STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
STATE OF CONNECTICUT

-AND-

CONNECTICUT STATE EMPLOYEES
ASSOCIATION, CORRECTIONS SUPERVISORY
COUNCIL

DECISION NO. 4101

NOVEMBER 21, 2005

Case No. SPP-23,168

A P P E A R A N C E S:

Attorney Ellen M. Carter
For the State

Attorney Robert J. Krzys
For the Union

DECISION AND ORDER

On March 15, 2002, the Connecticut State Employees Association, Corrections Supervisory Council (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board), amended on January 8, 2003, alleging that the State of Connecticut (State or DOC) violated the State Employee Relations Act (SERA or the Act) by discriminating against Union activists and by making unilateral changes in conditions of employment.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on December 10 and December 17, 2002, January 8, February 18, February 29, March 4, and March 5, 2003. Both parties appeared, were represented by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and make argument. After the conclusion of the hearing, the parties agreed to withdraw certain allegations before the Board based on resolutions reached in the interest arbitration process. The remaining allegations concern discrimination and retaliation against Union activists, the suspension of longevity payments, suspension of

vacation bonus days, and the alteration of the work schedule. Both parties filed post-hearing briefs and reply briefs, the last of which was received by the Labor Board on February 3, 2004. Thereafter, the Labor Board requested supplemental briefs from the parties regarding the effect, if any, of the intervening approval of an interest arbitration award, the last of which briefs was received by the Labor Board on June 17, 2004. Based on the entire record before us, we make the following findings of fact and conclusions of law and we issue the following order.

FINDINGS OF FACT

(Facts 1-9 are by stipulation of the parties).

1. The State of Connecticut Executive Branch ("State") is an employer under the State Collective Bargaining Act ("Act").

2. The Connecticut State Employees Association ("CSEA" or "Union") is an employee organization and the exclusive representative of the correctional supervisor bargaining unit under the Act.

3. Prior to October 1, 2001, DOC employees "at the level of Lieutenant or above" were included in the definition of managerial employee under the Act and therefore excluded from coverage of the Act.

4. Public Act 01-103, which was effective October 1, 2001, deleted the above provision from the managerial employee definition. (Ex. 3).

5. On October 3, 2001, the Union filed a petition (Case No. SE-22,768) to establish and represent a new bargaining unit consisting of "all Lieutenants, Captains and Training Officers working in the Department of Correction." (Ex. 4).

6. During conferences on November 21 and 29, 2001, the State and the Union reached a recognition agreement that was executed December 3, 2001. The agreement indicated that the parties agreed to the appropriateness of the unit consisting of "all Correctional Lieutenants and Correctional Training Officers, as those classifications presently exist" and the State recognized CSEA as the unit's exclusive bargaining representative. (Ex. 5).

7. As managerial and/or non-unionized employees, the Correctional Lieutenants and Training Officers were covered by certain provisions of the State Personnel Act (CGS Sec. 5-193 et seq.), which provides in relevant part:

> Sec. 5-213. **Longevity payments.** (a) Notwithstanding the provisions of section 5-212, each employee in state service who has completed not less than ten years of state service and who is not included in any collective bargaining unit, except those employees whose compensation is prescribed by statute, shall receive

> semiannual lump-sum longevity payments based on service completed as of the first day of April and the first day of October of each year …
>
> ***

8. The negotiations for the collective bargaining agreement commenced on March 14, 2002.

9. The present complaint was filed on March 14, 2002 and received by the Board on March 15, 2002. (Ex. 2).

10. Prior to recognition of the Union and continuing until the approval of the initial collective bargaining agreement between the State and the Union, bargaining unit members were compensated in accordance with the Management MP pay plan. Bargaining unit members received no increases in salary or bonus subsequent to recognition. (Ex. 20).

11. The rank of DOC lieutenant is supervised by the rank of captain . Above the captains are majors, deputy wardens and wardens.

12. Robert Rinker (Rinker) has been employed as the Executive Director of the Union and, at the time of this hearing, had been so employed for approximately 18 years. Rinker was the Chief Negotiator for the Union in negotiating the initial contract with the lieutenants bargaining unit (NP-8).

13. J. Philip Margeson (Margeson) has been employed as a Labor Relations Specialist by the State of Connecticut, Office of Policy Management (OPM), Office of Labor Relations (OLR) and, at the time of this hearing, had been so employed for over 15 years. Margeson was the Chief Negotiator for the State in negotiating the initial contract with the lieutenants bargaining unit (NP-8).

14. By letter dated March 11, 2002, Margeson advised Rinker as follows (Ex. 12):

> Please be advised that the Office of Labor Relations has advised the Department of Correction that the upcoming longevity payments for Correctional Lieutenants and Training Officers shall be suspended until the parties reach agreement on a new collective bargaining agreement and it is approved by the Legislature. The payments received in the past are consistent with the managerial salary schedule, and, as the Lieutenants/Training Officers have elected representation by your organization, effective December 3, 2001, they are no longer considered managers. Longevity payments are a mandatory subject of bargaining, and shall be discussed in the current negotiations.

15. Prior to January 1, 2003, eligible bargaining unit members received vacation bonus days per Management Personnel Policy 80-1 pertaining to “managers and confidentials” as follows (Ex. 64):

0-10 years	-	15 days
11 years	-	16 days
12 years	-	17 days
13 years	-	18 days
14 years	-	19 days
15+ years	-	20 days

16. On January 1, 2003, the State ceased to provide eligible bargaining unit members with vacation bonus days.

17. Prior to recognition and continuing to January 24, 2003, the line lieutenants' schedule was five days on followed by three days off. Line lieutenants shifts were approximately ten hours. Lieutenants with an administrative assignment were scheduled five days on followed by two days off.

18. By letter dated January 6, 2003, Margeson advised Rinker as follows (Ex. 50):

> As you are aware, the DOC, along with other State agencies is experiencing severe and continuing fiscal difficulties. Over the past three weeks the DOC has thoroughly analyzed lieutenants operations and has determined that in addition to layoffs, it must change the Correctional Lieutenants work schedule to a five (5) days on, followed by two (2) consecutive days off. The effective date of the change in schedule will be January 24, 2003.

Further, as a result of layoffs, transfers will be necessary to backfill the vacancies caused by the least senior Lieutenants being laid off. The DOC has done its best to minimize the impact of the transfers based on residence and travel to the new assignment.

19. In December 2002 and January 2003, the State laid off 166 employees of the Department of Correction. Of those affected employees, 15 were lieutenants.

20. In January 2003, 28 lieutenants were transferred as a result of the layoffs. Of those affected, five lieutenants were transferred to a facility farther from their home than their previous assignment. The determination as to which facility the lieutenants would be transferred was made by the State after considering the agency's operating needs, the lieutenants' home addresses, the location of the present assignments, and the distance from lieutenants' homes to other correctional facilities.

21. In fiscal year 2002/2003, the State experienced financial difficulties.

22. On May 2, 2003, Arbitrator Barbara Zausner issued an interest arbitration award in the matter between the State of Connecticut and the CSEA Correctional Supervisor Council (NP-8) unit, which was approved by the General Assembly. (Exs. 80, 81, 82).

23. The Arbitrator selected the State's last best offer on the issue of longevity as follows (Ex. 80):

a. Effective upon legislative approval of this Agreement, employees in this bargaining unit who were in the classifications of Correctional Lieutenant (MP 56) or Correctional Training Officer (MP 58) on or before December 3, 2001, will be eligible for longevity payments for the life of the Agreement in accordance with the longevity schedule of the classified service Management Pay Plan on such date. The classifications will be considered in their MP designation as noted above.

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24. The Arbitrator selected the State's last best offer in regard to the issue of vacation bonus days as follows (Ex. 80):

The following annual vacation leave shall apply for employees in the bargaining unit as of December 3, 2001:

YEARS OF SERVICE	VACATION LEAVE
10 years	15 days
11 years	16 days
12 years	17 days
13 years	18 days
14 years	19 days
15 plus years	20 days

Vacation leave beyond fifteen days is granted as bonus day(s) each January 1st of the calendar year.

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25. The Arbitrator selected the Union's last best offer in regard to the issue of scheduling as follows (Ex. 80):

a. Line Supervisors will work a five (5) on, three (3) off rotating schedule. Each employee will work a workday that will result in an average workweek of forty (40) hours per week in an eight (8) week cycle. This schedule shall be implemented as soon as practicable following legislative approval of this Agreement.

26. Lieutenant Kevin Manley (Manley) has worked for DOC since 1993. He served as a correctional officer from 1993-1996. He served as a treatment officer from 1996-1998. In 1998, Manley was promoted to lieutenant. At the time of the hearing, he was assigned to the Northern maximum security facility.

27. After Public Act 01-103 became effective, Manley was active in organizing a union for lieutenants. He distributed intent cards, encouraged lieutenants to join the Union, attended union meetings, and attended the Labor Board conference regarding recognition of the Union in November 2001. At the time of the hearing, Manley served as the Vice-President of the Union. His activities were known to his supervisors.

28. In March 2000, Manley was assigned as Intelligence Coordinator. In that assignment, he worked the administrative day shift (weekends and holidays off), supervising five correctional officers.

29. In September 2000, Manley transferred to the night shift due to the birth of his daughter. On that shift he coordinated with and acted as secondary Intelligence Coordinator to Captain William Fannith who performed the work on the day shift. This assignment resulted in no additional compensation.

30. In January 2002, Manley transferred an uncooperative inmate suffering with a medical condition from the Northern facility to the MacDougall facility using emergency protocols. During the transfer, Manley used mace on the inmate. After the transfer, Manley's supervising Captain asked him to submit an incident report regarding the transfer.

31. Director of Central Intelligence James Huckabey (Huckabey) has been employed by DOC for approximately twenty-two years. He was promoted to his current position in May 2000. Huckabey is responsible for approving intelligence coordinators and secondary coordinators at every correctional facility. In determining whether to approve individuals for these positions, one of the key factors considered by Huckabey is the integrity and judgment of the individuals under consideration.

32. The majority of incident reports were forwarded to Huckabey for review. However, the outcome of any investigations initiated as a result of the incident reports were not routinely forwarded to Huckabey.

33. By memo dated March 7, 2002 from Huckabey to Larry Myers, Lead Warden, Huckabey removed Manley as Intelligence Coordinator stating (Ex. 25):

> Per our conversation, please be advised that this office has reviewed the staff submitted for the position of Intelligence Coordinator at NCI, both primary and secondary positions.
>
> As I stated during our conversation, the approval of Captain William Faneuff was granted. I expressed to you the issues that I had in approving Lieutenant Kevin Manley as a back up or assistant Intelligence Coordinator. There remains serious concerns regarding cases in which Lt. Manley's judgement and decision making abilities are in question.
>
> Please submit an alternate, secondary name of a person that possesses the integrity, sound judgment and ability to carry out the duties and responsibilities required for this most sensitive duty.

34. The inmate transfer was investigated by Captain James Shea who concluded that Manley had exercised good judgment during the incident. The investigation of Manley was completed prior to Huckabey's decision to remove Manley as secondary Intelligence Coordinator.

35. After the investigation was complete, Shea asked Manley why he was getting involved with the Union and advised Manley that everyone liked him and that Manley should step away from the Union.

36. Manley attempted to speak to the affirmative action office regarding his removal and was told to contact DOC Commissioner Armstong directly, which he did by telephone. The Commissioner told Manley that he would look into the situation and get back to him. The Commissioner did not get back to Manley who then wrote a letter to the Commissioner. Manley received a written response from the Commissioner telling him to take the matter up through the chain of command at Northern.

37. Thereafter, Manley met with Warden Myers and Major Lajoie concerning his removal. He was told that Huckabey had made the decision to remove him and there was nothing anyone at the facility could do to override the decision.

38. Thereafter, Manley met with Huckabey who informed him that his removal was caused by the circumstances of the inmate transfer in January 2002. Manley informed Huckabey that the investigation had exonerated him. Huckabey responded that at the time of his decision to remove Manley, he was unaware of the results of the investigation.

Huckabey then told Manley to have his superiors at the Northern facility resubmit the request for Manley to serve as secondary Intelligence Coordinator.

39. At the time of the hearing, Manley had not been designated as secondary Intelligence Coordinator. There is no evidence that Manley requested his name be resubmitted.

40. Lieutenant Wilson Montalvo (Montalvo) has been employed by DOC since 1988. He worked as a correctional officer until 1992 when he was promoted to Lieutenant. In November 1999, Montalvo transferred to the New Haven Correctional Center on the second shift. In June 2000 Montalvo was assigned to the day shift at New Haven. In December 2000, Montalvo suffered a workplace injury and as a result of this injury went out on Workers Compensation in April 2001. He remained on Workers Compensation until February 2002. While Montalvo was assigned to the day shift at New Haven, he reported to Major Correa (Correa).

41. While Montalvo was on Workers Compensation, he distributed intent cards for the Union, attended meetings, and made phone calls to employees on behalf of the Union. In August 2001, Montalvo also signed a grievance concerning evaluation procedures at other facilities. Montalvo's supervisors were aware of these activities.

42. Montalvo checked in telephonically with his facility after each doctors visit. After he signed the grievance referred to above, Montalvo called in to speak with Lieutenant Sweat regarding his condition. At that time, Correa took the phone and asked Montalvo what was "behind" the grievance regarding the evaluations. Montalvo thought Correa was joking. Correa was not joking and told Montalvo that he would not think it was funny when he returned to work assigned to the 8pm to 6 am shift.

43. Correa has, in the past, used the 8 pm –6 am shift assignment as punishment for wrongdoing by Lieutenants.

44. In February 2002, Montalvo returned to work and was assigned the 8pm to 6am shift. At that time, other lieutenants also experienced shift changes. Montalvo did not inquire at that time about the reason for his reassignment.

45. Warden Eileen Higgins (Higgins) has been employed by DOC and has served as warden at the New Haven facility since May 2001. Higgins decided to assign Montalvo to the 8 pm – 6 am shift in January 2002 after considering his attendance record in conjunction with the operational needs of the facility.

46. In or about November 2002 Montalvo asked Warden Higgins why he was assigned to the 8 pm –6 am shift. She told him that he got "caught in the numbers" because he had not returned as early as anticipated from Workers Compensation.

47. Lieutenant Joseph Medford (Medford) has been employed by DOC since 1992. At the time of the hearing, he was assigned to Cheshire Correctional Institute.

48. Prior to the enactment of Public Act 01-103, Medford testified before the Legislature advocating in favor of collective bargaining rights for lieutenants. Medford could not recall if he testified in March 2000 or February 2001. Medford's supervisors were aware of these activities.

49. Prior to February, 2001 Medford was assigned to the second shift (3 pm to 11 pm). In December 2000, Medford was informed he would be reassigned to the 7 pm to 5 am shift effective February 2001. (Ex. 39).

50. By letter dated January 17, 2001, Medford asked Major Feliciano why his shift was changed. (Ex. 40).

51. By letter dated January 30, 2001, Medford asked Warden Acosta why his shift was changed. (Ex. 41).

52. Medford did not receive any written response to his inquiries.

53. Lieutenant Jeffrey Barnett (Barnett) has been employed by DOC for approximately 18 years. Barnett first worked as a corrections officer for six years and was then promoted to his current position as a Lieutenant. At the time of the hearing, Barnett was assigned to the Willard-Cybulski Correctional Institution.

54. After Public Act 01-103 became effective, Barnett was active in organizing his fellow employees in the unionization effort. Barnett served as the chairperson of the Union's negotiating committee. Barnett's supervisors were aware of his activities.

55. By memorandum dated December 10, 2001 from Warden Nelvin Levester, Barnett was informed he was being reassigned from a day shift to the 9 pm to 7 am shift. (Ex. 28).

56. Barnett spoke to his supervisor on the day shift, Major Nelson Garcia, and inquired as to the reasons behind this shift change. Garcia discussed with Barnett various reasons for the reassignment including Barnett's tendency to be a leader rather than a follower. At that point in the conversation, Garcia told Barnett that his leadership skills were probably the reason he was so involved with the Union. Garcia also mentioned to Barnett the two counselings Barnett had received for conduct Garcia attributed to poor judgment.

57. Garcia believed that Barnett was too familiar with lower ranking personnel and that "familiarity tends to be complacency after a while." Garcia shared these concerns with the Warden when making the recommendation that Barnett be transferred to a less active shift.

58. While negotiations for the initial collective bargaining agreement were pending, Barnett received a service rating. In the comments section of his service rating, Barnett's supervisors noted that he needed improvement in attendance and that this problem would be alleviated once negotiations concluded.

59. Between December 2002 and January 2003, Garcia had an off-duty conversation with a personal friend who is employed by DOC as a lieutenant. During this conversation, Garcia commented on the inconvenience that may be faced by Union members living in Bridgeport who would have to make a long distance telephone call in order to contact a Union representative. Garcia was referring to Barnett.

60. Lieutenant Catherine Osten (Osten) has been employed by DOC since 1989. She received promotion to her current rank of Lieutenant in 1994.

61. After Public Act 01-103 became effective, Osten was active in organizing her fellow employees in the unionization effort, represented her fellow employees in disciplinary proceedings, and was a member of the negotiating team for the initial collective bargaining agreement. At the time of this hearing, Osten served as president of the bargaining unit. Her supervisors were aware of these activities.

62. In early 2002, Deputy Warden Murdoch (Murdoch) conducted code simulations (training exercises focusing on the response of facility personnel to particular incidents within the facility) at the Corrigan facility. While debriefing after a code simulation involving an officer taken hostage by an inmate, Murdoch directed derogatory comments toward Osten including: "a little unstable and needs psychiatric help" and "that's just a scenario – you wouldn't want to follow her into a situation."

63. On February 2, 2002, Osten gave a direct order to a member of the kitchen staff directing that a substitute meal be provided to an inmate with a severe food allergy. After a disagreement, the substitute meal was provided. The member of the kitchen staff received a verbal warning from his direct supervisor as a result of the incident. (Ex. 54).

64. Osten believes that the member of the kitchen staff who refused to comply with her order should have been walked out of the facility and more severely disciplined. Her belief is based upon a prior experience at the Brooklyn Correctional Facility where a correction officer refused to follow her direct order, was walked out of the facility, and subsequently discharged. Osten discussed this belief with the duty officer (officer in charge of the facility) at the time of the incident.

65. During 2002, Murdoch spoke with Osten regarding inappropriate dress when she arrived at the Corrigan facility for an approved off-duty visit in shorts and high heels. Murdoch refused Osten's request for union representation during the discussion. The incident did not result in discipline.

66. On December 6, 2002, Captain David Anderson (Anderson) and Manley ran into each other at the Holyoke Mall. Anderson asked Manley if it was true that Osten "was given a chance to drop the union issues to prevent the layoffs." Manley responded that he was not aware of any such proposition made to Osten. Anderson and Manley discussed the fact that a lot of rumors were circulating within DOC.

67. Through various sources including several members of the bargaining unit, Osten became aware of rumors alleging a meeting had taken place between her and Commissioner Armstrong. The gist of the rumors was that if Osten agreed to renounce the Union and decertify, the lieutenants who were noticed for layoff would remain employed by DOC. There was no truth to these rumors.

68. By letter dated December 13, 2002 from Osten to Commissioner Armstrong, Osten requested a meeting to discuss the following (Ex. 53):

…alleged rumors believed to have begun circulating from your office. These rumors are being circulated by your Command Staff. It is imperative that we meet to put these rumors regarding the circumstances of the layoffs to rest.

69. By letter dated December 30, 2002 from Commissioner Armstong to Osten, Commissioner Armstrong denied Osten's request for a meeting and wrote (Ex. 51):

I have been made aware by our Acting Personnel Director, Dan Callahan, that you were concerned with an incident that occurred involving a discussion between Captain David Anderson and Lieutenant Kevin Manley at a shopping mall. I have spoken with Captain Anderson regarding your allegations and there appears to be major differences between your allegations of what was said and Captain Anderson's recollection of the discussion. Based on that I will authorize a formal investigation into this matter by our Security Division.

70. In January 2003, Osten was transferred to the Gates facility. This transfer resulted added approximately ten miles each way to Osten's commute.

71. The determination as to which facility Osten and the other 27 lieutenants would be transferred was made by the State after considering the agency's operating needs, including a desire to transfer supervisors from the Corrigan facility because there was an ongoing investigation regarding abuses of shift swapping, the lieutenants' home addresses, the location of the present assignments, and the distance from lieutenants' homes to other correctional facilities.

72. On February 18, 2003, Osten was contacted by the DOC Security Division and questioned regarding the conversation referenced in Commissioner Armstrong's December 30, 2002 letter.

CONCLUSIONS OF LAW

1. An employer's discrimination against an employee for engaging in protected, concerted activities is a violation of the Act.

2. To establish a *prima facie* case of discrimination, the Complainant must show the employee engaged in protected concerted activities; the employer had knowledge of those activities; and the employer harbored anti-union animus. Once the Complainant establishes a *prima facie* case, the burden shifts to the employer to establish an affirmative defense.

3. The Union failed to establish that the State discriminated against Manley, Montalvo, Medford or Osten in violation of the Act.

4. The State violated §5-272(a)(5) when it discriminated against Barnett in violation of the Act.

5. An employer's unilateral change in a condition of employment that is a mandatory subject of bargaining is a refusal to bargain in good faith in violation of §5-272(a)(4) of the Act, unless an adequate defense is established.

6. To establish a *prima facie* case of a unilateral change, the Complainant must show that there was an existing fixed practice prior to the alleged change and a clear departure from that practice.

7. The State violated §5-272(a)(4) of the Act when it unilaterally eliminated the payment of longevity to eligible bargaining unit members.

8. The State violated §5-272(a)(4) of the Act when it unilaterally eliminated the accrual of bonus vacation days to eligible bargaining unit members.

9. The State violated §5-272(a)(4) of the Act when it unilaterally changed the schedules of bargaining unit members on January 24, 2003.

DISCUSSION

We first address the Union's claims of discrimination in retaliation for protected, concerted activities. The Union cited the State's actions in regard to Manley, Montalvo, Medford, Barnett, and Osten and alleged that each of these individuals were discriminated against in violation of SERA.[1] On the basis of the record before us, we

[1] At the hearing, the Union also presented evidence concerning incidents involving Lieutenant Perry. However, the Union has not pursued any allegation involving Lieutenant Perry.

find that the State did not violate the Act with regard to Manley, Montalvo, Medford and Osten. We find that the State did violate the Act with regard to Barnett.

As to the allegation of discrimination made by the Union in regard to Medford, the alleged act of discrimination, the change in Medford's shift, occurred prior to the passage of Public Act 01-103. The Union did not argue nor does the record reflect any indication that the Legislature intended the protections of the Act to apply retroactively. Further, the evidence does not indicate that Medford was involved in any protected activity at the time of the shift change. As such, the portion of the Union's complaint pertaining to Medford is dismissed.

Concerning the remaining individuals, it is a prohibited practice within the meaning of the Act for an employer to discriminate against an employee for engaging in union or other protected activities. This Board has repeatedly affirmed the proper method of analysis applied to such cases.

> Where a complainant alleges that employees were discriminated against in their employment because of activity on behalf of a Union, the complainant has the initial burden of proving that the discriminatory action was taken because of these protected activities, or at least that the protected activities were a substantial factor in bringing about the adverse actions. ***Connecticut Yankee Catering Co., Inc.*** Decision No. 1601 (1977). Using an analytical framework such as is found in ***Wright Line*****,** 251 NLRB 1083, 105 LRRM 1169 (1980); ***enforced*****,** 622 F.2d 899 (1st Cir. 1981); *cert. denied***,** 455 U.S. 989, 102 S. Ct. 1612, we determine first whether a complainant has established a *prima facie* case of discrimination. Once the *prima facie* case is established, we then determine whether the employer has established an affirmative defense thereto. ***Town of Greenwich*****,** Decision No. 2257 (1983), aff'd ***O'Brien v. State Board of Labor Relations*****,** 8 Conn. App. 57 (1986); and ***Town of Windsor Locks*****,** Decision No. 2836 (1990), appealed on other grounds, aff'd ***Police Department of the Town of Windsor Locks v. Connecticut State Board of Labor Relations, et al.,*** 255 Conn. 297 (1993); ***Sheriff's Department Fairfield County*****,** Decision No. 3106-B (1993).
>
> A *prima facie* case includes proof that 1) the employee engaged in protected, concerted activities, 2) the employer had knowledge of those activities, and 3) the employer harbored anti-union animus. <u>See</u> ***Sheriff's Department Fairfield*** **County,** Decision No. 3106-B (1993), citing ***Hardin, Developing Labor Law*****,** Third Ed. (1992) at p.194.

Torrington Board of Education**,** Decision No. 3204 (1994).

> In regard to the third prong necessary to establish a *prima facie* case,
> The Labor Board has recognized that direct evidence of discriminatory motive is frequently unavailable, and therefore the Union is entitled to the benefit of reasonable inferences under the circumstances. ***Town of Hamden (Police*****),**

> Decision No. 2394 (1985). In this regard, the Labor Board considers indirect evidence of anti-union bias such as the timing of an employer's decision in relation to the protected activity ***(Town of East Haven*****,** Decision No. 2830 (1990)), and the "type and severity of the punishment imposed for the alleged employee wrongdoing." ***Town of Trumbull*****,** Decision No. 3056 (1992), citing ***Beebe School Transportation, Inc.,*** Decision No. 1731 (1979).

City of Hartford**,** Decision No. 3785 (2000).

If the Union is able to establish a *prima facie* case, the burden then shifts to the employer to establish an affirmative defense. The employer may establish such a defense by proving that the same actions would have been taken absent an improper motive. That is, the presumption of discrimination may be rebutted by showing that the employer would have taken the same action with regard to the affected employee for a legitimate reason. ***City of Hartford*****,** Decision No. 3785 (2000).

We find the Union successfully satisfied all three prongs necessary to establish a *prima facie* case of discrimination by the State against the four remaining individual employees, Manley, Montalvo, Barnett, and Osten. As to the first two prongs, the Union demonstrated the employees engaged in protected, concerted activities and that the employer had knowledge of those activities. The Union also demonstrated that the employer harbored anti-union animus.

There are a number of incidents within the record that lead this Board to reasonably infer anti-union animus on the part of the employer. First are the comments from supervisors directed toward individual lieutenants. These comments include: Captain Shea's remark to Manley to the effect that everyone liked him and he should step away from the Union; Major Correa's remark to Montalvo threatening that he may be transferred to an undesirable shift in retaliation for signing a grievance; remarks on Barnett's service rating indicating that he needs improvement in attendance because he was often released from work to attend Union negotiations; and Deputy Warden Murdoch's disparagement of Osten before her fellow employees.

In addition to the comments of the lieutenants' supervisors, the highest levels of the Department of Correction's administration engaged in similar behavior. Osten contacted Commissioner Armstrong concerning rumors she believed were being spread by his staff, the content of which was that if the lieutenants would decertify, laid off bargaining unit members would be returned to work. Commissioner Armstrong responded by ordering an official investigation into a conversation that occurred between a lieutenant and a captain at a shopping mall. This conversation was not referenced in Osten's letter. The DOC Security Division then contacted Osten on February 18, 2003, the fourth day of hearing before this Board, in order to question her in regard to the investigation. Commissioner Armstong's response to Osten's request for a meeting to discuss rumors, focusing on one conversation and launching a formal investigation into that conversation, was unreasonable and gives rise to an inference of anti-union animus. Further, the timing of the Security Division's contact with Osten is suspect.

Despite the fact that the Union established its *prima facie* case, the State was able to demonstrate a legitimate reason absent the improper motive for the actions it took in regard to Manley, Montalvo and Osten. We will now examine the circumstances surrounding the claims pertaining to each employee.

The Union established a *prima facie* case that Manley was discriminated against for engaging in concerted, protected activities when his responsibility as secondary Intelligence Coordinator was removed in March 2002. Manley did engage in concerted, protected activity when he distributed intent cards and encouraged other bargaining unit members to join the Union, and his supervisors knew of this activity. The employer did harbor anti-union animus as discussed above.

However, in this instance, Huckabey based his decision upon the incident report involving Manley. When Manley informed Huckabey that an investigation had cleared him of any wrongdoing, Huckabey advised Manley to have his name resubmitted to serve as secondary Intelligence Coordinator. There is nothing in the record to indicate whether such a request was made. Based on the record as it stands, it is reasonable to conclude that Huckabey was not aware of the final investigation findings when he made his decision. There is no evidence indicating Huckabey based his initial decision on anything other than his concerns regarding Manley's judgment. We do not know if this decision would have stood if Manley had resubmitted his name. Based on this evidence, we conclude that the State has adequately demonstrated a legitimate reason for the action taken and would have taken such action absent an improper motive. Thus, we dismiss this claim.

The Union also established a *prima facie* case that Montalvo was discriminated against for engaging in concerted, protected activity when his shift was changed in February 2002. Montalva, while out on workers compensation, engaged in concerted, protected activity when he distributed intent cards, made phone calls to other employees on behalf of the Union, and signed a grievance. The employer had knowledge of these activities; Montalvo's supervisor, Major Correa, questioned him about the grievance. The employer did harbor anti-union animus as discussed above.

However, Warden Higgins made the final decision as to Montalvo's change of shift. Warden Higgins decided to place Montalvo on the 8 pm to 6 am shift after considering his attendance record in conjunction with the operational needs of the facility. Other lieutenants also experienced shift changes around the same time as Montalvo.

Montalvo did not inquire as to the reason for his shift change at the time it occurred. When he did eventually inquire, Warden Higgins informed him that he simply got caught "in the numbers" due to his absence from work and the needs of the facility. This reason makes sense in the context of the other shift changes occurring at the same time and we therefore conclude that Warden Higgins decision to switch Montalvo's shift

was legitimate in that it was based upon the operational needs of the facility. The State successfully established that the same action, assigning Montalvo to the 8 pm to 6 am shift would have occurred absent any improper motive. Therefore, we dismiss this claim.

The Union also established a *prima facie* case that Osten was discriminated against for engaging in concerted, protected activities when she was transferred in January 2003. Osten did engage in concerted, protected activity when she attempted to organize her fellow employees in the effort to unionize and represented employees in disciplinary proceedings and the employer knew of Osten's activities. The employer did harbor anti-union animus as discussed above.

However, the record reflects that the decision to transfer Osten was based on the operational needs of the employer. In December 2002 and January 2003, the State laid off 166 employees at the DOC, of which, 15 were lieutenants. At this same time, 28 lieutenants were transferred in order to address the agency's operating needs. Of those 28 lieutenants, five were transferred to a facility farther from their homes than their previous assignments.

The determination as to which facility Osten would be transferred was made by the State after considering the agency's operating needs, including a desire to transfer supervisors from the Corrigan facility because there was an ongoing investigation concerning abuses in shift swapping. The Union did not argue nor does the record reflect any evidence that the ongoing investigation was motivated by anti-union animus. In making the determination as to whether and where to transfer Osten, the State considered Osten's home address, the location of her present assignment, and the distance from Osten's home to other correctional facilities, just as it did for the other 27 lieutenants who were transferred. We therefore conclude that the State successfully demonstrated that Osten would still have been transferred in January 2003 absent an improper motive. Therefore, we dismiss this claim.

The Union also established a *prima facie* case that Barnett was discriminated against for engaging in concerted, protected activities when his shift was changed in December 2001. Barnett did engage in concerted, protected activity when he organized his fellow employees in the effort to unionize and the employer did have knowledge of Barnett's activities. The employer did harbor anti-union animus as discussed above.

In this particular case, however, we find that the State did not successfully rebut the *prima facie* case. In this regard, Garcia told Barnett that part of the reason for Garcia's recommendation of a shift change was Barnett's "leadership ability", which ability Garcia also credited with Barnett's Union involvment. Likewise, in his service rating, it was noted that Barnett needed improvement in attendance and that his "attendance problem" might be alleviated once contract negotiations were concluded. Although it is tempting to blame Garcia's opinion of Barnett on personal animus, which should not be confused with union animus ***(Town of East Haddam,*** Decision No. 3619 (1998) citing ***State of Connecticut (UConn Health Center),*** Decision No. 3592 (1998), we simply cannot ignore the direct references to Barnett's union involvement by the

person recommending that his shift be changed. Unlike the situations described above involving other employees, here the State directly tied Barnett's Union involvement to his shift change. This direct evidence overcomes any other explanations the State offered for this action. We find a violation with regard to Barnett.

We now turn to the Union's allegations that the State instituted unilateral changes in conditions of employment that are mandatory subjects of bargaining; namely, the suspension of longevity payments and vacation bonus days, and the change in the schedules of line lieutenants in January 2003. The State argues that it had the ability to eliminate the longevity payments and vacation bonus days because certain state statutes provide these benefits only to those employees classified as managers or who are not represented for the purpose of collective bargaining. Because the lieutenants were no longer managers, the State asserts that it could not continue these benefits. The State also argues that the change in schedule absent negotiations was permissible because the Union failed to establish a fixed practice regarding schedules. In the alternative, the State argues that the schedule change was permissible because the parties had reached impasse in negotiations, or that financial exigencies permitted the change. As to the allegations of unilateral change, we agree with the Union.

Section 5-272 (4) of SERA prohibits employers from:

> refusing to bargain collectively in good faith with an employee organization which has been designated in accordance with the provisions of said sections as the exclusive representative of employees in an appropriate unit.

It is well established that an employer's unilateral change in an existing fixed practice in a condition of employment will constitute a refusal to bargain in good faith unless the employer establishes an adequate defense. ***Norwalk Third Taxing District,*** Decision No. 3695 (1999). "Unilateral change implies the existence of a fixed practice prior to the alleged change and a clear departure from that practice without bargaining." ***State of Connecticut (CHRO)*** Decision No. 3467 (1997)**,** affirmed ***Local 2663, Council 4, AFSCME v. State Board of Labor Relations*****,** Docket No. VC 97-568932 (3/12/97, McWeeny, J.); affirmed ***Local 2663, Council 4, AFSCME v. State Board of Labor Relations, 53 Conn. App. 902, 734 A. 2d 150 (1999)***. "There is no question that the practice must be definite and fixed rather than isolated and sporadic." ***State of Connecticut (DMV)*** Decision No. 3806 (2001).

There is no dispute that longevity payments, vacation bonus days, and scheduling are mandatory subjects of bargaining. In fact, the parties were engaged in the negotiation process when the State unilaterally suspended longevity payments and vacation bonus days and changed the schedules of line lieutenants.

Concerning the longevity payments and vacation bonus days, the State argues that it had the ability to suspend these benefits because the benefits were granted by statute and/or OPM Management Policy. Thus, the State asserts that these benefits could be changed when the lieutenants unionized.

It is true that prior to Public Act 01-103, the lieutenants were not eligible to participate in collective bargaining under SERA and that all of the benefits the lieutenants received, they received in their status as employees who were not members of any bargaining unit and/or as managers. As non-unionized and/or managerial employees, the terms and conditions of their employment were set by the Executive Branch and/or the Legislature. For example, the lieutenants were paid in accordance with the Management MP 40 hour plan. Presumably, lieutenants also received sick leave, paid holidays, and other benefits. As part of their employment, they received longevity payments according to Conn. Gen. Stat. § 5-213 and also received vacation bonus days per OPM policy.

Whatever the source or genesis of the terms of their employment, the fact remains that the lieutenants had certain established terms and conditions of employment when they unionized. An employer cannot unilaterally change those terms and conditions that are mandatory subjects of bargaining once the employees are represented. ***Town of Plymouth*****,** Decision No. 3691 (1999); ***Town of Plymouth*****,** Decision No. 2030 (1981).

We see nothing in the statutes or any other source that would prevent these employees from receiving the same level of benefits after the Union was recognized and before negotiations were finalized. Indeed, the State did not unilaterally place the lieutenants on some other pay scale after it recognized the Union. Similarly, the State did not unilaterally suspend the benefit of vacation bonus days until over a year from the date of recognition. It does not make sense to say that these employees can unilaterally lose fixed benefit levels because they selected union representation. The State's logic on this issue misses the mark and ignores the established rules of collective bargaining. As such, we reject this argument.

In regard to the schedule change for line lieutenants, the State first argues that no practice exists because there is a distinction between the schedule worked by line lieutenants and the schedule worked by lieutenants assigned administrative responsibilities. The distinction is without a difference in this circumstance. The variation itself is clearly fixed between two groups of employees with different operational functions. All line lieutenants were assigned the same schedule, five days on followed by three days off. The fact that a line lieutenant's schedule differed from that of administrative lieutenants does not alter the fact that a fixed practice existed in scheduling. We therefore reject this argument.

The State also argues that it was allowed to change the schedule because the parties had reached impasse in negotiations. Here, the parties were engaged in negotiating an initial collective bargaining agreement and, at the time of the change, were participating in interest arbitration proceedings. The employer cannot disregard the process in place for resolving impasse under the statute, binding interest arbitration, and unilaterally impose a change in a mandatory subject of bargaining. To allow the State to do so would flout the Legislature's statutory design for resolving disputes in the negotiation process.

The State further argues that financial difficulties somehow excused its duty to bargain in good faith. We reject this argument. There is nothing in the record which would support the State's claim that its statutory obligation was nullified by the existence of financial difficulties. ***City of Waterbury*****,** Decision No. 3945 (2004)**.**

As such, the State failed to establish any adequate defense to its unilateral changes in conditions of employment which are mandatory subjects of bargaining. We therefore find the State violated Section 5-272 (a) (4) of SERA.

We are now faced with the question of remedy. In this Board's determination of the appropriate remedy for this case, we are guided by the Act which provides broad remedial powers to the Board. Such powers include the issuance of a cease and desist and order "such further affirmative action as will effectuate the policies of sections 5-270 to 5-280." ***Conn. Gen. Stat. § 5-274(b).***

First, we will order the State to offer Barnett a return to his original shift and to make him whole for any losses he suffered as a result of the State's unlawful action.

Turning to the other violations, the interest arbitration award approved by the General Assembly restored longevity to eligible bargaining unit members[2] and such longevity was paid retroactively by the State. However, the State's violation of SERA deprived the eligible bargaining unit members of these payments, in some instances, for over one year. In order to effectively remedy this violation, we order the State to provide interest at the rate of 7% per annum to those eligible members from the date on which the longevity payments should have been made to the date on which the payments were made.[3] ***Norwalk Third Taxing District*****,** Decision No. 3676 (1999); ***State of Connecticut*****,** ***Office of Labor Relations*****,** Decision No. 2947 (1991).

The interest arbitration award approved by the General Assembly also restored vacation bonus days to eligible bargaining unit members. The record is unclear as to whether these days were retroactively credited to eligible bargaining unit members. If the days were not retroactively credited, however, we order that they be so credited and eligible employees be allowed to utilize these days within one year from the issuance of this decision or carry-over such days in accordance with the existing collective bargaining agreement.

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[2] By "eligible bargaining unit members" we mean those employees in the bargaining unit as of December 3, 2001.

[3] The interest rate is that used by the National Labor Relations Board pursuant to ***New Horizons for the Retarded***, 283 NLRB 1173 that in turn is based on the "short term Federal rate". For the first quarter of Fiscal Year 2006 (October 1, 2005 – December 31, 2005) this rate is 7%. See NLRB Memorandum OM 05-97, 9/23/05.

Further, the interest arbitration award restored the line lieutenants' schedule to five days on followed by three days off. This violation was effectively remedied by the interest arbitration award, there is nothing further we will order.

Finally, the Union also requested attorneys' fees and costs. We will award fees and costs when the issues raised by a respondent party are patently frivolous and non-debatable. We do not believe that the allegation involving Barnett calls for an award of attorney's fees. However, we are very troubled by the State's actions with regard to the unilateral changes involving the work schedule, longevity payments and vacation days. As discussed, changing employees' benefits and pay during an organizing campaign or during negotiations is one of the most damaging actions an employer can take and has the potential of dramatic effect on employees' ability to genuinely exercise their collective bargaining rights. Further, in this case the defenses offered by the State are weak and in our opinion, rise to the level of non-debatable. As such, we believe it is appropriate for the State to pay fees and costs for at least that portion of the case involving these allegations. As a reasonable method of calculating the apportionment of such costs, we note that this case originally involved 9 allegations (6 discrimination claims and 3 unilateral change claims). Of those, 3 are of concern to us. As such, we will order the State to pay 1/3 of the Union's attorney fees and costs for this case.

ORDER

By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the State Employee Relations Act, it is hereby

ORDERED that the State shall:

I. Cease and desist from discriminating against employees because of their protected, concerted activities.

II. Cease and desist from failing to bargain in good faith with the Union concerning the practices of longevity, vacation bonus days, and schedule change.

III. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Barnett a return to the schedule he worked prior to the State's unlawful action and make him whole for any losses he suffered as a result of the State's unlawful action;

(b) Make whole all eligible employees for the longevity payments withheld from them through payment of interest on the sums withheld at the rate of seven percent per annum.

(c) Make whole all eligible employees for vacation bonus days withheld, if any, and allow eligible employees to utilize these days within one year

from the date of this decision or carry-over such days in accordance with the existing collective bargaining agreement.

(d) Pay to the Union 1/3 of its costs associated with Case No. SPP-23,168 including but not limited to reasonable attorneys fees.

(e) Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees of the bargaining unit customarily assemble, a copy of this Decision and Order in its entirety.

(f) Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 38 Wolcott Hill Road, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the State of Connecticut to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS*

John W. Moore, Jr.
John W. Moore, Jr.
Chairman

Patricia V. Low
Patricia V. Low
Board Member

*Alternate Board Member, David C. Anderson participated in the hearings in this case but passed away prior to issuance of the decision.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 21st day of November, 2005 to the following:

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