STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

CITY OF NEW BRITAIN
-AND-
LOCAL 1186, COUNCIL 4, AFSCME,
AFL-CIO

DECISION NO. 4600

MAY 14, 2012

Case No. MPP-28,832

AND

LOCAL 1186, COUNCIL 4, AFSCME,
AFL-CIO
-AND-
CITY OF NEW BRITAIN

Case No. MEPP-28,844

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

Attorney Mary C. Pokorski
for the City

Attorney J. William Gagne, Jr.
for the Union

DECISION AND DISMISSAL OF COMPLAINTS

On October 15, 2010 Local 1186 of AFSCME, Council 4, AFL-CIO (the Union filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the City of New Britain (the City) had committed practices prohibited by the Municipal Employee Relations Act (MERA or the Act) when it entered into a Memorandum of Understanding concerning a temporary position the City never intended to fill on a permanent basis.

On October 19, 2010 the City filed a complaint, amended on March 30, 2011, alleging the Union violated the Act by filing a prohibited practice complaint which seeks a remedy inconsistent with the terms of the Memorandum of Understanding.

After the requisite preliminary administrative steps had been taken, the parties entered into a partial stipulation of exhibits, the cases were consolidated by notice dated June 29, 2011 and the matter came before the Labor Board for a hearing on June 30, 2011. Both parties were represented by counsel, allowed to present evidence, examine and cross-examine witnesses, and make argument. Both parties submitted post-hearing briefs, the last of which was received on October 20, 2011.

On the basis of the entire record before us, we make the following findings of fact and conclusions of law, and we dismiss the complaints.

FINDINGS OF FACT

1. The City is an employer within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act and at all material times has been the exclusive bargaining representative of certain City employees including three employees presently holding the position of General Foreman in the Public Works Department.

3. Local 818, AFSCME, Council 4, AFL-CIO (Local 818) is a labor organization within the meaning of the Act and at all material times has been the exclusive bargaining representative of certain City employees, including employees holding the permanent position of Fleet Manager in the Public Works Department.

4. Sometime prior to April of 2008 the City appointed Matt Terraconi (Terraconi) to the position of Fleet Manager in an acting capacity and in addition to his permanent position as General Foreman. Terraconi filed a grievance contesting the assignment which resulted in a settlement in which Terraconi was afforded additional compensation for the Fleet Manager work.

5. Terraconi ceased performing acting Fleet Manager duties upon the return of the permanent Fleet Manager who worked briefly and left again, creating a vacancy in the position.

6. Public Works Director Mark Moriarty (Moriarty) believed that General Foreman Paul Wooten (Wooten) was the most qualified person to serve as Acting Fleet Manager and that Wooten could perform the duties in addition to his General Foreman duties. Seeking to avoid a grievance similar to Terraconi's, Moriarty drafted a proposed Memorandum of Understanding which he presented to Union president Jim Amato (Amato).

7. Amato, Wooten, Moriarty and City Personnel Director Karen Levine (Levine) met and discussed the Fleet Manager position and Moriarty's draft proposal. On April 29, 2008 Amato, Wooten, Moriarty and Levine executed a written Memorandum of Understanding (MOU) that stated, in relevant part:

MEMORANDUM OF UNDERSTANDING
PAUL WOOTEN
April 29, 2008

This action is being made to assign a person the duties of temporarily overseeing and managing Fleet operations which are run by the Public Works Department. This temporary position will assume the duties of the existing Public Works Department's Fleet Manager Position.

Compensation and other terms that apply to this position are as follows:

1. The position will be compensated by a stipend . . .

. . .

3. On overtime assignments, this employee shall continue to serve as a Public Works General Foreman . . . .

4. This temporary assignment does not guarantee a long term assignment if the Public Works Fleet Manager position is filled on a permanent basis sometime in the future.

. . .

(Ex. 10).

8. On or about April 29, 2008 Wooten began serving as Acting Fleet Manager in addition to serving as a General Foreman.

9. On August 11, 2009 the Union and the City executed a collective bargaining agreement (Ex. 9) with effective dates of November 15, 2006 through June 30, 2012 that provides, in relevant part:

ARTICLE IV – SENIORITY

. . .

C) A position may be filled on an acting basis for a period not to exceed six months. This provision shall apply to any bargaining unit vacancy occurring after the signing of this agreement. Any acting position beyond six months must be agreed to by the City and the Union.

. . .

ARTICLE VI – HOURS OF WORK OVERTIME AND HOLIDAY PREMIUM PAY

. . .

6.1 A) Time and one-half shall be paid as follows:

1. For all work performed by an employee in excess of his/her Workday or work week.

. . .

6.2 . . .

B) Overtime work for all employees of the department shall be assigned on as equitable a basis as possible within respective job classifications.

. . .

ARTICLE XI – WAGES/LONGEVITY

. . .

11.1 A) An employee temporarily required and assigned to work in a higher classification shall receive an adjusted rate while working in the higher classification . . .

. . .

ARTICLE XIV – GRIEVANCE PROCEDURE AND ARBITRATION

. . .

14.7 The grievance procedure shall be the sole method of processing claims concerning rights and/or privileges provided herein or concerning interpretation or application of provisions of this Agreement.

10. At some point prior to September 23, 2010 several Union members informed Amato that the duration of Wooten's Acting Fleet Manager assignment was unnecessarily long and that they wanted an opportunity to either serve in that capacity and/or to apply for permanent appointment to the Fleet Manager position.

11. On April 28, 2008 Union Staff Representative Ed Thibodeau (Thibodeau) sent Associate City Attorney Mary C. Pokorski (Pokorski) a letter stating, in relevant part:

> . . . Local 1186 and the City of New Britain created a Memorandum of Understanding to assign Public Works General Foreperson Paul Wooten "*the duties of temporarily overseeing and managing Fleet operations which are run by the Public Works Department.*" . . .
>
> It has now been two and a half years and this "temporary" situation still exists. This is not what the Union anticipated when it agreed to accommodate the City's request in 2008.
>
> It is the Union's position is that it will not be held to "temporary" agreement forever. Accordingly, the Union is giving the City notice that the MOU to temporarily place Paul Wooten in charge of Fleet operations will become null and void on October 31, 2010.

(Ex. 11) (emphasis in original).

12. On October 7, 2010 Pokorski sent Thibodeau a letter (Ex. 12) stating, in relevant part:

> [T]he Memorandum of Understanding was clearly intended by the parties to continue until the position of Fleet Manager was filled on a permanent basis.

> Furthermore, the Memorandum of Understanding does not contain a time limitation on Mr. Wooten's assignment.
>
> Therefore, Local 1186 cannot declare the Memorandum of Understanding null and void as of October 31, 2010. Please be advised that the City will take appropriate action should Local 1186 fail to comply with the Memorandum of Understanding.

13. The Fleet Manager has existed as a funded position in the City's budget since the execution of the MOU, continuing to the present.

14. The City's mayor ultimately decides whether to fill vacant positions. To date the mayor has denied Moriarity's request to fill the vacant Fleet Manager position.

15. Other employees have served in Public Works positions in acting capacities for longer periods than Wooten.

16. Wooten continues to serve in the City's Public Works Department as a General Foreman and Acting Fleet Manager.

CONCLUSIONS OF LAW

1. An employer's failure to comply with a settlement agreement violates §7-470(a)(6) of the Act.

2. In assessing a claim that an employer has violated §7-470(a)(6), we compare the obligations created by the award or settlement agreement with the employer's actions or inaction to determine whether there is compliance.

3. The City did not violate the April 29, 2008 Memorandum of Understanding.

4. A union's failure to comply with a settlement agreement violates §7-470(b)(4) of the Act.

5. A union's prosecution of a prohibited practice complaint in subjective bad faith violates §7-470(b)(2) of the Act.

6. The Union did not violate the April 29, 2008 Memorandum of Understanding or file a prohibited practice complaint in violation of the Act.

DISCUSSION

In this case the City assigned a bargaining unit member to perform the duties of a vacant permanent position on an acting basis after bargaining the impacts with the Union and entering into the (MOU). The Union now challenges the extended and infinite duration of the acting assignment and argues that the City never intended to permanently

fill the position and that its inaction is both a breach of the MOU and a violation of its statutory duty to bargain in good faith. The City responds that it is in full compliance with the express terms of the MOU and counters that by filing a complaint with the Labor Board the Union has violated the MOU and hence, the Act. We address each complaint in turn.

MERA prohibits employers from "[r]efusing to comply with a grievance settlement. . . ." General Statutes §7-470(a)(6). We have also concluded that failure to abide by an agreement reached by an employer and a statutory bargaining agent in settlement of a dispute made *in lieu* of a grievance constitutes a refusal to bargain in good faith and a violation of the Act. In this respect such an agreement stands on the same footing as a grievance settlement. ***Norwalk Board of Education,*** Decision No. 3352 (1995); *see also* ***State of Connecticut, Department of Children and Families***, Decision No. 4494 (2011); ***Connecticut Department of Mental Retardation***, Decision No. 2942 (1991).

Although the MOU was not in settlement of a pending grievance, we find it was negotiated in the context of a prior dispute involving a temporary assignment to the same position that led to a grievance and a settlement. Since the parties negotiated the MOU in lieu of addressing a similar grievance by Wooten, we find that it should be treated as a grievance settlement for purposes of analysis of the claims before us.

When a prohibited practice complaint alleges that an employer has failed to abide by a grievance settlement agreement or grievance arbitration award, we look to the settlement or the award to determine what is required of the parties. ***City of New Haven,*** Decision No. 4350 (2008); ***City of Bridgeport,*** Decision No. 4272 (2007); ***City of Milford***, Decision No. 4144 (2006). We use an objective standard and we do not consider whether the respondent acted in good faith or whether its interpretation is a plausible one. ***Town of Wallingford***, Decision No. 3807 (2001); ***Town of Stratford***, Decision No. 3277 (1995); ***City of New Haven***, Decision No. 3060 (1992); ***Town of Newington***, Decision No. 2957 (1991); ***Weston Board of Education***, Decision No. 2678 (1988); ***Hartford Board of Education***, Decision No. 2683 (1988). As such, our analysis "only looks to the language of the settlement." ***Town of Enfield***, Decision No. 4461 p. 11 (2010) (*quoting* ***City of Waterbury***, Decision No. 3593 (1998)). If we find there has not been compliance, we will find a violation of the Act. ***State of Connecticut, Department of Correction***, Decision No. 4475 (2010).

Applying these principles to the MOU we find that the City is in compliance. There is no terminal date stated for Wooten's assignment to the position and although Wooten's term is indefinite and temporary, the record reflects that Public Works employees have been assigned to other acting positions for longer terms without complaint. The Union's reliance on the MOU's disclaimed "guarantee of a long term assignment" is misplaced because that provision limits Wooten's entitlement to the position, not the City's power to continue Wooten's assignment. Since the MOU has no express duration, it is subject to ***City of New Haven***, Decision No. 3060 (1992) and the

Union will have an opportunity to address the issue in negotiations for the successor collective bargaining agreement.[1]

Nor do we find merit in the Union's claim that the City had no intention to permanently fill the position and as such negotiated the MOU in bad faith. Conclusions regarding actual or subjective bad faith must be based on an examination of all the evidence, including circumstantial evidence existing when a party's claim flies in the face of clear contract language. ***City of Meriden***, Decision No. 4557 (2011), ***Ansonia Federation of Teachers***, Decision No. 2570 (1987); ***Bristol Federation of Teachers***, Decision No. 1656 (1978). The MOU is equivocal [2] as to whether the Fleet Manager position would ever be permanently filled and the City was presumable aware of the Union's right to renegotiate the MOU upon expiration of the collective bargaining agreement. Given our finding that the City has not violated the MOU, there is nothing in the record to support the Union's claim of bad faith bargaining and as such the Union's complaint is dismissed.

Turning to the City's case against the Union we note that the City also alleges a violation of the statutory obligation to honor grievance settlements.[3] The City contends that Thibodeau's letter giving notice that the MOU "will become null and void on October 31, 2010" establishes the Union's noncompliance with the MOU. As Pokorski notes in her response to Thibodeau, however, "Local 1186 cannot declare the Memorandum of Understanding null and void . . ." and there is nothing in the record before us to establish that the Union has somehow interfered with Wooten's acting Fleet Manager assignment.

We construe the City's claim that the filing of the Union's prohibited practice complaint constitutes noncompliance in violation of the Act as analogous to an

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[1] "We now state expressly and perhaps for the first time, the applicable rule for duration of settlement agreements.

If the [settlement] agreement concerns a mandatory subject of bargaining, then the party seeking to terminate the agreement must introduce the proposed termination as a subject of bargaining agreement and bargain until agreement is reached or impasse procedures are instituted. The final contract provision will determine the subject at issue.

If a party fails to raise the settlement agreement in the appropriate fashion, as outlined above, the settlement agreement will continue in effect unless and until the procedures referenced above are followed."

City of *New Haven*, Decision No. 3060 pp 10-11 (1992) (emphasis in original).

[2] The MOU states that it "does not guarantee a long term assignment *if* the Public Works Fleet Manager position is filled on a permanent basis sometime in the future."

[3]The City's brief erroneously cites Section 7-470(a)(6) rather than Section 7-470(b)(4) which identifies a labor organization's refusal to comply with a grievance settlement as a prohibited practice. The City's amended complaint, however, cites to Section 7-470(b)(2) which defines a labor organization's refusal to bargain in good faith as a prohibited practice and serves as an alternate basis to raise this issue. *See* ***Town of East Hartford***, Decision No. 1439 (1976).

employer's complaint that a grievance is frivolous and was filed in bad faith. We analyze such claims under the standard announced in ***Bristol Federation of Teachers,*** Decision No. 1656 (1978):

> "[W]e hold that the filing of a grievance will not violate the act unless complainant sustains the burden of proving, by a fair preponderance of evidence that respondent filed the grievance in actual subjective bad faith in the sense that it knew the issue presented by the grievance was settled in prior negotiations so that the grievance itself amounted to repudiation of an agreement previously reached."

Id. at p. 7 (*emphasis in original*); *see* ***IBPO, Local 731***, Decision No. 4340 (2008).

While we do not agree with the Union's construction of the MOU for the reasons noted above, we find that the Union has presented a colorable claim and that there is nothing in the record before us to establish that the Union knew that its position was without merit. Wooten's acting assignment is characterized as temporary throughout the MOU yet had existed in excess of two years when the complaint was filed. The position is vacant yet fully funded in the City's annual budgets and no action has been taken to fill the position despite Moriarty's request(s). Since the Union presented a feasible argument the City's complaint must be dismissed.

ORDER

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

ORDERED that the complaints filed herein be, and the same hereby are, **DISMISSED.**

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Wendella Ault Battey
Wendella Ault Battey
Acting Chairman

Patricia V. Low
Patricia V. Low
Board Member

Kenneth Leech
Kenneth Leech
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 14th day of May, 2012 to the following:

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