STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

TOWN OF CROMWELL

DECISION NO. 4991

-AND-

JANUARY 30, 2018

NIPSEU/CROMWELL POLICE UNION

Case No. MPP-32,012

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

Attorney Kenneth S. Weinstock
for the Town

Attorney Eric R. Brown
for the Union

DECISION AND ORDER

On January 25, 2016, the International Brotherhood of Police Officers, Local 357 (IBPO) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Town of Cromwell (the Town) had committed practices prohibited by the Municipal Employee Relations Act (MERA or the Act) by unilaterally changing the minimum qualifications for participation in the promotional process for the position of police sergeant. On May 18, 2016, NIPSEU/Cromwell Police Union (the Union)[1] amended the complaint.

After the requisite preliminary steps had been taken, the parties entered into a partial stipulation of facts and exhibits and the matter came before the Labor Board for a hearing on February 3, 2017. Both parties were represented by counsel, allowed to present evidence, examine and cross-examine witnesses and make argument. Both parties submitted post-hearing briefs on March 27, 2017. Based on the entire record before us, we make the following findings of fact and conclusions of law and we issue the following order.

[1] During the pendency of these proceedings NIPSEU/Cromwell Police Union replaced IBPO as the recognized collective bargaining representative for the bargaining unit.

FINDINGS OF FACT

1. The Town is a municipal employer within the meaning of the Act.

2. The Union is an employee organization within the meaning of the Act and at all relevant times has represented a bargaining unit consisting of all full-time police officers of the Town, up to and including the rank of sergeant, excluding civilian employees, the Chief of Police and all ranks above sergeant.

3. At all times relevant hereto the Union and the Town were parties to a collective bargaining agreement (Ex. 6) with effective dates of July 1, 2012 through June 30, 2016 which provides, in relevant part:

> **ARTICLE 4**
> **SENIORITY**
>
> **Section 1.** Seniority shall commence from the date of employment as a full-time police officer of the Town. Seniority shall consist of total continuous service within the Department.
>
> . . .
>
> **ARTICLE 14**
> **GRIEVANCE PROCEDURE**
>
> **Section 1.** Purpose. The purpose of the grievance procure shall be to settle employee grievances on as low an administrative level as possible and practicable so as to insure efficiency and employee morale.
>
> **Section 2.** Definition. A grievance, for the purpose of this procure, shall be considered to be an employee or Union complaint concerned with:
>
> . . .
>
> (d) Matters relating to interpretation and application of the Articles and sections of this Agreement.
>
> . . .
>
> **ARTICLE 16**
> **STABILITY OF AGREEMENT**
>
> **Section 1.** No amendment, alteration or variation of the terms of this Agreement shall bind the parties hereto, unless made and agreed to in writing by both parties.
>
> . . .
>
> **ARTICLE 20**
> **PRIOR BENEFITS AND PRESERVATION OF RIGHTS**
>
> **Section 1.** Nothing in this Agreement shall be construed as abridging any prior right, benefits or privileges that the employee of the Unit has enjoyed heretofore, except those specifically abridged or modified by this Agreement.

ARTICLE 21
PROMOTIONS

Section 1. The parties agree that all promotions for any position within the Bargaining Unit shall be from within the Bargaining Unit, when there are qualified applicants in the Bargaining Unit.
. . .

4. Prior to June of 2002, the Town required four years prior service as a full-time police officer in the Town's police department as a minimum qualification for participation in the promotional process for the position of police sergeant.

5. In June of 2002, the Town's board of selectmen adopted a job description for the position of police sergeant that states, in relevant part:

TOWN OF CROMWELL

TITLE POLICE SERGEANT
. . .

REQUIRED QUALIFICATIONS (Minimum)

Graduation from high school and 4 years work experience as a Police Officer, or equivalent combination of education, training and experience.

(Exs. 8, 10)

6. Subsequent to June of 2002 and prior to June 29, 2015, the Town conducted six police sergeant promotional examinations and required four years prior experience as a Town police officer as a minimum qualification to participate in such examinations.

