

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. SUPERIOR COURT

TOWN OF NORTH KINGSTOWN)
)
)
 VS.) CASE NO: WC-2012-0542
)
)
 INTERNATIONAL ASSOCIATION OF)
 FIREFIGHTERS)

TOWN OF NORTH KINGSTOWN)
)
)
 VS.) CASE NO: WM-2012-0368
)
)
 NORTH KINGSTOWN FIREFIGHTERS)

HEARD BEFORE
THE HONORABLE BRIAN P. STERN
ON FEBRUARY 6, 2013

APPEARANCES:

TIMOTHY CAVAZZA, ESQUIRE.....FOR THE TOWN
MATTHEW PARKER, ESQUIRE.....FOR THE TOWN
DANIEL KINDER, ESQUIRE.....FOR THE TOWN
MARC GURSKY, ESQUIRE.....FOR THE UNION
ELIZABETH WIENS, ESQUIRE.....FOR THE UNION

GINA GOMES
COURT REPORTER

C E R T I F I C A T I O N

I, Gina Gomes, hereby certify that the succeeding

pages 1 through 33, inclusive, are a true and accurate transcript of my stenographic notes.

GINA GOMES
COURT REPORTER

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1 WEDNESDAY, FEBRUARY 6, 2013

2 MORNING SESSION

3 THE COURT: Good morning.

4 THE CLERK: Your Honor, the matters before the Court
5 are WC-2012-0542, Town of North Kingstown vs.

6 International Association of Firefighters, and

7 WM-2012-0368, Town of North Kingstown vs. North Kingstown
8 Firefighters. These matters are on for motions. Would

9 counsel please identify themselves for the record.

10 MR. CAVASSA: Timothy Cavassa for the Town of North
11 Kingstown.

12 MR. PARKER: Matthew Parker for the Town of North
13 Kingstown.

14 MR. KINDER: Daniel Kinder for the Town of North
15 Kingstown.

16 MR. GURSKY: Marc Gursky for the firefighters.

17 MS. WIENS: Elizabeth Wiens for the firefighters.

18 THE COURT: The Court in its recent order had asked
19 if there were any motions to be filed for hearing today
20 that they be filed yesterday. The Court has received two
21 motions from the defendants, one for judgment under Rule
22 54(b) and the other a motion for a stay. It will be
23 appropriate to address the 54(b) motion. The Court also

24 did receive objections on both of those motions from the
25 Union, I believe, last night and at least one came in

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1 this morning. Let's start with the 54(b) motion.

2 Counsel, you may proceed.

3 MR. CAVASSA: Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. CAVASSA: Or good afternoon. First, I want to
6 apologize yesterday for the mix up with the e-mail. I
7 don't know what happened. It looked like it had gone
8 through.

9 THE COURT: As I said in my last e-mail to you, it
10 went through. I got it. The motions were not extensive
11 and I appreciate the fact that everyone sent me
12 electronic copies. I know the issues that come up. Why
13 don't we move on.

14 MR. CAVASSA: All right. Thank you, your Honor. As
15 we indicated in the motion, the Town has already filed a
16 notice of appeal with respect to Paragraph 10 of the
17 order that issued under Rhode Island General Laws 9-24-7.
18 So we're here today on a motion for entry of final
19 judgment under Rule 54(b) with respect to paragraph one
20 through five of the order and the declaratory judgment
21 aspect of the decision and the order that issued on
22 December 14th and the order that issued yesterday.

23 The Supreme Court has adopted a two-part approach
24 with respect to 54(b) motions. First, the case must be
25 one in which one of the issues has been decided but not

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1 all of the issues have been decided. That's clearly the

2 case here. The Union admits as much in its papers. For
3 example, the decision effectively disposes of the motion
4 to stay 11-12 interest arbitration and it says nothing
5 about the 12-13 motion to stay interest arbitration.

6 Moving to the second piece of the Court's analysis,
7 requires an express determination from the Court that
8 there is no just reason for delay. I want to start out
9 by at least pointing out to the Court, as we did in our
10 papers, that your Honor has indicated on numerous
11 occasions in conference, from the bench, and even in its
12 decision that these issues are very likely, and they
13 should go up on appeal due to their novelty and also the
14 financial ramifications on the Town of North Kingstown.

15 THE COURT: I guess my question is, and I think you
16 would agree, that whether or not the Court rules in your
17 favor on the 54(b), there's still an avenue that you can
18 seek relief, albeit by the discretion of the Supreme
19 Court.

20 MR. CAVASSA: That's correct, your Honor. But the
21 54(b) will allow a direct appeal and we've pointed out we
22 already have a right as a matter of right under statute
23 to appeal at least part of the order so we believe the
24 entire order should go up.

25 THE COURT: Just so I understand, I think it was in

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1 a footnote, so there is no dispute, at least as far as
2 you're concerned, that the declaratory relief that the
3 Court gave under the statute is final and has the effect
4 of a judgment. We're talking about all of it, and also
5 to make it abundantly clear, that the whole order is
6 going up to the Supreme Court.

7 MR. CAVASSA: That's the purpose of our motion, your
8 Honor. We don't want to get upstairs and have them say
9 there's a defect in what was done and have them send it
10 back down here and have to ask for a certification from
11 your Honor. And, again, we have as a matter of right to
12 take part of the order up and this is just to effectuate
13 the certification for the whole order and decision to go
14 up at one time rather than piecemeal. On that basis
15 alone, and I quote from you, Judge, you should exercise
16 your discretion and allow the five wise men and women
17 from upstairs to decide these issues as you have
18 indicated from almost the beginning of this in the other
19 cases.

20 Moving to the factors that are cited in the Court's
21 decision under 54(b), first, this case does have and the
22 issues that we're talking about here do have an aspect of
23 finality that the Court looks for in order for a
24 certification to go up under 54(b). The issues that were
25 disposed of effectively were the Town's motion, a

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1 petition to stay the 11-12 interest arbitration, the
2 question of whether the State Labor Relations Board has
3 jurisdiction over the questions before it in an unfair
4 labor practice case 1688, and the question of whether the
5 Town's action in implementing a three-division
6 organizational structure for a client firefighting rescue
7 personnel was lawful. These are separate and distinct
8 issues, your Honor, and we believe the decision disposes
9 or effectively disposes of these issues or it intends to
10 leaving really only the questions involving the 2012-2013
11 interest arbitration.

12 THE COURT: I guess, counsel, my concern is and it
13 certainly may not be a concern as far as not granting a
14 54(b), is one of the things our Supreme Court has spoken
15 to in the Federal Court is that we grant 54(b), they
16 don't want the same type of issues necessarily being
17 litigated. I understand your position where this
18 effectively takes care of some of the counts. My concern
19 is, as I'm sure you recall from the first action when the
20 Court invalidated the ordinance, the Town then decided,
21 okay, that's the decision, we can go another way, okay,
22 and keep this being implemented. My fear is that I grant
23 54(b), it's up before the Supreme Court, and then the
24 Town decides, wait a second, there's a third way to go
25 there that both of them are going to end up. How can you

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1 help me in terms of dissuading me in terms of -- you
2 know, I don't want to be, and certainly the Supreme Court
3 doesn't want to be, in a position that we're bouncing
4 back and forth. That this issue is going to be before
5 the Supreme Court and they're going to decide it one way
6 or the other.

7 MR. CAVASSA: I believe that's what we're asking for
8 here and in our subsequent motion to stay, your Honor, is
9 that the decision be stayed and that the Supreme Court be
10 allowed to hear all of these issues that were decided in
11 the decision at one time. If your Honor is concerned
12 about sort of piecemeal appeals, and I think that's sort
13 of where you're going here, that's an inevitability in
14 this case. There are three separate C.A. numbers, some
15 filed by the Union; some filed by the Town. One has
16 already been appealed; another was appealed yesterday.

17 There will be multiple appeals in this case.

18 THE COURT: Multiple appeals on different issues. I
19 guess my question is: Does the Town intend at this point
20 to, if this issue goes up on appeal and whether the Court
21 grants a stay or the Supreme Court grants a stay, aside
22 say, okay, we're still going to be dealing with those
23 same issues but another approach would help me get there.

24 MR. CAVASSA: I don't believe so, your Honor.

25 THE COURT: Thank you.

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1 MR. CAVASSA: We will be asking for a stay of the
2 order and without a stay we're bound by the terms of the
3 order.

4 THE COURT: Thank you.

5 MR. CAVASSA: So moving on, did that answer your
6 question, your Honor?

7 THE COURT: It did. Thank you.

8 MR. CAVASSA: Okay. The final point, and I already
9 hit on it, and the Union makes note in its objection and
10 its brief of bringing up all of the issues between these
11 parties in various cases. I point out that's a red
12 herring for the purpose of this motion. We are here on a
13 motion and a decision out of 0542, which is one separate
14 C.A. number. There are other pending cases, some of
15 which have been appealed, some of which are still in
16 litigation. We believe all of those other matters are,
17 quite frankly, irrelevant. The only issue here is
18 whether the decision and the order that was issued in
19 0542 is properly certified so we can appeal all the
20 issues. And, again, multiple appeals and piecemeal
21 appeals are inevitable in this case. The Supreme Court

22 has the option of consolidating what is before them if
23 it's more convenient for them to do so, but we would
24 leave it in their hands and allow us to go up on this
25 entire order and decision. So we respectfully request

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1 that our motion be granted.

2 THE COURT: Thank you. Counsel.

3 MR. GURSKY: Judge, on the 54(b) motion we filed an
4 objection. As your Honor indicated, your decision in
5 0542 was intended to address some of the more than 30
6 interrelated issues that are pending in four separate
7 lawsuits. One of them has been somewhat resolved.
8 That's the action filed by the Town seeking to enjoin
9 affects bargaining on its change in the platoons and now
10 it says it doesn't want affects bargaining but that case
11 is still pending. Even as to the other remaining cases,
12 they could have all been brought as one case.

13 The parties are, obviously, the same and the issues
14 are all interrelated, which under the Supreme Court's
15 decision in Astro-med and Judge Silverstein's decision,
16 which I think is a good road map for how to handle these
17 cases and the lead paint case, both of those say you look
18 at whether the issues are interrelated, not necessarily
19 whether they conflict, but whether they're interrelated,
20 and, clearly, they're interrelated.

21 First of all, of the 13 affirmative requests --
22 sorry, 23 affirmative requests for relief in 0542, your
23 Honor dealt with five or six of them leaving the
24 remaining ones unresolved. Clearly, they are
25 interrelated and part of the same complaint. And, in

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1 fact, many of them hinge on each other. For example, the
2 12-13 arbitration question hinges on the resolution of
3 the 11-12 arbitration question. The question of the
4 State Labor Relations Board decision hinges on resolution
5 of the 11-12 arbitration. And in the related case that
6 the Town has brought to enjoin that proceeding, that
7 decision relates on whether or not the Union has elected
8 its remedies, which was in part discussed and resolved in
9 the 0542.

10 And that's just a handful of examples. I could go
11 on, but I know you don't want me to, with at least a
12 dozen actual conflicts between resolved and unresolved
13 issues. In fact, even in this case the Town doesn't want
14 all the issues 54(b) to the Supremes. They only want the
15 ones that they feel they didn't win. So it's clear that
16 there are a number of interrelated issues. And as I
17 think you alluded to, Judge, there's a presumption
18 against granting a Rule 54(b) motion. The burden is on
19 the moving party to show that it's in the best interest
20 of the judicial system as well as the parties. It's
21 supposed to be used sparingly and only on unusual and
22 compelling circumstances. And I would think that none of
23 those elements are present here.

24 With regard to the other pending appeals and what
25 other relief the Town may have, we all know the Supreme

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1 Court has supervisory authority and they're upstairs from
2 us and they get to decide ultimately what happens in a
3 trial court, but the mere fact there is an order doesn't
4 make it appealable on any basis because courts issue

5 orders all the time on discovery issues, mediation, and
6 what have you. Not every order is automatically
7 appealable.

8 THE COURT: Counsel, you agree there are portions of
9 this order, the declarations that are made, that may very
10 well be automatically appealable?

11 MR. GURSKY: I don't think they are, but I don't get
12 to decide. I think that ultimately if some aspects of
13 your order were brought to the attention of the Supreme
14 Court by some vehicle, whether it's certiorari or appeal
15 or mandamus, I don't know, whatever it might be, I'm sure
16 a duty judge would consider those papers and we would
17 have an opportunity to respond. So I don't think anyone
18 is ever without a remedy when they are aggrieved in a
19 Superior Court, but 54(b) isn't in it so for those
20 reasons we ask that the motion be denied.

21 THE COURT: Counsel, if I can just clarify, you're
22 asking for 54(b) on the action. You're saying that
23 there's -- and you said before the entire order. So do I
24 misunderstand? I think what counsel is saying is only
25 portions or, I guess, you're only contesting portions.

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1 You're asking for 54(b) on judgment in the case.

2 MR. CAVASSA: Your Honor, we don't believe we need
3 54(b). For example, paragraph ten of the order, we view
4 that as granting mandatory preliminary injunctive relief.
5 With respect to paragraphs one through five of the order,
6 those are declaratory judgment counts. Your Honor cited
7 a portion of the D.J. act in your decision, which may
8 very well say that the order is a final judgment in and
9 of itself giving us an automatic right of appeal to the

10 Supreme Court. We move for 54(b) judgment, belt and
11 suspenders.

12 THE COURT: So I understand, you may choose to agree
13 or disagree.

14 (Cell phone is ringing.)

15 THE COURT: Phones off.

16 MR. KINDER: Your Honor, I turned it off but I think
17 that's mine so apparently I didn't. I apologize.

18 MR. CAVASSA: So, again, it would be a belt and
19 suspender's approach so this wouldn't be taken up
20 piecemeal and so that the entire decision and order could
21 be brought up at one time.

22 THE COURT: Thank you very much.

23 MR. CAVASSA: And if I may just respond just to a
24 few brief points. The Astro-Med decision that my brother
25 was speaking about, the motion for 54(b) was actually

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1 granted in that case. Also, some of the examples that
2 were brought up with respect to overlap between the
3 2012-13 interest arbitration and the 11-12, that is
4 absolutely not the case. They are overlapping legal
5 theories, but the 11-12 interest arbitration and the
6 12-13 interest arbitration are mutually exclusive as a
7 matter of law. The statute says an interest arbitration
8 award shall be enforceable only for a year. We are
9 dealing with two separate contract years at issue, two
10 separate lists of proposals, two separate rounds of
11 negotiation completely separate and distinct issues, your
12 Honor. And the other issues that were brought up, they
13 are mere pieces of what your Honor decided in the
14 decision.

15 THE COURT: The only concern I have with the 12-13,
16 if I recall correctly, one of the positions that the Town
17 was taking was that even if the Court ordered interest
18 arbitration to go forward for 12-13, there were certain
19 issues because of a waiver under 11-12 that could not
20 necessarily be taken up by the interest arbitrator.

21 MR. CAVASSA: Your Honor, our arguments for 11-12
22 are again mutually exclusive from those of 12-13. Same
23 statute, same underlying legal forfeiture theory. But,
24 for example, in 11-12 the Union sent a letter on February
25 23, 2011, attempting to initiate bargaining under

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1 28-9.1-13. The next year they issued a separate letter
2 actually on the same date, February 23rd, I believe,
3 2012, under the same statute but it was attempting to
4 invoke negotiations under a different contract here.
5 There is a separate demand for arbitration, and, again,
6 it involves a separate list of proposals, separate
7 contract years. So I don't believe -- there may be some
8 legal arguments that overlap, as occurs in many cases,
9 but the cases themselves are exclusive.

10 THE COURT: Thank you very much. With respect to
11 the 54(b) motion, as counsel is aware, Rule 54(b)
12 provides when more than one claim for relief is presented
13 in an action where there is a claim, counterclaim,
14 cross-claim, or third-party claim, the Court may direct
15 the entry of final judgment as to one or more but fewer
16 than all of the claims or parties only upon an expressed
17 determination there is no just reason for delay and upon
18 an expressed determination for an entry of judgment.

19 Both sides raised Astro-Med and whatever the end

20 result was of Astro-Med, the Supreme Court's decision in
21 that case was very helpful in terms of elaborating on
22 54(b). This Court may properly look in that case to a
23 federal court interpretation of analogous federal rule
24 for guidance. Rule 54(b) constitutes an exception to the
25 general rule that a final judgment is appropriate only

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1 after the rights and liabilities of all parties to the
2 action have been adjudicated. Rule 54(b) essential
3 objective is to avoid the possible injustice of delay in
4 entering judgment on a distinctly separate claim until
5 the final adjudication of the entire case by making an
6 immediate appeal available.

7 The rule asks this Court to balance two competing
8 factors.

9 1. The undesirability of more than one appeal in a
10 single action and,

11 2. The need for making review available in multiple
12 claim situations at a time that best serves the needs of
13 the litigants.

14 The determination of whether or not to grant Rule
15 54(b) certification is committed to the discretion of the
16 trial justice. It's a two-step analysis.

17 First, the trial justice should consider the
18 finality of the disputed ruling. If the ruling lacks the
19 necessary finality, the application must fail.

20 Furthermore, it must be shown that the ruling at a bare
21 minimum disposes fully of at least a single substantive
22 claim.

23 Second, the judge must determine or ascertain
24 whether there is no just reason to delay.

1 54(b) certification, the trial justice should take into
2 account judicial administrative interests as well as the
3 equities involved, as the court said in the Astro-Med
4 decision.

5 Examining judicial administrative interests, the
6 trial justice should consider the existence of a
7 transactional relationship between the remaining
8 unadjudicated claim and a claim that has been disposed
9 of. If the claims in an action are closely related and
10 there is a link or there is a risk of repetitive appeals,
11 the Court may decide there is a reason for delaying
12 review and refuse to make a determination as required by
13 54(b). A judge should enter final judgment on 54(b) only
14 in unusual and compelling circumstances. Therefore,
15 entry of a judgment should be not be indulged as a matter
16 of routine or as a magnanimous accommodation to lawyers
17 or litigants. The rule reflects a policy against
18 piecemeal appeals and is to be exercised sparingly.

19 In this case the Court has made a number of
20 declarations in the order that it issued and
21 understanding while there may be a dispute among the
22 parties in terms of the interpretation of Title 9 and the
23 finality and reviewability of the declaratory relief,
24 this Court for the purposes of this decision believes
25 that those decisions on declaratory relief are directly

1 appealable to the Supreme Court. And the Court
2 completely understands the defendant's position, which is

3 whether the Supreme Court agrees or disagrees with the
4 Court's interpretation. Even if they agree, there are
5 other issues that are raised in the Court's decision and
6 thereafter the order that should be reviewed by the
7 Supreme Court at this time.

8 The Court did in its decision not only provide for a
9 30-day stay or before the entry of an order in this
10 decision to allow the parties to attempt to consent to an
11 order because, as the Court indicated in its decision,
12 this is a novel issue, an issue that there is not direct
13 guidance from our Supreme Court in terms of precedent.
14 Ultimately, there are other issues involved in this case,
15 but the issue that has been determined at this point,
16 which deals with the ability of a Town to unilaterally
17 implement changes to a collective bargaining agreement
18 and the effect most importantly of the waiver section of
19 the Firefighter's Arbitration Act and the implications of
20 that section are central to the dispute here.

21 This Court, based on its decision that the issues of
22 declaratory relief can be taken up as a matter of a right
23 to the Supreme Court and also its finding that this is,
24 in fact, a novel issue that not only affects this case
25 but many other collective bargaining agreements as well,

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1 the Court, as it had said in chambers, as counsel
2 correctly discussed and on the record that this is a case
3 of importance that the Supreme Court should decide.

4 That being said, there is a way for the defendant to
5 ask the Supreme Court for relief through an extraordinary
6 writ to hear this case. And the decision on the 54(b) is
7 very separate from the next issue, which is going to be

8 before the Court, which is a stay. The granting of the
9 54(b) is not that a stay of the Court's order will be
10 issued. We will deal with that separately, but the Court
11 finds that in this case understanding the potential
12 dangers that there could be multiple appeals to the
13 Supreme Court on similar issues and this is certainly not
14 a, you know, black and white case one way or the other,
15 but certainly the Court needs to exercise discretion.

16 This Court determines that the request for 54(b)
17 will be granted by the Court. And based on that, there
18 is no just reason for delay and that shall enter, again,
19 bringing the Court's entire order before the Supreme
20 Court as opposed to a portion of that order being
21 discretionary and a portion of the order being brought up
22 as a matter of right. Counsel can submit the appropriate
23 order on 54(b) and we can do all that at the end.

24 I think what I would like to do now is move on to
25 the next motion before the Court, which is the

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1 defendant's request for a stay. The Court is also fully
2 aware that at this point the 54(b) has not been entered
3 by the clerk. As I discussed with the parties at a prior
4 conference, we will work that through in terms of the
5 filings, any other notice of appeals. But the Court
6 believes that in a case where right now there is an order
7 for implementation several days from now, that it's
8 appropriate when I have all the parties here to hear the
9 stay application at this time. Please proceed.

10 MR. CAVASSA: Thank you, your Honor. We submitted a
11 motion yesterday and we're not going to belabor the
12 reason for our request for a stay at this point. We'll

13 simply point out that as far as the likelihood of success
14 and the merits of the appeal under the Narragansett
15 standards, we believe, the Town believes, that the only
16 issue before the Court at the time it issued its decision
17 was a narrowly framed issue, a motion to stay interest
18 arbitration pursuant to Rhode Island General Laws 28-9-13
19 Subsection 2.

20 On that same prong we believe this decision is on
21 all fours with the Warwick Teachers' case from 1992 that
22 I know if you weren't well aware of before this case,
23 you've been well aware of at least from our papers in the
24 mountain that we've submitted up to this point. In terms
25 of harm, if the decision isn't stayed, the Town of North

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1 Kingstown will suffer immensely. It will have a
2 devastating impact on the Town's budget and on the Town's
3 citizens.

4 THE COURT: Let me understand that a little more.
5 For a stay what we're talking about is between the order
6 becoming effective and a decision by the Supreme Court.
7 What is the irreparable harm?

8 MR. CAVASSA: Your Honor, we read paragraph 10, I
9 think the only way it can be read, as telling us to go
10 back to the way things were on March 10, 2012, which is
11 an order that we abide by the terms and conditions of the
12 expired collective bargaining agreement, which was
13 amended by the interest arbitration award of
14 August 9, 2011. Since the implementation on March 11th,
15 the Town has saved on average approximately \$20,000 a
16 week in overtime costs. There are 20 weeks remaining in
17 the fiscal year. That's upward of \$400,000 in savings

18 that the Town would be realizing if the terms and
19 conditions remain as they currently are. The Town built
20 its budget, passed its budget on May 1, 2012, for this
21 fiscal year. The budget was based on the savings
22 achieved through the three division construct that was
23 implemented on March 11th. If the Town is required to
24 revert back to its overtime budget, which as of yesterday
25 the finance director was expecting to actually be under

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1 budget by approximately \$68,000. Under the current terms
2 and conditions, it will be over budget by between three
3 and \$400,000. Under the Town of Coventry vs. Turco,
4 that's irreparable harm.

5 THE COURT: So this is different than, it's amazing
6 how these cases evolve, the argument that either you or
7 your brother made at the original temporary restraining
8 order hearing when you were here at the beginning where
9 you wanted to implement that you were dealing with money
10 with any change to the firefighters, therefore, that
11 doesn't constitute irreparable harm.

12 MR. CAVASSA: That's settled precedent under Sampson
13 vs. Murray, United States Supreme Court, and In Re: State
14 Employees' Union in the Rhode Island Supreme Court. When
15 it comes to money damages in terms of backpay, there is a
16 legal -- there's an adequate remedy at law, therefore,
17 there is no irreparable harm under Cohen vs. Rhode Island
18 predetermined by authority in the numerous cases cited
19 thereafter. On that end, your Honor --

20 THE COURT: I guess, I'm just trying to understand.
21 What you're saying is, and I understand that and that's
22 very clear, so if the Town now may need to expend

23 additional funds, that is irreparable harm. So if it's
24 the firefighters during the restraining order, the Town
25 may need money down the road, that's damages that we need

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1 to recover. If the Town is going to spend money on
2 overtime, because at least what the Court found was an
3 improper ordinance and a policy, that would be
4 irreparable harm.

5 MR. CAVASSA: Right. And I believe it derives from
6 the adequate remedy at law and irreparability. There is
7 no irreparability when it comes to harm on backpay
8 because that can be paid with interest and sort of make
9 whole relief under other avenues. When it comes to
10 budgeting for the Town of North Kingstown, the Town of
11 North Kingstown's budget, I believe it's in the Town
12 Charter Section 1008, says, "This shall be the budget for
13 the fiscal year and it shall not be changed." Once money
14 is appropriated and expended, it's irretrievable. The
15 Town can't now then go get the money back that it
16 improperly paid in terms of wages to firefighters. Our
17 laws don't allow that. So I believe that was the Court's
18 reasoning in Turco for finding irreparable harm based on
19 unbudgeted moneys.

20 We're also dealing with the inability to now tax or
21 have supplemental tax increased in time. Where does the
22 money come from? It's going to come from other portions
23 of the budget. The budget is already barebones. The
24 Town has for five years or more cut, cut, cut, cut. It
25 found a way to achieve dramatic savings through the

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1 action that we're litigating here today and built its
2 budget around that. If it's required to revert back to
3 the terms of the old contract, there will be devastating
4 cuts to the Town's budget, whether it's in terms of
5 layoffs of other personnel, whether it's cuts in public
6 safety, across the board. They're going to have to come
7 up with approximately at least \$400,000 on that line item
8 alone to fill the budget hole. On that basis, we believe
9 that the Town and its budget and its citizens and the
10 public at large in North Kingstown would be irreparably
11 harmed if it's required to revert back to the terms and
12 conditions of the expired contract.

13 THE COURT: Thank you. Counsel.

14 MR. GURSKY: Judge, on the four prongs in the
15 Narragansett case, I think on the first one you've
16 already ruled so it's unlikely that they're going to
17 prevail. But I think more significantly is when I hear
18 these irreparable harm arguments, I really feel like I've
19 gone down the rabbit hole. The idea that money is
20 irreparable harm when it comes to the Town but not when
21 it comes to workers just doesn't make sense to me. Maybe
22 I should just leave it at that.

23 As far as the argument that they budgeted around the
24 three-platoon system, as you know, Judge, only last
25 Wednesday we had an agreement to go back to the

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1 four-platoon system on two-day's notice. More than that,
2 Judge, for the 11-12 budget, apparently, they were
3 perfectly content with the four-platoon system and
4 budgeting around it until March when they unilaterally
5 implemented the three-platoon system. Maybe they could

6 take some of the money that they saved on the 11-12,
7 which, I guess, is over a million dollars - and, by the
8 way, they saved it off of the workers that were working
9 there, the firefighters that were working there - and
10 maybe apply it for the next few weeks and they can cover
11 their \$400,000 and still come up with a tidy profit.

12 What is most bizarre about this is that the Town
13 persists in telling you that when it increases hours by
14 over 30 percent and raises wages by ten percent, that
15 it's not in the interest of the Union firefighters to
16 turn that down, and that's why the Union will benefit
17 from this. That doesn't make any sense to anybody and I
18 can't believe they're still arguing it. So for all those
19 reasons, Judge, the motion for the stay should be denied.

20 THE COURT: The Court will now address the
21 defendant's motion for a stay and the Court is cognizant
22 and will order that --

23 MR. CAVASSA: Your Honor --

24 THE COURT: Yes.

25 MR. CAVASSA: I apologize.

24

1 THE COURT: If it's something briefly, go ahead.

2 MR. CAVASSA: I'm sorry, your Honor.

3 THE COURT: The rules provide -- the Court wants to
4 make sure on the record that the transcript is ordered by
5 whoever prevails on the motion and is expedited, and if a
6 stay is sought on all or part of this, that it is
7 provided to the justice of the Supreme Court.

8 Rule 62(d), which we are dealing with here on a
9 stay, of the Superior Court rules does not provide the
10 elements that the Court should consider in deciding

11 whether or not to grant a stay. Our Supreme Court,
12 however, has provided instruction in *Narragansett*
13 *Electric vs. Harsch*, 117 R.I. 940, and adopted the
14 federal standard for granting a stay pending appeal. The
15 standard requires that the moving party, in this case the
16 Town, make a strong showing that:

17 1. It will prevail on the merits of its appeal.

18 2. It will suffer irreparable harm if the stay is
19 not granted.

20 3. No substantial harm will come to other
21 interested parties and,

22 4. The stay will not harm the public interest.

23 The Supreme Court, however, has somewhat tempered
24 this standard in the *Department of Corrections vs. State*
25 *Labor Relations Board* at 658 A.2d 509, where it held that

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1 while the Harsch criteria may be persuasive in a given
2 context, we do not consider that they are rigid
3 requirements that the reviewing court must meet in each
4 instance. That holding in *Department of Corrections vs.*
5 *The State of Labor Relations Board* is important because
6 certainly if this Court was to take the Harsch criteria
7 as you need to meet each one of them, the first one it
8 would prevail on the merits of the appeal. As our
9 Supreme Court has said and the Superior Court in
10 decisions, is that a decision that was just issued by the
11 Superior Court it is not very likely that the Court will
12 decide that the decision that it issued will not stand on
13 appeal. And that's why we look at all of the factors.

14 And the Court wants to start with the likelihood of
15 success. First, the Court reiterates the determination

16 it made in its December 14, 2012, decision and the
17 defendants urge the Court to grant a stay not
18 specifically because of the legal issues with respect to
19 the Court's determination, but as I'm hearing, what I
20 heard in oral argument and what I read in the papers that
21 were filed, because there were issues that were decided
22 that weren't properly before the Court.

23 First and importantly, the question our Supreme
24 Court must deal with is whether or not the defendant has
25 waived this argument based on the fact it has requested

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1 final judgment under 54(b) which the Court has granted.
2 There is now a final judgment of this Court.

3 Second, and more importantly, the Court addressed
4 and gave the parties notice that it would address the
5 central issues in this case, the interpretation of the
6 waiver portion of the Firefighters' Arbitration Act, and
7 the 120-day period as far as notice before bargaining
8 begins.

9 As a result of these determinations certain other
10 issues raised by the parties in the agreed to scheduling
11 order could be addressed at that point by the Court.
12 Further, these are not new and novel issues in this case
13 and the related cases. In fact, many of these issues
14 were briefed in the prior proceeding dealing with the
15 ordinance, were addressed in dicta in that decision, and
16 were addressed in this case.

17 The Court also notes that with reservation, the
18 defendant informed the Court subsequent to the decision
19 that it had chosen not to submit any briefs with respect
20 to other issues before the Court in the scheduling order

21 citing the cost to the client and that these issues had
22 been determined. Therefore, it appears the defendant's
23 sole reasons for their likelihood of success was that all
24 of the issues were not before the Court. And while this
25 issue may have been waived based on now the Court

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1 entering judgment at the defendant's request under 54(b),
2 the Court fines irrespective the defendant does not have
3 a likelihood of success on these issues.

4 The second issue is irreparable harm. The Court has
5 ordered that the defendants after being unable or
6 unwilling to come to an agreement on an order by consent
7 to reinstate the pre-implementation terms and conditions.
8 Although the defendant has not provided in its papers
9 with the irreparable harm it will suffer, it appears to
10 be monetary in nature.

11 And I've asked that question during oral argument
12 and the Court is very clear at this point that any harm
13 will be monetary in nature between the time that they
14 need to go back to pre-implementation until such time as
15 the Supreme Court issues a decision in this matter. If a
16 stay is not granted, the Town's position is it will need
17 to expend more money on staffing and overtime until the
18 Supreme Court decides this appeal or an agreement can be
19 reached. As the Court stated, the same as the
20 irreparable harm that the Union argued at the time of the
21 temporary restraining order in the prior ordinance case
22 when the changes were implemented, one of the major
23 reasons for irreparable harm was money, less money for
24 more hours of work.

25 The Court finds that the fact that the Town may have

1 to, as it said in its decision, unring the bell and go
2 back to the platoon structure or the structure prior to
3 the implementation, and understanding that it is the
4 Town's position on the record here in court that it may
5 cost additional money for overtime and other expenses
6 until the Supreme Court decides this appeal, the Court
7 rejects this irreparable harm argument especially in
8 light of the fact that the Court has found that the
9 unilateral implementation by the Town was not legal, and,
10 basically, what this would be doing would be to allow the
11 Town to continue with this illegal activity until a
12 determination is made by the Supreme Court.

13 The next issue is whether substantial harm will come
14 to other interested parties. Now, it's undisputed that
15 the three-platoon structure has been in place for a long
16 time in many collective bargaining agreements prior to
17 the unilateral changes by the Town. The substantial harm
18 to third parties may have been changing the platoon
19 structure unilaterally and not changing it back.
20 Therefore, other than the monetary issues discussed, no
21 substantial harm will come to other interested parties by
22 going back to pre-implementation.

23 And I think most importantly in this case is the
24 last, which is public interest and the balancing of the
25 equities. As this Court details in its decision both in

1 its December 14th decision and in the prior decision on
2 the ordinance, this is, in fact, a major legal and public
3 policy issue. The Town would like to make changes to

4 what they assert are management rights in an expired
5 collective bargaining agreement that it is their position
6 will ultimately benefit the taxpayers of the Town of
7 North Kingstown.

8 One of the issues it has contended that was
9 permissibly bargained in prior contracts was the platoon
10 structure and shifts for the firefighters. It's clear
11 that a majority of this Town Council does not feel it was
12 appropriate for past Town Council's to bargain away what
13 they consider this management right and they wish to
14 reassert the management right. It goes without saying
15 that the Union may disagree whether or not this is a
16 management right.

17 So after the Town of North Kingstown fails to obtain
18 a change of platoon and shifts in a prior interest
19 arbitration and negotiations broke down for a new
20 collective bargaining agreement it decided to
21 unilaterally implement these changes. It did this based
22 on its position that because the Union did not provide
23 notice under the Firefighter's Arbitration Act within the
24 applicable 30-day period it had waived interest
25 arbitration and this is where the Town was creative.

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1 They then took the position that because the
2 contract had expired and/or interest arbitration was
3 waived by the Union it could pass an ordinance making
4 unilateral changes to the terms and conditions of
5 employment, not just a platoon structure but wages and
6 hours as well. The Town past an ordinance unilaterally
7 making these changes.

8 The Union brought suit, and this Court in the prior

9 case ultimately decided that the ordinance was not valid
10 because it violated the Open Meeting's Act and it was in
11 conflict with the Firefighters' Arbitration Act. The
12 Court in that decision did not issue an injunction
13 because the issue was moot as the ordinance was
14 invalidated.

15 Rather than seeking a review of this Court's
16 decision by extraordinary writ or passing another
17 ordinance, the Town continued its course of conduct under
18 the invalidated ordinance through, as stated on the
19 record in these proceedings, the alleged authority of the
20 town manager, Mr. Embrey. The Union did not move for an
21 injunction at that point and the defendant proceeded to
22 file a myriad of separate actions including request for
23 declaratory relief on more than 30 issues. This Court
24 decided these issues that were dispositive and issued
25 declarations in its December 14th order.

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1 In essence, what the Court told the Town is that you
2 did not go about changing the shifts, platoon structures,
3 and others legally under the Firefighters Arbitration
4 Act. I want to be clear. The Court did not rule whether
5 or not these are management rights and whether or not
6 they can be reinserted by the Town. Specifically, at the
7 end of a collective bargaining agreement can a management
8 right be reinserted, in this case the platoon structure,
9 and what is the process to do that? In this decision the
10 Court has simply found that this cannot be done in the
11 manner in which the Town attempted to do.

12 The Court in its Dresik vs. North Providence
13 decision did deal with a process where a management

14 right, if it is a management right, can be reinserted
15 even if it impacts wages, hours, and working conditions.
16 That was not done here. Effectively, the Town to get the
17 new platoon structure, to use an analogy, got on the
18 autobahn and just did it. If the Town had taken the
19 local roads, stopped along the way to ask for directions,
20 in this case some prior declaratory relief from the
21 Court, they may have been able to accomplish their goal.
22 It may have taken longer, whether that would have
23 ultimately saved the Town money because there would still
24 need to be in all likelihood interest arbitration over
25 the effects, which would be the impact on wages, hours,

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1 and conditions of employment, and at the end of the day
2 an arbitrator or interest arbitrator would determine what
3 that affect would be.

4 So one of the issues that this Court weighs heavily
5 in the balancing of the equities in this case is the fact
6 that the Town may very well have been able to accomplish
7 the reassertion of their management rights, the shifts,
8 if they had done it the right way and didn't take the
9 quick autobahn approach and just do it. Those issues
10 have not been brought before the Court in terms of
11 whether or not it's a management right and the process,
12 but this Court finds that the balance of equities is
13 certainly not in the Town's favor at this point.

14 For these reasons, after considering the factors in
15 Harsch as well as the tempered factors in D.O.T. vs.
16 State Labor Relations Board, the Court denies the motion
17 of the Town of North Kingstown for a stay of its
18 decision.

19 As the Court told counsel and laid out in its order,
20 that order does not become effective until after the
21 weekend, today is Wednesday, which allows the Town time,
22 if they so chose, to seek a stay from the Rhode Island
23 Supreme Court. The Court will enter such appropriate
24 orders so as to make that effective and will order the
25 clerk to pull together the appropriate files so if the

1 duty justice wishes to review these files or any of the
2 relating files, he or she has the ability to do so.
3 Counsel shall submit the appropriate order denying the
4 stay. This Court is in recess.

(A D J O U R N E D)

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