STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: July 31, 2013)

LESLIE J. HART, JR.	:	
	:	
VS.	:	**C.A. No. KC 10-0470**
	:	
WEST WARWICK FIREFIGHTERS' UNION LOCAL # 1104, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; WILLIAM LEAHY, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE WEST WARWICK FIREFIGHTERS' UNION LOCAL # 1104; JIM RITA, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE WEST WARWICK FIREFIGHTERS' UNION LOCAL # 1104; JOSEPH BARIS, JR., IN HIS OFFICIAL CAPACITY AS CHIEF OF THE WEST WARWICK FIRE DEPARTMENT; MALCOLM MOORE, IN HIS OFFICIAL CAPACITY AS THE FINANCE DIRECTOR OF THE TOWN OF WEST WARWICK; AND THE TOWN OF WEST WARWICK	:	

DECISION

K. RODGERS, J. This civil action arises from the restructuring of the West Warwick Fire Department (the Department) that was designed to address what had become a revolving door in the Fire Prevention Division within the Department. In November 2009, following that restructuring, Plaintiff Leslie J. Hart, Jr. (Hart) was not selected to serve as the Assistant Fire Marshal when a vacancy opened up, despite his senior rank to the individual ultimately chosen and the next-in-line position he held on the captains' promotional list. Hart filed a grievance with the West Warwick Firefighters' Union

Local # 1104, International Association of Firefighters (the Local Union), which was denied. This lawsuit followed.

This matter was tried before the Court without a jury on Plaintiff's Complaint seeking declaratory judgment and injunctive relief. As against the Local Union, William Leahy, in his official capacity as President of the Local Union (Leahy), and Jim Rita, in his official capacity as Treasurer of the Local Union (Rita, and collectively the Union Defendants), Hart alleges that the Union Defendants breached the duty of fair representation to Hart as a member of the Local Union by failing to arbitrate Plaintiff's grievance. As against Joseph Baris, Jr. (Chief Baris), in his official capacity as Chief of the Department, Malcolm Moore, in his official capacity as Finance Director of the Town of West Warwick, and the Town of West Warwick (the Town, and collectively the Town Defendants), Hart alleges that the Town Defendants breached the existing Collective Bargaining Agreement (CBA) entered into between the Local Union and the Town by appointing a less senior individual to the Assistant Fire Marshal position.

The Union Defendants assert that Plaintiff has failed to exhaust his intra-union remedies before filing the within action, and the Town Defendants assert that a portion of Hart's grievance was not timely made. Defendants also collectively maintain that Plaintiff's suit is barred as it was filed in this Court beyond the six-month statute of limitations. Hart maintains that he is entitled to a three-year statute of limitations.

This Court has jurisdiction pursuant to G.L. 1956 § 8-2-13 and renders its Decision in accordance with Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure. For the reasons that follow, judgment shall enter for all Defendants.

I

Facts

Having heard the testimony presented by the parties and examined the exhibits admitted into evidence, the Court makes the following findings of fact.

A

The Collective Bargaining Agreement

The Local Union is the recognized collective bargaining agent for West Warwick firefighters and is the local affiliate of the International Association of Firefighters (IAFF). Both the Local Union and IAFF are governed by a Constitution and By-Laws. See Pl.'s Ex. 7; Defs.' Ex. GG. Further, the Local Union is bound by the Constitution and By-Laws of IAFF. Pl.'s Ex. 7, at art. I, sec. 3.

The CBA entered into between the Local Union and the Town was in effect from July 1, 2008 through June 30, 2011. The CBA was ratified by the Town Council on October 21, 2008. See Pl.'s Ex. 1.

Article IX, section 1 of the CBA sets forth the grievance procedures. Specifically, a member of the Union must first "take the matter up with his/her immediate supervisor within twenty (20) days of the occurrence or knowledge thereof." Id. at art. IX, sec. 1. If the matter cannot be resolved by the immediate supervisor, the member must "then present this grievance to the Chief of the Fire Department or his/her designee within ten (10) days." Id. If a grievance has not been settled within ten (10) days of being presented to the Chief, the member may then present his or her grievance in writing to the Executive Committee of the Local Union, in which case the Executive Committee must then, within five (5) days of receiving said grievance, arrange for the member to

present the grievance at a meeting of a majority of the Executive Committee. Id. The Executive Committee must determine the justification of the complaint within fifteen (15) days. Id. If agreement on the matter is not reached via these procedures, the grievance may thereafter be referred to arbitration before a mutually agreed upon impartial arbitrator. Id. at art. IX, sec. 2.

The Local Union also has the right to bring a grievance on behalf of any employee or on its own behalf for the violation of any terms of the CBA. Id. at art. IX, sec. 1. Such a grievance must be in writing and presented directly to the Chief within thirty (30) days of the alleged violation. That type of grievance then proceeds in the same manner as if the grievance had been filed by an individual member. Id.

The IAFF's Constitution and By-Laws provides that "[n]o member . . . shall resort to any court of law or equity or other civil authority . . . until such [member] shall have first exhausted all remedies by appeal or otherwise provided in this Constitution and By-Laws." Defs.' Ex. GG, at art. XVIII, sec. 7. The IAFF's Constitution and By-Laws further provides that any final order or decision of a local union shall be appealable, and that appeals shall be referred initially to the General President of the IAFF for review and decision. Id. at art. XVIII, secs. 1-2.

The President of the Local Union is required to enforce the CBA as well as the Constitution and By-Laws of the Local Union and IAFF. Pl.'s Ex. 7, at art. VII, sec. 1. The Executive Board of the Local Union consists of nine (9) members and is authorized to act on behalf of the Local Union in the interim between monthly Local Union meetings. Id. at art. VII, sec. 5. Actions taken by the Executive Board in the name of the

Local Union must be presented to the general membership for conformation at the next regular meeting of the Local Union. Id.

Promotions within the Department are governed by article IV, section 4 of the CBA and are "made in accordance with the strict standings of the current promotional list, beginning with the top person on the list." Pl.'s Ex. 1, at art. IV, sec. 4. The list is developed from the results of a written promotional examination combined with seniority. Id. Each promotional list is valid for a two-year period, meaning that if an individual appearing on a promotional list is not promoted within two (2) years, he or she is required to take the promotional test again to be considered for promotion to the sought-after position. Thus, appearance on a promotional list does not guarantee a promotion. No consideration is given to one's overall placement on an earlier promotional list once that list has expired.

Generally, seniority as used in the CBA is computed in each rank based upon the date of the original appointment to that rank; it is only when more than one officer is promoted to the same rank on the same day that seniority as between those individuals is determined by the length of time in service in the Department. Id. at art. III, sec. 1. Seniority within a rank is used with regard to choice of days off and vacations and to determine bids for transfers to another division or position within that rank. Id. at art. III, sec. 2. By way of example, the individual serving as a captain for the longest period is the most senior captain and may bid to transfer to another captain position, with the second-most-senior captain having the next opportunity to do so, and so on. Transfers within the Department by rank seniority are applicable except when a vacancy is to be filled by a promotional exam. Id.

Article XIX, section 5 of the CBA provides that educational opportunities pertinent to one's service within the Department, up to two courses per semester per fiscal year, are to be paid by the Town. Neither article XIX, section 5 nor article III containing the seniority provisions mandate that educational programs be afforded to Department members based upon departmental seniority. Id. at art. XIX, sec. 5; cf. id. at art. III, sec. 2. However, testimony at trial established that the Department practice was to allow for educational and training opportunities by departmental seniority.

B

The Fire Prevention Division

All members of the Department are tasked with preventing, controlling and extinguishing fires and other emergencies. Although not expressly spelled out in the CBA, the testimony revealed that the Department contains two specialized divisions—the Fire Alarm Division and the Fire Prevention Division—in addition to staffing at fire stations, on trucks and on rescues. At the time the CBA was entered into, the Department provided for staffing in the Fire Prevention Division in the following positions: one Battalion Chief/Fire Marshal and two Captains/Assistant Fire Marshals. See id. at art. XIII, sec. 1. Individuals serving in the Fire Prevention Division would, subsequent to his or her assignment, be required to attend and graduate from the Deputy Fire Marshal certification class offered at the State Fire Academy. The weeks-long, full-time class is only sporadically offered by the State.

Generally, service in the Fire Prevention Division was not a desired position for several reasons. After the Station Fire tragedy on February 20, 2003, the scrutiny surrounding the Town's Fire Marshal was heightened and few people sought that

additional responsibility. Moreover, firefighters commonly preferred to be working as line firefighters out of a station and fighting fires. Accordingly, few existing captains bid to become either of the two Captains/Assistant Fire Marshals, notwithstanding the slight increase in pay over a captain at a station. Instead, lieutenants who placed first on the captains' promotional list would accept the Captain/Assistant Fire Marshal position, receive the desired promotion to captain, and stay in that position only until another captain position became vacant elsewhere. Thus began the rotating door of Captain/Assistant Fire Marshals, leaving the Department with individuals who were not in that position long enough to attend the State Fire Academy course and become certified or to provide any continuity in that important office.

When the Local Union and the Town reached agreement on the CBA in the summer of 2008, the parties had not yet reached an agreement on what could or should be done contractually to address this rotating door in the Fire Prevention Division. Recognizing the need for qualified individuals to remain in the Fire Prevention Division for the sake of continuity and the Local Union's desire to maintain promotional opportunities for its members, the parties incorporated into the CBA the opportunity for the Chief and the Local Union President to reorganize the structure of the Fire Prevention Division. Specifically, the CBA provided as follows:

> "SECTION 11. MISCELLANEOUS
>
> The parties agree, if discussions between the Fire Chief and Union President are not mutually successful, to form a six (6) person committee (3 selected by the Union President and 3 selected by the Town Manager/Fire Chief) to review issues surrounding the organization and structure

> of the Fire Prevention and Fire Alarm Divisions.[1] The committee will report its findings to the negotiating committees of the Union and the Town no later than April 1, 2009 for review and further discussion/negotiation."

Id. at art. XIX, sec. 11.

Beginning in December 2008, two months after the CBA was ratified by the Town Council, Chief Baris and Leahy met on numerous occasions to further negotiate the restructuring of the Fire Prevention Division. Chief Baris had been appointed as Chief in June 2008; Leahy was a twenty-year veteran of the Department, served on the Local Union's Executive Board for fourteen years, and was elected President in October 2008. Handwritten notes were introduced at trial reflecting some of those meetings between Chief Baris and Leahy. See, e.g., Defs.' Ex. HH. Chief Baris sought to create a career ladder within the Fire Prevention Division and Fire Alarm Division whereby personnel in each division would remain in the division, and vacancies occurring with the division would be filled by someone already in that division.

By April 2009, Chief Baris and Leahy agreed that future appointments to the Fire Prevention Division would be filled based upon seniority within the Department and not based upon rank. This manner of appointment by departmental seniority mirrored the existing appointment process to the Fire Alarm Division.[2] With respect to the newly structured Fire Prevention Division, a private who joined the Department earlier than a lieutenant or a captain could bid to an opening in the Assistant Fire Marshal position at

[1] Testimony of Leahy revealed that the parties had intended to have some level of parity as between the Fire Alarm Division and the Fire Prevention Division, thus the Fire Alarm Division's inclusion in this section of the CBA.

[2] Although the testimony was undisputed that, at all pertinent times, appointment to the Fire Alarm Division had been based upon departmental seniority, the CBA is silent on this selection process.

the rate of captain's pay over the very same captain or lieutenant. That private then would be afforded a significant pay increase when he or she otherwise may not be eligible for a promotion. This structure would allow the Assistant Fire Marshal position to be filled from a larger pool of prospective bidders who may desire to be in that post and remain there for the higher pay grade, thereby encouraging qualified staffing and continuity within the Fire Prevention Division.

The agreement reached between Chief Baris and Leahy also provided that, under this restructuring, the new Fire Marshal would be paid at the pay grade of the Director of Communications in the Fire Alarm Division and have two eligibility requirements: (1) certification as an Assistant Deputy State Fire Marshal in Rhode Island, and (2) one year of service in the Fire Prevention Bureau. The new Assistant Fire Marshal position under this restructuring would be paid at the pay grade of a captain and have two eligibility requirements: (1) certification as an Assistant Deputy State Fire Marshal in Rhode Island, and (2) six months service in the Fire Prevention Bureau.[3] The second Captain/Assistant Fire Marshal position would instead become the Fire Prevention Inspector under this restructuring and would be paid at the pay grade of lieutenant. The only requirement for that new position was to be certified as an Assistant Deputy State Fire Marshal in Rhode Island as soon as a class were available at the State Fire Academy.

[3]The credible testimony of both Chief Baris and Leahy revealed that because the one-year and six-month service in the Fire Prevention Division was a new requirement for the new Fire Marshal and Assistant Fire Marshal, respectively, they agreed to waive that requirement for the initial appointment to these positions. Leahy also credibly testified that such a waiver of the time-in-service requirement was generally supported by the Union membership as discussed in the various Local Union meetings held in the spring of 2009.

Chief Baris and Leahy agreed that no incumbent would lose pay or benefits as a result of the restructuring. Accordingly, the downgrade in pay grade of the new Fire Prevention Inspector from the pay grade of captain to lieutenant would not be effective until then-Captain Scott Perkins, one of the two existing Captain/Assistant Fire Marshals, vacated his position and that vacancy as Fire Prevention Inspector was subsequently filled.

Because an agreement had been reached between Chief Baris and Leahy concerning the restructuring of the Fire Prevention Division and the Fire Alarm Division, the six-member committee was not formed to review the issues surrounding the organization and structure of these divisions, as set forth in article XIX, section 11 of the CBA.

C

The Memorandum of Agreement

After reaching agreement with Chief Baris in principle, Leahy attended Local Union membership meetings in May, June and July 2009 to orally inform the membership of the terms of such agreement. Leahy orally advised the membership at these meetings that the first vacancies in the Fire Prevention Division would be filled by the senior Department member bidding for such position, regardless of rank, and without the required time in the Fire Prevention Division. At the July 2009 membership meeting, a duly qualified quorum of the members voted 24 to 1 to conduct a day-long membership vote in August 2009, to either accept or reject the terms reached between Chief Baris and Leahy. That vote was conducted on August 5, 2009. The question presented to the membership on that day read as follows: "A yes vote will move the proposal forward, and

a no vote will keep the rooms[4] the same." Further, a copy of the written terms of the agreement was posted at the location of the all-day vote.[5] By a vote of 43 to 21, the Local Union membership approved the terms of the agreement as presented to it.

Subsequent to the August 5, 2009 vote, Chief Baris notified Leahy that changes in the salaries associated with the restructuring could not be implemented until the end of the fiscal year, to wit, June 30, 2010, because the salary changes had not been budgeted in the ongoing fiscal year.[6] Without submitting that modification to the membership, Leahy agreed to delay the salary adjustments until June 30, 2010, and a final paragraph to that effect was added to the draft Memorandum of Agreement prepared by the Local Union. Chief Baris and Leahy both testified that the delayed effective date of June 30, 2010 applied only to the financial components of the agreement, and not to the remaining provisions.

A written Memorandum of Agreement (MOA) was finalized on August 13, 2009. Pl.'s Ex. 4. The MOA was thereafter signed by Leahy and James Thomas, the Town Manager. The additional, final paragraph that was not presented to, nor approved by, the Union members reads as follows:

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[4] Leahy's testimony made clear that "rooms" is another reference to the Fire Prevention Division and the Fire Alarm Division.

[5] The written terms as posted on August 5, 2009 were not introduced as a full exhibit at trial; however, the undisputed testimony revealed that the posted document was identical to the Memorandum of Understanding, marked as Pl.'s Ex. 4, with the exception of the final paragraph, which is further addressed infra, at 11-12.

[6] Although not pertinent to the restructuring of the Fire Prevention Division as it relates to Plaintiff, the agreement reached between Chief Baris and Leahy also upgraded the pay grade of the Fire Alarm Technician in the Fire Alarm Division to that of a lieutenant. Accordingly, the salary changes to be implemented included more than a downward adjustment for the new position of Fire Prevention Inspector. The cumulative effect of the structural changes in the Fire Prevention Division and the Fire Alarm Division under the agreement reached and approved by the Local Union membership would cost the Department an additional $3200 annually if all the positions were filled.

> "This contract addition shall become effective at the end of the work day on June 30th 2010. Prior to that date, openings in each division will be filled in accordance with Article III, Section 2, use of seniority, subsection 3B and 3C of the collective bargaining agreement, by qualified firefighters. No loss of pay or benefits will occur upon implementation of the agreement above."

Notably, article III, subsections 3B and 3C do not exist in the CBA, but article III, subsections 2B and 2C address use of seniority in transfers and bids except when such positions are filled by promotional exam. See Pl.'s Ex. 1, at art. III, sec. 2.

The MOA was not presented to, and therefore was not ratified by, the Town Council.

D

Plaintiff's Status on Promotional List and Interest in the Fire Prevention Division

Hart was employed by the Town as a firefighter from January 1990 until his retirement on July 1, 2011, at the rank of lieutenant, to which he had been promoted in October 2005. In October 2008, Hart took the promotional test to become a captain and placed second overall. As of the spring of 2009, as a result of one promotion to captain being made, Hart was the next person on the promotional list to become a captain.

Hart attended the July 1, 2009 Local Union meeting[7] at which Leahy orally advised the Local Union membership of the terms of the agreement, including that the position in the Fire Prevention Division would be by departmental seniority and that the initial appointments would not have to comply with the time-in-division requirement. Hart expressed his disapproval of the proposed restructuring of the Fire Prevention

[7] Hart testified that he believed he attended the Local Union meeting in June 2009 when the restructuring agreement was discussed. However, the more credible testimony of Leahy revealed that Hart was in attendance and expressed his disapproval at the July 1, 2009 meeting.

Division and the Fire Alarm Division because the Department would be losing two (2) captain positions overall. With the captains' positions being eliminated, his promotion to that position as the next-in-line on the captains' promotional list would likely be delayed or may not come to fruition by October 2010, when that promotional list expired. Hart was the sole dissenting vote on whether to present the proposed restructuring agreement to the membership at an all-day vote to be held in August. Hart did not participate in the August 5, 2009 vote.

The State Fire Academy announced that a Deputy Fire Marshal certification class would be held at the Academy beginning on September 9, 2009. On August 13, 2009, Chief Baris posted a notice seeking persons interested in attending the upcoming certification course; interested individuals were instructed to notify the Chief's office by August 18, 2009. Plaintiff, along with three other individuals, timely notified the Chief's office of his interest. Of the four interested individuals, Plaintiff had the least Departmental seniority. Chief Baris selected the two individuals with the highest Departmental seniority to attend the Deputy State Fire Marshal course, Firefighter Paul Petrozzi and Lt. James Bobola. Thus, Plaintiff was aware no later than September 9, 2009, that he was <u>not</u> selected to attend the Deputy State Fire Marshal course despite his seniority by rank. Plaintiff did not file a grievance concerning Chief Baris' selection at or around that time, although he acknowledged that he was aware that the selection of a private over him to attend the certification class "didn't look good" for his prospects of joining the Fire Prevention Division, should there be a vacancy therein.

On October 15, 2009, Captain/Assistant Fire Marshal Albert Heroux (Heroux) filed Department paperwork indicating he would be retiring forthwith. The vacancy

created by Heroux's retirement was the first vacancy within the newly restructured Fire Prevention Division. The Local Union membership was advised via an automated telephone notification system that the position of Assistant Fire Marshal formerly held by Heroux was being put out to bid. The bid session for this position was held in early November 2009, at which all interested individuals were required to attend. Plaintiff did not attend the session or otherwise bid for the position. Similarly, no existing captain bid for that position. Pvt. Petrozzi bid for the position and it was awarded to him. For the first time then, a private was appointed to the Fire Prevention Division and qualified for captain's pay over a lieutenant on the captains' promotional list.

E

Plaintiff's Grievance

Although Hart had not bid for the position created by Heroux's retirement, he did file a grievance within twenty (20) days of Pvt. Petrozzi's elevation and transfer into the Fire Prevention Division. On November 20, 2009, Hart's written grievance was presented to Battalion Chief Russ McGillvray, Hart's direct supervisor and also a member of the Local Union's Executive Committee. That written grievance addressed three specific matters: (1) that Heroux's vacancy should have been filled by eligible individuals on the existing captains' promotional list pursuant to article IV, section 2 of the CBA; (2) that transfer to the Fire Prevention Division can be done by promotional exam only, and only officers in the rank of captain or above are eligible to bid to that Division in accordance with seniority provisions in article III, sections 1 and 2 of the CBA; and (3) that Hart was improperly denied admittance to Assistant Fire Marshal certification class, with a private taking his place, in violation of the seniority provisions

in article III, sections 1 and 2 of the CBA. Pl.'s Ex. 2. To remedy these violations, Hart requested that he be immediately promoted to the rank of captain to fill the vacancy created by Heroux's retirement. Id.

Battalion Chief McGillvray presented Hart's grievance to Chief Baris on November 20, 2009. Hart had not discussed or disseminated his grievance to anyone else at that time. On November 22, 2009, Leahy called Hart and asked him to attend an Executive Board meeting on November 23, 2009, which meeting had been previously scheduled to address two other grievances filed by other firefighters. Chief Baris had not yet acted on Hart's grievance by November 23, 2009, as required by article IX, section 1 of the CBA. Notwithstanding, Hart voluntarily attended the Executive Board meeting on that day. At that Executive Board meeting, each member already had been provided a copy of Hart's grievance.

Hart had the opportunity to fully present his grievance to the Executive Board on November 23, 2009, over a twenty-thirty minute period. Hart pointed out that the MOA as executed has an effective date of June 30, 2010, and therefore the preexisting structure in, and promotional process to, the Fire Prevention Division remained in effect; namely, if there was no existing captain bidding for the Captain/Assistant Fire Marshal vacancy created by Heroux's retirement, then the vacancy would be filled by the next person on the captains' promotional list who bid for the position. The Executive Board disagreed and informed Hart that the "effective date" specified in the MOA was intended to apply only to salary changes and that the manner of transferring to the Fire Prevention Division was presently governed by the MOA. Hart also argued to the Executive Committee that there is no provision for Departmental seniority in the CBA, and the MOA's reference

therein to subsections 3B and 3C is erroneous. Finally, Hart asserted that the restructuring to the Fire Prevention Division caused the Department to lose two captain's positions, and suggested a structure that would allow for the creation of another captain position. Hart did not argue before the Executive Board that the MOA was void because it had not been ratified by the Town Council or that the Local Union's vote did not in any respect take into consideration the delayed effective date of the MOA.

The Executive Committee meeting that Hart attended on November 23, 2009 became contentious. Despite the heated exchanges, the Executive Board agreed to take Hart's proposal for another captain position to Chief Baris for consideration.[8] Accordingly, Hart's grievance was not resolved at the conclusion of the November 23, 2009 Executive Board meeting.

By written notice dated December 1, 2009, Chief Baris denied Hart's grievance without explanation. By written notice dated December 9, 2009, the Executive Board denied Hart's grievance, citing "[a] resolution between the Union and the Chief," .the proposal presented to the Local Union membership that "the first opening in either [the Fire Alarm or Fire Prevention] division would be filled by strict department seniority," and the 43-21 vote by the Local Union body "to move forward with Department seniority, replacing the system of positions being filled through the promotional list." Pl.'s Ex. 5.

Hart did not at any time appeal the Local Union's decision not to proceed with his grievance to the General President of the IAFF, in accordance with the IAFF's Constitution and By-Laws. See Defs.' Ex. GG, at art. XVIII, secs. 1, 3.

[8] Ultimately, this suggestion was rejected by Chief Baris.

F

Ongoing Discussions Concerning Effective Date of the MOA

Subsequent to Hart's grievance being denied, other issues implicating the effective date of the MOA were addressed. Specifically, at the request of Private Kevin Tellier, a former Union President and holding the position of Fire Alarm Technician in the Fire Alarm Division, Leahy asked Chief Baris to implement the pay increases that were specified in the MOA immediately, rather than on June 30, 2010. This would have resulted in an immediate pay raise for both Pvt. Tellier and Pvt. Petrozzi. Tellier argued that the Local Union membership had not voted on the effective date of the financial component being delayed until June 2010. A compromise was reached and Chief Baris agreed to implement the pay increases in January 2010, relying in part on having some funds available within the Department as a result of some vacancies not being filled. There was nothing in writing to memorialize this modification to the MOA.

II

Presentation of Witnesses

Hart testified in his case-in-chief. Hart appeared to be sincere in his testimony, but certainly disgruntled that he never was promoted to captain by the time of his retirement. Hart had little reaction when he confirmed on cross-examination that he had not participated in the all-day Local Union vote on August 5, 2009, had not filed a grievance within twenty days of learning that he had not been selected to attend the Deputy Fire Marshal certification class in September 2009 but that Pvt. Petrozzi had, and that he had not bid for the position of Assistant Fire Marshal created by Heroux's

vacancy. Hart appeared to this Court to be disinterested in protecting his rights along the way.

While sitting idly by and not registering a specific interest in being appointed to the Fire Prevention Division, Hart nonetheless bases his grievance in part on the suggestion that Pvt. Petrozzi was selected to fill Heroux's vacancy in the Fire Prevention Division due to family relationships and Local Union support. Specifically, Hart asserted that Pvt. Petrozzi had nominated Leahy as Union President and supported his run for that office; Pvt. Petrozzi's cousin, Steven Patalano, seconded Leahy's nomination; and another cousin of Pvt. Petrozzi's is Chief Baris's Administrative Assistant. Finally, Hart noted that Pvt. Petrozzi's brother-in-law, Michael Masciarelli, serves on the Executive Board. Hart's contentions are wholly unavailing. The evidence demonstrated a genuine need to fix the revolving door that had become the Fire Prevention Division, a months-long process through which that fix was developed, and an overwhelming support by the Local Union membership for those changes. There was no evidence that suggested that the changes in the Fire Prevention Division had been proposed in order to benefit Pvt. Petrozzi or any other specific individual. Hart's suggestion that Pvt. Petrozzi received preferential treatment based upon family relationships and Local Union support appears to be little more than sour grapes.

Leahy was called to testify in both Hart's case-in-chief and the Defendants' case-in-chief. Leahy appeared to toe the Local Union's party line. Leahy offered credible testimony concerning why he, as the Union President, agreed to the restructure of the Fire Prevention Division in the manner he did, and he explained—and Chief Baris confirmed—the need for the June 30, 2010 effective date to relate to financial

components. What became evident, however, was that Leahy failed to recognize how ambiguous the Local Union-drafted, written MOA was that he signed as a party.

Chief Baris was also called to testify in both Hart's case-in-chief and the Defendants' case-in-chief. Chief Baris presented the most credible testimony, expressing a genuine concern for the need to restructure the Fire Prevention Division and to keep qualified individuals in those important positions. Admittedly, he had only been on the job several months before the CBA was ratified and he and Leahy undertook discussions concerning the restructuring. His explanations concerning the need to delay the financial components of the restructuring were credible, as was a later agreement reached with Leahy to move up the effective date of the financial components upon finding other funds in the Department budget. Like Leahy, however, Chief Baris did not recognize how ambiguous the MOA was, although he only executed it as a witness to Leahy's and Town Manager James Thomas' signatures.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). "In a non-jury trial, the trial justice sits as the trier of fact as well as of law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. "'A trial justice's findings of fact will not be disturbed unless such findings are clearly erroneous, the trial justice misconceived or overlooked material evidence, or unless the

decision fails to do substantial justice between the parties."' Opella v. Opella, 896 A.2d 714, 718 (R.I. 2006) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)). While the trial justice's analysis of the evidence and findings need not be exhaustive or "categorically accept or reject each piece of evidence," the trial justice's decision must '"reasonably indicate[] that [she] exercised [her] independent judgment in passing on the weight of the testimony and credibility of the witnesses."' Notarantonio v. Notarantonio, 941 A.2d 138, 144 (R.I. 2008) (quoting McBurney v. Roszknowski, 875 A.2d 428, 436 (R.I. 2005)). Further, although the trial justice is required to make specific findings of fact, '"[e]ven brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case."' Hilley v. Lawrence, 972 A.2d 643, 651 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

IV

Analysis

A

Plaintiff's Complaint Qualifies As a Hybrid Action

In the arena of labor law, Rhode Island courts frequently look to the voluminous body of federal case law for guidance. Town of Burrillville v. Rhode Island State Labor Relations Bd., 921 A.2d 113, 120 (R.I. 2007); DiGiulio v. Rhode Island Bhd. of Corr. Officers, 819 A.2d 1271, 1273 (R.I. 2003). The case presented to this Court is a "hybrid" action wherein the Plaintiff-Local Union member filed both a claim of unfair representation against the Local Union as well as a claim against the Town-employer alleging that the employer breached the CBA. In order to prevail on the merits against either the Union Defendants or the Town Defendants, Plaintiff must prove both: (1) that

the Local Union breached its duty of fair representation; and, (2) that the employer breached the CBA. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 165, 103 S. Ct. 2281, 2291, 76 L.Ed. 2d 476 (1983). Accordingly, a plaintiff-employee must prevail on his unfair representation claim against the union before he may even litigate the merits of his claim against his employer. Id. at 165, 103 S. Ct. at 2291; Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71, 96 S. Ct. 1048, 1059, 47 L.Ed. 2d 231, 245 (1976); Ayala v. Union de Tronquistas de Puerto Rico, Local 901, 74 F.3d 344, 346 (1st Cir. 1996).

The Rhode Island Supreme Court has expressly adopted these principles. In DiGiulio, the plaintiff-union member filed suit against both the union and her employer, the Rhode Island Department of Corrections, seeking declaratory relief under a collective bargaining agreement after she lost a bid position to someone deemed to have more seniority. DiGiulio, 819 A.2d at 1272. The plaintiff disagreed with the union's interpretation of seniority and took her grievance to the union. Id. The union, in turn, informed her that it would not take her case to arbitration. Id. The plaintiff never alleged that the union breached its duty of fair representation, but rather just proceeded against the union on her request for declaratory relief. Id. Our Court stated:

> "Under federal law, in order to prevail in court against an employer for breach of contract when a union refuses to arbitrate an employee's grievance, the employee must demonstrate not only that the employer breached the contract but also that the union breached its duty to represent the employee fairly. . . . Consequently, without a showing that the union breached its duty of fair representation, the employee does not have any standing to contest the merits of his contract claim against the employer in court."

Id. at 1273 (internal citations and footnote omitted). The Court further noted that

while the union does not actually have to be a party to the suit, the employee must still establish that the union breached its duty of fair representation before the employee can contest the merits of his or her breach of contract claim against the employer in court. Id. (citing DelCostello, 462 U.S. at 165, 103 S. Ct. at 2291).

Against this legal backdrop, this Court will now consider the Plaintiff's claims against the Union Defendants and the Town Defendants.

B

Union's Breach of Duty of Fair Representation

The mere fact that a union does not pursue a grievance is not, in itself, a breach of the union's duty of fair representation. See DiGiulio, 819 A.2d at 1273-74. A union is not duty-bound to arbitrate a meritless grievance; rather, it "'must balance and consider the legitimate interests of all its members.'" Id. at 1273 (quoting Ayala, 913 F. Supp. at 79). As it relates to a determination of seniority, a decision to arbitrate one union member's grievance may very well affect other union members whose status may be altered under the grieving union member's proposed interpretation. See id. at 1273; see also Ayala, 74 F.3d at 346 (rejecting on appeal plaintiff's claim of unfair representation against union on seniority definition because "a union, caught in the middle between dueling employees, is not obligated to throw some union members to the wolves merely to placate others"). Accordingly, courts throughout the country have determined that a union's duty of fair representation is breached only upon a showing of arbitrary, discriminatory, or bad faith conduct, or by the handling of a grievance in a perfunctory manner and not by union error in failing to process a meritorious grievance. Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S. Ct. 903, 916, 17 L.Ed. 2d 842, 857-58 (1967); Lee v.

Rhode Island Council 94, 796 A.2d 1080, 1083 (R.I. 2002); see also Air Line Pilots Ass'n, Inter. v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130 (1991).

A union's actions may be found to be arbitrary "only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" Air Line Pilots, 499 U.S. at 78, 111 S. Ct. at 1136 (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L.Ed. 2d 1048 (1953)). '"To be discriminatory, union conduct must be 'intentional, severe, and unrelated to legitimate union objectives,' as in the case of invidious discrimination based on race or gender."' Marcoux v. American Airlines, Inc., 645 F. Supp. 2d 68, 93 (E.D.N.Y. 2008) (quoting Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L.Ed. 2d 473 (1971)). "'[B]ad faith requires a showing of fraudulent, deceitful, or dishonest action.'" Id. (quoting White v. White Rose Food, 237 F.3d 174, 179 (2d Cir. 2001)).

Plaintiff has failed to demonstrate that the Local Union acted arbitrarily, discriminatorily, or in bad faith in determining that Plaintiff's grievance would not be pursued. Indeed, it was reasonable for the Local Union to interpret the state of the CBA and the MOA as it did at the time it considered Plaintiff's grievance and reach the conclusion that Plaintiff's grievance was without merit. In light of the credible testimony of Chief Baris and Leahy that only the financial components of the MOA would be delayed until June 2010, the discussion that took place on November 23, 2009, as between the Local Union's Executive Board and Plaintiff that that was the intent of the last paragraph in the MOA, and the overwhelming Local Union support for the changes to the Fire Prevention Division structure, including the change to appointment by

departmental seniority, this Court finds that the Local Union's actions were within the wide range of reason and were not arbitrary or irrational.

Further, there is no credible evidence that the Local Union discriminated against Plaintiff. This Court disregards Plaintiff's contentions that the Local Union favored Pvt. Petrozzi based upon his Local Union support and family relationships as not being credible or supported by any evidence other than Plaintiff's surmise. Certainly, there is no evidence that the Local Union's conduct was intentional, severe and/or unrelated to legitimate Local Union objectives. To the contrary, the Local Union's denial of Plaintiff's grievance was specifically related to the legitimate concern of both the Local Union and the Town that the revolving door in the Fire Prevention Division be fixed.

Likewise, there is no evidence before the Court that the Local Union was fraudulent, deceitful or dishonest in its handling of Plaintiff's grievance. Again, to the contrary, the Local Union immediately conducted an Executive Board hearing with Plaintiff voluntarily present, at which time the Local Union's position that the effective date of the MOA related to financial components only was conveyed to Plaintiff, the same position that the Local Union takes in the matter before this Court. There is nothing fraudulent, deceitful or dishonest in the manner in which Plaintiff's grievance was considered and denied.

Finally, it cannot be said that the Local Union handled Plaintiff's grievance in a perfunctory manner. Plaintiff voluntarily participated in the hearing before the Executive Board before Chief Baris even responded to the grievance as he was otherwise required to do under the CBA. The Executive Board conducted a twenty-thirty minute hearing with Plaintiff present. Plaintiff certainly benefitted by having his grievance considered

by the Executive Board expeditiously rather than wait an additional period after Chief Baris responded, as required under article IX, section 1 of the CBA. See Pl.'s Ex. 1, at art. IX, sec. 1. In any event, Plaintiff never objected to participating in the process; he was afforded the opportunity to present his argument; the Executive Board considered that argument and discussed with Plaintiff the same that it does here—that only the financial components of the MOA were delayed in being put into effect; and the Local Union even went so far as to present Plaintiff's alternative suggestion to Chief Baris that another captain position be created as a means of compromise on his pending grievance. A "perfunctory" handling of a grievance would likely not include such lengthy consideration by the Executive Board of the issues raised by Plaintiff, nor its consistent response to Plaintiff's grievance as has been presented to this Court. Cf. Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124 (1975) (finding for union member on unfair representation claim where union never investigated plaintiff's grievance, never met with plaintiff and never considered reasons why plaintiff should have been awarded a position over another union member).

"The duty of fair representation dictates that a union must conduct at least a 'minimal investigation into the employee's grievance.'" Carreiro v. Stop & Shop Supermarkets, LLC, 2008 WL 2944660, *7 (D.R.I. 2008) (quoting Emmanuel v. Int'l Bhd. of Teamsters, 426 F.3d 416, 420 (1st Cir. 2005)). Our Supreme Court has also held that if a union investigates a grievance in an informal manner, the union's obligation of fair representation would be satisfied so long as the procedure affords the ability to place all relevant information before the union. Belanger, 115 R.I. at 344, 346 A.2d at 132. Here, the Local Union complied with its duty to investigate. The evidence demonstrated

that Plaintiff had the opportunity to be heard on all the issues he raised before the Executive Board and that the Local Union investigated Plaintiff's assertions and concluded that they were without merit. The Local Union also went so far as to explore Plaintiff's suggestion that another captain position be created by conferring with Chief Baris. This was indeed more than a minimal investigation that the Local Union was obligated to undertake.

Moreover, and importantly, Plaintiff did not raise, in his written grievance or in his presentation to the Executive Board, that the MOA was void because it was not ratified by the Town Council. Having not raised the issue, it cannot be said that the Local Union breached its duty of fair representation by not considering that issue and/or seeking a legal opinion as to whether Town Council ratification was required.

It has been held that "unions are not mandated to provide perfect representation or even representation that is free of negligence." Lee, 796 A.2d at 1084 (citing Achilli v. John J. Nissen Baking Co., 989 F.2d 561, 563 (1st Cir. 1993)). This Court would be remiss if it did not point out the Local Union's less-than-perfect drafting of the MOA, which is at the root of Plaintiff's claims. Surely, the effective date of each element of the changes to the Fire Prevention Division and Fire Alarm Division could have been more artfully drafted, and the reference to non-existent subsections in the CBA should not have occurred. Both Leahy and Chief Baris appeared unfazed by the poor draftsmanship. However, such errors and/or cavalier responses do not mandate that Plaintiff's grievance must be pursued by the Local Union. The evidence demonstrated that the Local Union advised Plaintiff and the Local Union membership in the spring 2009 meetings that the appointment to the Fire Prevention Division would be based upon departmental seniority,

effective immediately; the membership approved the changes; Plaintiff participated in earlier discussions and registered his displeasure concerning the impending changes; other Local Union members would be adversely affected by Plaintiff's interpretation of the effective date of the change to departmental seniority; the "effective date" set forth in the MOA related only to the financial components; and all these same points were discussed with Plaintiff over the course of the November 23, 2009 Executive Board meeting on Plaintiff's grievance. For all these reasons, this Court finds that the Local Union's decision not to pursue Plaintiff's grievance was neither arbitrary, discriminatory, made in bad faith, nor reached in a perfunctory manner.

Accordingly, the Union Defendants are entitled to judgment on the breach of duty of fair representation claims against them.

C

Town's Breach of the Collective Bargaining Agreement

In light of the holding in DiGiulio requiring that a union member first demonstrate that the union breached its duty of fair representation before the member has standing to seek a judicial remedy against the employer under the collective bargaining agreement, this Court need not even consider the breach of the CBA claims directed at the Town Defendants. See DiGiulio, 819 A.2d 1273-74. Nonetheless, this Court takes the opportunity to discuss the state of the law and the evidence presented and concludes that, even if Plaintiff did have standing, Plaintiff's claims fail.

Plaintiff's claims against the Town Defendants are premised on Pvt. Petrozzi being sent to the State Fire Academy in September 2009 instead of the more senior ranking Plaintiff, and by not promoting or appointing Plaintiff to the Assistant Fire

Marshal position. See Pl.'s Post-Trial Mem., at 18. However, Plaintiff did not timely file a grievance with the Local Union concerning Pvt. Petrozzi's selection to attend the State Fire Academy certification course which began on September 9, 2009. See Pl.'s Ex. 1, at art. IX, sec. 1 (grievance shall be taken up with immediate supervisor within twenty days of date of occurrence of knowledge thereof). Any grievance that Plaintiff had concerning Pvt. Petrozzi's selection to attend the certification course over him was required to be raised with Plaintiff's immediate supervisor no later than September 29, 2009. This was not done; therefore, Plaintiff is without standing to pursue a judicial remedy against the Town in that regard. See DiGiulio, 819 A.2d 1273.

As it relates to his own appointment to the Assistant Fire Marshal position of which Plaintiff now complains, Plaintiff admittedly did not attend the bid session nor bid for the position. No matter the manner in which the appointment was made, whether by rank seniority or departmental seniority, Plaintiff did not bid for the position. Moreover, his testimony at trial that he expected Chief Baris to come to him to offer him the position is not grounded in the CBA nor in reality. A union member seeking a vacant position must register some interest with the employer before an employer may be held accountable for failing to appoint or promote that individual. See Washington v. BellSouth Telecommuncations, Inc., 203 F. Supp. 2d 668, 673 (D.C. Miss. 2001) ("Union cannot be faulted because plaintiff failed to follow the correct procedures for submitting bids for the positions at issue."). Plaintiff presents no evidence or authority for this Court to hold otherwise. Accordingly, as Plaintiff sat idly by and registered no interest while bids were made for the vacant position, he cannot now complain that the Town breached the CBA by not appointing or promoting him to that post.

Finally, Plaintiff contends that the Town is liable for breaching the CBA wherein it failed to have the MOA ratified by the Town Council. See Pl.'s Post-Trial Mem, at 18. Clearly, the CBA, as ratified by the Town Council on October 21, 2008, contemplated that the Chief of the Department and the Local Union would discuss issues surrounding the organization and structure of the Fire Prevention Division and the Fire Alarm Division, and that only if those discussions were not "mutually successful" would there be a committee formed that would, in turn, report back to the Town Council. Pl.'s Ex. 1, at art. XIX, sec. 11. There is no evidence before this Court to suggest that the discussions between Chief Baris and Leahy were anything but mutually successful. Thus, the Town Council, in ratifying the CBA, delegated the authority to reach further agreement on the structure and organization of the Fire Prevention Division to the Chief and the Local Union, which they did in fact do.

Further, even if the MOA required ratification by the Town Council, the Town Defendants' conduct has effectively ratified that agreement. See McGee v. Stone, 522 A.2d 211, 214 (R.I. 1987) (holding a party ratifies an agreement by conduct which serves to give party the benefit of the agreement and cannot then deny its obligations under the same agreement). The Town is a named defendant in this action and has not in any manner attempted to repudiate its obligations under the MOA. The testimony demonstrated that the Town and the Local Union have both acted in a manner consistent with applying the terms of the MOA. Accordingly, the Town and the Local Union, by their own conduct, have ratified the terms of the MOA, and this Court is not persuaded that the Town Defendants breached the CBA insofar as the MOA was never separately ratified by the Town Council.

For these reasons, in addition to this Court's conclusion that Plaintiff has failed to demonstrate that the Local Union breached its duty of fair representation owed to him, Plaintiff's breach of contract claims fail and the Town Defendants are entitled to judgment.

D

Failure to Exhaust Intra-Union Remedies

Finally, the Defendants contend that Plaintiff's failure to exhaust his intra-union remedies serves as a bar to his claims raised before this Court. Not only is Plaintiff contractually bound under the Local Union's CBA, as well as the IAFF's Constitution and By-Laws, to exhaust internal union procedures before filing suit, but also the United States Supreme Court has made similar rulings. See Clayton v. UAW, 451 U.S. 679, 692-93 (1981); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). Here, it is undisputed that Plaintiff failed to appeal the Local Union's decision not to pursue Plaintiff's grievance to the General President of the IAFF as required by the IAFF's Constitution and By-Laws. See Defs.' Ex. GG, at art. XVIII, secs. 1, 3. Additionally, Plaintiff failed to timely file his grievance within twenty days of the date that Pvt. Petrozzi was selected to attend the Deputy Fire Marshal certification class instead of Plaintiff.[9]

This Court is also not persuaded that Plaintiff's lack of familiarity with the IAFF's Constitution and By-Laws excuses his failure to exhaust his administrative

[9] Defendants' contention that the six-month statute of limitations bars Plaintiff's cause of action relates to this portion of his grievance and the corresponding causes of action before this Court. Because this Court finds that that grievance did not comply with the internal union procedures set forth in the CBA, that grievance fails in any event and this Court need not address the statute of limitations issue.

remedies. Federal courts have widely rejected such arguments, and so does this Court. See, e.g., Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390, 1397 (9th Cir. 1985); Munroe v. UAW, 723 F.2d 22, 26 (6th Cir. 1983); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1214 (9th Cir. 1980); Newgent v. Modine Mfg Co., 495 F.2d 919, 927-28 (7th Cir. 1974); Dean v. Gen. Teamsters Union, Local No. 406, 1989 WL 223013 (W.D. Mich. Sept. 18, 1989). For these additional reasons, Plaintiff's claims against these Defendants must be dismissed and Defendants are entitled to judgment.

V

Conclusion

Based on the testimony, evidence and memoranda submitted and for the reasons stated above, this Court finds that all Defendants are entitled to judgment in their favor.

Counsel for Defendants shall submit an appropriate judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Leslie J. Hart, Jr. v. West Warwick Firefighters' Union Local # 1104, International Association of Firefighters, et al.**
CASE NO:	**C.A. No. KC 10-0470**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**July 31, 2013**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Kevin F. McHugh, Esq.**
For Defendant:	**Marc B. Gursky, Esq.** **John L. Breguet, Esq.**