STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 10, 2018]

TOWN OF NORTH PROVIDENCE	:	
	:	
V.	:	**C.A. No. PC-2018-0008**
	:	
ELIZABETH IAFRATE and	:	
RHODE ISLAND STATE LABOR	:	
RELATIONS BOARD	:	

DECISION

LICHT, J. The Town of North Providence (Town), has appealed the Decision of the Rhode Island State Labor Relations Board (Board), finding that the Town violated G.L. 1956 § 28-7-13(10) by retaliating against Elizabeth Iafrate (Iafrate) for her history of filing grievances. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Before addressing the incident which is the subject matter of this appeal, it is helpful to set forth Iafrate's employment history with the Town.

Iafrate began her career with the Town in 1988, as a Clerk 1 in the Board of Canvassers. (Hr'g Tr. 15:8-11, Apr. 25, 2017.) She was a member of Rhode Island Laborers District Council, Local 1033 (Union), the union for employees of the Town. (Decision Findings of Fact, at 3.) The relationship between the Town and the Union was governed by a collective bargaining agreement (CBA), which provided the procedure, including arbitration, for grievances which arise from "the application, meaning or interpretation of the express provisions of this agreement." (CBA Joint Ex. 1, at 23.)

Iafrate transferred into the position of senior clerk to the Town Clerk's office "in the mid-90s," and was later promoted to deputy town clerk. *Id.* at 15:16-19. In 2007, Iafrate transferred to the planning and zoning department, where she served as senior clerk and chief zoning clerk. *Id.* at 16:3-7.

On June 10, 2013, Iafrate received a memorandum from Mayor Charles Lombardi (Lombardi or Mayor) informing her that she was being transferred to the Finance Department. (Hr'g Tr. 16:12-15, Apr. 25, 2017). Iafrate filed a grievance through the Union regarding this transfer. *Id.* at 16:19-17:1. Before the grievance could be arbitrated, Iafrate's position in the finance department was eliminated. *Id.* at 17:1-2. Iafrate again filed a grievance through the union protesting the elimination of her position, and sought to exercise "bumping rights." *Id.* at 17:19-18:1-6. The grievances were consolidated and arbitrated together. *Id.* at 18:13-15. The arbitrator decided against allowing Iafrate to exercise her bumping rights, and Iafrate was returned to the position of Clerk 3 in the zoning and finance department. *Id.* at 18:16-21. Iafrate also filed a grievance challenging the denial of her application for a housing inspector position, which was summarily arbitrated and denied. (Hr'g Tr. 40:16-24, Apr. 25, 2017; Joint Ex. 9.)

In 2014, Iafrate took an extended period of sick leave from her position in the zoning and finance department. (Hr'g Tr. 18:20-24, Apr. 25, 2017.) Iafrate was scheduled to return to work on June 2; however, on May 29, 2014, Iafrate was informed that she would be transferred to the tax assessor's office and to report to that office on her return to work. *Id.* at 19:3-10. Iafrate assumed the role of Clerk 3 in the tax assessor's office, a position which she continues to occupy today. *Id.* at 19:8-12.

In 2016, Iafrate filed two grievances regarding the fact that she believed she was doing the work of a deputy tax assessor. (Hr'g Tr. 20:8-21, Apr. 25, 2017; *see* Joint Exs. 11, 12.) One of the grievances was scheduled to be arbitrated on January 12, 2017. *Id.* at 21:1-9; Joint Ex. 6.

On November 2, 2016, Thomas Kane[1] (Kane) sent an email to all the employees in the tax assessor's office, including Iafrate, regarding a new policy regarding transfers of trusts. (Hr'g Tr. 265:10-15, June 8, 2017.) Kane then came out into the office to discuss the policy. *Id.* Iafrate vocally disagreed with the policy, telling Kane that it contradicted a state statute. *Id.* at 265:15-266:14. According to Iafrate, later that afternoon, Kane called her into his office and told her she was "a little strong with him," and that she should not have disagreed with him in front of the other staff. *Id.* at 266:14-24. Kane placed an employee warning regarding the incident in Iafrate's disciplinary file. *Id.* at 267:1-10; *see* Town's Ex. 2. According to Iafrate, she did not learn that Kane had written an employee warning regarding the incident until her attorney accessed her disciplinary records in the instant proceedings before the Board. *Id.*

On the afternoon of December 9, 2017, Iafrate received a call from a Providence resident, Allyn Reynolds. (Hr'g Tr. 88:17-24, Apr. 25, 2017.) Kane overheard the call from his office, which was across from Iafrate's workspace. *Id.* at 88:17-21. Kane walked over to Iafrate and asked her to transfer the call to him because "her tone was elevated, she sounded frustrated," the call "wasn't progressing to a solution" and "really need[ed] to be handled differently." *Id.* at 88:21-22; 89:17-22. It is undisputed that Kane did not talk to Iafrate about her conduct on the

[1] Kane was hired as tax assessor in October 2016 and was Iafrate's direct supervisor. (Hr'g Tr. 22:12-14; 85:22-86:2, Apr. 25, 2017.)

call with Reynolds on December 9, 2016, or at any time prior to January 11, 2017. (Hr'g Tr. 27:14-24, Apr. 25, 2017.)

Kane spoke with Reynolds and was able to resolve her issue.[2] While speaking with Kane, Reynolds expressed a desire to write a letter about her experience on the call with Iafrate. (Hr'g Tr. 95:2-6, Apr. 25, 2017.) At some time during the week following the call, Kane spoke with Mayor Charles Lombardi and Richard Fossa,[3] the Mayor's Chief of Staff, about the December 9, 2016 call to alert him "about the potential issue" and that Reynolds would be writing a letter (Hr'g Tr. 98:19-24, April 25, 2017; Hr'g Tr. 141-143, May 30, 2017).

Reynolds drafted her letter on December 12, 2016. (Respondent's Ex. 1.) Reynolds had planned to mail the letter, but was unable to do so because of difficulties with a chronic back condition. (Hr'g Tr. 103:6-19, Apr. 25, 2017.) Kane offered to pick up the letter from her, and did so on December 15, 2016, delivering it to the Mayor the same day. *Id.* Upon reading the letter, the Mayor was "very concerned" by the contents of the letter, and wanted to know the details, expressing to Kane that there would be some type of discipline. (Hr'g Tr. 124:20-24; 127:17-128:3, May 30, 2017.)

The Mayor wrote a response to Reynolds. (Hr'g Tr. 149:3-10, May 30, 2017.) *See also* Hr'g Tr. 255:20-22, June 8, 2017. They ultimately spoke on the phone and the Mayor apologized to Reynolds for how she was treated. *Id.* at 256:1-257:8. He asked if she would "come forth and

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[2] Reynolds had called to contest an excise tax bill she had received from the Town. (Hr'g Tr. 92-95, Apr. 25, 2017.) Her property was situated in Providence, but was on the border of Providence and the Town. (Hr'g Tr. 246:2-8, June 8, 2017.) Kane established that Reynolds was not a resident of the Town and abated her tax bill. *Id.* at 250:1-4.

[3] Fossa also served as the Town's "acting personnel director." (Hr'g Tr. 60:22-24, Apr. 25, 2017.)

take responsibility" for her letter and testify in hearings, and Reynolds agreed to do so. *Id.* at 257:18-258:3.

The week before Christmas, Fossa called Ronald Coia,[4] business manager for the Union, and described Iafrate's conduct on the December 9, 2017 call with Reynolds and Reynolds' subsequent letter. Fossa told Coia that they were considering suspension or termination, but that any disciplinary action would be deferred until after the holidays. Apparently, Coia agreed with this approach. (Hr'g Tr. 183:17-23, May 30, 2017; 208:13-15, May 30, 2017.) It is undisputed that neither Kane nor Fossa spoke with Iafrate regarding her conduct on the call with Reynolds until January 11. (Hr'g Tr. 66:22-67:2, Apr. 25, 2017.)

On January 11, 2017, Iafrate returned from a break at 3:30 P.M. and was called into Kane's office with Fossa who handed her a letter informing her that she had a "pre-suspension hearing" scheduled for the next day at 10 A.M. because of an incident with a "customer" in December. *Id.* at 23-25. According to Iafrate, she was unaware what customer or which phone call to which Fossa was referring. *Id.* at 25:19-26:1.

The next morning, Mayor Lombardi, Fossa, Lynda Labbadia (a payroll employee), and Iafrate attended the pre-suspension hearing. Coia represented Iafrate and Vincent Ragosta represented the Town. *Id.* at 28:1-7. After the completion of the pre-suspension hearing around

[4] Kane also spoke with Coia around December 15, returning Coia's call about an unrelated matter, and told him about the complaint against Iafrate. (Hr'g Tr. 128:17-24, May 30, 2017.) During this call, Kane declined to comment upon the possibility of discipline against Iafrate because he "had only been employed by the Town for maybe two months or so," and didn't think it was "in [his] jurisdiction to recommend disciplinary action." *Id.* at 129:11-17.

noon, the group participated in the previously scheduled arbitration hearing of Iafrate's pending grievance. *Id.* at 28:10-20.

Around 3:30 P.M., Fossa came to Iafrate's office and handed her notice that she would be suspended for five days without pay, beginning the following day. *See* Joint Ex. 3; Hr'g Tr. 29:1-7, Apr. 25, 2017. While delivering the notice, Fossa told Iafrate "we could have dropped this, you know, if you got rid of the [deputy tax assessor grievance] . . . if that went [away] and the other grievance went away, you would have came [sic] to work tomorrow." *Id.* at 52:1-5.[5]

The following day, Iafrate grieved the suspension through the Union. (Joint Ex. 9; Hr'g Tr. 52:14-21, Apr. 25, 2017.) On January 23, 2017, Iafrate filed an unfair labor practice charge before the Board asserting that the Town timed the January 12, 2017 pre-suspension hearing in order to attempt to "extort her into dropping her grievances in exchange for more lenient treatment." (Decision at 1-2.) The Board summarily issued a Complaint in the matter on March 1, 2017, alleging that the Town violated R.I.G.L. § 28-7-13(8). (Decision at 2.)

Hearings before the Board occurred on April 25, 2017; May 30, 2017; and June 8, 2017. Iafrate testified on her own behalf on April 25, 2017. (Hr'g Tr. 14:21-23, Apr. 25, 2017.) Thomas Kane, Mayor Charles Lombardi, Lynda Labbadia, and Ronald Coia testified on May 30, 2017. On June 8, 2017, the Board heard testimony from Frank Bursie and Allyn Reynolds, and allowed Iafrate to be recalled as a witness.

[5] At the hearing, Fossa initially denied that he had made any such comment; however, when counsel for Iafrate told Fossa that there was a tape recording of the conversation, Fossa stated "I might have said that." *Id.* at 69:8-17.

Noting the distinct differences in testimony regarding the December 9, 2016 call between Iafrate and Reynolds, the Board first assessed the credibility of the witnesses at the hearing. (Decision at 10.) The Board found that while Reynolds had spoken to Iafrate and Kane "became involved" in the phone call, there was no evidence in the record supporting Reynolds' testimony that Iafrate had called Reynolds a "deadbeat" and stated "people have to pay their bills." *Id.* at 10-11. Specifically, the Board noted that Kane did not testify that Reynolds shared Iafrate's inflammatory alleged comments with him, and Reynolds did not include those statements in the letter. *Id.* The Board also found that Reynolds was not a credible witness on the basis that her testimony about how the December 9, 2017 call occurred differed from her account in the letter and from the accounts of witnesses. *Id.*

The Board further noted that it was "troubled" by the fact that the Town issued its pre-suspension letter to Iafrate just one day before her pre-disciplinary hearing was to be held. (Decision at 12.) More specifically, the Board noted that the Town presented no evidence that it had sought to investigate the claims in the letter between December 15, 2016 and January 11, 2017. *Id.* at 12-13. Additionally, the Board did not credit the Town's assertion that it waited until after the holidays to prosecute the matter, given the seriousness of the charge and that Kane had previously addressed a similar issue with Iafrate immediately after that incident had occurred. *Id.* at 13. Accordingly, the Board found that the "the timing of the disciplinary action was designed to intimidate and pressure Ms. Iafrate into dropping her arbitration, scheduled for the same day as her pre-disciplinary hearing," *Id.* at 13, and concluded that the Town violated R.I.G.L. § 28-7-13(10) in doing so. *Id.* at 16. The Board ordered the Town to cease and desist from retaliating

against Iafrate, expunge her personnel record of the January 12, 2017 suspension, and reinstate her wages for the days of her suspension. *Id.* The Town timely filed an appeal to this Court.

II

Standard of Review

Pursuant to § 42-35-15 of the Rhode Island Administrative Procedures Act, "[a]ny person, . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by this Court. Sec. 42-35-15. This Court "may affirm the decision of the agency or remand the case for further proceedings," and may reverse or modify an agency's decision if:

> "[S]ubstantial 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 must not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," and will defer to an agency's factual determinations as long as they are supported by legally competent evidence on the record. Sec. 42-35-15(g); *Town of Burrillville v. R.I. State Labor Relations Bd.*, 921 A.2d 113, 118 (R.I. 2007). Legally competent evidence is defined as '"such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance."' *R.I. Temps, Inc. v. Dep't of Labor and Training, Bd. of Review*, 749 A.2d 1121,

1125 (R.I. 2000) (quoting *Ctr. for Behavioral Health, R.I., Inc. v. Barros*, 710 A.2d 680, 684 (R.I. 1998)).

In contrast to an agency's findings of fact, an agency's determinations of law, including issues of statutory interpretation, "are not binding on the reviewing court." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008). Instead, this Court reviews the record *de novo* in order "to determine what the law is and its applicability to the facts." *Id.* The Court will afford deference to an agency's reasonable construction of an ambiguous statute if that statute's administration and enforcement have been delegated to the agency. *Labor Ready Ne., Inc. v. McConaghy*, 849 A.2d 340, 345-46 (R.I. 2004). However, an agency's interpretation "will not be considered controlling by reviewing courts if the construction is clearly erroneous or unauthorized." *See Flather v. Norberg*, 119 R.I. 276, 283 n.3, 377 A.2d 225, 229 (1977).

On issues of witness credibility, the Superior Court "is not privileged to assess the credibility of witnesses and may not substitute its judgment for that of the [agency] concerning the weight of the evidence on questions of fact." *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991). Thus, the Court must sustain the decision of the agency unless it finds that the decision was '"clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."' *Id.* (quoting § 42-35-15(g)(5)).

III

Analysis

On appeal to this Court, the Town first argues that the Board improperly failed to defer to Iafrate's earlier-filed grievance and that the Board's adjudication of Iafrate's unfair labor practice charge was barred by the doctrine of election of remedies. Additionally, the Town asserts that the Board's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the record. The Court will address each of the Town's arguments in turn.

A

Election of Remedies

The Town argues that the Board improperly failed to defer to the grievance Iafrate filed regarding this matter on January 13, 2017. Because of the long-established tradition of deference to arbitration and because both actions seek essentially the same relief, the Town avers that the Board's decision should be vacated so the Union's grievance may proceed.

In response to the Town, both Iafrate and the Board[6] assert that the Town failed to properly raise the election of remedies issue before the Board and as such, waived the issue. The Town responds that it asked the Board to defer in its opening statement and in the conclusion portion of its post-hearing memorandum filed with the Board. While acknowledging that the Town asked the Board to defer to the grievance arbitration, both the Board and Iafrate contend that the election of remedies doctrine is an affirmative defense not raised by the Town before the Board. *See Town of Burrillville*, 921 A.2d at 119. The record shows that the Town did not even

[6] Iafrate and the Board each filed separate briefs through counsel.

file an answer to the Board's Amended Complaint. (Decision at 2), and it certainly made no motion to dismiss.

This Court concurs with the Respondents that a meek request to defer does not constitute an affirmative defense and as such the election of remedies doctrine should not be available to the Town. Nevertheless, notwithstanding the Town's procedural failure, the Court will address the merits of the issue. For the reasons to follow, the Court finds that the election of remedies doctrine does not apply in this case even if it had been properly raised.

First of all, the parties in the arbitration and the charge before the Board were not the same. The Union is the party to the arbitration while the Union is not a party in this matter as Iafrate filed her charge with the Board "after unsuccessfully requesting assistance from Local 1033." (Decision at 3.)

The Town relies on *State, Dep't of Envtl. Mgmt. (DEM) v. State, Labor Relations Bd.*, 799 A.2d 274 (R.I. 2002), for the proposition that the Board must defer to a plaintiff's earlier elected choice of remedy, even if the remedies sought from the later filed charges were different.

In *DEM*, Council 94, the union for the Department of Environmental Management's employees, filed a grievance asserting the Department had violated the terms of the collective bargaining agreement between the parties by posting a part-time position. DEM denied the grievance on the grounds that there were no funds available for a full-time position. Council 94 subsequently appealed to the Office of Labor Relations, which denied its appeal. The union then filed an unfair labor practice charge with the Board, which found in favor of the union. The agency petitioned for certiorari after a Superior Court ruling upholding the Board's decision.

Ruling in favor of the agency, the Court held "Counsel 94 resorted to the grievance process only to abandon this avenue after two unfavorable decisions but before it had fully exhausted its contract remedies through arbitration." Id. at 278. The Court cited favorably *Cipolla v. Rhode Island Coll., Bd. of Governors for Higher Educ.*, 742 A.2d 277, 281 (R.I. 1999) which stated "when one party to a CBA attempts to take advantage of the grievance procedure and loses, the election of remedies doctrine prohibits that party from pursuing the same dispute in the courts of this state." Iafrate is not a party to a CBA. Only the Union is. The case at bar also differs significantly from *DEM* in an important procedural respect: unlike Council 94's grievance, Iafrate's grievance has yet to be arbitrated or resolved in any way. Iafrate did not seek alternative redress after receiving an unfavorable decision from a finder of fact; rather, she filed an unfair labor practice charge with the Board after the Union refused to file the charge on her behalf. She filed with the Board on January 23, 2017, a mere ten days after the actions she complained about occurred and before the Union filed the request for arbitration on February 7, 2017. The Town's reliance on *DEM* is misplaced.

Under the State Labor Relations Act, the Board is empowered

> "to prevent any employer, or public sector employee organization as provided in § 28-7-13.1, from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation, or conciliation in labor disputes that have been or may be established by law." Sec. 28-7-20.

Unlike the contract dispute in *DEM*, Iafrate's charge was squarely within the Board's broad jurisdiction. *See N.L.R.B. v. Bhd. of Ry., Airline & Steamship Clerks*, 498 F.2d 1105, 1109 (5th Cir. 1974) which states "the mere presence of an arbitration clause in a bargaining

agreement does not foreclose the Board's jurisdiction and consideration of an unfair labor practice which also constitutes a breach of the agreement."

Our Supreme Court has previously placed emphasis on the procedural posture of a pending grievance in ascertaining whether that grievance constitutes an election of remedies. In *Weeks v. 735 Putnam Pike Operations, LLC*, 85 A.3d 1147 (R.I. 2014),[7] the Court considered whether a clause in a collective bargaining agreement requiring the arbitration of allegations of discrimination precluded an employee from filing a discrimination suit in court. Relying on the reasoning of federal Title VII jurisprudence, the Court found that absent an explicit waiver in the CBA, an arbitration clause should not be interpreted to waive the employee's right to sue under Rhode Island anti-discrimination law, even if the employee has filed a grievance through the CBA's mechanism for redress. In support of its reasoning, the Court noted that while *Weeks* had filed a grievance prior to bringing her case in Superior Court, she had availed herself of only the most preliminary steps of the grievance procedure. The union in *DEM*, however, progressed much further.

This Court finds the posture of Iafrate's grievance to be more similar to that of *Weeks* than *DEM*. Iafrate grieved the suspension on January 13, 2017, the day after the predisciplinary hearing and receipt of the letter confirming her suspension. *See* Notice of Five (5) Day Suspension Letter Joint Ex. 3, Jan. 12, 2017; Grievance Joint Ex. 9, Jan. 13, 2017. Given that the

[7] The Town argues that *Weeks* is inapplicable to this matter as Iafrate has not alleged discrimination under RICRA or FEPA, and urges this Court that the matter is far more similar to that of *Cipolla*, 742 A.2d at 281, in which our Supreme Court held that an employee alleging a violation of the collective bargaining agreement who elects the remedy of the grievance process is barred from filing a claim in Superior Court. Unlike *Cipolla*, however, Iafrate's charge before the Board does not draw its substance directly from the CBA.

grievance and arbitration clause in the CBA requires the Union to submit a grievance "[n]ot later than ten working (10) days after the event giving rise to the grievance," it is not surprising that an aggrieved employee would move quickly to file a grievance in order to preserve her rights under the CBA. (CBA Joint Ex. 1, at 23.) Although the Union pressed Iafrate's grievance to arbitration and an arbitration was scheduled, there is no evidence in the record to suggest Iafrate participated in those preliminary steps or that her grievance was ever arbitrated. *See* Grievance Joint Ex. 9, Jan. 13, 2017; Demand for Arbitration Joint Ex. 10, Feb. 7, 2017.

Moreover, there is substantial precedent from federal labor jurisprudence[8] to suggest that a labor board need not defer to a previously filed grievance, even when such a grievance has already been arbitrated. Like the Board, the National Labor Relations Board (NLRB) has a similarly broad statutory mandate to adjudicate charges of unfair labor practices. *N.L.R.B. v. Walt Disney Prods.*, 146 F.2d 44, 48 (9th Cir. 1944), *cert. denied*, 324 U.S. 877, 65 S. Ct. 1025 (mem.), 89 L.Ed. 1429 (1945) ("[b]y 29 U.S.C.A. § 160(a) the [National Labor Relations Act] authorizes the Board 'to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce.'") Under this broad delegation of power, the NLRB has subsequently refused to defer to arbitration proceedings awards in cases where the union's and employee's interests conflicted, and where a charging employee had alleged unlawful reprisal or retaliation by the employer when attempting to assert a protected right. Given that Iafrate has

[8] Our Supreme Court has long "expressed our willingness to look to federal labor law for guidance in resolving labor questions." *Bd. of Trustees, Robert H. Champlin Mem'l Library v. R.I. State Labor Relations Bd.*, 694 A.2d 1185, 1189 (R.I. 1997) (citing *Fraternal Order of Police, Westerly Lodge No. 10 v. Town of Westerly*, 659 A.2d 1104, 1108 (R.I. 1995); *State v. Local No. 2883, AFSCME*, 463 A.2d 186, 189 (R.I. 1983)).

alleged reprisal by the Town for her use of the grievance process and the Union refused to represent her in her unfair labor practice charge, the Board's decision to decline to defer to an incomplete arbitration process was not in error.

Accordingly, while it is possible that the dispute in this case may be arbitrable, this Court sees no reason to vacate the Decision of the Board when the issue was well within the agency's jurisdiction and the arbitration process has not yet begun. The Court finds that the doctrine of election of remedies does not apply to the instant case, and the Board did not err when it adjudicated Iafrate's unfair labor practice charge, despite the pendency of a grievance.

B

Substantial Evidence

The Town also asserts on appeal that the Board's Decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

The Town asserts that the Board erred in inferring a retaliatory motive from its decision to schedule Iafrate's pre-suspension hearing for the same day as the arbitration for one of her pending grievances. In response, both Respondents argue that there is substantial, reliable, and probative evidence on the record to support the Board's Decision.

In its briefs to the Court, the Town seeks to characterize the comments made by Fossa on January 12, 2017 as a non-retaliatory offer of settlement. The Town asserts that the Board has "use[d] its unquestionable power to assess the credibility of witnesses to posit factual findings [of retaliation] unsupported by *any* evidence other than its disbelief of one or more witnesses." *State, Office of the Sec'y of State v. R.I. State Labor Relations Bd.*, 694 A.2d 24, 28 (R.I. 1997) (emphasis in original).

Unlike *Secretary of State*, in which our Supreme Court reprimanded the Board for inferring anti-union animus from non-coercive comments and testimony by an employer's representative, here, there is ample competent evidence to support the Board's inference of retaliatory conduct. An examination of its Decision can lead to no other conclusion other than the Board was relying on the three days of testimony and its determination of what testimony was credible. This Court cannot ignore the Board's credibility determinations. The Board articulated its reasons in a direct manner based on evidence in the record. For example, it felt Ms. Reynolds "embellished" her story as time went on because "[h]ad Ms. Iafrate made the offensive comments that were attributed to her at the hearings before the Board, Ms. Reynolds would have included them in her letter of complaint . . ." (Decision at 14). The Board relied upon numerous facts in the record to support its conclusion. It found the Town's decision to schedule the pre-disciplinary hearing for the same day as one of Iafrate's pending arbitrations and notify Iafrate of the hearing less than twenty-four hours prior as evidence of a retaliatory intent. (Decision at 13.) It did not give credence to "the wait until after the Holidays" excuse. To support that position, it pointed to the November 2, 2016 incident when Kane immediately upbraided Iafrate for her behavior and put a warning in her file. Yet, for this incident, there was no discussion for a month, no investigation of the facts, and no notice to Iafrate. *Id.* The Board was then "troubled" by the lack of progressive discipline, especially since the Kane letter on November 2, 2016 said "failure to improve will result in written consequences." In its Decision, the Board carefully explicated its reasoning behind its inferences and its evaluation of the credibility of the witnesses. The Board found credible Iafrate's assertion that Fossa had suggested that Iafrate could avoid the suspension if she were to drop her pending grievances on the basis that Fossa

had initially denied making the statement, but changed his testimony when Iafrate's attorney suggested that there was a tape of the conversation. (Hr'g Tr. 69, Apr. 25, 2017.) Additionally, the Board also found the Mayor's testimony that he believed that Iafrate was guilty prior to the pre-suspension hearing to be suggestive of retaliatory conduct, further noting the Mayor also testified that he "probably would" give Iafrate the label of "malcontent"[9] based on "the records . . . of [her] employment with the Town."[10] (Hr'g Tr. 139:15-24, May 30, 2017.)[11]

In the presence of competent evidence to support the Board's reasoning, this Court may not overturn the Board's decision. Accordingly, this Court finds that there is l reliable, probative, and substantial evidence to support the Board's Decision.

IV

Conclusion

After review of the entire record, this Court finds the Board's Decision is supported by reliable, probative, and substantial evidence on the record and that the Decision is not made on improper procedure, and not arbitrary or capricious. The Court also finds that the Decision was

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[9] The Town's statement of facts included the characterization of Iafrate as a "malcontent," which counsel for Iafrate brought up during its cross-examination of the Town's witnesses.

[10] "Q: So the fact that she's filed a number of grievances and arbitrations makes her a malcontent"?
"A: When someone is never satisfied, I would say, "yes." (Hr'g Tr. 140:1-3, May 30, 2017.)

[11] The Court also notes for the record the presence of other uncontested comments by the Town and its agents that could suggest the presence of anti-union animus, including a November 2015 comment to Iafrate by Vincent Ragosta, attorney for the Town, before the arbitration of one of her grievances, in which he compared her repeated filing of grievances to "a bad marriage"; and the Mayor's 2013 comment to Iafrate in which he suggested that he was visiting her office "in case [she] had more grievances to file." (Hr'g Tr. 30:20-31:3, 34:3:12, Apr. 25, 2017.)

not rendered in violation of constitutional or statutory provisions and was not an abuse of discretion. Substantial rights of the Town have not been violated.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of North Providence v. Elizabeth Iafrate, et al.
CASE NO:	PC-2018-0008
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 10, 2018
JUSTICE/MAGISTRATE:	Licht, J.

ATTORNEYS:

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