STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

CITY OF SHELTON

DECISION NO. 5219

-and-

MARCH 3, 2022

SHELTON POLICE UNION

Case Nos. MPP-34,059
MPP-34,070
MPP-34,077

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

Attorney Mark Sommaruga
for the City

Attorney Barbara Resnick
for the Union

DECISION, ORDER AND PARTIAL DISMISSAL OF COMPLAINTS

On May 15, 2020, the Shelton Police Union (the Union) filed a complaint (MPP-34,059) with the Connecticut State Board of Labor Relations (the Labor Board), alleging that the City of Shelton (the City) violated the Municipal Employee Relations Act (MERA or the Act) by unilaterally closing locker rooms, gym facilities, and the day room at the Shelton Police Department (SPD). On May 27, 2020, the Union filed a second prohibited practice complaint (MPP-34,070), alleging that the City made an unlawful unilateral change and retaliated against the Union by closing indoor restroom facilities at the SPD and relegating bargaining unit members to using porta-potties. On June 5, 2020, the Union filed a third prohibited practice complaint (MPP-34,077), alleging that the City retaliated against the Union and repudiated the

collective bargaining agreement by charging its business representative with trespass for visiting the SPD on union business.[1] All three complaints were subsequently consolidated.

After the requisite preliminary steps had been taken, the parties came before the Labor Board for a formal hearing on ten dates between February and August, 2021.[2] Both parties appeared, were represented, and allowed to present evidence, examine and cross-examine witnesses, and make argument. The parties filed briefs, the last of which was received on September 17, 2021. Based on the entire record before us, we make the following findings of fact and conclusions of law and issue the following order and partial dismissal of the complaints.

FINDINGS OF FACT

1. The City 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 material times has represented a bargaining unit of certain regular uniformed and investigatory officers of the SPD, including patrol officers and lieutenants.

3. At all times relevant hereto, the Union and the City were parties to a collective bargaining agreement, with effective dates of July 1, 2016 through June 30, 2019 (Ex. 3), which stated, in relevant part:

ARTICLE IV-MANAGEMENT RIGHTS

> **Section 4.01**. It is recognized that the City … has and will continue to retain the rights and responsibilities to direct the affairs of the [SPD] in all of its various aspects, except those specifically abridged or modified by this Agreement.
>
> The City reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of management and all of the rights, powers and authority which the City had prior to the effective date of this Agreement. Such rights include but are not limited to the following:
>
> A. To determine the care, maintenance and operation of equipment and property used for and on behalf of the purposes of the City…
>
> B. To plan, direct and control departmental operations and hours[;]
>
> C. To determine and/or change methods, processes, equipment and facilities;

[1] At the hearing on February 4, 2021, the Union requested that it be allowed to amend the complaint in MPP-34,077 to include a repudiation claim. Over the City's objection, the Labor Board granted the Union's request and directed the Union's counsel to file a written amendment to be placed in the record. No written amendment was filed.

[2] February 4, 2021; February 16, 2021; March 9, 2021; March 19, 2021; April 23, 2021; May 7, 2021; May 24, 2021; June 11, 2021; July 14, 2021; and August 6, 2021.

…

G. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the City;

…

L. To determine the methods, processes, means and personnel necessary for providing police service, including the increase or diminution or change of operations or police equipment, in whole or in part, including … to determine and/or change methods processes, equipment and facilities.

…

ARTICLE V - UNION BUSINESS LEAVE

…

Section 5.04. The Union's business representative shall be permitted to visit the [SPD] provided such visits do not interfere with the operation of the department.

…

4. On March 10, 2020, Governor Ned Lamont proclaimed a state of emergency because of the coronavirus (COVID-19) outbreak in the United States and its confirmed spread within the state. (Ex. 4).

5. On March 16, 2020, the Governor issued Executive Order No. 7D, entitled Protection of Public Health and Safety during COVID-19 Pandemic and Response – Crowd Reduction and Social Distancing, which stated, in relevant part, "[e]ffective at 8 p.m. … any indoor gym, fitness center, or similar facility … shall cease all operations." (Ex. 4).

