together so they will harmonize with each other. Providence Teachers Union, Local 958, American Federation of Teachers, AFL-CIO v. Sch. Comm. of City of Providence, 108 R.I. 444, 448, 276 A.2d 762, 765(1971).

The Town's argument—that the Labor Board has concluded that the SLRA and the FFAA conflict with the Town's authority to unilaterally implement changes to the fire department's organization guaranteed to the Town through the Charter—is tautological and without merit. When the General Assembly validated the Charter through P.L. 1980, Ch. 47, the validated Charter became a special act which takes precedence over any inconsistent provision of the general laws insofar as it applies to the Town. Napolitano, 516 A.2d at 1349. This Court finds that the special act of the Charter is not in direct conflict with the FFAA or the SLRA and accordingly reads in the two acts and the Charter in pari materia. This Court concludes that it is entirely possible to construe the Charter provision in harmony with the FFAA and the SLRA, and so the Town is bound to compliance with the terms of both statutes, which require collective bargaining over the implementation of the restructuring plan.

Article III of the Charter is entitled "Town Council." Section 310 of Article III describes "Ordinance Requirements." It provides, in pertinent part, that "[a]n ordinance shall be required for any act of the council, the purpose of which is to create, abolish or reorganize any offices or departments, to authorize the borrowing of money, or to establish a fine or other penalty." Charter Art. III § 310. The FFAA requires that "any and all unresolved issues" that emerge from

negotiations between an employer and a firefighters' union "shall be submitted to arbitration" after 30 days of bargaining. Sec. 28-9.1-7. The SLRA provides for the Labor Board to determine if an employer has committed an unfair labor practice during collective bargaining negotiations. See §§ 28-7-13; 28-7-13.1. If the Labor Board does find that an employer has committed an unfair labor practice, the SLRA provides the Labor Board with substantial authority to level the playing field. Sec. 28-7-22(b). Our Supreme Court has even stated that the Labor Board may determine if "the terms and conditions of an expired agreement should be controlling" after a collective bargaining agreement has expired, but before the parties have agreed on a successor. Warwick Sch. Comm., 613 A.2d at 1276. The language of § 310 does not clearly and unambiguously conflict with the FFAA or the SLRA, and it is entirely possible to construe this provision of the Charter in harmony with both statutes. Section 28-9.1-7 takes effect specifically in situations when the parties to a collective bargaining arrangement reach a sticking point on a mandatory issue of bargaining during collective bargaining negotiations over a new contract. The Charter applies more generally—i.e., whenever a Town seeks "to . . . reorganize any offices or departments." Charter Art. III § 310. While the Charter expressly provides the Town with the inherent rights of management that our Supreme Court has recognized public employers must have to formulate and implement policies that go to the essence of the employers' mission as a public entity, North Providence School Committee v. North Providence of Federation of Teachers, Local 920, 945 A.2d 339, 346 (R.I. 2008), the FFAA provides parties with the formula to follow in the event that the parties are unable to reach agreement on a mandatory subject of bargaining. Similarly, the SLRA does not dictate to the Town or any other public employer what may or may not be reorganized as a matter of inherent rights of management—it merely provides a means of disentangling the parties to collective bargaining from the unfair consequences of an

unfair labor practice committed during negotiations. Thus, reading § 310 in pari materia with the SLRA and the FFAA, this Court concludes that this section of the Charter does not preempt the relevant provisions of the FFAA or the SLRA.

Similar reasoning applies to the analysis of the Charter's Sections 406 and 408. Article IV of the Charter is entitled "Town Officers." Section 406 of Article IV describes "Department Organization," and provides that "[t]he head of any department or agency appointed by the manager may organize his/her department and make such assignment of powers and duties as he/she may consider advisable unless otherwise provided by Charter or ordinance." Charter Art. IV § 406 (emphasis added). Section 408 of Article IV is entitled "Rearrangements." Section 408 provides that, "[t]he council by ordinance may create, abolish, combine and arrange the several offices, departments and agencies of the town other than those established by the provisions of this Charter." Charter Art. IV, § 408. Again, neither of these provisions of the Charter are clearly or unambiguously in conflict with any of the provisions of the FFAA or the SLRA. It is entirely possible to construe this provision in harmony with both statutes, because again, the Charter expressly provides the Town with the necessary rights of management that are necessary to advance its mission as a public entity, and the SLRA and the FFAA deal with unfair labor practices and unresolved issues, respectively, that materialize in the course of collective bargaining. Accordingly, reading §§ 406 and 408 in pari materia with the FFAA and the SLRA, this Court concludes that the provisions of the Charter do not supersede the requirements of the Acts. The Town's contention that these provisions of the Charter prevails over the FFAA or the SLRA and thereby permits it to unilaterally implement the restructuring plan is unavailing.

B

The Labor Board's Compliance With the SLRA's Procedural Requirements

1

The Labor Board Complied With the SLRA's Service Requirement

The Town next argues that the Labor Board's Decision and Order is contrary to law because it was issued on unlawful procedure and in excess of the Labor Board's statutory authority because the Labor Board failed to issue a lawful complaint against the Town as required by § 28-7-21 of the SLRA. The Town contends that the Labor Board thereby deprived itself of jurisdiction to consider the unfair labor practice dispute between the parties, and so its Decision and Order should be overturned. The Town argues that the Labor Board did not abide by the voting, reporting, and recording requirements of the Open Meetings Act, §§ 42-46-1, et seq., and so the Labor Board could not adjudicate an unfair labor practice complaint because the complaint was not validly issued.

