STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

STATE OF CONNECTICUT,
DEPARTMENT OF CORRECTION
-AND-

LOCALS 387, 391 & 1565, NP-4
UNIT, COUNCIL 4, AFSCME

Case No. SPP-28,471

STATE OF CONNECTICUT,
DEPARTMENT OF CORRECTION
-AND-

CSEA, SEIU LOCAL 2001, CORRECTION
SUPERVISORY COUNCIL (NP-8)

Case No. SPP-28,473

APPARENCES:

Attorney Ellen M. Carter
for the State

Attorney J. William Gagne, Jr.
for AFSCME, Council 4, Locals 387, 391 & 1565

Attorney Robert J. Krzys
for CSEA/SEIU, Local 2001

DECISION AND DISMISSAL OF COMPLAINTS

On April 1, 2010, Locals 387, 391 & 1565, NP-4 Unit, Council 4, AFSCME (AFSCME) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the State of Connecticut (the State) violated Section 5-272 of the State Employee Relations Act (SERA or the Act) by making a unilateral change in the terms and conditions of employment when it changed a practice regarding the use of sick leave for attending funerals. On April 4, 2010, CSEA, SEIU Local 2001, Correction Supervisory Council
(NP-8) (CSEA) filed a complaint with the Labor Board alleging that the State violated the Act by making a unilateral change in terms and conditions of employment when it changed the practice of approving requests for funeral days regardless of work shift.

After the requisite preliminary steps had been taken, the two matters were consolidated, the parties entered into a partial stipulation of facts and exhibits, and the matter came before the Labor Board for a hearing on December 2, 2010. All parties appeared, were represented and were allowed to introduce evidence, examine and cross-examine witnesses, and make argument. All parties filed post-hearing briefs, the last of which was filed on June 28, 2011. Based on 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 State is an employer within the meaning of the Act.

2. AFSCME is an employee organization within the meaning of the Act and at all relevant times has represented the NP-4 bargaining unit, the largest job classification of which is Correction Officer.

3. CSEA is an employee organization with the meaning of the Act and represents the Correction Supervisors (NP-8) bargaining unit.

4. The Department of Correction (DOC) currently operates seventeen facilities throughout Connecticut. Employee work shifts include first (day), second (evening), and third (night) shift.

5. Since July 9, 1975, Regs., Conn State Agencies §§5-247-4(a),(2), (4) have provided, in relevant part:

   (a) An eligible employee shall be granted sick leave . . .
   
   (2) in the event of death in the immediate family when as much as three working days leave with pay shall be granted. Immediate family means husband, wife, father, mother, sister, brother, or child and also any relative who is domiciled in the employee’s household; . . .
   
   (4) for going to, attending, and returning from funerals of persons other than members of the immediate family, if permission is requested and approved in advance by the appointing authority and provided that not more than three days of sick leave per calendar year shall be granted therefore.

(Ex. 6).

6. The State and AFSCME are parties to a collective bargaining agreement (Ex. 4) with effective dates of July 1, 2008 through June 30, 2011 that provides, in relevant part:

ARTICLE 12
GRIEVANCE PROCEDURE
Section 1. Definition of Grievance. A grievance is defined as, and limited to a written complaint involving an alleged violation or a dispute involving the application or interpretation of a specific provision of this Agreement.

Section 6. Grievance Procedure: Steps

Step III. Director of Labor Relations or Designee. An unresolved grievance may be appealed to the Director of Labor Relations...

Section 9. Arbitration. Within forty (40) days from receipt of a Step III response, or if no response, within forty (40) days of the due date, grievances, during the life of this Agreement, shall be submitted for arbitration as follows:...

12) Decision Final and Binding. The arbitrator’s decision shall be final and binding on the parties in accordance with Connecticut General Statutes Sections 52-418, ...

ARTICLE 16
RETIREMENT, INSURANCES AND LEAVES

Section 2. Insurance and Leaves. Except where varied in this Agreement, the State will continue in force its written rules and regulations presently in effect with reference to:

A. Sick leave...

7. The State and CSEA are parties to a collective bargaining agreement (Ex. 5) with effective dates of July 1, 2008 to June 30, 2012 that provides, in relevant part:

ARTICLE 17 – GRIEVANCE PROCEDURE

Section 1. Definition. A grievance is defined as, and limited to, a written complaint involving an alleged violation or a dispute involving the application or interpretation of a specific provision of this Agreement.

Section 6. The Grievance Procedure.

Step III. Office of Labor Relations or Designee.

... An unresolved grievance may be appealed to said Director...

Step IV. Arbitration. Within ten (10) working days after the State’s answer is due at Step III or if no conference is held within (30) days, within seven (7) days after the expiration of the thirty (30) day period an unresolved grievance may be submitted to arbitration...

The arbitrator’s decision shall be final and binding on the parties in accordance with Connecticut General Statutes, Section 52-418 . . .

ARTICLE 35 – SICK LEAVE

Section 3. Employees may use sick leave:

(c) Death in the immediate family. Immediate family means spouse, parent, siblings, children, and also relative who is domiciled in the employee’s household. In the event of death in the immediate family, when as many as three (3) working days leave with pay may be used.

(e) For going to, attending, and returning from funerals of persons other than members of the immediate family, provided that not more than three (3) days of sick leave per calendar year shall be taken therefore.

8. Prior to July 14, 2008 members of the NP-4 and NP-8 bargaining units were allowed, regardless of shift assignment, a full day off for funerals of persons other than immediate family.

9. On July 14, 2008, DOC Human Resources Director Dan Callahan (Callahan) e-mailed a Memorandum (Ex. 7) to DOC Wardens, Unit Heads, HR staff, and AFSCME and CSEA representatives which states, in relevant part:

This letter serves to inform you that the Human Resources Unit has conducted an audit into the use of funeral and family funeral time. This audit revealed inconsistencies in the granting of and recording of employee funeral and family funeral time.

Pursuant to Sec. 5-247(a)(4) of the regulations, sick leave may also be used for going to, attending, and returning from funerals of persons other than members of the immediate family, if permission is requested and approved in advance. In these instances, the proper coding is SFNRL and sick leave usage is limited to three (3) days per calendar year, regardless of the number of funerals.

For record keeping and audit purposes, I have attached a form1 that should be submitted prior to being taken when possible . . .

The Human Resources Unit will question . . . any instance where the use of this time exceeds the statutory or bargaining unit allotment . . . An audit by Human Resources staff will be conducted on a quarterly basis to ensure compliance with the State Personnel Regulations.

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1 Attached to the July 14, 2008 letter was a form entitled “Request for Funeral Leave” which requests certain information, including “Date(s) of absence requested,” “Amount of time off requested,” “Name of deceased,” and “Town in which services were held.”
10. On September 3, 2008, AFSCME filed a complaint with the Labor Board alleging that Callahan’s implementation of a funeral leave request form constituted a unilateral change of working conditions in violation of the Act. (Ex. 13). An informal Labor Board conference was held with representatives of AFSCME and the State. As a result of the conference, AFSCME withdrew its complaint without prejudice on the basis that the State was entitled to certain information before approving a request for funeral leave and that the form was a reasonable prophylactic measure designed to ensure compliance with an existing rule or condition of employment.

11. On January 20, 2010, Captain Chris Taylor (Taylor), a member of the NP-8 unit assigned to the third shift at Manson Youth Institution (Manson) in Cheshire requested a day off to attend the funeral of a co-worker’s brother in Meriden at 10:00 a.m. (Ex. 11). After consulting with Callahan, Deputy Warden Jesus Guadarrama (Guadarrama) denied the request on the basis that Taylor could attend the funeral on off-duty time.

12. On February 1, 2010, Guadarrama issued a memo (Ex. 12) to Manson Warden Jose Feliciano (Feliciano) and all Manson shift supervisors which stated:

No staff shall be allowed funeral leave (SFNR) unless the funeral is during their scheduled work shift. All staff need to use other accrued time unless it is an immediate family member (SFFNR).

We will continue this practice per HR and/or until they develop a new policy to override the current one.

13. On February 5, 2010 CSEA filed an institutional grievance contesting denial of funeral leave at Manson, and an individual grievance contesting denial of Taylor’s request. (Exs. 8,9). These grievances are pending final resolution.

14. On May 21, 2010, Lieutenant Jeffrey Saucier (Saucier), a Manson shift commander, issued a memo (Ex. 15) to Guadarrama and other shift supervisors which stated, in relevant part:

Just a reminder – The current policy directed to us is that only up to 4 hours of non-family funeral leave can be granted and only if the funeral/wake is during the employee’s shift . . .

Exception: If the funeral is out of state and 4 hours will obviously not be enough to travel to, attend and return from, the funeral/wake, contact the Shift Commander or Duty Officer for approval to grant a full day of funeral leave.

Most of the call-outs you will take will be for 3rd shift staff, so please be cognizant of the current policy (it is under review) so that you grant the funeral time off accordingly. There have been inconsistencies within the Supervisors of all shifts when dealing with this issue. We need to be on the same page and enforce the current policy (even if you don’t agree with it) until it gets resolved/revised.

15. After Saucier’s memo issued, AFSCME filed institutional grievances and several individual grievances contesting denial of funeral leave at Manson, some or all of which were
subsequently resolved when Feliciano allowed additional leave after considering the specific circumstances involved.

16. Callahan either personally or through his staff has informed Feliciano and Guadarrama that summary denial of funeral leave on the basis of shift assignment or imposition of a four hour limit on such leave was improper. Feliciano and Guadarrama were then informed that funeral leave requests must be assessed on a case by case basis in order to allow employees sufficient time to travel to, attend, and return from funerals, wakes, and/or memorial services.

**CONCLUSIONS OF LAW**

1. A unilateral change in a condition of employment involving a mandatory subject of bargaining constitutes a refusal to bargain unless the employer proves an adequate defense.

2. Unilateral implementation of *per se* rules governing usage of funeral leave constitutes a violation of the statutory duty to bargain in good faith.

3. The contracts and relevant work rules gave the State the right to limit funeral leave to the time necessary to attend services for persons other than members of an employee's immediate family.

4. The State did not violate the Act by enforcing existing limitations on employee funeral leave.

**DISCUSSION**

AFSCME and CSEA allege in this case that the State violated the Act by unilaterally changing the practice of affording an employee a full day off to attend memorial services for persons other than the employee's immediate family. Complainants argue that the funeral leave practice involves a mandatory subject of collective bargaining that cannot be altered absent bargaining in accordance with the Act.

The State admits that the benefit at issue is a mandatory topic of bargaining and that the long-standing practice existed prior to July of 2009 as alleged. The State relies, however, on the provisions in the collective bargaining agreements that expressly limit the benefit to work leave for "going to, attending, and returning from funerals" as authorization for the change as implemented.

It is now well settled that it is a violation of the Act for an employer to unilaterally change an existing condition of employment that is a mandatory subject of bargaining unless the employer provides an adequate defense. *State of Connecticut, Department of Public Safety*, Decision No. 4550 (2011); *Norwalk Third Taxing District*, Decision No. 3695 (1999); *Bloomfield Board of Education*, Decision No. 3150 (1993); *City of Stamford*, Decision No. 2680 (1988). Under SERA, a complainant must "prove the existence of a fixed and definite practice . . . as part of its *prima facie* case of unilateral change." *State of Connecticut (DMV)*, Decision No. 3806 p. 6 (2001). "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, Commission on Human Rights and Opportunities*, Decision No. 3467 p. 4, appeal dismissed, *Local 2663, AFSCME v. State Board of Labor Relations*, judicial district of
Hartford-New Britain at Hartford, Docket No. 97-0568932 (2/19/98), aff’d 53 Conn. App. 902 (1999). “There is no question that the practice must be definite and fixed rather than isolated and sporadic.” State of Connecticut (DMV), supra at p. 6.

There is no dispute that the funeral leave practice at issue had “a material effect on employment” was not “indirectly, incidentally, or remotely related to employment,” and would ordinarily be considered a mandatory subject of bargaining. State of Connecticut, Judicial Branch, Decision No. 4550 p. 5 (2011). Nor is there any dispute as to the specifics of the practice, namely, that since on or before July 14, 2008 employees were allowed, regardless of shift assignment, a full day off to attend funeral services of persons other than immediate family. As such, AFSCME and CSEA have met their respective burdens to “establish that the employment practice was ‘clearly enunciated and consistent, [that it] endure[d] over a reasonable length of time, and [that it was] an accepted practice . . .’” Board of Education of Region 16 v. State Board of Labor Relations, 299 Conn. 63, 73 (2010) (quoting Honulik v. Greenwich, 299 Conn. 698, 719 n. 33 (2009). Therefore we find on the basis of the record before us that Complainants have made a prima facie case of unilateral change.

Once the union has made out its prima facie case, the burden shifts to the employer to establish an adequate defense. We recognize a controlling provision of a collective bargaining agreement as such a defense. East Hartford Housing Authority, Decision No. 3733 (1999); Norwalk Third Taxing District, supra; City of Stamford, Decision No. 2992 (1992). In analyzing a contract defense we exercise our “limited jurisdiction to interpret a contract where the employer’s conduct constitutes a prima facie violation of the Act and the employer seeks to justify its conduct on the grounds that the contract permits the change.” Woodbridge Board of Education, Decision No. 4565 (2011); State of Connecticut, Decision No. 4573 (2012); New Haven Parking Authority, Decision No. 3523 p. 8 (1997); see also Town of Plainville, Decision No. 1790 (1979). We find on the basis of the record that the State’s actions, as amended, were consistent with and authorized by the relevant collective bargaining agreements and as such we dismiss the complaints before us.

Principles of contract law govern interpretation of collective bargaining agreements and it is well established that a contract is to be given effect according to its terms where the language is clear and unambiguous. Honulik v. Town of Greenwich, supra, 293 Conn. at 710. Both agreements expressly define the benefit at issue as leave for “going to, attending, and returning from funerals other than members of the immediate family.” Read in context, this language is unambiguous in that it does not appear to be susceptible to multiple reasonable interpretations. See Francis v. Fonfara, 303 Conn. 292, 297 (2012) (holding that test for ambiguity is whether language read in context is susceptible to more than one reasonable interpretation). As such, we are not concerned with adopting a construction that maintains consistency with the parties’ past practice. See Elkouri & Elkouri, How Arbitration Works, §12.8 (6th ed. 2003)(noting that past practice of the parties is the most widely used standard to interpret unclear contract language). We conclude that to the extent the State restricts funeral leave to actual time expended attending memorial services in lieu of work, the State’s actions are authorized by the collective bargaining agreements and do not violate the Act.

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2 We find on the basis of the evidence that employees are no longer subject to summary denial of funeral leave on the basis of shift assignment, nor is such leave ordinarily subject to a four hour limitation.
Complainants argue that the State implemented an illegal unilateral change by replacing the per se rule embodied in the long standing practice with other per se rules in the form of a four hour limit on funeral leave and summary denial of all funeral leave by third shift employees. We agree such conduct would violate the Act and the Complainants would be entitled to relief - if the record supported this allegation. The evidence before us, however, supports the State’s claim that it affords funeral leave on the basis of specific information provided by the employee on the request form which Complainants admit is an appropriate prophylactic means to administer the benefit. Callahan credibly testified that upon notice of blanket denials of funeral leave at Manson his office took steps to advise Manson administrators that requests must be assessed on a case by case basis. Those measures were apparently successful because most if not all of a substantial number of AFSCME funeral leave grievances were resolved by agreement.

Based on the record before us we conclude that the State has established an adequate defense to Complainants’ claim that there was a unilateral change to the past practice at issue and so we dismiss the complaints.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the State 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

Patricia V. Low
Patricia V. Low
Board Member

Wendella Ault Battey
Wendella Ault Battey
Board Member

Robert A. Dellapina
Robert A. Dellapina
Board Member

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3 While CSEA, unlike AFSCME, did not file and withdraw a complaint upon implementation of the request form in July of 2008, we infer that CSEA does not contest the State’s right to require use of the request form on the basis of CSEA’s failure to act until 2010.
CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 13th day of March, 2012 to the following:

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CONNECTICUT STATE BOARD OF LABOR RELATIONS
NO. CV 12 6015310S  
LOCAL 387 NP-4 UNIT COUNCIL 4  
AFSCME, ET AL.  
V.  
STATE OF CONNECTICUT  
DEPARTMENT OF CORRECTIONS, ET AL.  
SUPERIOR COURT  
JUDICIAL DISTRICT OF  
NEW BRITAIN  
JULY 16, 2013

MEMORANDUM OF DECISION

The plaintiffs, Locals 387, 391 & 1565 AFSCME (the union), appeal from a March 13, 2012 final decision of the defendant state board of labor relations (the board), dismissing the union's complaint that the state department of correction (the department) violated General Statutes § 5-272 of the State Employee Relations Act (the Act). The union's complaint alleged that the department had made a unilateral change in the terms and conditions of employment when it changed a practice regarding the use of sick leave for attending funerals.

The board held a hearing on December 2, 2010 on the union's complaint and issued its final decision on March 13, 2012. The final decision made the following relevant findings of fact and conclusions of law.

The union is aggrieved for purposes of § 4-183 (a) by the dismissal of its complaint by the state board of labor relations.
FINDINGS OF FACT

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

2. AFSCME is an employee organization within the meaning of the Act and at all relevant times has represented the NP-4 bargaining unit, the largest job classification of which is Correction Officer.

3. CSEA is an employee organization within the meaning of the Act and represents the Correction Supervisors (NP-8) bargaining unit.

4. The Department of Correction (DOC) currently operates seventeen facilities throughout Connecticut. Employee work shifts include first (day), second (evening), and third (night) shift.

5. Since July 9, 1975, reg.s., Conn State Agencies §§ 5-247-4(a), (2), (4) have provided, in relevant part:

   (a) An eligible employee shall be granted sick leave . . .

   * * *

   (2) in the event of death in the immediate family when as much as three working days leave with pay shall be granted. Immediate family means husband, wife, father, mother, sister, brother, or child and also any relative who is domiciled in the employee’s household; . . .

   * * *

   (4) for going to, attending, and returning from funerals of persons other than members of the immediate family, if permission is
requested and approved in advance by the appointing authority and provided that not more than three days of sick leave per calendar year shall be granted therefore.

6. The State and AFSCME are parties to a collective bargaining agreement with effective dates of July 1, 2008 through June 30, 2011 that provides, in relevant part:

   ***

   Insurance and Leaves. Except where varied in this Agreement, the State will continue in force its written rules and regulations presently in effect with reference to:
   Sick leave...

7. The State and CSEA are parties to a collective bargaining agreement with effective dates July 1, 2008 to June 30, 2012 that provides in relevant part:

   ***

   Section 3. Employees may use sick leave:

   (c) Death in the immediate family.
   Immediate family means spouse, parent, siblings, children, and also relative who is domiciled in the employee’s household. In the event of death in the immediate family, when as many as three (3) working days leave with pay may be used.

   ***

   (e) For going to, attending, and returning from funerals of persons other than members of the immediate family, provided that not more than three (3) days of sick leave per
calendar year shall be taken therefore.

8. Prior to July 14, 2008 members of the NP-4 and NP-8 bargaining units were allowed, regardless of shift assignment, a full day off for funerals of persons other than immediate family.

9. On July 14, 2008, DOC Human Resources Director Dan Callahan (Callahan) e-mailed a Memorandum to DOC Wardens, Unit Heads, HR staff, and AFSCME and CSEA representatives which states, in relevant part:

This letter serves to inform you that the Human Resources Unit has conducted an audit into the use of funeral and family funeral time. This audit revealed inconsistencies in the granting of and recording of employee funeral and family funeral time.

* * *

Pursuant to Sec. 5-247(a)(4) of the regulations, sick leave may also be used for going to, attending, and returning from funerals of persons other than members of the immediate family, if permission is requested and approved in advance. In these instances, the proper coding is SFNRL and sick leave usage is limited to three (3) days per calendar year, regardless of the number of funerals.

* * *

For record keeping and audit purposes, I have attached a form that should be submitted prior to being taken when
possible...

10. On September 3, 2008, AFSCME filed a complaint with the Labor Board alleging that Callahan's implementation of a funeral leave request form constituted a unilateral change of working conditions in violation of the Act. An informal Labor Board conference was held with representatives of AFSCME and the State. As a result of the conference, AFSCME withdrew its complaint without prejudice on the basis that the State was entitled to certain information before approving a request for funeral leave and that the form was a reasonable prophylactic measure designed to ensure compliance with an existing rule or condition of employment.

11. On January 20, 2010, Captain Chris Taylor (Taylor), a member of the NP-8 unit assigned to the third shift at Manson Youth Institution (Manson) in Cheshire requested a day off to attend the funeral of a co-worker's brother in Meriden at 10:00 a.m. After consulting with Callahan, Deputy Warden Jesus Guadarrama (Guadarrama) denied the request on the basis that Taylor could attend the funeral on off-duty time.

12. On February 1, 2010, Guadarrama issued a memo to Manson Warden Jose Feliciano (Feliciano) and all Manson shift supervisors which stated:

No staff shall be allowed funeral leave (SFNL) unless the funeral is during their scheduled work shift. All staff need to use other accrued time unless it is an immediate family member (SFNR).

We will continue this practice per HR and/or until they develop a new policy to override the current one.

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13. On February 5, 2010 CSEA filed an institutional grievance contesting denial of funeral leave at Manson, and an individual grievance contesting denial of Taylor’s request. These grievances are pending final resolution.

14. On May 21, 2010, Lieutenant Jeffrey Saucier (Saucier), a Manson shift commander, issued a memo to Guadarrama and other shift supervisors which stated, in relevant part:

   Just a reminder—The current policy directed to us is that only 4 hours of non-family funeral leave can be granted and only if the funeral/wake is during the employee’s shift ...

   Exception: If the funeral is out of state and 4 hours will obviously not be enough to travel to, attend and return from, the funeral/wake, contact the Shift Commander or Duty Officer for approval to grant a full day of funeral leave.

   Most of the call-outs you will take will be for 3rd shift staff, so please be cognizant of the current policy (it is under review) so that you grant the funeral time off accordingly. There have been inconsistencies within the Supervisors of all shifts when dealing with this issue. We need to be on the same page and enforce the current policy (even if you don’t agree with it) until it gets resolved/revised.

15. After Saucier’s memo issued, AFSCME filed institutional grievances and several individual grievances contesting denial of funeral leave at Manson, some or all of which were subsequently resolved when Feliciano allowed additional leave after considering the specific
circumstances involved.

16. Callahan either personally or through his staff has informed Feliciano and Guadarrama that summary denial of funeral leave on the basis of shift assignment or imposition of a four hour limit on such leave was improper. Feliciano and Guadarrama were then informed that funeral leave requests must be assessed on a case by case basis in order to allow employees sufficient time to travel to, attend, and return from funerals, wakes, and/or memorial services.

CONCLUSIONS OF LAW

1. A unilateral change in a condition of employment involving a mandatory subject of bargaining constitutes a refusal to bargain unless the employer proves an adequate defense.

2. Unilateral implementation of per se rules governing usage of funeral leave constitutes a violation of the statutory duty to bargain in good faith.

3. The contracts and relevant work rules gave the State the right to limit funeral leave to the time necessary to attend services for persons other than members of an employee’s immediate family.

4. The State did not violate the Act by enforcing existing limitations on employee funeral leave. (Return of Record, ROR, final decision, pp. 1-6).

The board in its discussion of its findings of fact and conclusions of law stated that the union had established a *prima facie* case of unilateral change in that since on or before July 14, 2008 employees were allowed, regardless of shift assignment, a full day off to attend funeral services of persons other than immediate family. (Id., p. 7). The
board further found that the department had met its burden of an "adequate defense" based on the collective bargaining agreement and the regulations referenced therein. (Id.). The collective bargaining agreement was unambiguous and could not be re-interpreted by reference to past practice. (Id.). Finally, the department was appropriately administering the sick leave for funerals benefit by use of a request form. (Id., p. 8). The board dismissed the union's complaint and this appeal followed.

The court reviews the board's final decision under the following standard: "According to our well established standards, review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Citation omitted.) Dept. of Public Safety v. State Board of Labor Relations, 296 Conn. 594, 598, 996 A.2d 729 (2010).

With regard to the union's claim in this administrative appeal, the union informed the court at oral argument on June 4, 2013, that the board in its final decision had overlooked the union's argument. The union was not claiming that the past practice of the department should be used to interpret an ambiguously-worded collective bargaining
agreement. Rather the union's point was that the past practice of the department had altered the specific terms of collective bargaining agreement itself.

Because this latter contention had not been discussed by the board, the court on June 5, 2013 remanded the issue to the board for its review as follows: "Assuming that the collective bargaining agreement is unambiguous . . . may the contract language be altered by past practice . . . such that the duty to bargain and not make any unilateral changes in the [collective bargaining agreement] continues." On June 21, 2013, the board replied that "Article 16 § 2(A) of the 2008-201 collective bargaining agreement, incorporating Regs. Conn. State Agencies § 5-247-4(a)(4), was not modified by past practice . . . so as to impose on the State a duty to bargain with the Union prior to enforcing said provision."

The issue in this appeal is whether the board was correct in this conclusion. The union had to demonstrate a "clear departure" from the contractual language. See Local 2663, Council 4 v. State Board of Labor Relations, Superior Court, judicial district of

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2 As noted above in the court's summary, the board rejected this contention because the contractual language was not subject to multiple interpretations and was not in need of a "construction" through the parties' past practice. Final Decision, p. 7.

3 The court agrees with the union that the current use by the department of the request form with consideration being given to special circumstances does not render this appeal moot. The union, arguing the past history, questioned the right of the department to impose even the request form without further bargaining.

The leading case on this topic is Port Huron Education Ass'n v. Port Huron Area School District, 452 Mich. 309, 550 N.W.2d 228 (Mich. 1996). There the union contended that the district had committed an unfair labor practice by not affording full health insurance to teachers who worked less than a full year and instead providing these teachers with a prorated benefit. The union claimed that even if the collective bargaining agreement was unambiguous, "the conduct of the district established an enforceable past practice." Id., 237.

The Michigan Supreme Court declared: "In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties.... Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue.... However, where the agreement unambiguously covers a term of employment that conflicts with a parties' past behavior, requiring a higher standard of proof facilitates the primary goal of the PERA—to promote collective

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bargaining to reduce labor-management strife. A less stringent standard would
discourage clarity in bargained terms, destablize union-management relations, and
undermine the employers’ incentive to commit to clearly delineated obligations.

“To require a party to bargain anew before enforcing a right set forth in the
contract requires proof that the parties knowingly, voluntarily, and mutually agreed to
new obligations. . . . To vary the clear written mandates of the contract, the
understanding or past practice must be evidenced by substantially stronger evidence than
when utilized to interpret ambiguous language or to fill in areas where the contract is silent. . . .

“The party seeking to supplant the contract language must submit proofs
illustrating that the parties had a meeting of the minds with respect to the new terms or
conditions—intentionally choosing to reject the negotiated contract and knowingly act in
accordance with the past practice. . . . In such situations, it is the underlying agreement to
modify the contract that alters the parties’ obligations.” (Citations omitted; emphasis
added; internal quotation marks omitted.) Id., 237-239.

The Port Huron court noted that the fact that the employer knew or should have
known that it was acting contrary to the collective bargaining agreement was not
sufficient to find that past practice had altered the express terms of the collecting
bargaining agreement. Id., 240. The essence, even of tacit agreements, was a meeting of
the minds. In footnote 22, the court continued: “The record in this case provides no evidence that the district intentionally paid summer insurance benefits to teachers hired midyear. Testimony before the hearing referee indicates that insurance benefits were not paid as a result of a cognizant or deliberate decision by the district, but rather as a result of mere happenstance or oversight.”

Here, the union argues that the past practice of allowing full days off for funerals that occurred prior to July 14, 2008 modified the unambiguous terms of the contract bargaining agreement. It relies on the board’s finding # 8 that the collective bargaining agreement and its incorporated regulations were not precisely followed by the department before July 2008. The union does not contend, however, that any evidence of record demonstrates that the department accepted this modification under the standards set forth in Port Huron. Based on the record, the amended decision of the board dated June 21, 2013, as well as Local 2663 and Port Huron, the court rejects the union’s contention that there has been a modification of the collective bargaining agreement through past practice, so as to require a continued duty to bargain. The board correctly concluded that the department did not violate the State Employees Relations Act.

5 Thus the union’s case of Orth v. Wisconsin State Employees Union Counsel, 546 F.3d 868, 873 (7th Cir. 2008) is distinguishable. There the court noted that subsequent dealings between a union and an employer may result a modified contract. Orth does not discuss the added requirement in Port Huron that the employer’s subsequent acceptance of the contract alteration be “definite, certain and intentional.”
Therefore, the appeal is dismissed.

Henry S. Cohn, Judge