7. On July 29, 2015, the Town posted a promotional examination announcement (Ex. 7) for the position of police sergeant that states, in relevant part:

MINIMUM QUALIFICATIONS

Not less than four (4) years of service as a full-time police officer in the [Town's] Police Department (as of [August 10, 2015] . . .
. . .

EXAMINATION PROCESS

The examination process will consist of a written examination, an oral examination by a three-member panel, and an evaluation by the Chief of Police . . .
. . .
APPLICATION FOR EXAMINATION

> Applicants shall submit to the office of the Chief of Police a written and signed statement indicating their intention to participate in the examination process, along with a brief resume.
> . . .
>
> **SELECTION PROCESS**
>
> Rule of three is in effect governing appointment procedure.
> . . .
>
> **EXPIRATION OF PROMOTIONAL LIST**
>
> Examination Promotional List will remain in effect for one year.

8. By memo (Ex. 10) to then Town police chief Anthony J. Salvatore (Salvatore)[2] dated August 6, 2015, Town police officer Michael S. Maslauskas (Maslauskas) stated, in relevant part:

> This memo is to advise you in my interest in participating in the promotion process to the rank of Sergeant [Town] Police Department. After a review of the posted eligibility criteria, published by the Town . . . It is my firm belief that based on my training and experience; I meet the requirements for consideration for participation in the promotion process. [The Town's] Police Sergeant job description states: Required Qualifications (Minimum) Graduation from High School and four 4 years work experience as a Police Officer, or equivalent combination of education, training and experience.
> . . .

Attached to the memo was a copy of the sergeant job description adopted by the board of selectmen in 2002.

9. By memo (Ex. 11) to Maslauskas dated August 6, 2015, Salvatore stated, in relevant part:

> I have reviewed your memorandum in its entirety stating your education, training and experience, as well as the 2002 Sergeant's Job Description. As a result, I am approving your request to participate in the upcoming Sergeant's Promotional Process.

10. Maslauskas did not have four years of service as a full-time Town police officer as of August 10, 2015. (Ex. 10).

11. By notice (Ex. 8) to all personnel on August 13, 2015, then captain Denise Lamontague (Lamontague)[3] stated, in relevant part:

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[2] On August 17, 2015, Salvatore left the position of Town police chief and was appointed to the position of Town Manager.

[3] In September 2015, Lamontague was promoted to the position of Town police chief.

> Due to a discrepancy in the Cromwell Police Department Examination Announcement for Sergeant posted on July 29, 2015 regarding minimum qualifications and the attached "adopted by the Board of Selectmen June 2002" job description the pre-test meeting . . . written test date have been postponed. The written test date is now October 2, 2015 . . .
>
> The minimum qualifications for Sergeant are the ones adopted by the Board of Selectmen in June 2002 (attached) . . .
> . . .
>
> Those officers who already submitted their letters of intent need not resubmit . . .

12. While on vacation in August 2015, then IBPO local union president Kevin Vandersloot (Vandersloot)[4] was informed of the posted change to the minimum qualifications for participation in the police sergeant examination and Vandersloot contacted Salvatore who agreed to refrain from further action pending discussion of the issue. After returning from vacation, Vandersloot consulted with an IBPO staff representative and certain bargaining unit members and concluded that since the minimum qualifications set forth in the 2002 job description for sergeant opened the promotional process to more members of the bargaining unit, there were no negative aspects to the change. Vandersloot believed that that a bargaining unit vote on the issue was not necessary and no vote was taken.

13. At some point in August 2015, Vandersloot and Salvatore met and discussed the issue. Salvatore stated that he did not have the authority to change the minimum qualifications as established by the board of selectmen in 2002 and the meeting concluded with an oral understanding between Vandersloot and Salvatore that those minimum qualifications would govern the pending police sergeant promotional process.

14. Of the six unit members who took the written exam on October 2, 2015, two did not have four years prior service as Town police officers.

15. Of the three unit members that passed the written examination and participated in the oral examination on October 29, 2015, two did not have four years prior service as Town police officers.

16. By letter (Ex. 14) to Town police chief Lamontague dated November 2, 2015, oral examination panelist Frederick Sifodaskalakis of the Simsbury police department stated, in relevant part:

> After consulting with the other two panelists . . . we have concluded that the [Town] Police Officers that were interviewed . . . lack the experience necessary to be promoted to the rank of Sergeant at this time . . .

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[4] Vandersloot was a detective sergeant in August 2015 and left his position as IBPO local union president shortly thereafter. In October 2015, Vandersloot was promoted to police captain, a position outside the bargaining unit.

17. By letter (Ex. 9) to Chief Lamontague dated November 13, 2015, Attorney Eric R. Brown (Brown) stated, in relevant part:

> I have been retained to represent the [Town] Police Union relative to the recent sergeant promotional process.
>
> As I understand the process, the Police Department modified the requirements that eligible applicants have four years of experience as police officers with the [Town] Police Department. This modification was made without negotiating with the Union.
> . . .
> An established practice has been in existence requiring four years of experience in the Cromwell Police Department in order to take a sergeant's promotional examination . . .
>
> Currently two of the three candidates on the promotional list do not meet that minimum qualification.
>
> We are sending you this letter to advise you that should you promote anybody who has not met the minimum qualifications to the position of sergeant, we will seek intervention whereby we will demand that the promoted person remain in the position and that an eligible candidate also be promoted . . .

18. On November 9, 2015, the Town certified a police sergeant promotional list containing three unit members, two of whom did not have four years prior service as Town police officers prior to participating in the promotional process.

19. As of November 9, 2016 and to-date, the Town has not promoted any person from the certified list to the position of police sergeant.

20. At no time relevant hereto did the Union or any bargaining unit member file a grievance challenging the change to the minimum qualifications for participation in the police sergeant promotional process.

CONCLUSIONS OF LAW

1. An employer's unilateral change in an existing condition of employment that is a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a violation of the Act unless the employer establishes an adequate defense.

2. The necessary qualifications for taking a promotional examination is a mandatory subject of bargaining.

3. The Labor Board does not have jurisdiction over the mere breach of an agreement that is not the result of the settlement of a prohibited practice complaint, grievance (or in lieu of a grievance), or arbitration.

4. The Town violated the Act when it unilaterally changed promotional minimum qualifications.

DISCUSSION

The Union claims that the Town violated Section 7-470(a)(4) of the Act[5] when it changed the eligibility criteria for participation in the promotional process for the position of police sergeant. Specifically, the Union alleges that for many years there existed a fixed and definite practice of limiting participation in the promotional process for police sergeant to bargaining unit members having four or more years of service as Town police officers which the Town unlawfully altered when it began assessing eligibility on the basis of prior police work experience regardless of employer. This change, the Union argues, is to the detriment of candidates who now face a potentially larger pool of competitors in the promotional process.

The Town responds that the Union has failed to establish a *prima facie* case of unlawful unilateral change because the former union president and police chief allegedly agreed to the new minimum qualifications as adopted by the board of selectmen in 2002. The Town also argues that we should dismiss this case because we lack jurisdiction over mere breach of contract issues and the Union relies on the collective bargaining agreement to rebut the Town's claim that the change at issue was orally agreed to by the parties. Lastly, the Town contends that even if we do find that a prohibited practice occurred as alleged, we should confine ourselves to a restoration of the *status quo ante* given the record before us. For the reasons set forth below we agree with the Union that the Town unilaterally changed a material term and condition of employment concerning the promotional process and with the Town that the proper remedy is to place the parties in the positions they would have been but for that change.

> An employer violates the Act when, absent a defense, it unilaterally changes an existing condition of employment that is a mandatory subject of bargaining. ***Shepaug Valley Regional School District***, … [Decision No. 4765 (2014)]; ***State of Connecticut, Judicial Branch***, Decision No. 4532 (2011); ***Norwalk Third Taxing District***, Decision No. 3695 (1999); ***Bloomfield Board of Education***, Decision No. 3150 (1993); ***City of Stamford***, Decision No. 2680 (1988). A condition of employment may be established by past practice where the complainant shows that the employment practice was "clearly enunciated and consistent, [that it] *endured[d] over a reasonable length of time*, and [that it was] an accepted practice by both parties." (Emphasis in original, internal quotation marks omitted). ***Board of Education of Region 16 v. State Board of Labor Relations***, 299 Conn. 63, 73 (*quoting* ***Honulik v. Greenwich***, 293 Conn. 698, 719 n. 33 (2009)). A ***prima facie*** case of unlawful unilateral change requires proof that an employer unilaterally changed a past practice

[5] Conn. Gen. Stat. § 7-470(a)(4) states, in relevant part:

> (a) Municipal employers . . . are prohibited from . . . (4) refusing to bargain collectively in good faith with an employee organization which has been designated . . . as the exclusive representative of employees in an appropriate unit.

Although the Union also cited Section 7-474(g) of the Act in its amended complaint, it abandoned this charge at the hearing before the Labor Board.

> involving a mandatory subject. ***Shepaug Valley Regional School District***, *supra*. A defense sufficient to rebut such a case includes a showing that an employer's actions were *de minimus* or that the parties' collective bargaining agreement affords express or implied consent to the unilateral action at issue. ***Region 16 Board of Education v. State Board of Labor Relations***, *supra*, 299 Conn. at 74; ***City of New Haven***, Decision No. 4735 (2014).

Town of Plymouth, Decision No. 4890 p. 3 (2016). *See also* ***Town of Glastonbury,*** Decision No. 4971 (2017); ***State of Connecticut, Judicial Branch***, Decision No. 4940 (2017); ***City of Stamford***, Decision No. 4832 (2015); ***City of Ansonia***, Decision No. 4836 (2015).

The necessary or minimum qualifications for taking a promotional exam are considered a mandatory subject of bargaining. ***City of Meriden***, Decision No. 4139 (2006); ***Town of Middlebury***, Decision No. 3104 (1993); ***Town of Stratford***, Decision No. 1241 (1993); *cf*. Conn. Gen. Stat. § 7-474(g).[6] Given the previous six police sergeant examinations conducted by the Town, we have no difficulty finding that there existed an enforceable practice of requiring four years prior Town service of eligible candidates or that this practice changed[7] with respect to the examination administered in 2015. As such, we turn to the central issue in this case - whether the change at issue was unilateral.

The Town contends that there is substantial support in the record for a finding that upon Vandersloot's return from vacation in August, the Town and the Union entered into an agreement to apply the minimum qualifications for police sergeant as adopted by the board of selectmen in 2002. We disagree. Shortly before the meeting between Vandersloot and Salvatore resulting in the purported oral agreement, Salvatore expressly applied the new qualifications to an otherwise ineligible candidate and the bargaining unit was formally notified that those qualifications would govern the pending promotional process. At the meeting itself, Salvatore informed Vandersloot that Salvatore was *without authority* to apply qualifications other than those adopted by the board of selectmen in 2002. In short, the change was a *fait accompli*[8] when Vandersloot and Salvatore met to

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[6] Conn. Gen. Stat. § 7-474(g) states, in relevant part:

> The conduct and the grading of merit examinations . . . shall not be subject to collective bargaining, provided once the procedures for the promotional process have been established by the municipality, any changes to the process proposed by the municipality concerning the following issues shall be subject to collective bargaining: (1) The necessary qualifications for taking a promotional examination . . .

The parties agree that since the Town lacks the necessary "municipal civil service commission, personnel board [or] personnel agency . . . established by statute, charter or special act to conduct and grade merit examinations" the prohibitions of Section 7-474(g) do not apply.

[7] In order to prevail, a complaining union must establish, as part of its *prima facie* case that a change in an existing condition of employment has in fact occurred, for if no change is proven, no further inquiry is warranted. ***Southington Board of Education***, Decision No. 4879 (2016); ***Town of Farmington***, Decision No. 4767 (2014); ***City of Hartford***, Decision No. 4719 (2014); ***Town of Hamden***, Decision No. 2364 (1985).

discuss the matter and while we find that the two men shared a mutual understanding that the Town had implemented a change to the promotional process, we decline to conclude under these circumstances that this accord amounted to an agreement by the Union to accept this change without recourse under the Act.

We note that our conclusion that the Union did not orally ratify the change at the meeting between Salvatore and Vandersloot is consistent with the collective bargaining agreement. The parties' practice of limiting competition in the promotional process at issue to candidates having four years Town seniority is an Article 20 "prior right, benefit[] or privilege[] that . . . employee[s] of the Unit ha[ve] enjoyed heretobefore" that is not subject to "amendment, alteration or variation" under Article 16 "unless made and agreed to in writing by both parties". Furthermore, the Union's reliance on Article 16 does not deprive us of jurisdiction we otherwise have to address claims of unlawful unilateral change under the Act. "Although . . . the board of labor relations is not the proper body to resolve contract disputes that do not also involve an allegation of a prohibited labor practice . . . [there is] no authority . . . that the board of labor relations may not exercise jurisdiction over a breach of contract claim when it is interdependent with a claim over which the board of labor relations does have jurisdiction." ***Piteau v. Hartford Board of Education***, 300 Conn. 667, 689 (2011); *see e.g.* ***Town of East Hartford***, Decision No. 3347 (1995) (discussing circumstances where Labor Board interprets collective bargaining agreements to perform its statutory function.)

The Town's reliance on ***State of Connecticut, Department of Children and Youth Services***, Decision No. 2574 (1987), is misplaced because we found on the basis of the record in that case that the parties entered into an oral agreement to resolve a claim that the employer unilaterally ceased allowing employees the option of performing certain work at home. Unlike the instant case, the employer's representatives were authorized to negotiate with the union and the matter was resolved when the parties agreed to additional worksite changes that inured to the benefit of employees. Nor does our enforcement of an oral agreement in ***Town of Wolcott***, Decision No. 1472 (1976) lend particular support to the Town's position. In ***Town of Wolcott***, the existence of the alleged agreement was not in dispute and there was no provision in the collective bargaining agreement requiring that settlements be reduced to writing.

We find that the Union has established a *prima facie* case of unilateral change in violation of the Act and since the Town has not rebutted the Union's case, we turn to the issue of remedy. We find that traditional restoration of the *status quo ante* would best effectuate the policies of the Act and agree with the Town that this does not entail promotion of any specific person given the record in this case. The three-member oral examination panel found that the candidates lacked necessary experience and no promotions were made from the certified list prior to its expiration.

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[8] A union has an obligation to demand negotiations upon notice of a matter than involves mandatory topics of collective bargaining. ***Norwich v. Norwich Fire Fighters***, 173 Conn. 210 (1977). A union is relieved of this obligation when faced with a *fait accompli*. *See* ***Windsor Board of Education***, Decision No. 4555 (2011) and cases cited therein. Otherwise a union would be forced negotiate impact when the balance of the bargaining relationship has been illegally altered. ***Norwalk Board of Education***, Decision No. 3163 (1993); ***Town of Middlebury***, Decision No. 2434 (1985).

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 Cromwell shall:

I. Cease and desist from failing to negotiate changes to the minimum qualifications for participation in the promotional process for the position of police sergeant as set forth in the examination announcement dated July 29, 2015.

II. Take the following affirmative action which we find will effectuate the policies of the Act:

A. 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.

B. 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 receipt of this Decision and Order of the steps taken by the Town of Cromwell to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

[9]

Patricia V. Low
Chairman

Wendella Ault Battey
Wendella Ault Battey
Board Member

Barbara J. Collins
Barbara J. Collins
Board Member

[9] Patricia V. Low sat in on the deliberation and agreed with the decision but passed away before signing.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 30th day of January, 2018 to the following:

Attorney Eric R. Brown
Law Office of Eric R. Brown RRR
P.O. Box 615
Watertown, CT 06795

Attorney Kenneth S. Weinstock
Kainen, Escalera & McHale, P.C. RRR
21 Oak Street, Suite 601
Hartford, CT 06106

_____
Harry B. Elliott, Jr., General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS