STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC **SUPERIOR COURT**

(Filed: May 23, 2012)

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

DECISION

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

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

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

I

Facts and Travel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A

The Instant Action

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

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

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

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

B

Hearing

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

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

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

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

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

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

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

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

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

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

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

II

ANALYSIS

A

Town's Motion To Dismiss

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

1

Subject Matter Jurisdiction

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

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

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

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

> "66. As a direct and proximate result of the Town's violation of its Charter, the SLRA, and the FFAA, the Union will suffer irreparable harm in that the ongoing collective bargaining and interest arbitration processes will be compromised.
>
> 67. Absent intervention by this Court, the Town will be free to unilaterally change any provision of the CBA it wishes to change without resorting to the collective bargaining and/or interest arbitration processes.
>
> 68. Absent intervention by this Court, the Town will be free to pass ordinances in violation of its charter.
>
> 69. Firefighters will suffer irreparable harm. . . .
>
> . . .
>
> 73. Because the Town has bypassed the collective bargaining and statutory interest arbitration processes by passing an ordinance that unilaterally changes the terms and conditions of employment, Plaintiffs have no adequate remedy at law.
>
> . . .
>
> 76. If Defendants are not enjoined from unilaterally implementing changes to the terms and conditions of the

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

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

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

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

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

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

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

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

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

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

2

Failure to State a Claim

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

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

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

B

Consolidation

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

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

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

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

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

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

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

C

Declaratory Judgment

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

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

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

1

Whether the Ordinance Was Passed in Accord with Town Charter

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

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

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

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

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

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

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

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

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

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

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

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

2

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

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

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

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

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

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

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

A

Waiver

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

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

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

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

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

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

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

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

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

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

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

B

Conflict with the FFAA

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

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

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

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

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

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

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

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

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

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

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

D

Preliminary Injunction

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

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

III

Conclusion

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