6. On April 10, 2020, SPD lieutenant Brian Yerzak placed signs on the doors of the SPD's gym facility and male and female locker rooms stating that they were closed until further notice and that entry may result in disciplinary action. (Exs. 5, 6).

7. In a memorandum to all SPD patrol officers dated April 13, 2020,[3] SPD command staff stated, in relevant part:

Effective Immediately:

The workout rooms and locker rooms are closed until further notice. Any patrol officer who needs to enter the building needs to radio or call the on-duty supervisor for permission.

…

[3] SPD issued a revised memorandum the next day. However, it did not change the relevant language. (Ex. 9).

In an email to Shelton mayor Mark Lauretti and administrative assistant Jack Bashar of even date, Union attorney Barbara Resnick responded, in relevant part:

> I am enquiring as to whether .. closure [of the gym, locker room, and day room] is short term for a particular reason with a definite end date, or permanent.
>
> If this closure is not short term for a specified reason to be provided, the Union is demanding to bargain this change of working conditions…. Please respond forthwith … and provide dates of availability to bargain this issue.
>
> …

(Exs. 7, 9).

8. In an email to Resnick dated April 21, 2020,[4] Lauretti stated, in relevant part:

> In light of the global pandemic, governmental orders, and obvious safety and health reasons, the facilities that you have mentioned have been temporarily closed. They will be opened again as part of [the] general reopening of our state and this country, based upon health and safety conditions and further guidance from our state and federal government … We will let you and your members know once these facilities can be reopened.
>
> …

(Ex. 10).

9. In an email to SPD chief Shawn Sequeira,[5] Bashar, and others dated April 19, 2020, Resnick attached a notice stating, in relevant part:

> Please be advised that the … Union has recently hired former [SPD] employee[6] Mike Lewis to assist in the representation of the … Union.… [Lewis] is authorized to communicate and act on behalf of the Union….
>
> …

(Ex. 25) (Footnote added).

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[4] Resnick could not open Lauretti's email because it was encrypted and the City hand delivered a copy to the Union president. (Exs. 11, 12, 14).

[5] The police chief, Shawn Sequeira, testified that he received Resnick's notice regarding Lewis.

[6] Lewis worked for the SPD in various roles for approximately 28 years and had been the Union president for 15 years.

10. At all times relevant hereto, the men's locker at the SPD room had an attached restroom with multiple stalls. On or before May 14, 2020, Yerzak placed an additional sign on the men's locker room door stating that individuals could use the restroom one at a time. Since the women's locker room restroom had only one stall, Yerzak did not place a similar sign on that door. Nor did Yerzak remove the sign barring entry.

11. In an email to Sequeira dated May 15, 2020, Resnick stated, in relevant part:

> I have recently been notified that the male officers of the [SPD] have access to the restroom facilities in the locker room on a one-at-a-time basis. I have also recently been notified that the female officers... are not being given that same option. Can you please remedy this disparity so that female officers are entitled to the same options and privileges as the male officers.
>
> …

12. On or before May 19, 2020, the SPD again closed the men's locker room restroom.

13. On May 19, 2020, the SPD installed two porta-potties equipped with lighting and hand sanitizers in the rear parking lot of police headquarters. The same day, Sequeira issued an order stating, in relevant part:

> To encourage social distancing and limit the spread of infection, the lobby of Police Headquarters will remain closed. A sign is posted to call the routine line from the parking lot or use the intercom system. Officers will continue to take all complaints, without bringing the complainant(s) into the building, when possible.
>
> …

- Dispatchers, custodial staff, and anyone on light-duty may remain in the building. Entering the building must only be for a specific police-related function that is not possible to be completed elsewhere.
- The following locations have been provided for anyone needing a restroom while on the road. Portable restrooms have been placed in the rear parking lot of this department. Supervisors will be issued keys to the Farmers' Market,[7]where additional restrooms are located. City Hall is also open during business hours M-F.

  …
- The locker rooms and gym will remain closed.

(Ex. 16) (Footnote added). Approved officers and civilian personnel conducting required police business within the building were permitted to continue to use certain single occupancy restrooms inside the SPD.

14. On May 20, 2020, Resnick emailed the City stating, in relevant part:

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[7] SPD employees were issued keys to a farmers' market's restrooms upon request. (Ex. 17).

I was recently notified that an Order was issued last night, following the Union's request that the City remedy a gender disparity issue regarding access to restroom facilities. Apparently this Order now denies … all … Officers … use of restroom facilities at the [SPD]. In lieu of access to … appropriate restroom facilities in the building, two portable toilets were placed in the parking lot … The Union is demanding to immediately bargain this unsafe change in circumstances. Please contact me today to arrange for same.

…

(Ex. 18). The same day, Sequeira responded to Resnick by email stating, in relevant part:

> Recently the restroom in the hallway on the lower level near the range became inoperable. It was at that point it was decided to allow male officers to use the restroom facilities in the male locker room one person at a time … It was never intended to prevent female officers from using the restroom in their locker room in the same fashion. The male locker room has several stalls and urinals whereas the female locker room only has a single stall. In an effort to limit the number of people inside the building …[t]wo portable restrooms … have been placed at the rear of the [SPD].
>
> …

(Ex. 19).

15. Later that same day, Resnick replied, in relevant part:

> The Union disagrees with your assessment that the 2 portable restrooms … are sufficient restroom facilities for the approximate 50 officers of the [SPD]. There are significant health and safety issues, and … [t]he Union continues to demand to negotiate this significant change in working conditions immediately….
>
> …

(Ex. 20).

16. In an email to Resnick dated May 21, 2021, Sequeira stated, in relevant part:

> The portopotties … [are] one of four options….
>
> [P]lease understand that I am responsible for the safety of the community as well as the safety of the entire department which includes civilian staff such as janitors, dispatchers, etc…. As the officers have more of a probability to come in contact with a COVID positive individuals [sic], we are trying to prevent exposure within the building…. We all hope this change in working conditions and adjustment is temporary.
>
> [D]ue to social distancing … it is best that we not meet in person, … [however, I] welcome any discussion via telephone or other technology.

…
(Ex. 21).

17. On Saturday May 23, 2020, Lewis saw a photograph on social media of a flatbed truck delivering two porta-potties to the SPD.

18. On Sunday May 24, 2020, Lewis drove to the SPD headquarters to inspect the porta-potties. A few minutes before he arrived, Lewis called the SPD and informed a dispatcher that he was the Union's business representative and that he was on his way to inspect the porta-potties. Lewis left a similar message on Sequeira's office voicemail[8] and drove to the rear parking lot of the SPD, which was marked with signs stating "police vehicles only" and "no through traffic". Lewis left his car, examined the porta-potties and took photographs.[9] As Lewis was leaving, he briefly exchanged pleasantries with an SPD sergeant who was standing outside the building. The entire visit took several minutes. At some time during Lewis' visit, an SPD dispatcher notified Sequeira that an unknown individual was in the restricted area of the parking lot. Later that day or the next day, Sequeira asked Yerzak to look into the matter.

19. On Memorial Day, Monday May 25th, 2020, Yerzak was off-duty.

20. On Tuesday, May 26, 2020, Yerzak and lieutenant Michael McPadden investigated the report of a suspicious individual in the rear parking lot. As part of their investigation, McPadden and Yerzak reviewed surveillance video footage showing an individual dressed in a tee-shirt, shorts, and flipflops exit an idling vehicle and examine the porta-potties. Yerzak and McPadden recognized the individual as Lewis, and after reviewing Article V, Section 5.04 of the collective bargaining agreement, drove to Lewis' home and issued him a criminal infraction for simple trespass.[10] Although civilians have entered the rear parking lot of the SPD before, the SPD has no record of anyone other than Lewis being charged with trespass.

21. On May 28, 2020, Lewis filed a civilian complaint, alleging that Sequeira attempted to prevent him from properly representing the Union. (Ex. 58).

22. On June 16, 2020, the Governor issued Executive Order No. 7ZZ, which eased restrictions on certain business operations and public gatherings. Among other things, E.O. 7ZZ rescinded E.O. 7D by permitting gym facilities to reopen.