Section 28-7-21 of the SLRA provides, in pertinent part, that "[w]henever a charge has been made that any employer or public sector employee organization . . . has engaged in or is engaging in any unfair labor practice, the [Labor Board] shall have the power to issue and cause to be served upon the party a complaint stating those charges in that respect and containing a notice of a hearing before the board at a place fixed in the complaint, to be held not less than seven (7) days after the serving of the complaint." Sec. 28-7-21. That same section further states that "[a]ny complaint may be amended by the board or its agent conducting the hearing at any time prior to the issuance of an order based on the complaint," id., and that "[t]he person complained of shall have the right to file an answer to the original or amended complaint within five (5) days after the service of the original or amended complaint and to appear in person or otherwise to give testimony at the place and time set in the complaint." Id.

There is no doubt that the Labor Board satisfied the SLRA's notice and service requirement, as prescribed by § 28-7-21. The situation here is not one where the Labor Board arguably made an affirmative decision to not pursue an unfair labor practice complaint against the Town and subsequently decided to issue a complaint, to the Town's prejudice. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Nor is this a situation where litigation on the underlying complaint never even got off the ground because of the Town's contention that it did not have adequate notice to begin with. NLRB v. H.P. Townsend Mfg. Co., 101 F.3d 2992 (2d Cir. 1996). Clearly, the Town has had ample notice of the unfair labor practice complaint issued against it by the Labor Board, and has been afforded ample opportunity to litigate the underlying issue—and has taken advantage of it. The Town's contention that the Labor Board is without jurisdiction for failing to abide by § 28-7-21 is unavailing.

2

The Labor Board Complied With the SLRA's Informal Hearing Requirement

Next, the Town complains that the Labor Board failed by its "plain and obvious duty" under § 28-7-9(b)(5) of the SLRA to conduct an informal hearing on the unfair labor practice complaint before calling for a formal hearing and issuing its Decision and Order. The Town argues that because the Labor Board "skipped" a statutory prerequisite before issuing its Decision and Order, the issuance of that Decision and Order was an ultra vires act that must now be reversed and vacated by this Court.

Section 28-7-9(b)(5) of the SLRA provides that:

> "All charges of unfair labor practices and petitions for unit classification shall be informally heard by the board within thirty (30) days upon receipt of the charges. Within sixty (60) days of the charges or petition the board shall hold a formal

> hearing. A final decision shall be rendered by the board within sixty (60) days after the hearing on the charges or petition is completed and a transcript of the hearing is received by the board." Sec. 28-7-9(b)(5).

In State Dept. of Corrections v. Rhode Island State Labor Relations Bd., 703 A.2d 1095 (R.I. 1997), our Supreme Court found that the Labor Board is "commanded by mandatory language to hold first an informal and then a formal hearing" in cases involving unfair labor practices complaints. 703 A.2d at 1097. In that case, the Supreme Court quashed the judgment of the Superior Court and remanded the case so the Labor Board could hold § 28-7-9(b)(5) hearings because the Labor Board "held neither an informal nor formal hearing" prior to issuing its decision and order. Id. (emphasis added). Here, there is no doubt that the Labor Board conducted formal hearings, and it is clear, too, that an "informal" hearing took place, in satisfaction of § 28-7-9(b)(5). An "informal" hearing, by definition, is a hearing that is "[n]ot done or performed in accordance with normal forms or procedures." Black's Law Dictionary (9th ed. 2009). Pursuant to § 28-7-9(b)(5), the Rhode Island State Labor Relations Board General Rules and Regulations provides, in pertinent part, that "[u]pon the filing of any Unfair Labor Practice Charge, the parties shall be notified in writing, by the Board's Administrator or its Agent, of either an informal oral hearing process or the request for submission of written statements in lieu of the informal oral hearing process, to be determined by the Board's Administrator or its Agent." 16–020–001 R.I.Code R. § 7.02.1(a). In other words, the informal hearing process, per the Labor Boards rules and regulations, can be satisfied either through an oral hearing process or through the submission of written statements by the parties to the Labor Board. Clearly, the Labor Board has satisfied the informal hearing requirement because the Town had ample opportunity to present its version of facts by the time the formal hearing began

in September 2012. In fact, on August 10, 2012, the Town filed an answer to the Labor Board's Unfair Labor Practice Complaint through which it denied the charges that it had committed an unfair labor practice and asserted twenty-one affirmative defenses. Certainly providing a party the opportunity to submit a statement detailing its own point of view on an issue in contention satisfies the dictionary definition of an "informal hearing" and conforms to Rule 7.02.1.

After carefully reviewing the record and considering the Town's arguments, this Court finds that the Labor Board did comply with the SLRA's § 28-7-9(b)(5) requirement for an informal hearing. Having found that the Labor Board complied with the procedural requirements of the SLRA, this Court concludes that the Town's jurisdictional arguments on this ground are without merit.

C

The Board's Application of the Law

The Court has disposed of the Town's concern that the Labor Board did not have jurisdiction to consider the dispute and the Town's contention that the Labor Board failed to abide by the SLRA's procedural requirements. The Court now turns its attention to the Town's argument that the Labor Board's conclusion—that the Town committed an unfair labor practice by unilaterally implementing the restructuring plan without pursuing the matter in arbitration—is not sufficiently supported by competent evidence.

The crux of the Town's argument—that its unilateral implementation of the restructuring plan was not an unfair labor practice—is based on a theory that the parties had negotiated, in good faith, to "impasse" on the issue of a new CBA by March 11, 2012—the date that the Town implemented the restructuring plan unilaterally through the ordinance. The Town maintains that despite its engagement in good faith bargaining over the course of nearly four months and eight

separate negotiation sessions, the parties were at impasse over the "critical issue" of the Town's proposed restructuring plan—which included implementation of a fifty-six hour workweek and reconfiguring the number of firefighter platoons. The Town claims the failure to reach an agreement on this "critical issue" led to a breakdown in the negotiations between the two sides, and that its unilateral implementation of the restructuring plan conformed to the impasse-breaking procedures prescribed by labor law and the FFAA. The Town submits that the Labor Board's contrary conclusion—that the unilateral changes were not legally permissible, and thus an unfair labor practice—is contrary to settled law and therefore clearly erroneous. The Town argues that, "[t]here are not many principles more firmly embedded in federal labor law than an employer's right to unilaterally implement impasse," and that impasse occurred, in this case—and occurs under operation of the FFAA generally—when the Union and the Town failed to reach an agreement on a contract within the thirty day negotiation window prescribed in § 29-9.1-7 of the FFAA. The Town claims that by implementing the restructuring plan unilaterally, the Town was properly applying the "impasse-breaking procedures" called for under § 29-9.1-7. The Town also asserts that under our Supreme Court precedent—in particular, the Court's holdings in Lime Rock, 673 A.2d at 51; Town of Burrillville, 921 A.2d at 113; and Tiverton v. Fraternal Order of Police Lodge 23, 118 R.I. 160, 372 A.2d 1273 (R.I. 1977)—the Town was permitted to unilaterally implement the restructuring plan after it and the Union waived or forfeited their respective rights to engage in the statutory dispute resolution mechanism—i.e., binding arbitration—that the FFAA calls for.

1

Reaching Impasse Was Impossible Under the FFAA

In the private sector—and in public sector situations where binding interest arbitration mechanisms are not statutorily prescribed for resolving both financial and nonfinancial disputes—an employer does have the ability to implement unilateral changes after the parties have reached a legitimate impasse. See McLean v. NLRB, 333 F.2d 84 (6th Cir. 1964); Mass. Org. of State Scientists and Eng'rs v. Mass. Labor Relations Comm'n, 452 N.E.2d 1117 (1983); Detroit Police Officers Ass'n v. City of Detroit, 214 N.W.2d 803 (1974). Generally, under federal law, when a bona fide impasse is reached after negotiations, an employer may make unilateral changes from its best previous proposal to the union. McLean, 333 F.2d at 87 (citing NLRB v. United States Sonics Corp., 312 F.2d 610, 615 (C.A. 1. 1963)); see also Beverly Farm Foundation, Inc. v. NLRB, 144 F.3d 1048, 1052 (7th Cir. 1998) (finding that, as long as "the changes have been previously offered to the union during bargaining," an employer "is free to implement changes in employment terms unilaterally"). "Impasse," as defined in Black's Law Dictionary, is the "point in labor negotiations at which agreement cannot be reached." Black's Law Dictionary (9th ed. 2009) (emphasis added). Reaching impasse "signifie[s] that the parties have exhausted (at least temporarily) the avenues of bargaining," and so '"termination of bargaining at that point cannot be thought to demonstrate a cast of mind against reaching agreement."' Id. (quoting Robert A. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 447). The touchstone for the existence of impasse at the time an employer implements unilateral changes is the absence of any real possibility that continuing negotiations would lead to a fruitful result. Beverly Farm Foundation, 144 F.3d at 1052. To get to impasse, the parties must have bargained in good faith, United Packinghouse, Food, and Allied Workers Intern. Union, AFL-CIO v. NLRB, 416 F.2d 1126, 1131 (7th Cir. 1998), and a party may not insist on the inclusion of a non-mandatory subject of bargaining in the negotiations. First Nat'l

Maint. Corp. v. NLRB, 452 U.S. 666, 683 (1981). Once negotiation partners reach impasse, unilateral implementation by the employer of its last best offer to the union is recognized as a potentially effective way of resuscitating collective bargaining proceedings that have, at least temporarily, stalled despite the good faith intentions of the parties. See, e.g., NLRB v. Crompton-Highland Mills, 337 U.S. 217, 224-225 (1949); Bi-Rite Foods, Inc., 147 NLRB 59, 65 (1964).

Lawful "impasse," however, is not a relationship in which a "corporate authority" and a firefighters' union can possibly find themselves under the terms of the FFAA.[19] An unsuccessful negotiation between firefighters' unions and public employers might yield, at most, "unresolved issues," 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." Sec. 28-9.1-3(c) (emphasis added). The FFAA contemplates the swift and expedient resolution of these "unresolved issues" through mandatory binding arbitration.[20] The FFAA was developed as a means of avoiding entrenchment on substantive issues and the concomitant, unilateral self-help remedies of impasse-breaking afforded to parties under more conventional labor-management relationships in the private sector and in public sector regimes that do not statutorily prescribe binding interest arbitration as an exclusive dispute resolution mechanism. The General Assembly adopted mandatory arbitration as the exclusive means of

[19] The word "impasse" does not appear anywhere in the text of the FFAA. Secs. 28-9.1-1, et seq.

[20] See §§ 28-9.1-7 (prescribing for a thirty day period for negotiators to meet; identify unresolved issues; and submit them to arbitration); 28-9.1-8 (providing for a 15-day period for establishing the composition of the arbitration board that is to resolve the parties' unresolved issues); 28-9.1-9 (calling for an expedited schedule for hearing testimony on all unresolved issues upon appointment of the arbitration chairperson and issuing a decision within ten days of the hearing's conclusion); 28-9.1-10 (establishing a set of factors to be considered by the board in rendering "a prompt, peaceful, and just settlement"); 28-9.1-12 (instituting a 30-day period following the conclusion of arbitration for the parties to implement the new collective bargaining contract based on the arbitration decision and the parties' independent bilateral accords).

settling unresolved issues between firefighters and their employers, recognizing the importance of firefighters and other emergency services personnel in ensuring public safety. The General Assembly understood the dangerous impact that a prolonged negotiation and a resort to self-help measures—such as lockouts, slowdowns, or strikes—would potentially have on the public welfare.[21] See § 28-9.1-2. The FFAA, by its very nature—but without claiming that its nature is the best nature[22]—protects firefighters' "well-recognized rights of labor" in acknowledgement and consideration of their inability to strike or engage in other self-help remedies. Sec. 28-9.1-2(b), (c).

