STATE OF CONNECTICUT
LABOR DEPARTMENT
CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

CITY OF SHELTON

-and-

TEAMSTERS, LOCAL 145

DECISION NO. 5212

DECEMBER 27, 2021

Case No. MPP-34,080

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

Attorney John M. Walsh, Jr.
for the Union

Attorney Francis A. Teodosio
for the City

DECISION AND ORDER

On June 12, 2020, International Brotherhood of Teamsters, Local 145 (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board), amended on January 29, 2021, alleging that the City of Shelton (the City) violated the Municipal Employee Relations Act (MERA or the Act) by direct dealing concerning the duration of the probationary period in the collective bargaining agreement and retaliating against the Union.

After the requisite preliminary administrative steps had been taken, the matter came before the Labor Board for a hearing on March 29, 2021. All parties appeared, were represented and allowed to present evidence, examine and cross-examine witnesses, and make argument. Both parties submitted post-hearing briefs, the last of which was received on July 20, 2021. Based on the entire record before us, we make the following findings of fact and issue the following order.

FINDINGS OF FACT

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

2. The Union is a labor organization within the meaning of the Act and at all relevant times was the exclusive bargaining representative of a unit of full-time City employees in certain job classifications, including maintainer II in the City's Department of Highway and Bridges. (Ex. 1).

3. At all times relevant hereto, the City and the Union were parties to a collective bargaining agreement, effective through July 30, 2018, which stated, in relevant part:

> **ARTICLE II – UNION SECURITY**
>
> …
>
> **Section 2.02.** The City agrees to deduct from the paycheck of each employee who has signed an authorized payroll deduction card, dues, service fees,[1] and initiation fees as may be fixed by the Union and allowed by law. Deductions will be made in the payroll as specified, and amounts collected shall be made in the first week of each month, except where the employee is not on the payroll for that week. The City shall not be liable for any employee's dues or service fees if such employee is not on the payroll during the specified deduction week.
>
> …
>
> **ARTICLE III – MANAGEMENT RIGHTS**
>
> …
>
> **Section 3.01.** Except as otherwise specifically abridged or modified by a specific provision of this Agreement, the City reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of management. Such rights include, but are not limited to, the right to determine staffing levels and composition; to appoint … personnel; … and to … contract out or discontinue services, positions, or programs, in whole or in part[.]
>
> …
>
> **ARTICLE IV – SENIORITY AND PROBATIONARY PERIOD**
>
> …
>
> **Section 4.02.-Probationary Period.** No initial appointment of employment in any position shall be deemed final until after the expiration of a period of six (6) months probationary service. The discipline or dismissal of an employee during the probationary period shall not be subject to the grievance procedure. Probationary employees may be dismissed without cause in the discretion of the Department

[1] The collective bargaining agreement predates the U.S. Supreme Court's decision in ***Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31***, 138 S. Ct. 2448 (2018).

Head and/or the Mayor. Upon completion of the probationary period, an employee's seniority shall date from the date of employment.

…

ARTICLE XXI - TEMPORARY REPLACEMENT WORKERS

Section 21.01. This Article applies to temporary replacement workers other than summer help.

Section 21.02. Effective the 31st day of employment, temporary placement workers shall commence paying Union dues or a Union service fee.

Section 21.03. Temporary replacement workers are not eligible for time off, insurance and pension benefits during the period of temporary employment.

Section 21.04. Temporary replacement workers will have no seniority status, provided however, that in the event any such workers appointed to a vacant position through the Merit System after at least 90 days of work and the date of such appointment is contiguous to the ending date of the temporary work, days worked as a temporary replacement worker shall be credited toward the probationary period.

…

(Ex. U1)[2] (Footnote added).

4. At all relevant times prior to May 20, 2020, Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin were part-time, non-union City employees whose names appeared on an eligibility list for appointment to the full-time bargaining unit position of maintainer II.

5. In letters to Nagy, Sura, Jimenez, and Martin dated April 30, 2020, city administrative assistant John Basher stated, in relevant part:

> Congratulations, you have been selected from a Certified List for the position of Highway Maintainer II, Department of Highways and Bridges …
>
> Pursuant to the terms of the contract with the City …. and the [U]nion, your pay will be $27.16 per hour and your full time hire date will commence upon your acceptance of this offer and your first date. This position is in the IBT Union Local 145, Teamsters union.

[2] Exhibit U1 was amended by mutual agreement of the parties on or about June 28, 2021.

> If you choose to accept this appointment, you must within seven (7) days, inform this office of your intention … Please do so by signing and returning a copy of this notice to my office.
>
> …

In a footnote, Basher added that "[p]ursuant to the contract there is a six month probationary period, at which time, upon successful completion your pay will increase …" Nagy, Sura, Jimenez, and Martin each signed and returned a copy of Bashar's letter. (Ex. U5).

6. On or before May 6, 2020, Basher presented Nagy, Sura, Jimenez, and Martin with a memorandum of understanding (MOU) (Ex. U4), which stated, in relevant part:

> This memorandum of Understanding is between [the Union] …, Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin … and the City …. It is hereby understood and agreed that:
>
> 1. On May 1, 2020, the City has made an offer to hire the Employees to the position of Highway Maintainer II in the Highways and Bridges Department effective May 4, 2020 …
>
> 2. **Section 4.02 Probationary Period** of the [collective bargaining agreement (CBA)] provides, in pertinent part, that "no initial appointment of employment in any position shall be deemed final until after the expiration of a period of six (6) months probationary service." And further that, "probationary employees may be dismissed without cause in the discretion of the Department Head and/or the Mayor."
>
> 3. The Employees and the City are willing to make the offer of employment conditional on the following conditions:
>
>   a. The parties waive the usual six (6) month probationary period set forth in Section 4.02 of the CBA and instead agree that the Employees will [be] subject to a twelve (12) month probationary period for these positions.
>
> 4. All other terms and conditions of Section 4.02 of the CBA shall remain in full force and effect during this extended Probationary Period. The Union hereby agrees to this modification of the CBA.
>
> …

7. The MOU included signature lines for the four employees, Basher, the City superintendent of highways and bridges, and Union Secretary Treasurer Dennis Novak. Both City representatives and all 4 employees signed the MOU. Novak was not present and did not sign. (Ex. U4).

8. On May 6, 2020, Basher emailed the signed MOU[3] and the April 30 offer letters to Novak, and participated in the following exchange:

Basher:

> The City has completed promotional testing for Highway Maintainer II positions. The Certified List actually consists of individuals who are presently part time employees at the Highway and Bridges Department. The Mayor wants to promote four employees to full time conditioned on the parties agreeing to extending the probationary period under the contract from 6 months to one year. All parties have agreed to this condition of employment and have signed the MOU that we have used in the past.[4] Attached is a copy of the MOU for your signature. Please sign the agreement so that we may move forward with the official hiring process of these four employees to full time. Thanks.
>
> …

Novak:[5]

> I … am not signing the MOU. I am happy that you've finally hired these individuals to the full-time positions, but the contract probationary period is six (6) months. There is no need to extend probation. Further, a probationary employee has no right to alter provisions in the contract.
>
> …

Bashar:

> You misunderstood. The employees have not been hired as of yet. The hiring is conditioned on the extension of their probationary period which everyone agrees to.

Novak:

> How long have these part timers been working for the City? ... Usually a promotion need not require a probationary period.
>
> …

Basher:

---

[3] Bashar did not discuss the MOU with the Union prior to May 6.

[4] Novak testified that, in or about 2018 or 2019, he agreed to extend the probationary period of a new employee in lieu of termination. That was the only time Novak recalls the Union agreeing to extend the probationary period.

[5] Novak communicated through the Union's office manager. Internal quotation marks have been omitted.

> These are not promotions, but rather new hires so there is absolutely a probationary period. This hiring, if approved, would add four more individuals to your union.... the individuals are in agreement with this condition of employment.
> ...

(Ex. U4).

9. The City did not hire Nagy, Sura, Jimenez, or Martin as maintainer IIs.

10. On or about May 20, 2021, the City contracted with one or more of the 4 employees at issue to temporarily perform the same or similar work at the same starting hourly rate of $26.17, and reporting to the same work location, as maintainer IIs. (Ex. 6).

11. On May 15, 17, and 19, respectively, Jimenez, Sura, and Nagy submitted applications for membership in the Union and authorized the City to deduct union dues from their wages.

12. In an email to Novak dated May 27, 2020, Bashar stated in relevant part:

> Please be advised that the offer of employment set forth in the [April 30th letters] ... was conditioned on the [U]nion executing an MOU to extend the probation period to 1 year. Although all the parties signed the MOU, the Union refused to do so ... As such, the offers of employment in the [April 30th letters] were rescinded and of no effect as the parties could not reach an agreement. The applications for membership in the Union should therefore likewise be rescinded.
> …

(Ex. U5).

CONCLUSIONS OF LAW

1. It is a prohibited practice and a violation of the Act for an employer to negotiate a bargaining unit member's terms or conditions of employment directly with the member.

2. Employer discrimination and retaliation against employees for engaging in protected, concerted activity is a violation of the Act.

3. Seeking Sura's, Jimenez's, and Martin's concurrence on a term and condition of employment which was at odds with the collective bargaining agreement constituted direct dealing.

4. The Union's protected activity of enforcing the 6-month probationary period in the collective bargaining agreement was the determinative factor in the City administrative assistant's decision to withdraw job offers to fill 4 full-time bargaining unit positions, and, therefore, constituted retaliation for protected activities in violation of the Act.

DISCUSSION

The Union contends that the City violated Section 7-470(a)(1) and (4)[6] of the Act by dealing directly with Nagy, Sura, Jimenez, and Martin regarding the duration of their probationary period and retaliated against the Union for engaging in protected activity.

The City denies that it tried to bypass the Union or retaliated against anyone. Specifically, the City argues that it made offers of fulltime employment to Nagy, Sura, Jimenez, and Martin which were always contingent upon the Union agreeing to extend the probationary period. When the Union refused, the City further argues, it exercised its rights under Article XXI of the collective bargaining agreement to hire one or more as temporary contract workers. According to the City, it did not revoke the four employees' fulltime positions because those positions did not exist. Based on the entire record before us, we find that the City violated the Act.

Direct Dealing

Where a labor statute imposes the duty to negotiate with the employees' exclusive representative, it also "impose[s] the negative duty to treat with no other." ***N.L.R.B. v. Jones and Laughlin Steel Corp***., 301 U.S. 1, 44 (1937). An employer engages in direct dealing when it ignores the union's status as exclusive representative and its statutory obligation "to deal with the employees through the union rather than dealing with the union through the employees." ***West Hartford Education Association v. DeCourcy***, 162 Conn. 566 (1972). "The element of negotiation is critical." *Id*. (Citation omitted). ***City of New Haven***, Decision No. 4974 (2017); ***City of Hartford***, Decision No. 4736 (2014). This prohibition does not preclude all direct employer communication to employees. "The element of negotiation is critical." ***DeCourcy***, supra, 162 Conn. at 593. Statements which are informative and neither denigrate the Union nor attempt to elicit negotiations do not violate the Act. ***City of Bridgeport***, Decision No. 4706, p.10 (2014); see also ***City of New Haven***, Decision No. 4618 (2012).

The City contends that it did not deal directly with Nagy, Sura, Jimenez, and Martin because extending the 6-month probationary period set forth in the contract to one year was explicitly conditioned on the Union's agreement. The City's argument misses the mark.

---

[6] Conn. Gen. Stat. §7-470 states, in relevant part:

> (a) Municipal employers or their representatives or agents are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in section 7-468; … (4) refusing to bargain collectively in good faith with an employee organization which has been designated in accordance with the provisions of said sections as the exclusive representative of employees in an appropriate unit; …
> …