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[8] In the past, Union representatives did not ask permission from the police chief to go to the SPD headquarters on Union business. Lewis testified that he called ahead because he had left his employment with the SPD before Sequeira and many of the current dispatchers were hired. Nor is there any evidence that the SPD required Union business representatives to be escorted while during a visit.

[9] At some time thereafter, Lewis posted the porta-potty pictures to the "Support the Shelton Police Union" Facebook page.

[10] McPadden testified that he was aware that Lewis was running for business representative but denied receiving any official notice that Lewis had been elected to that post.

23. On June 18, 2020, Sequeira issued a special order to all SPD personnel stating, in relevant part:

- All SPD employees have access to the police department…
- During the shift, unless summoned to headquarters by a supervisor or dispatch, officers shall continue to request permission to return and enter headquarters which can only be granted by a **supervisor** (Examples: Report writing, restroom use, etc.) This will ensure supervisors know where officers are in relation to area coverage.
- Officers can still choose to use any of the restroom options previously provided if needed.
- At this time the locker rooms/gym will remain closed. Officers can continue to change in the single occupancy restrooms on the main floor.

…

(Ex. 22) (Emphasis in original).

24. On September 14, 2020, Sequeira issued a memorandum to all SPD personnel stating, in relevant part:

> The locker rooms and restrooms located on the lower level are now available for use by all SPD personnel [subject to certain occupancy limits]...
> …
> The gym located on the lower level is now available for use by all SPD personnel. Gym use will be limited to one person at a time...
> …

(Ex. 23).

25. As of August 6, 2021, Lewis pled not guilty to simple trespass and the criminal prosecution against him was still pending. Lewis' civilian complaint against Sequeira was also still pending.

CONCLUSIONS OF LAW

1. Absent an adequate defense, an employer's unilateral change in an existing condition of employment involving a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a violation of the Act.

2. Under our emergency doctrine, an employer may make a temporary unilateral change involving a mandatory subject of bargaining where such change is reasonably necessary to meet the emergency.

3. Although our emergency doctrine permitted the City to unilaterally close SPD gym facilities, locker rooms, restrooms, and day room at the beginning of the covid-19 pandemic, the City violated the Act by failing to bargain with the Union within a reasonable time thereafter.

4. An employer violates the Act by retaliating against a union for engaging in protected concerted activities.

5. To establish a prima facie case of retaliation, the union must show that it was engaged in protected concerted activities, the employer had knowledge of those activities, and that the employer harbored anti-union animus.

6. The City retaliated against the Union when it issued a criminal infraction for trespass to the Union's business representative on or about May 26, 2020.

DISCUSSION

In MPP-33,059, the Union contends that the City violated the Act by refusing to bargain about closing SPD's locker rooms, gym facility, and day room. In MPP-34,070, the Union argues the City failed to bargain and retaliated against the Union for challenging gender disparity by requiring patrol officers to use porta-potties in the rear parking lot. Finally, in MPP-34,077, the Union argues that the City unlawfully retaliated against the Union and repudiated Article V, Section 5.04 of the collective bargaining agreement when it charged Lewis with trespass for inspecting those porta-potties.

The City responds that closing the locker rooms, restrooms, gym facility, and day room were justified by the emerging public health emergency and the Governor's executive orders. Regarding retaliation, the City argues that the Union failed to prove that any of its actions were motivated by anti-union animus. Lastly, since the Union failed to file an amended complaint, the City declined to address the Union's retaliation claim in its brief. Based on the entire record before us, we find that the City failed to bargain in good faith and retaliated against the Union and decline to address the Union's contract repudiation claim.

We address the complaints in the order in which they were filed.

MPP-34,059

> 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."… ***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 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).

City of Stamford, Decision No. 4832 p. 11 (2015); see also ***Town of Plymouth***, Decision No. 4890 (2016); ***State of Connecticut, Judicial Branch***, Decision No. 5168 (2021).

The Union established its prima facie case. Specifically, the record establishes that in April 2020, the City made a unilateral change to a clearly enunciated and consistent practice of providing bargaining unit members with access to locker rooms, a gym, and a day room and we find that those facilities constitute "creature comforts" which are mandatory subjects of bargaining. See ***City of Hartford***, Decision No. 4685 (2013); ***State of Connecticut Judicial Branch***, Decision No. 4532 (2011); ***Town of Wallingford***, Decision No. 3662 (1999).

The City counters that it was legally compelled to act by E.O. No. 7D and the global pandemic. We are not persuaded. We have held that changes made by an employer under legal compulsion are not mandatory subjects of bargaining. ***City of New London***, Decision No. 4186 p. 5 (2006); see also ***Town of East Hartford***, Decision No. 2697 (1988) (Changes to facial hair restrictions made under legal compulsion are not mandatory subjects of bargaining); ***Town of East Haven***, Decision No. 2774 (1975) (Unilateral change to method of paying police officers for extra duty work required by state and federal law did not violate the Act). In this case, E.O. 7D was limited to indoor gyms and similar facilities and the City's assertion that it also compelled closure of locker rooms and the day room is undermined by the timing of those actions. Specifically, the City waited nearly a month after E.O. 7D was issued to close the locker rooms and the day room and almost three months after it was rescinded to reopen them. Accordingly, we find that legal compulsion did not excuse the City's failure to bargain.

The City's reliance on the pandemic is a closer question. Under our emergency doctrine, an employer may make a temporary unilateral change involving a mandatory subject of bargaining where such change is reasonably necessary to meet the emergency. ***Town of Orange***, Decision No. 2969 (1991); see also ***Town of Wallingford***, Decision No. 3601 (1998); ***City of New Britain***, Decision No. 1975 (1981); ***Hartford Board of Education***, Decision No. 1777 (1977). In April and early May 2020, the City made unilateral decisions to keep certain SPD facilities open and close others which we believe were reasonably necessary to meet the public health emergency. However, the question remains as to whether the emergency permitted the City to refuse to bargain for the entire six month period that those facilities remained closed. In ***City of New Britain,*** supra, our then chairman Fleming James, Jr. noted that:

> Emergencies are often of short duration. The only case in which we have found that an emergency justified unilateral change in substantial conditions of employment involved a strike of corridor monitors that lasted one week. ***Hartford Bd. of Ed.***, Dec. No. 1777 (1979). Those of us who recall the great depression and the second world war, however, … remember officially declared emergencies that lasted for years. We think that an emergency of such long duration should not suspend the duty to bargain for its entire span. Each case must be decided on its own facts and

> where bargaining would not seriously impede the meeting of the emergency and where the emergency situation would not frustrate or impede useful bargaining then the statutory duty should no longer be held in abeyance.

Id., p. 5.

Although unilateral action was justified in April and early May, we believe that commencing negotiations in the subsequent weeks and months would not have impeded the City's ability to meet the emergency, as demonstrated by Sequeira's May 21st email expressing a willingness to meet remotely with Resnick. Accordingly, we find that the City violated the Act by failing to bargain about the locker rooms, gym, and the day room from May 21 through September 16, 2020.

<u>MPP-34,070</u>

The Union argues that the City also violated its duty to bargain and retaliated against the Union by restricting patrol officers' access to SPD restrooms and installing porta-potties with no running water or soap. We again agree with the Union that the City violated its duty to bargain. We have little difficulty finding that access to restrooms is a condition of employment and a mandatory subject of bargaining and that the City made a unilateral change to an established practice of providing such access to patrol officers. While we recognize the initial need for unilateral action, for the same reasons discussed in MPP-34,059, we find that the emergency did not justify suspending the duty to bargain much beyond May 21, 2020. Moreover, even absent a duty to bargain the initial decision, "an employer is 'nevertheless required to bargain over the effects of its … decision on employee working conditions.'" ***Local 1186, AFSCME v. State Board of Labor Relations***, 224 Conn. 666, 671 (1993); see also ***First National Maintenance Corporation v. NLRB***, 452 U.S. 666 (1993) (Employer has duty to bargain over secondary impacts of decision to close part of its business). As with any condition of employment subject to the duty to bargain, the impact at issue must be substantial. *Id.*, 224 Conn. at 672; 452 U.S. at 679. See also ***City of Shelton***, Decision No. 5132 (2020); ***Hartford Board of Education***, Decision No. 5097 (2019). At a minimum, the City was required to bargain over the Union's health and safety concerns, such as the lack of soap and water in the porta-potties.

The Union's retaliation claim is a different matter.

> 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).

Bridgeport Board of Education, Decision No. 5101 p. 7 (2019).

If the Union is able to establish a prima facie case, the burden then shifts to the employer to establish an affirmative defense. The employer may establish such a defense by proving that it would have taken the same actions absent an improper motive. In other words, the presumption of discrimination may be rebutted by showing that the employer would have taken the same action with regard to the affected employee for a legitimate reason. ***State of Connecticut***, Decision No. 4001 (2005); ***City of Hartford***, supra.

Based on this record, we find that the Union failed to establish the third prong of a prima facie case of retaliation. "In 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). Proof "need not consist [of] direct evidence of improper motive. Such direct evidence is rarely available and the Union is entitled to the benefit of any inferences that are reasonable under the circumstances ..." ***Connecticut Yankee Catering Co***., Decision No. 1601 p. 5 (1977). "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." ***Town of East Haven***, Decision No. 2830 (1990); ***City of Hartford***, Decision No. 4854 p. 9 (2015); ***Bridgeport Board of Education***, Decision No. 5101 (2019).

The Union contends that the City relegated patrol officers to porta-potties in retaliation for contesting the City's decision to reopen the men's locker room restroom without reopening the women's locker room restroom. Installing porta-potties 4 days after Resnick complained of gender disparity can be reasonably inferred to be circumstantial evidence of improper motive. Even with the benefit of this inference, however, the record does not support the Union's claim of animus. In light of the still evolving public health emergency in May 2020, evidence that patrol officers interact with the public on a daily basis, and confirmed COVID-19 cases within the SPD, we credit Sequeira's explanation that the porta-potties were merely the latest of several options for limiting contact between officers in the field and SPD personnel working within police headquarters. Lastly, even if we were to conclude that anti-union animus played a role in the City's decision, we believe that the existing record is sufficient to establish that the City would have taken the same action for legitimate public health reasons. ***State of Connecticut***, supra; ***City of Hartford***, supra.

MPP-34,077

In this case, the Union contends that the City charged Lewis with trespass in retaliation for inspecting the porta-potties in his capacity as business representative and repudiated Section 5.04 of the collective bargaining agreement. The City argues that issuing the trespass infraction was a legitimate exercise of professional judgment by two police lieutenants.

Based on the entire record before us, we find that the Union has established a prima facie case of retaliation. First, we have little difficulty finding that the Union's opposition to the porta-potties, including Lewis's inspection on May 24th was protected concerted activity within the meaning of the Act. ***State of Connecticut, Dept. of Children and Families***, Decision No. 5034 (2018)(Union safety committee delegate's efforts to convince management of workplace health and safety concerns was protected concerted activity). Second, since McPadden and Yerzak made a point of reviewing Section 5.04 of the contract during their investigation, we can reasonably infer that they were aware of Lewis' Union status and the official nature of his visit. Finally, we find that the City's actions towards Lewis were inherently retaliatory and intended to punish the Union for continuing to challenge Sequeira's determination that porta-potties were adequate alternative restroom facilities for patrol officers, and as such, were improper under the Act.[11]

Turning to the City's defenses, the record does not support a finding that the City would have issued a citation to Lewis absent an improper motive. Civilians have historically trespassed in the rear parking lot of SPD headquarters without being charged and the record is devoid of evidence to justify treating Lewis more severely. Lewis gave notice of his arrival, quickly and unobtrusively inspected the porta-potties, and left the premises within several minutes. Lewis had no contact with SPD personnel, except for an insignificant encounter with a police sergeant. Accordingly, under the ***Wright Line*** analysis, we find that the City retaliated against the Union in violation of the Act.

The Union's repudiation claim is more problematic. Section 7-471-27[12] of our regulations permits a party to amend its complaint "upon such terms as the Board deems proper" and "[w]e

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[11] Although McPadden may have also felt hostility towards Lewis for Lewis' perceived lack of professional courtesy, ***State of Connecticut, Department of Correction (Jeffrey S. Wing)***, Decision No. 5161 (2021) ("Personal animus is not to be confused with animus necessary to establish a violation under the Act"), we believe that anti-union animus was a substantial, motivating factor in the conduct. *Id*.; see also ***Town of Bloomfield***, Decision No. 3255 (1994); ***Town of Greenwich***, supra; ***Connecticut Yankee Catering Co., Inc.*** supra.

[12] Regs., Conn. State Agencies § 7-471-27 states, in relevant part:

> Any complaint may be amended by any party or the board at any time before final decision or order, upon such terms and conditions as the board deems just and proper.
> …

See also Conn. State Agencies § 7-471-27, which states:

> (a) A variance between an allegation in a petition for an election or a pleading in a prohibited practice proceeding and the proof shall be considered immaterial unless it prejudicially misleads any party or the board. Where a variance is not material, the board may admit such proof and the facts may be

have historically been liberal in regard to our pleading requirements." ***Town of Manchester***, Decision No. 2900 (1991).

> As long as the respondent has received notice of the facts which form the basis of the complaint and has not been prejudiced by the variation between the pleading and the proof, we will not dismiss the complaint because of a procedural defect.

Id., p. 6; see also ***Vernon Board of Education***, Decision No. 5164 (2021).

The critical inquiry in assessing prejudice is "whether the respondent received fair notice of the claim and a meaningful opportunity to prepare its defense." ***Vernon Board of Education,*** supra p. 6; see also ***Hartford Board of Education***, Decision No. 3350 (1995); ***Town of Montville***, Decision No. 2587 (1987). During the first hearing in this case, the Labor Board granted the Union permission to amend its complaint in MPP-34,077 to include a claim of contract repudiation[13] but the Union failed to submit that amendment. The City objects to the claim on that basis. Thus, the question is whether the oral exchange between the Union's counsel and the Labor Board alone provided the City with adequate notice. ***Hartford Board of Education***, supra.

> found accordingly. Where a variance is material, the board may permit an amendment at any time before the final order of the board, upon such terms as it deems just. Any party or the board may move to conform the pleadings to the proof.
>
> (b) The board shall disregard all defects in pleading and procedure wherever this may be done without impairing the substantial rights of any party, if justice so requires.
> …

[13] The following discussion occurred during the Union counsel's opening statement:

> Ms. Resnick: … I'd like to amend the charge to also add … repudiation of the contract, which allows [Lewis'] presence there…
>
> Ms. Battey: Which case are you amending?
>
> Ms. Resnick: [MPP-34,]077, which is the Mike Lewis ticket one, as I have it.

(Tr. 2/4/21, p. 27:09-27:17).

The Union's counsel subsequently concluded her opening statement as follows:

> Ms. Resnick: … and finally, the evidence will show that in the history of the [SPD], there has never been … criminal action taken … against any single human being for entering the parking lot of the [SPD] other than Mike Lewis two days after he came as the Union Rep to document these working conditions, which then sparked the final charge, [MPP-34,]077, of retaliation … and, as amended, repudiation for that action.

(Tr. 2/4/21, p. 29:03-29:14).

Upon careful review of the transcript of the February 4, 2021 hearing, we believe that the Union's counsel provided notice of the factual basis for its repudiation claim and, if the matter had ended there, that her remarks would have satisfied our liberal pleading requirements. However, this Board directed the Union to file an amended complaint[14] and we believe that the Union's noncompliance over the course of nine subsequent hearings indicated that it had abandoned that claim. Since few respondents have the time or resources to prepare a defense to every conceivable claim, adequate notice is essential to preparing a meaningful defense. Taking these additional facts into consideration, we find that the Union created sufficient doubt about the status of its repudiation claim to deprive the City of a meaningful opportunity to prepare a defense. Accordingly, we decline to address contract repudiation.

Remedy

In our determination of the appropriate remedy for this case, we are guided by the Act which provides broad remedial powers to the Board. Such powers include the issuance of a cease and desist order and "other affirmative action as will effectuate the policies of the Act." Conn. Gen. Stat. § 7-471(5). As part of its requested remedy, the Union seeks attorneys' fees and costs. We have the authority to grant that remedy where we conclude that a proffered defense presents no debatable issue and is wholly frivolous. ***City of Bridgeport***, Decision No. 4478 (2010); ***Killingly Board of Education***, Decision No. 2118 (1982). In making this determination, we must carefully examine each of a respondent's defenses to determine whether there is any substance to them. If there is, an award of attorney's fees, costs and interest is not warranted. ***Norwalk Third Taxing District***, supra, pp. 6-7; see also ***City of New Haven***, Decision No. 4974 (2017); ***Town of East Hartford***, Decision No. 4907 (2016); ***City of Hartford***, Decision No. 4736 (2014). ***Town of Vernon***, supra; ***City of Hartford***, Decision No. 4549 (2011).

In this case, we find that the City's defenses to the retaliation claim in MPP-34,077 are frivolous, not debatable, and lacking in substance. The City has offered no reasonable explanation for why Lewis was singled out for criminal prosecution. Unlike an ordinary citizen, Lewis had a contractual right to visit the premises for Union business and the assertion that his mere presence interfered with operations is an obvious pretext when considered alongside the other evidence in the record. As discussed above, Lewis gave prior notice, was on the premises

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[14] Member Battey made the following decision:

> Ms. Battey: I'm going to deny [the City's] objection and I'm going to allow counsel to amend her complaint.
>
> Mr. Sommaruga: Okay.
>
> Ms. Battey: I … ask attorney Resnick that you follow up with the amendment, so that we can put that in the record, although you haven't fully done so.
>
> Ms. Resnick: Thank you.

(Tr. 2/4/21, p. 40).

for only a matter of minutes, and had no significant contact with SPD personnel or anyone else. Accordingly, we find that the Union is entitled to the portion of attorneys' fees and costs attributable to prosecuting MPP-34,077 before this Board. We further believe that additional relief is necessary to meet our statutory obligation of effectuating the policies of the Act. Since the record establishes that the criminal charge against Lewis is a direct consequence of the City's unlawful conduct, it follows that the City also should reimburse the Union for attorneys' fees and costs, if any, related to defending its business representative in the criminal action. See ***Baptist Mem'l Hosp.***, 229 NLRB 45, 46 (1977); ***Springfield Hosp.,*** 281 NLRB 643, 697 (1986).

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 shall:

1. Cease and desist from refusing to bargain collectively with the Shelton Police Union, as the exclusive representative of certain officers employed by the City of Shelton, with respect to conditions of employment; and

2. Cease and desist from retaliating against the Union for engaging in protected concerted activities; and

3. Take the following affirmative steps which the Board finds will effectuate the purposes of the Act:

   a. Pay to the Shelton Police Union its reasonable attorneys' fees and costs, including interest, associated with prosecuting MPP-34,077 before this Board, including but not limited to preparing for and attending hearings, filing a brief, and obtaining hearing transcripts.

   b. Pay to the Union its reasonable attorneys' fees and costs with interest, if any, associated with defending Michael Lewis against the criminal infraction for trespass issued by the Shelton Police Department on or about May 26, 2020.

   c. Post and leave posted for a period of sixty (60) consecutive days from the date of such posting, in a conspicuous place where the employees customarily assemble, a copy of this Decision, Order and Partial Dismissal of Complaints in its entirety; and

   d. 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, Order and Partial Dismissal of Complaints of the steps taken by the City of Shelton to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

____________________[15]
Wendella Ault Battey
Acting Chairman

Barbara J. Collins
Barbara J. Collins
Board Member

Thomas Clifford
Thomas Clifford
Alternate Board Member

[15] Wendella A. Battey participated in the deliberation but left the Board before signing the decision.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 3rd day of March, 2022 to the following:

Attorney Mark Sommaruga
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702

Attorney Barbara Resnick
781 Boston Post Road
Suite 586
Madison, CT 06443

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