Although an employer's right to implement proposed changes unilaterally upon reaching impasse in negotiations with a union in collective bargaining might be "firmly embedded" according to the general principles of labor law, these principles are inapplicable here under the existence of the FFAA, and the Town's reliance on them is inapposite. Reaching impasse with the Union was legally impossible: § 28-9.1-7 is the circuit breaker for potential impasse. "Any and all" unresolved issues will ultimately be resolved because § 28-9.1-7 demands that they "shall be" submitted to arbitration for resolution. Id. The FFAA simply forecloses the possibility that an unresolved issue will ever graduate to intractable status—or even that it will remain "unresolved" for very long. It follows that the Labor Board had sufficient competent evidence to conclude that the Town's unilateral implementation of the restructuring plan was an unfair labor

[21] This Court recognizes that, in practice, the time it actually takes from the time of filing for interest arbitration until Decision is much longer than the time frame provided for under the FFAA. The parties' remedy to deal with that issue is to seek relief before this Court to compel compliance with the statutory time frames. It is not, however, a license to resort to self-help remedies such as unilateral implementation or a strike.

[22] Section 28-9.1-2(c) provides that"[t]he 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 employer." Sec. 28-9.1-2(c).

practice because the FFAA forecloses the possibility of unilateral implementation as a legally cognizable outcome. It is not possible that a "point in labor negotiations at which agreement cannot be reached" will ever come to pass: before any such point occurs, the FFAA demands that the parties submit their unresolved issues to arbitration where, by definition, an agreement will be "reached," because the arbitration panel will decide it.

2

The Parties' Waiver of Arbitration Did Not Revive the Possibility of Impasse

The Town maintains that under the FFAA, the right to engage in interest arbitration to settle unresolved issues is a permissive right that the General Assembly has appropriated to each side of a labor dispute through statute, and it being a permissive, affirmative right, it is one capable of being exhausted, waived, or forfeited by the parties at their election or at their failure to exercise it. The Town suggests that forfeiture or waiver is what has taken place in this case, and with the escape hatch—binding arbitration—having been forfeited or waived by the parties, the relationship between the parties had, by March 11, 2012, devolved to an unabrogated, conventional union-management relationship in which resort to unilateral impasse-breaking procedures is permissible, and in which the Town's unilateral implementation of its restructuring plan is allowed.

The Union did not forfeit the right to collectively bargain on the issue of the restructuring plan by failing to abide by the timeframe of § 28-9.1-13. The FFAA provides that, "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." Sec. 28-9.1-13. Although clearly the Union did not provide the Town with the required notice, the Union's defective request to engage in collective bargaining was not fatal to its ability to collectively bargain "[b]ecause the parties initiated collective bargaining negotiations for purposes of entering into a new agreement." Lime Rock, 673 A.2d at 53. Lack of timely notice means only that "the [T]own was not obliged to negotiate" on issues falling under the statute. Town of Tiverton, 118 R.I. 160 at 166, 372 A.2d at 1276. It

does not mean that such negotiations were prohibited from taking place. The Town, in this case, actually engaged in collective bargaining negotiations with the Union on a wide range of issues—after receiving the Union's defective § 28-9.1-13 notice. Our Supreme Court has made it clear 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. Although the Town did not have the obligation to collectively bargain with the Union on account of the defective notice, the Town actually engaged in such negotiations, and so, clearly, it was not deprived of "sufficient time to consider matters affecting town finances." The Union, therefore, did not forfeit its ability to engage in collective bargaining because the Town became bound by the FFAA's collective bargaining provisions once it actually engaged in collective bargaining negotiations with the Union. The Town's assertion that the FFAA's prescriptions were inapplicable on the grounds that the Union forfeited the right to insist on them through defective notice is unavailing.

Having established that the Union did not forfeit its right to enter into collective bargaining with the Town with respect to collective bargaining over a new CBA, the Court next considers the position that the parties "waived" the right to arbitrate their dispute under the FFAA and the Town's contention that the organizational changes it implemented unilaterally became detached from the FFAA's mandate that unresolved issues be submitted to binding arbitration for ultimate resolution. The FFAA provides that "any and all" unresolved issues "shall be" submitted to arbitration within the thirty days of the date of the parties' first negotiation session. Sec. 28-9.1-7. It is not disputed that neither the Town nor the Union complied with the FFAA's procedural requirement. However, Rhode Island case law does not support the Town's contention that the parties waived the FFAA's protections—and, by

extension, that Rhode Island citizens forfeited the public safety guarantees attendant in FFAA public policy—when the parties failed to timely submit to arbitration their unresolved issues as required by § 28-9.1-7, because Rhode Island case law does not contemplate that the protections of the parties under the FFAA become non-applicable or void if not exercised. The Union did waive its right to participate in interest arbitration on unresolved issues—and so did the Town. Under § 28-9.1-7, the responsibility for submitting unresolved issues to an arbitrator is borne equally by both sides of the bargaining table: if one party is derelict in timely submitting the unresolved issues to an arbitration panel, the other party may still submit them in satisfaction of § 28-9.1-7. If both sides fail to abide by the requirements of the statute by failing to submit the issues to arbitration, arbitration may not proceed, because the unresolved issues have not been submitted. But, it is incorrect to conclude that the arbitration process—indeed, the FFAA itself—has somehow become a nullity. Neither the Town nor the Union have the ability to override the existence of a legislative act by choosing to ignore it, or neglecting to abide by it, or refusing to participate in it, or forfeiting the right to engage in it. Indeed, the General Assembly contemplated the FFAA not only as a way of leveling the playing field in collective bargaining for firefighters who did not have the right to strike, but also as a way of protecting the public welfare—the health and safety interests of Rhode Islanders—from the adverse effects of a slowdown, strike, or lockout by emergency services providers. Neither the Town nor the Union has the power to undermine that crucial public policy consideration by triggering the FFAA's inapplicability. The FFAA—and § 28-9.1-7, specifically—continue to exist, and the parties continue to be bound by it. The parties may have waived the remedy that the FFAA provides. But the remedy the FFAA provides—binding arbitration—remains the "specific mechanism" for resolving disputes. Lime Rock, 673 A.2d at 54. The parties must either wait for the arbitration

window to reopen, or they must agree, independently, to resubmit the matter to arbitration. They may have a choice, when the arbitration window reopens, to again waive the right to interest arbitration—and kick the can further down the road. But they do not have a choice to call it "impasse." They do not have the choice to perpetually avoid coming to an agreement. That is the nature of the FFAA. As the General Assembly has pointed out, this policy choice is not a proclamation that mandatory binding arbitration is "superior" to traditional means of collective bargaining. Sec. 28-9.1-2(c). But, it is a policy choice necessary to protect the welfare and safety of Rhode Islanders. The Town's contention that the FFAA contemplates some kind of "opt out" is wholly without merit.[23]

3

Failure to Bargain in Good Faith and Negotiation Over Mandatory Subjects of Negotiation

Assuming, arguendo, that impasse was a legally conceivable outcome when the parties waived or forfeited their right to arbitration by failing to submit the unresolved issues to an arbitrator pursuant to § 28-9.1-7, the Town is incorrect in asserting that the two requisite

[23] The FFAA states that "[t]he 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." Sec. 28-9.1-2. In consideration of that disability, the FFAA provides firefighters with a remedy—interest arbitration—as a way of resolving disputes in collective bargaining. By implementing the FFAA, the General Assembly sought to compensate firefighters for their disability from striking by shutting off the corresponding, unilateral self-help remedies traditionally afforded to management agents in collective bargaining—i.e., the right to lock out the firefighters, and the right to implement unilaterally their last best offer after reaching impasse. The Town's argument that the Town and the Union, through inaction, rendered the FFAA's mandatory arbitration provision inapplicable suggests that the firefighters' disability from striking or otherwise slowing down was also, somehow, obliterated. Such a result—achievable through the mutual discretion of the bargaining agents for the parties, strikes this Court as perverse; in direct conflict with the nature, policy and spirit of the FFAA's passage; and a threat to the public welfare that the General Assembly sought to avert by passing the FFAA in the first place.

elements of impasse—bargaining in good faith and negotiation over mandatory subjects of bargaining—were satisfied. The evidence does not allow a conclusion that the parties negotiated in good faith, and even if there was good faith negotiation, bargaining over the budget is not a mandatory issue that would allow for impasse.

i

The Town Did Not Bargain in Good Faith

No valid impasse occurs when a deadlock is caused by one of the parties' failure to bargain in good faith. United Packinghouse, 416 F.2d at 1131. While "[t]here is no per se test of good faith," id. (citing Warehousemen & Mail Order Employees v. NLRB Warehousemen & Mail Order Employees, Local No. 743 v. NLRB, 302 F.2d 865, 868 (1962) (internal quotation marks omitted)), the question of whether a party has bargained in good faith is based on the totality of the party's conduct throughout the negotiations. Dayson DeCourcy, 162 Conn. at 591. The failure to come to an agreement on a mandatory subject of bargaining is not in and of itself proof that a party or both parties have failed to negotiate in good faith, as long as "the insistence is genuinely and sincerely held, [and] it is not merely window dressing." NLRB v. Herman Sausage Co., F.2d 223, 231 (5th Cir. 1960); see also Pease Co. v. NLRB, 666 F.2d 1044, 1049 (6th Cir. 1981) (court finds that "[a] lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from conduct clearly showing an intent not to enter into a contract of any nature." (Internal citation omitted)). Good faith bargaining "must be more than a willingness to enter upon a sterile discussion of union[-]management differences." United Packinghouse, 416 F.2d at 1131 (citing NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952) (internal quotation marks omitted)). The Labor Board's Decision and Order is supported by competent evidence that the

Town failed to bargain in good faith. Accordingly, a necessary condition for impasse to occur was not satisfied by March 11, 2012, and the possibility of the Town implementing the restructuring plan unilaterally—even if such implementation was sanctioned or contemplated by the General Assembly in its passage of the FFAA—was foreclosed.

In United Packinghouse, the D.C. Court of Appeals upheld the NLRB's finding of unfair labor practices against a cotton-processing company, finding that the company's "bargaining posture" could be interpreted "as a take-it-or-leave-it stance," and that "the holiday and wage increases [proposed by the company] can well be said to have been calculated to undermine the union's bargaining position." United Packinghouse, 416 F.2d at 1131. Competent evidence exists in this case that supports the Labor Board's conclusion that the Town did not negotiate in good faith for the same reason that the cotton-processing company in United Packinghouse was found to have not negotiated in good faith. At the arbitration hearing, for example, the Town Manager testified that he believed that the Town and the Union were at impasse over the restructuring plan from the very first negotiation meeting—evidence that the Labor Board legitimately interpreted to mean that "there was no intent to engage in good faith bargaining," and that "[s]uch a mindset is more indicative of 'surface bargaining' in a pre-determined effort to get to impasse." Labor Board Decision at 16. The Labor Board also considered evidence that the Town's initial offer during negotiations was "the very structure" that the previous arbitration panel had rejected when it issued the arbitration award for the 2010-2011 fiscal year—in part after finding that the Town's financial situation did not warrant "such a drastic departure" from the current organization, and that none of the comparable communities had proposed the same kind of shift schedule. Labor Board Decision at 5-6. The Labor Board also cited evidence that the employer continued to seek a 56-hour workweek even at the third negotiation session

between the parties, on December 5, 2011—even though the Union had made concessions in work hours and financial terms. Labor Board Decision at 6. The Labor Board referred to evidence in the record that the Town "delivered an ultimatum," on December 19, 2011—the day before the December 20, 2011 negotiation session—indicating that it was prepared to pass the ordinance if the Union did not concede; that it was not willing to bargain over the issue of the 56-hour workweek with the Union; and that it would only bargain over the effects of the Town's implementation of the unilateral plan, not the issue of its implementation. Labor Board Decision at 6-7. And the Labor Board also found, in the record, that there were no documents to show why the Town needed $1.2 million in structural savings, just that there were documents showing that the Town wanted them. Labor Decision at 15-16. This evidence, taken together, and considered in the "totality" of the Town's conduct during the course of the negotiations, Dayson DeCourcy, 162 Conn. at 591, supports the Labor Board's conclusion that the Town did not negotiate in good faith. The record contains competent evidence supporting the Labor Board's conclusion that the Town's bargaining posture was a "take-it-or-leave-it stance," United Packinghouse, 416 F.2d at 1131, and warrants this Court upholding the finding of bad faith bargaining by the Town. There being no good faith bargaining, there could be no lawful impasse, and the Town unilaterally implementing the restructuring plan must have been, necessarily, unlawful.

ii

The Restructuring Plan Was Not a Mandatory Subject of Bargaining

Even accepting that the Town and the Union had engaged in sufficiently serious bargaining over the issue of the restructuring plan, a party cannot insist on the inclusion of a non-mandatory subject to the point of creating a bargaining impasse. NLRB v. Davison, 318 F.2d

550, 554 (4th Cir. 1963); see also NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (U.S. Supreme Court holding that "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory bargaining"). Such conduct is, "in substance, a refusal to bargain about subjects that are within the scope of mandatory bargaining," id., and under Rhode Island Law, would be violative of the State Labor Relations Act under § 28-7-13(6). Sec. 28-7-13(6) (it is an unfair labor practice for an employer to "[r]efuse to bargain collectively with the representatives of employees, subject to the provisions of §§ 28-7-14—28-7-19"). Parties to a collective bargaining negotiation have a duty to negotiate mandatory subjects of bargaining, but "[a]s to other matters . . . each party is free to bargain or not to bargain." Wooster, 356 US at 349. Parties may genuinely reach impasse on mandatory subjects of bargaining because "adamant insistence on a bargaining position" with respect to a mandatory subject of bargaining "is not necessarily a refusal to bargain in good faith." Town of New Canaan v. Conn. State Bd. of Labor Relations, 160 Conn. 285, 292 (1971). [24] By contrast, a party may never reach impasse on a non-mandatory subject of bargaining: adamant insistence on a non-mandatory subject of bargaining is, by definition, failure to negotiate in good faith—because the parties are not "mandated" to negotiate over it in the first place. Id.; see also NLRB v. Yutana Barge Lines, Inc., 315 F.2d 524, 528 (9th

[24] For the purposes of this analysis, this Court considers the two requisite elements of impasse—good faith bargaining over mandatory subjects of negotiation—as separate and distinct, but in practice, the elements go hand-in-hand with each other and are coextensive. It may be arguable, for example, that a party's insistence on debating a non-mandatory subject of bargaining to "impasse" is in itself a bad-faith negotiation tactic, obliterating any possibility that the parties might reach legal impasse and foreclosing any opportunity of unilateral implementation, even though the parties may very well have negotiated over that non-mandatory subject in a serious, genuine, and well-considered manner, though failing to reach agreement. See Town of New Canaan, 160 Conn. 285, 292 (1971); NLRB v. Yutana Barge Lines, Inc., 315 F.2d 528.

Cir. 1963). The "parties are free to bargain on these voluntary subjects; but neither party may insist on them to impasse." Davison, 218 F.2d at 554.

The question of whether a subject of bargaining is mandatory or non-mandatory turns on whether the matter settles a term or condition of employment. Wooster, 356 US at 350.[25] Mandatory subjects of bargaining include, "wages, hours, and other terms and conditions of employment," Holly Farms Corp. v. NLRB, 48 F.3d 1360, 1364 (4th Cir. 1995) (internal quotations omitted), and an employer also has an obligation "to bargain about the 'effects' on employees of a management decision that is not itself subject to the bargaining obligation." Id. (citing First National Maintenance Corp, 452 U.S. at 679-682; NLRB v. Litton Financial Printing Div., 893 F.2d 1128, 1133-34 (9th Cir. 1990)).[26] In this case, the Labor Board's Decision and Order that the Town committed an unfair labor practice is supported by competent evidence in the record that the subject matter of the negotiation was non-mandatory, thereby making it legally impossible for the parties to negotiate to impasse on this issue. Since it was impossible for the parties to reach impasse after bargaining about the restructuring plan, it was therefore impermissible for the Town to implement the restructuring plan unilaterally. Even if the General Assembly did not foreclose the possibility of impasse through passage of the FFAA, and even

[25] In Wooster, the U.S. Supreme Court found that a so-called "balloting" system proposed by the employer during good-faith collective bargaining agreement negotiations was not a subject within the phrase "wages, hours, and other terms and conditions of employment" which define mandatory bargaining because the system related only to the procedure to be followed by the employees among themselves before their representative could call for a strike or refuse a final offer. Wooster, 356 U.S. at 349-350. Since the proposed system did not settle a term or condition of employment, but rather dealt only with relations between the employees and their unions, it could not be a mandatory subject of negotiation, impasse was not a lawful outcome, and the employer could not subsequently impose the change unilaterally. Id.

[26] Negotiation over the "effects" of the Town's unilateral implementation of the restructuring plan is not at issue here, because the Labor Board found that the Town was not able to make the management decision to implement the restructuring plan in the first place, thereby mooting any ability or obligation to negotiate with the Union over the effects of that management decision.

assuming that what the parties did bargain over was done in good faith, the restructuring plan was not a mandatory subject of bargaining, and foreclosing the possibility of impasse, which itself forecloses the possibility of unilateral implementation.

Non-mandatory subjects of bargaining may, or may not be bargained for by both parties, but at any rate, their permissive nature renders it impossible for the parties to reach impasse on them. An employer like the Town may unilaterally implement a term or condition that is a non-mandatory subject of bargaining, but if this unilaterally implemented term or condition has any effect on the terms and conditions of the union workers' employment, the employer is required to collectively bargain on those effects before it can implement any changes. Those effects themselves become the mandatory subjects of bargaining, which in an FFAA case must be submitted to binding arbitration pursuant to § 28-9.1-7, if agreement on them is not reached.

D

The Terms of the Labor Board's Order Comply with the Provisions of the SLRA

Section 28-7-20 of the SLRA empowers and directs the Labor Board "to prevent any employer, or public sector employee organization provided in § 28-7-13.1, from engaging in any unfair labor practice." Sec. 28-7-20. The SLRA vests the Labor Board with the authority to, inter alia, order employers to cease and desist from such practices; reinstate with or without pay any employee whose work has ceased or whose return to work has been delayed or prevented as a result of any unfair labor practice; and, to take such further affirmative or other action as will effectuate the policies of the SLRA. Sec. 28-7-22. The Labor Board is also authorized under the SLRA to petition the Superior Court for process to enforce its orders against recalcitrant or noncomplying employers. Sec. 28-7-26; see also Paton v. Poirier, 109 R.I. 401, 406, 286 A.2d 243, 245 (R.I. 1972).

Having concluded that the Town committed an unfair labor practice by implementing the organizational changes to the fire department without submitting the matter to binding arbitration, the Labor Board issued an 8-point order at the conclusion of its September 27, 2013 Decision and Order.[27] After analyzing the terms of the Labor Board's Order, this Court is

[27] The Order, in full, reads as follows:

> "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

satisfied that the order—except for two directives—satisfies the requirements of § 28-7-22 and that the order—except for those same two elements—complies with the General Assembly's directive to the Labor Board that it prevent a public employer, such as the Town, "from engaging in any unfair labor practice." Sec. 28-7-20.

This Court is vested with the power to "reverse or modify" the Labor Board's decision under specific circumstances. Sec. 42-35-15. The Labor Board is a creature of statute and possesses no inherent common-law powers of its own. Little v. Conflict of Interest Comm'n, 397 A.2d 884, 886-7 (R.I. 1979). The Labor Board does not have the authority under § 28-7-22 to issue an order contingent on the occurrence of a judicial happenstance. Accordingly, Paragraph 5 of the Labor Board's Order—directing the Town to participate in interest arbitration for the 2011-12 fiscal year only "if and when the Rhode Island Supreme Court overturns [this Court's] decision finding a waiver of the Union's right to interest arbitration for the 2011-2012 year" in North Kingstown II—does not comply with § 28-7-22 of the SLRA and therefore falls outside of the Labor Board's § 28-7-20 authority. The Labor Board also lacked the authority to issue Paragraph 7 of its order, and therefore this paragraph must also be vacated. The directive contained in Paragraph 7 is duplicitous with the content of Paragraph 6 of the Order: restoration and maintenance of the status quo "on all terms and conditions of employment that existed in the 2010-2011 collective bargaining agreement" necessarily precludes the unilateral implementation of "changes to the wages, rates of pay, hours, working conditions, or other terms and conditions of employment of the employees represented by the Union. In all other respects, however, the Labor Board's Order complies with the requirements of the law.

Kingstown and any other employee represented by the Union in this case. Decision and Order at 50.

E

The Labor Board's Order Restoring the Terms and Conditions of the Expired CBA is Supported by Law

Having decided that the Town had committed an unfair labor practice by unilaterally implementing the restructuring plan without bargaining with the Union, the Labor Board ordered the Town, inter alia, 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" and to "restore and then maintain the status quo on all terms and conditions of employment that existed in the 2010-2011 collective bargaining agreement." Decision and Order at 50. The Labor Board had the jurisdiction to make this determination pursuant to the Supreme Court's holding in Warwick School Committee—which calls for a union to file an unfair labor complaint with the Labor Board should it contend "that the terms of an expired agreement should apply until a new agreement should be reached." 613 A.2d at 1276. The Labor Board's order is also supported by the Supreme Court's Order staying this Court's mandatory injunction to "unring the bell" in North Kingstown II, in which the Supreme Court referred to Warwick School Committee in finding that this Court "was without authority to affirmatively set the terms and conditions of employment." 65 A.3d at 483.

Valid public policy considerations support the terms of the Labor Board's Order, and the Labor Board's Order is consistent with its own long-held position on the unilateral implementation of terms and conditions of employment in the public sector, which itself has sufficient basis in the law. The Labor Board alluded to these public policy considerations—which were announced in Rhode Island State Labor Relations Board v. Warwick School

Committee, No. ULP-4647 (RISLRB Nov. 10, 1992)—in its Decision and Order,[28] and found "no reason to depart the position" it took in that case. Decision and Order at 22. The Labor Board concluded, as this Court does, per the discussion, supra, that the FFAA "do[es] 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."

F

The Labor Board's Petition to Enforce

The Labor Board is expressly authorized under the SLRA to seek judicial aid in the enforcement of its orders by filing a petition with the Superior Court. Sec. 28-7-26; see also

[28] In that case, the Labor Board concluded 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 RIGL § 28-7-13 to bargain collectively." ULP-4647 Decision at 10. In so holding, the Labor Board adopted the approach followed in New York State according to Triborough Bridge and Tunnel Authority, 5 PERB 3064 (1972), which rejected application of the federal model for dealing with private sector disputes to the public sector. Policy considerations for delaying—if not eliminating—the point at which a public employer may take unilateral actions have been cited by courts in a majority of jurisdictions across the country. See, e.g., Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48, 393 A.2d 218, 230 (1978) (finding that a Board of Education's unilateral withholding of a teachers' union's scheduled salary increments were unlawful because they "frustrate[d] the statutory objective of establishing working conditions through bargaining" (internal quotation omitted)); Local 1467, Int'l Ass'n of Firefighters, AFL-CIO v. City of Portage, 134 Mich. App. 466, 473, 352 N.W.2d 284, 288 (1984) (finding that a prohibition on unilateral action by public employers "serves to foster labor peace"); Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n, 456 N.E.2d 709, 712 (Ind. 1983) (citing the reasonable expectation of employees "in the continuance of existing terms and conditions of their employment"; an incentive for employers to "to prolong negotiations past the expiration of the existing agreement to gain bargaining leverage" in the absence of a prohibition against unilateral action; and the maintenance of "balance in the bargaining power of the parties [and] the flexibility necessary to reach agreement in the give and take inherent in the collective bargaining process" as reasons for upholding a finding that a school board violated a fair bargaining statute); Appeal of Cumberland Valley Sch. Dist. from Final Order of Pa. Labor Relations Bd. in Case No. Pera-M-6966-C, 483 Pa. 134, 142, 394 A.2d 946, 950 (1978) (finding that a school district's unilateral actions in cancelling employees' fringe benefits was at odds with its obligation to bargain in good faith).

Rhode Island State Labor Relations Bd. v. Valley Falls Fire Dist., 505 A.2d 1170, 1172 (R.I. 1986); Barrington Sch. Committee, 120 R.I. 470 at 474, 388 A.2d at 1372. A proceeding for a Petition to Enforce is instituted "to enforce the board's orders after the contested administrative proceedings are concluded," and does not in itself "seek review" of the Labor Board's decision. Valley Falls Fire Dist., 505 A.2d at 1172-73. Under the SLRA, the Labor Board is authorized "to bring a separate equitable proceeding in order to obtain judicial assistance to enforce its orders." Id. at 1173.

As this Court has now upheld the Labor Board's Decision and Order against the Town's APA challenge, the Court finds that the Labor Board's Petition to Enforce its Decision and Order is now rightfully before this Court for consideration. The Petition to Enforce adheres to the relevant sections of the SLRA and the applicable case law.

This Court is vested with the power to "reverse or modify" the Labor Board's decision under specific circumstances. Sec. 42-35-15. The Labor Board is a creature of statute and possesses no inherent common-law powers of its own. Little v. Conflict of Interest Comm'n, 397 A.2d 884, 886-7 (R.I. 1979). The Labor Board does not have the authority under the SLRA to issue a ruling contingent on the occurrence of a judicial happenstance. Accordingly, Paragraph 5 of the Labor Board's Order—directing the Town to participate in interest arbitration for the 2011-12 fiscal year only "if and when the Rhode Island Supreme Court overturns [this Court's] decision finding a waiver of the Union's right to interest arbitration for the 2011-2012 year" in North Kingstown II—is vacated. Paragraph 7 of the Labor Board's Order is also vacated. This Court finds that the directive contained in this paragraph is duplicitous with the content of Paragraph 6 of the Order: restoration and maintenance of the status quo "on all terms and conditions of employment that existed in the 2010-2011 collective bargaining agreement"

necessarily precludes the unilateral implementation of "changes to the wages, rates of pay, hours, working conditions, or other terms and conditions of employment of the employees represented by the Union. In all other respects, the Petition to Enforce is hereby granted.

IV

Stay of this Court's Decision and Order

After the State Labor Relations Board issued its Decision and Order on September 27, 2013, the Town sought a Temporary Restraining Order from this Court on a number of grounds, including a potential conflict with the May 10, 2013 Order of the Supreme Court to maintain the "status quo" during the pendency of the appeal of North Kingstown II. This Court, after hearing from the parties, found that under a fair reading of the Supreme Court's May 10, 2013 Order the Superior Court's jurisdiction to potentially issue an order changing the status quo between the parties may be affected. Based upon this finding, this Court entered a Stay of the Labor Board'Order. Subsequent to the Stay Order the parties met in conference with a duty justice of the Supreme Court. The Union then filed a motion requesting that the Supreme Court review this issue. The Motion was denied by the Supreme Court. However, the Supreme Court did order that these cases be consolidated with the related cases currently pending before the Supreme Court.

This Court recognizes that if this Court allows this Decision and Order(s) to enter without a stay, it will effectively place the Town and the Union in a position where they must either violate this Court's Order or potentially violate the Supreme Court's Order. This situation is not appropriate for the same reasoning this Court found during the Temporary Restraining Order hearing. As a result this Court hereby stays this Decision and Order until such time as the Supreme Court has the opportunity to review whether or not this stay should remain in effect or

be vacated by the Court. This Court reiterates that the Stay is based on the limited and important issue of a potential conflict with the Supreme Court's Order in North Kingstown II.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of North Kingstown v. Rhode Island State Labor Relations Board, et al.
CASE NO:	PC 13-4261; WM 13-0516
COURT:	Kent County Superior Court
DATE DECISION FILED:	January 6, 2014
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Daniel K. Kinder, Esq.; Timothy C. Cavazza, Esq.
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