Whether the offer of employment was contingent upon the Union's agreement is not relevant to the charge of individual bargaining. Conditions of employment of prospective employees for a bargaining unit position, including probationary periods, are mandatory subjects which must be bargained with the Union, just as they are for employees. ***State of Connecticut***, Decision No. 2786 p.12 n.7 (1990). The City violated its duty to bargain with the Union as exclusive bargaining representative when it sought Nagy's, Sura's, Jimenez's, and Martin's concurrence to a term and condition of employment which is at odds with the collective bargaining agreement. ***State of Connecticut***, Decision No. 2368 p.8 (1985); see also ***New Haven Board of Education***, Decision No. 1359 (1976) (Asking employees to vote on accepting a shorter workweek or facing an early school closing at a board of education meeting constituted direct dealing); ***Town of Hamden***, Decision 1484 (1977)(Negotiations consisting of an offer to change compensation from that agreed upon in the contract and an acceptance of that change by individual employees violated the duty to bargain). "It is the bargaining itself which is offensive to the Act," ***State of Connecticut***, supra, p.9, and aligning prospective employees with a City proposal to diminish a contractual benefit, by its very nature, denigrates the Union by casting it as an "opposing party" rather than exclusive bargaining representative. In sum, the City's conduct is inconsistent with an employer's obligation "to deal with the employees through the union rather than dealing with the union through the employees". ***DeCourcy***, supra, 162 Conn. at 593. Accordingly, we turn to the issue of retaliation.

Retaliation

Our standard for assessing claims of wrongful discrimination or retaliation in response to protected activity is well established:

> A complainant alleging that employees were discriminated against in their employment because of [protected concerted] activity has the initial burden of showing that the discriminatory action was taken because of these protected activities, or at least that the protected activities were a substantial factor in bringing about these adverse actions. ***Town of Greenwich***, Decision No. 2257 (1983), aff'd ***O'Brien v. State Board of Labor Relations***, 8 Conn. App. 57 (1986); ***Connecticut Yankee Catering Co***., ***Inc***. Decision No. 1601 (1977). We determine whether the complainant has met this burden to establish a prima facie case of discrimination using an analytical framework such as is found in ***Wright Line***, 251 NLRB 1083, enfd 622 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). "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." ***New Britain Board of Education***, Decision No. 4290 p.4 (2008). Once a prima facie case is established, we then address whether the employer has established an affirmative defense which may include proof that the employer would have pursued its course of conduct regardless of any anti-union motivation. ***City of Hartford***, Decision No. 3785 (2000); ***New Fairfield Board of Education***, Decision No. 3327 (1995).

City of Norwalk, Decision No. 4621 p. 6 (2012), appeal dismissed, 156 Conn. App. 79 (2015). See also ***City of New Haven***, Decision No. 5061 (2019); ***State of Connecticut, Department of Children and Families***, Decision No. 5034 (2018); ***State of Connecticut***, Decision No 5023 (2018); ***State of Connecticut, OPM***, Decision No. 4960 (2017); ***City of Bridgeport***, Decision No. 4927 (2016); ***State of Connecticut, Department of Correction***, Decision No. 4914 (2016); ***City of New Haven***, Decision No. 4898 (2016); ***Town of Windham***, Decision No. 4859 (2016); ***City of Hartford***, Decision No. 4854 (2015); ***Town of Montville***, Decision No. 4823 (2015); ***Hartford Board of Education***, Decision No. 4544 (2011); ***Town of Hamden***, Decision No. 4404 (2009); ***Town of Wallingford***, Decision No. 3999 (2004); ***Orange Board of Education***, Decision No. 3417 (1996).

In this case we find that the Union, through Novak, was engaged in protected, concerted activity and that the City was aware of that activity. Novak was the Union secretary-treasurer and responded to Bashar in that capacity. The Board has adopted in its definition of "protected, concerted activity" both the definition set forth in ***Meyers Industries***, 268 NLRB 493, 115 LRRM 1035 (1984) (***Meyers I***) ("engaged with or on the authority of other employees, and not solely by or on behalf of the employee himself") and that in ***NLRB v. City Disposal Systems***, 465 U.S. 822, 115 LRRM 3193 (1984) ("invocation of a right derived from a collective bargaining agreement"). ***Town of Orange***, Decision No. 4490 (2011); ***Board of Trustees for State Technical Colleges***, Decision No. 2825 (1990). As such, preserving the integrity of the collective bargaining agreement is protected concerted activity.

Turning to the question of anti-union animus, "[i]n this day and age, discrimination is almost invariably conducted surreptitiously; employers who engage in this form of misconduct do not do so overtly." ***Town of Watertown***, Decision No. 3719 (1999). Because direct evidence of discriminatory motive so frequently is unavailable, the Union is entitled to the benefit of reasonable inferences under the circumstances. ***Town of Hamden (Police)***, Decision No. 2394 (1985). In this regard, the Labor Board considers indirect evidence of anti-union bias such as the timing of an employer's decision in relation to the protected activity. ***City of Waterbury***, Decision No. 3884 (2002); ***Town of East Haven***, Decision No. 2830 (1990). This is one of those rare cases, however, where direct evidence exists. Bashar admitted in his emails that he rescinded the offers of employment to Nagy, Sura, Jimenez, and Martin *because the Union refused to sign the MOU extending the probationary period in the contract*. (Ex. U5). Accordingly, we find that the Union has established animus and proven a *prima facie* case of unlawful retaliation.

Regarding the City's defenses, we believe that Bashar's May 6th and May 27th email exchanges with Novak forecloses any affirmative defense that the City would have pursued the same course of conduct regardless of any anti-union motivation. ***City of Hartford***, Decision No. 3785 (2000); ***New Fairfield Board of Education***, Decision No. 3327 (1995). Furthermore, we find that the City's reliance on the conditional status of Bashar's employment offers is misplaced since there is little substantive difference between revoking a job offer for an improper purpose

and terminating a person's employment for an improper purpose. We do not read MERA as providing a prospective employee for a bargaining unit position and/or a labor organization with no remedy for preemployment unlawful behavior. Lastly, the City's reliance on the contracting out language in the collective bargaining agreement is similarly misplaced since the issue here is the motivation behind the City's decision to deny Nagy, Sura, Jimenez, and Martin fulltime employment and not whether it had the contractual right to subsequently hire them as temporary contract workers.

REMEDY

Having found direct dealing and unlawful retaliation, we turn to the issue of remedy. The record reveals that but for the City's unlawful conduct, Nagy, Sura, Jimenez, and Martin would have been hired as Highway Maintainer IIs, effective May 4, 2020. Therefore, we find that an order requiring the City to follow through on its offers and hire Nagy, Sura, Jimenez, and Martin as full-time Highway Maintainer IIs, with back pay, benefits, and seniority retroactive to May 4, 2020, would best effectuate the policies of the Act. As such, we issue the following order.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby **ORDERED** that the City of Shelton:

I. Cease and desist from dealing directly with prospective employees for bargaining unit positions on terms and conditions of employment and unlawfully retaliating against the Union.

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

A. The City of Shelton shall, no later than twenty-one (21) calendar days from the date of this Order:

1. Appoint Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin to the position of Maintainer II at the salary grade and step in the applicable collective bargaining agreement which they would currently occupy had they been hired into that bargaining unit position on May 4, 2020;

2. Pay Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin back pay, including all applicable step increases, retroactive to May 4, 2020, less any wages earned during that period;

3. Provide Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin with all benefits and other emoluments of employment to which they would be entitled if they were hired into the fulltime bargaining unit position of maintainer II on May 4, 2020, and retroactive to that date;

4. Pay to the Union the back dues for Steven Nagy, Robert Sura, Carlos Jimenez, and Jacob Martin, retroactive to May 4, 2020, unless they have opted out of paying said dues in accordance with ***Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31***, 138 S. Ct. 2448 (2018).

B. 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.

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

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Wendella A. Battey
Wendella A. Battey
Acting Chairman

Barbara J. Collins
Barbara J. Collins
Board Member

Ellen Carter
Ellen Carter
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 27th day of December 2021 to the following:

Attorney Francis A. Teodosio
Teodosio Stanek, LLC
375 Bridgeport Avenue
Shelton, CT 06484

Attorney John M. Walsh, Jr.
Licari, Walsh and Sklaver, LLC
322 E. Main Street
Suite 2B
Branford, CT 06405

____
Frank N. Cassetta, General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS