STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
TOWN OF GROTON

-and-

MAY 12, 2000

GROTON MUNICIPAL EMPLOYEES
UNION, SEIU, LOCAL 742, AFL-CIO

Case No. MPP-18,169

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

Attorney Harry E. Calmar
For the Town

Attorney William S. Zeman
Attorney Janis C. Jerman
For the Union

DENIAL OF MOTION TO PRECLUDE DEFENSE

On September 18, 1998, the Connecticut State Board of Labor Relations (the Labor Board) issued Decision No. 3623 in Case Nos. MPP-18,169 and MEPP-19,011. In the compliance process on November 30, 1999, concerning Case No. MPP-18,169, the Groton Municipal Employees Union, SEIU, Local 742, AFL-CIO (the Union) filed a Motion to Preclude a defense raised by the Town of Groton (the Town) in the compliance proceedings. The Union filed a Memorandum of Law in support of its Motion on January 19, 2000. The Town filed an Objection to the Motion on February 4, 2000.

A hearing was held before the Labor Board on February 16, 2000 at which both parties appeared and were represented by counsel. They were given full opportunity to make argument in support of and in opposition to the Motion to Preclude Defense.

Based upon the entire record before us, we deny the Motion to Preclude Defense.

THE PROCEEDINGS

The Order in Decision No. 3623 provides in relevant part that the Town shall:

> A. Pay to Loreta Zdanys and Peter Vandenbosch the difference between the amount they would have earned had they remained salaried employees and what they earned as hourly employees after the change in method of compensation.

This Order resulted from our finding that the Town had violated the Municipal Employee Relations Act (the Act) by unilaterally changing the method of compensating these two employees from a salary basis to hourly. Consistent with our practice, we did not determine nor did we specify in the Decision the exact amount of back pay due to the two employees, leaving this calculation to the compliance process.

After investigating the relevant facts, the Board Agent issued a Back Pay Specification (Ex. 4) showing the amounts owed to the two employees for the periods in question.

During the investigation and calculation of back pay liability, the Town raised for the first time the fact that the parties had agreed in successor contract negotiations that as of the effective date of the contract, July 1, 1996, Ms. Zdanys and Mr. Vandenbosch would be compensated on an hourly basis. Therefore, the Town argued that any back pay liability should cease as of that date. In the Town's view, Mr. Vandenbosch was entitled to no back pay because he actually remained on salary until July 1, 1996. As to Ms. Zdanys, the Town asserts that she is entitled to the difference in compensation only for the period from March 14, 1996 to July 1, 1996, or a total of $847.55.

The Union states that the Town should be precluded from relying on the collective bargaining agreement to curtail back pay liability since it was in effect at the time of the hearing held on April 14 and 16, 1997, and September 19 and 26, 1997, but was not introduced into evidence nor raised as a defense during that portion of the proceedings. In the Union's view, giving effect to the change in method of compensation established in the collective bargaining agreement as of July 1, 1996 would constitute a reopening of the hearing. Additionally, the Union claims the Town is estopped from raising a newly asserted defense in the back pay proceedings.

The parties presented their respective positions orally at the hearing held on February 16, 2000.

DISCUSSION

We are puzzled by the fact that neither party saw fit to inform us during the initial hearing that a very significant, relevant event had occurred effective July 1, 1996, well

prior to the hearing. The Town failed to raise a fact that could very substantially limit its back pay liability. The Union's witnesses, Ms. Zdanys and Mr. Vandenbosch, obviously knew of the change in method of compensation since they were both being paid under the new hourly method at the time of their testimony. We believe that both parties were remiss in not informing us of an important fact existing at the time of the initial hearing in this case.

Although the initial hearing in this case was not bifurcated as to liability and damages and both parties were therefore free to submit evidence bearing on both liability and damages and did so to a certain extent, the focus in that hearing was on liability. The principal issue was whether or not the Town's action in unilaterally changing the method of compensation from salaried to hourly violated the Act. We concluded that the Town's action was in violation of the Act. The Town at this point does not seek to alter that finding. It does not seek to reopen the decision to attempt to persuade us that we incorrectly found it to have violated the Act.

We agree with the Union that it would be improper at this point to reopen the hearing. However, we are not being asked by the Town to do that. The question before us is the amount of back pay due the two employees under our Order.

In accordance with our practice, after finding that the Town had violated the Act by implementing the unilateral change, we ordered the Town to make the employees whole by paying them the difference between what they would have earned had they remained salaried employees and what they actually earned as hourly employees. It would be impractical and unnecessary for a make whole order to be more specific than this. It would require the parties in every case to prove the amount of damages when the fundamental question of liability (i.e., whether any damages at all are due) is in issue. We could have concluded that the Town's action was justified on some basis; therefore, no damages were due. A review of the Board Agent's Back Pay Specification (Ex. 4) demonstrates the scope of information that would have to have been presented at the initial hearing to have allowed us to make a precise calculation of back pay. This would have involved establishing the hourly rates and salaries during various periods (taking into account negotiated increases), the amount of overtime worked, periods when the employees remained on salary and periods of suspension.

Rather than requiring proof of all these elements when the issue of liability is being contested, our regulations in effect bifurcate the questions of liability and back pay damages. Sections 7-471-19 through 7-471-34 govern the initial hearing. When our order directs the payment of back pay, the procedure is established by Section 7- 471-35 under which the Board Agent makes an investigation and issues a back pay specification showing the amount due. A hearing may be held before the Labor Board to permit the parties to contest the back pay calculations.

While we fault both parties for not bringing to our attention the fact that they had agreed to change the method of compensation of the employees in question to hourly effective July 1, 1996, we believe that this fact was properly raised during the back pay

calculation phase of the proceeding. As previously discussed, when we issue a back pay order, we do so only in general terms, leaving the exact amount to be determined by the parties or, in the event they are unable to reach agreement, by means of a back pay proceeding. In the course of the Board Agent's investigation, the existence of the labor contract provision establishing hourly rates for the employees in question came to light. The question presented is whether we must ignore this vital fact because neither party saw fit to bring it to our attention during the initial hearing. We believe we are not required to do so because it relates only to the proper calculation of back pay under our Order. We would reach a different result if the Town had raised the labor contract provision in the back pay proceedings to try to overturn our finding that it had violated the Act.

The Union has invited our attention to three decisions of the NLRB, ***We Can, Inc.*** 147 LRRM 1242 (1994); ***Lear Siegler, Inc.*** 131 LRRM 1763 (1989); and ***Special Mine Services, Inc.*** 149 LRRM 1293 (1994) for the proposition that a respondent may introduce in the compliance phase only evidence that was not available at the time of the unfair labor practice hearing. We believe that these cases are not on point. In each of them, the respondent sought to introduce evidence in the compliance phase to show that the restoration of the status quo ante order had become inappropriate. Here, the Town raises the labor contract provision not to attack the finding of violation of the Act or the make whole order, but only as a fact necessary for calculation of the proper amount of back pay due. Even though this evidence was available at the time of the hearing but was not raised until the compliance phase, it is ultimately involved in effectuating our make whole order. "This approach comports with our usual policy of leaving the details of the remedy to the compliance process." ***Lear Siegler, Inc.*** *supra*, at p. 1768.

The Town correctly points out that the Union inconsistently agrees with the Board Agent's consideration of the annual wage increases provided by the belatedly submitted labor contract.

We do not accept the Union's claim of estoppel since the Town made no representation that the Union could have relied upon to its determent.

In summary, we believe that even though the labor contract was in existence at the time of the initial hearing but was not introduced, its provisions are essential facts necessary for the implementation of our Order. We will, therefore, deny the Union's Motion to Preclude Defense.

ORDER

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

ORDERED, that the Union's Motion to Preclude Defense be and it hereby is, **DENIED**.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Wendella A. Battey
Wendella A. Battey
Acting Chairman

Patricia V. Low
Patricia V. Low
Board Member

David C. Anderson
David C. Anderson
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 12th day of May, 2000 to the following:

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New London, Connecticut 06320

_____
Jaye Bailey Zanta, General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the matter of Town of Groton
-and-
Groton Municipal Employees Union, SEIU, Local 742, AFL-CIO
Case Nos. MPP-18,169 & MUPP-19,011
Decision No. 3623

Appealed to Hartford Superior Court on 12/4/98
Docket No. CV98-492626

Motion to Dismiss Granted on 7/6/99

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
TOWN OF GROTON

DECISION NO. 3623

-and-

SEPTEMBER 18, 1998

THE GROTON MUNICIPAL EMPLOYEES
UNION, SEIU, LOCAL 742, AFL-CIO

Case Nos. MPP-18,169
MUPP-19,011

APPEARANCES:

Attorney Harry E. Calmar
For the Town

Attorney William S. Zeman
For the Union

DECISION AND ORDER
and
DISMISSAL OF COMPLAINT

On May 2, 1996, the Groton Municipal Employees Union, SEIU, Local 742, AFL-CIO (the Union) filed a complaint (Case No. MPP-18,169) (amended on April 11, 1997 and further amended on March 5, 1998) with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Town of Groton (the Town) had violated §§ 7-470(a)(1), (3) and (4) of the Municipal Employee Relations Act (the Act) by unilateral change and by discrimination against Loreta Zdanys and Peter Vandenbosch by unilaterally changing salaries and conditions of employment.

On April 7, 1997, the Town filed a complaint (Case No. MUPP-19,011) with the Labor Board alleging that the Union bargained in bad faith by failing to negotiate compensation schedules and by initiating claims against the Town in bad faith.

After the requisite preliminary steps had been taken in Case No. MPP-18,169, a hearing was held before the Labor Board in that matter on April 14 and 16, 1997 and September 19 and 26, 1997. Also, on November 14, 1997, the Agent of the Labor Board recommended dismissal

of the complaint in Case No. MUPP-19,011. The Town received a copy of the Agent's recommendation of dismissal on November 17, 1997. Thereafter, by letter dated November 24, 1997 and received by the Labor Board on December 3, 1997, the Town objected to the Agent's recommendation of dismissal of Case No. MUPP-19,011.

By notice dated December 5, 1997, the Labor Board consolidated Case Nos. MPP-18,169 and MUPP-19,011 of further hearing on December 11, 1997. On that date, the Labor Board dismissed Case No. MUPP-19,011 on the ground that the Town's objection to the Agent's recommendation of dismissal had not been timely filed with the Labor Board pursuant to § 7-471-24 of the Regulations of Connecticut State Agencies, having been received by the Labor Board more than fourteen days after service of the recommendation upon the Town.

During the entire hearing in these matters, both parties appeared, were represented by counsel and were given full opportunity to present evidence, to examine and cross-examine witnesses and to make argument. Both parties filed briefs and reply briefs, the last of which was received on March 17, 1998.

Based upon 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

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

2. The Union is an employee organization within the meaning of the Act and at all material times has represented a bargaining unit comprising certain professional, technical and clerical employees of the Town of Groton.

3. Loreta Zdanys was employed as Assistant Assessor at an annual salary for FY 1995-1996 of $44,864. (Ex. 7, pp 34; 39).

4. Peter Vandenbosch was employed as Assistant Building Official at an annual salary for FY 1995-1996 of $51,434 (Ex. 7, pp. 34; 39).

5. Both salaried positions were included in the bargaining unit and were considered to be "exempt" (i.e., exempt from the overtime pay requirement) under the Fair Labor Standards Act and the similar provisions of the Connecticut General Statutes.

6. Ms. Zdanys was regularly scheduled to work 37.5 hours per week. Under Article XI of the collective bargaining agreement between the parties (Ex. 7), no additional compensation was payable for hours worked in excess of 80 per two-week pay period. Hours worked in excess of 80 in a two-week pay period were paid at her straight time rate.

7. Mr. Vandenbosch was regularly scheduled to work 40 hours per week. Under Article XI of the collective bargaining agreement, he was entitled to no additional compensation for hours worked up to 85 in a two-week pay period. Hours worked in excess of 85 in a two-week pay period were paid at his straight time rate.

8. In 1994, during the term of the collective bargaining agreement, the Town requested negotiations regarding the classification of certain jobs as exempt or non-exempt from the overtime pay requirements. Although several meetings were held, there was no agreement to change any jobs from exempt to non-exempt.

9. In March, 1995, Mr. Vandenbosch inquired about his eligibility for overtime pay. Mr. Ackerman , the Town's Director of Administrative Services, responded that if Mr. Vandenbosch was performing the duties in his job description, he was exempt from the overtime pay requirement. Although Mr. Ackerman requested the reason for the inquiry, Mr. Vandenbosch did not respond.

10. In 1995, the Union began an investigation of the overtime eligibility status of several classifications of employees covered by the collective bargaining agreement, including the two employees in this case. The Union gathered information from salaried employees and sought legal advice from its headquarters.

11. By letter dated July 16, 1995 (Ex. 14), the President of the Union requested an opinion from the Wage and Workplace Standards Division of the Labor Department regarding the exempt status of the Assistant Assessor and Assistant Building Official positions.

12. On November 7, 1995, Mr. Vandenbosch filed a claim with the Labor Department for unpaid overtime pay and on November 9, 1995, Ms. Zdanys did the same. (Exs. 17, 27).

13. By letter dated January 10, 1996 (Ex. 15), the Labor Department notified the Town that it had completed its investigation and had concluded that Ms. Zdanys and Mr. Vandenbosch were not exempt from the overtime pay requirement and were entitled to unpaid overtime pay. The Town first became aware of these wage claims at this time. It did not become aware of the Union's involvement until shortly before the hearing.

14. The Town entered discussions with the Labor Department to resolve the claims.

15. Mr. Ackerman investigated the duties performed by Ms. Zdanys and Mr. Vandenbosch and satisfied himself that they were indeed non-exempt employees.

16. At this time, the Town and the Union began negotiations for a successor contract. The Town proposed to change the two jobs (Assistant Assessor and Assistant Building Official) from exempt to non-exempt, but there was no agreement on this issue.

17. In order to reconcile the Labor Department's order with the terms of the collective bargaining agreement, Mr. Ackerman decided to change the two employees from salaried to hourly and calculated an hourly rate for each of them. It was his intention to keep their total compensation as hourly employees at the same level as their former salaries on which the Town's budget had been based.

18. For Ms. Zdanys, Mr. Ackerman calculated her hourly rate to be $21.37 by dividing her annual salary ($44,864) by 80 hours (the biweekly number of hours her salary was intended to cover, in the Town's view) times 26 (the number of biweekly pay periods in a year). Mr. Ackerman sent Ms. Zdanys a letter dated March 14, 1996 setting forth her new hourly rate of pay. (Ex. 8). (Mr. Ackerman made an error in his calculation. At the hearing, the Town offered to correct this error. The correct hourly rate under the Town's method of calculation is $21.57.) (Exs. 8 and 32).

19. For Mr. Vandenbosch, Mr. Ackerman calculated the hourly rate by dividing the annual salary ($51,434) by the 2210 annual hours his salary was intended to cover (in the Town's view), adjusted by premium pay to which he was entitled for hours worked in excess of 80 per two-week pay period multiplied by 26 pay periods per year. Mr. Ackerman sent a letter dated March 14, 1996 setting forth the new hourly rate. (Ex. 9). However, the resulting hourly rate of $22.37 contained in Exhibit 9 was incorrect because of the Town's failure to include premium pay in the calculation. The Town offered at the hearing to correct this to $22.61 per hour. (Ex. 31).

20. In the fall of 1995, Mark Oefinger, the Town's Manager of Planning and Development Services, had reviewed the services under his supervision, which included the Building Inspection Office to which Mr. Vandenbosch was assigned. At the time, this office had two supervisory positions. Mr. Oefinger considered the number of supervisory positions to be excessive in light of the small size of the department and the decrease in building inspection activity and therefore recommended the elimination of the Assistant Building Official position held by Mr. Vandenbosch, to be effective July 1, 1996.

21. In his letter to Mr. Vandenbosch of March 14, 1996 (Ex. 9), Mr. Ackerman noted that Mr. Vandenbosch's representations concerning his actual duties showed a change since his classification as Assistant Building Official. Since the Assistant Building Official job was to be eliminated in the 1996-1997 budget and the duties and new hourly rate were close to those of a Senior Building Inspector, he was reclassified as a Senior Building Inspector effective March 18, 1996 at an hourly rate of $22.50. The reclassification of Mr. Vandenbosch to Senior Building Inspector did not actually occur until July 1, 1996, and he continued to receive his salary as Assistant Building Official until that date.

22. Mr. Vandenbosch continued in the position of Senior Building Inspector from July 1, 1996 until January, 1997 at the hourly rate for that job (Step 5) provided by the collective bargaining agreement. From January, 1997 through October, 1997, Mr. Vandenbosch served as Building Official in an acting capacity because of the resignation of the Building Official and

received the pay for the Building Official for this period. In October, 1997, Mr. Vandenbosch again assumed the position of Senior Building Inspector.

23. Shortly after receiving the letters of March 14, 1996, grievances were filed on behalf of both Ms. Zdanys and Mr. Vandenbosch. (Exs. 33A and 33B). Ms. Zdanys objected to the change from salary to hourly, disputed the hourly rate and asked that her hourly rate be restored to $23.00. Mr. Vandenbosch objected to the unilateral reclassification, disputed the hourly rate and asked that his hourly rate be restored to $24.73.

24. The difference in hourly rates calculated by the Town and by the employees resulted from the length of the biweekly working period used in the denominator of the calculation. The Town asserts that this should be 80 in the case of Ms. Zdanys and 85 for Mr. Vandenbosch (adjusted for required overtime pay) since this is the period their salaries were intended to cover under Article XI of the collective bargaining agreement. On the other hand, the employees claim that the figures to be used in the denominator should be 75 for Ms. Zdanys and 80 for Mr. Vandenbosch since these were their regular or core working periods. In other words, Ms. Zdanys maintains that she was entitled to her full salary if she worked 75 hours in a two-week period and Mr. Vandenbosch maintains that he was entitled to his full salary if he worked 80 hours in the two-week period. Therefore, they claim that their figures should be used in the denominator.

CONCLUSIONS OF LAW

1. An employer's unilateral change in an existing condition of employment which involves a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a prohibited practice under the Act unless the employer provides an adequate defense.

2. By unilaterally changing the status of Loreta Zdanys and Peter Vandenbosch from salaried to hourly and thus changing the basis for their compensation when it was under no legal compulsion to do so, the Town violated the Act.

3. The Union did not establish a prima facie case of discrimination against Loreta Zdanys regarding the change in her compensation status or against Mr. Vandenbosch regarding the change in his compensation status and job reclassification.

4. The Town's objection to the Agent's recommendation of dismissal in Case No. MUPP-19,011 was not timely filed with the Labor Board pursuant to Regulations of Connecticut State Agencies § 7-471-24 and, therefore, the case is dismissed.

DISCUSSION

We first briefly discuss our dismissal of the Town's complaint in Case No. MUPP-19,011. In that matter, the Town filed its objection to the Agent's recommendation of dismissal

sixteen days after it had received the recommendation.[1] The Town indicated at the hearing that its failure to file the objection in a timely manner was due to a problem with the mail; the objection had been placed in the mail by the Town's counsel's office no later than November 25, 1997 but was not delivered to the Labor Board until December 4, 1997.

As stated at the hearing on December 11, 1997, the Labor Board has no reason not to believe that the Town's representatives mailed the objection on the date indicated. However, as we stated in ***City of Stamford (Thomas Gleason)***, Decision No. 3456 (1996), the language of Regulation 7-471-24 does not allow the Board discretion in matters involving the late filing of objections. In this regard, we must dismiss the Town's complaint because it was not filed within 14 days of service of the recommendation of dismissal as required by the regulations.

The amended complaint in Case No. MPP-18,169 dated March 5, 1998 alleges violations of §§ 7-470(a)(1), (3) and (4) of the Act in that the Town changed the pay status of Loreta Zdanys and Peter Vandenbosch from salaried to hourly without bargaining with the Union and for discriminatory purposes. In addition, the Union claims that the Town discriminated against Mr. Vandenbosch by eliminating his job (Assistant Building Official) and transferring him to Senior Building Inspector.

The dispute arose out of the filing of wage complaints by Ms. Zdanys and Mr. Vandenbosch claiming unpaid overtime pay. At the time, they were both classified as exempt from the overtime pay requirement under the collective bargaining agreement. (See Ex. 7 at p. 39.) After investigation, the Wage and Workplace Standards Division of the Labor Department concluded that the two employees were not exempt from the overtime pay requirement and ordered back pay with future compliance. (See Ex. 15).

After resolving the wage/hour complaint, the Town attempted to reconcile the obligation to pay overtime with the provisions of the collective bargaining agreement and, specifically, to limit the annual compensation of the two employees to the salary amount contained in the collective bargaining agreement on which the Town's budget had been based.

Unilateral Change

Even at this relatively late date, we are frequently required to review unilateral changes in mandatory subjects of bargaining. The current status of our case law on this subject is as follows:

An employer's unilateral change in an existing condition of employment which

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[1]The Labor Board's records indicate and the Town admits that the recommendation was received by the Town on November 17, 1997. The Town's objection was received by the Labor Board by facsimile on December 3, 1997 and by U.S. mail on December 4, 1997.

involves a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a prohibited practice under [MERA] unless the employer provides an adequate defense.

New Haven Parking Authority, Decision No. 3523 (1997).

The basis on which compensation is paid is obviously a mandatory subject of bargaining. This is particularly true where, as here, the change made affects the total compensation to which an employee is entitled. Since a unilateral change was made in a mandatory subject of bargaining, the only question to be resolved is whether or not the Town established an adequate defense.

The Town raises the defense of legal compulsion, one that we have recognized on several occasions as a valid defense to a charge of unilateral change. See ***Town of East Hartford***, Decision No. 2697 (1988); ***Town of East Haven***, Decision No. 1337 (1975). In each of these cases, we declined to find that a unilateral change constituted a refusal to bargain because the Towns were compelled by law to make the disputed changes. However, the situation here is different. The Labor Department ordered the Town to pay overtime to the two employees after finding that they were not exempt from this requirement. The order did not require the Town to change the status of these employees from salaried to hourly. There is no requirement under the wage-hour laws that non-exempt employees be paid on an hourly basis. Non-exempt employees may, and frequently are paid on a salary basis. Since they are entitled to overtime pay, it is necessary to convert their salary to an hourly "regular rate" upon which the overtime rate is calculated:

> The "regular rate" under the [Fair Labor Standards Act] is a rate per hour. The Act does not require employers to compensate employees on an hourly basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of an hourly rate derived therefrom and therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . .
> 29 C.F.R. § 778.109. (Emphasis added).

Since it was not necessary for the Town to convert the employees from salaried to hourly to comply with the Labor Department's order, the defense of legal compulsion is unavailable. The Town's unilateral action violated the Act as a refusal to bargain.

The dispute over the proper method to be used to calculate the hourly rates for the two employees is not one for us to decide as it involves interpretation of the contract and of the wage and hour laws. Both parties raised good arguments to support the correctness of their respective calculations. However, only the claims of unilateral change and discrimination are within our jurisdiction.

Discrimination

We find that the Town's action in converting the two employees from salaried to hourly, although improper as a refusal to bargain, did not constitute discrimination on any of the grounds set forth in § 7-470 (a) (3) of the Act. The Town's action in this regard was an attempt to reconcile the Labor Department's order with the terms of the collective bargaining agreement, and particularly, to keep the total compensation for the two employees within the budgeted amount. The Town advanced good reasons to support its method of calculation which may be accepted or rejected in another forum. We find that the Town acted in sincere belief in the correctness of its method of calculating the hourly rate and that it was not motivated by discriminatory purposes.

The second allegation of discrimination involves the elimination of the Acting Building Official job held by Mr. Vandenbosch and his reassignment to the job of Senior Building Inspector. Although the Union views this change as retaliation for having engaged in concerted activity,[2] we are persuaded that this change resulted from a decision reached prior to the time the Town knew of the wage/hour complaints.

We have set forth a union's burden to establish a prima facie case of discrimination as follows:

> 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. ***State of Connecticut, UCONN Health Center***, Decision No. 3592, at p. 19, quoting ***Torrington Board of Education***, Decision No. 3209 (1994).

The employees here engaged in protected, concerted activities, and the Town had knowledge of these activities by mid-January, 1996. However, we do not find sufficient evidence of anti-union animus on the Town's part to satisfy this element of the Union's prima facie case. Based on the evidence presented, it would seem that the Town had good reason to eliminate the Assistant Building Official job. Excluding the secretary, there were two supervisors and one "worker" in the department. Mr. Oefinger testified without challenge that his recommendation to eliminate the job was made in the fall of 1995, well before the Town had knowledge of the wage complaints. After Mr. Vandenbosch successfully established that the duties of his job did not warrant exempt status, the Town's decision to place him in a job more in

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[2]The concerted activity here being the assertion of a right derived from a collective bargaining agreement. See ***Board of Trustees for State Technical Colleges***, Decision No. 2825 (1990). The Town did not learn of the Union's involvement in the wage/hour complaint until shortly before the hearing; therefore, the primary form of concerted activity ("engaged with or on the authority of other employees", Id. at p. 10) is not applicable.

keeping with his duties was not unreasonable.[3] We note as evidence of lack of anti-union animus that Mr. Vandenbosch remained in the Acting Building Official job for several months after March 14, 1996 and, indeed, acted as the Building Official for 10 months in 1997. For these reasons, even if the Union had established the element of anti-union animus, the timing of the elimination of the Acting Building Official job and the other events provide an adequate defense to the Town.

The portion of the complaint alleging discrimination is dismissed.

Remedy

As previously discussed, the calculation of the correct hourly rate is not a matter within our jurisdiction. However, it is proper for us to order a remedy for the unlawful unilateral change from salaried to hourly status. The salaries in effect at the time of the change (on or about March 14, 1996 for Ms. Zdanys and on or about July 1, 1996 for Mr. Vandenbosch) are known, as are the subsequent increases. The amounts they both earned subsequent to the change in status are ascertainable. (The period during which Mr. Vandenbosch was acting as Building Official and paid at the rate for that job should be disregarded.) The employees are entitled to the difference between the amount they would have received had they remained salaried employees and the amount they actually received after the change to hourly status.

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[3]Under Sec. 1 of Act. IX the collective bargaining agreement, the Town retains the right to reclassify positions to another classification which more accurately reflects the actual duties and responsibilities. However, the salary may not be reduced without the Union's consent.

ORDER

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

ORDERED, that the Town of Groton:

I. Cease and desist from unilaterally changing the compensation status of employees from salaried to hourly and thus changing the basis for their compensation.

II. Take the following action which the Labor Board finds will effectuate the policies of the Act:

A. Pay to Loreta Zdanys and Peter Vandenbosch the difference between the amount they would have earned had they remained salaried employees and what they earned as hourly employees after the change in method of compensation.

III. 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.

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

CONNECTICUT STATE BOARD OF LABOR RELATIONS

C. Raymond Grebey
C. Raymond Grebey
Chairman

Wendella A. Battey
Wendella A. Battey
Board Member

David C. Anderson
David C. Anderson
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 18th day of September, 1998 to the following:

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