STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

STATE OF CONNECTICUT
JUDICIAL BRANCH

DECISION NO. 4940

FEBRUARY 16, 2017

-AND-

LOCAL 749 OF COUNCIL 4,
AFSCME, AFL-CIO

Case No. SPP-31,951

APPEARANCES:

Attorney George J. Kelly, Jr.
for the State

Attorney J. William Gagne, Jr.
for the Union

DECISION AND ORDER

On January 6, 2016, Local 749 of Council 4, AFSCME, AFL-CIO (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the State of Connecticut Judicial Branch (the State) violated the State Employee Relations Act (SERA or the Act) by unilaterally changing a past practice of allowing bargaining unit members to take time-off on the day preceding certain holidays without using their accrued leave.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on June 6, 2016. Both parties were represented by counsel, allowed to introduce evidence, examine and cross-examine witnesses, and make argument. Both parties filed post-hearing briefs, which were received on August 4, 2016. Based on the entire record before us, we make the following findings of fact and conclusions of law and we issue the following order.

FINDINGS OF FACT

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

2. The Union is an employee organization within the meaning of the Act and at all material times has represented a bargaining unit of certain employees of the State of Connecticut Judicial Branch (Judicial Branch), including but not limited to police officers, juvenile detention officers, and various clerks and secretaries. (Ex. 5).

3. The Judicial Branch operates, among other units, a human resources management unit, Supreme Court police department, Public Defender offices, court clerks' offices and a juvenile detention center. Judicial Branch employees working a 40-hour workweek normally work Monday through Friday between the hours of 8:00 a.m. and 5:15 p.m. (Ex. 5).

4. The Union and the State are parties to a collective bargaining agreement (Ex. 5) with effective dates of July 1, 2009 through June 30, 2012, that contains the following relevant provisions:

ARTICLE 6
Management Rights

. . .

Management also reserves the right to decide whether, when, and how to exercise its prerogatives, whether or not enumerated in this agreement. Accordingly, the failure to exercise any right shall not be deemed a waiver.

ARTICLE 17.[1]
Compensation

. . .

Section 6. Additional Compensation for Work on Premium Holidays.

. . .

(b) . . . [E]mployees who are required to work on a premium holiday shall be paid at the rate of time and one-half for all hours worked on the premium holiday in addition to compensatory time for the day . . .

. . .

ARTICLE 19.
Hours of Work

...

[1] Appendices B through E of the collective bargaining agreement state the annual salaries for all unit job classifications during the term of the agreement.

(b) Employees now working a regular forty (40) hour workweek will continue to do so for the life of this agreement...

...

ARTICLE 21.
Vacation

...

Section 2. Accrual of Vacation Time.
(a) (1) Eligible employees who are on the forty (40) hour per week payroll shall accrue ten (10) vacation hours per month . . .

...

ARTICLE 22.
Personal Leave Days

Section 1. In addition to normal vacation accrual . . . there shall be granted to each full-time, (part-time pro-rated) permanent employee of the department three (3) days of personal leave of absence with pay in each calendar year . . .

ARTICLE 23.
Military Leave

A full-time employee . . . who is a member of the armed forces of the United States and who is required to undergo field training therein shall, for a period not exceeding three (3) calendar weeks of such field training per year, be entitled to a leave of absence with pay in addition to his/her annual vacation . . .

ARTICLE 24.
Sick Leave – Leave without Pay

...

Section 2. Sick Leave Accrual
(a) Sick leave accrues at the rate of (10) hours per completed calendar month of continuous full-time service for employees who work an eight (80 hour day . . .

ARTICLE 25.
Civil Leave

Section 1.
(a) Employees absent from duty to perform jury service shall receive their regular straight-time salary . . .

ARTICLE 26.
Holidays

Section 1. Holidays. For the purposes of this article, holidays are as follows: New Year's Day, Martin Luther King Day, Lincoln's Birthday, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day.

(a) Premium holidays are:

New Year's Day	January 1st
Memorial Day	the last Monday in May
Independence Day	July 4th
Labor Day	the first Monday in September
Thanksgiving	the fourth Thursday in November
Christmas Day	December 25th

. . .

ARTICLE 33.

. . .

Section 2.

(a) Except to the extent that a particular personnel or operational practice is specifically modified or restricted by an express provision of this Agreement, or specifically incorporated by reference in this Agreement, the Employer reserves and retains the right to add to, alter, or eliminate such practices.

. . .

5. In 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2012, 2013, and 2014, the chief court administrator[2] authorized all Judicial Branch units except the juvenile detention center[3] to operate with skeleton crews[4] beginning at 1:00 p.m. on the day preceding the Christmas Day holiday and frequently the New Year's Day holiday. Employees leaving on or after 1:00 p.m. were afforded "granted time off"[5] for the time they were absent through the end of their regular work shifts and were neither docked wages nor charged accrued leave[6] because of such absence. Employees who worked the remainder of their

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[2] Conn. Gen. Stat. §51-5a(a)(1) states, in relevant part:

> (a) The Chief Court Administrator: (1) Shall be the administrative director of the Judicial Department and shall be responsible for the efficient operation of the department . . .

[3] The juvenile detention center operates on a continuous basis (24 hours per day, 7 days per week.)

[4] The individual in charge of each unit determined the size and composition of the skeleton crew.

[5] Units were instructed to use the code "G" in employee attendance records for use of granted time off which was also known as "G time".

[6] E.g. vacation time, personal leave, or compensatory time.

shifts as skeleton crew members were afforded, in addition to regular wages, compensatory time[7] for hours worked from 1:00 p.m. to the end of their work shifts.

6. At all times relevant hereto, members of the Union's bargaining unit assigned to the Public Defender offices were similarly allowed the option of leaving early before the Christmas Day holiday and the New Year's Day holiday when authorized by the chief court administrator. Employees leaving on or after 1:00 p.m. were allowed to submit timesheets indicating that they were present through the end of their regular work shifts and were neither docked wages nor charged accrued leave[8] because of such absence. Employees who worked the remainder of their shifts as skeleton crew members were afforded additional pay at their straight time rate for hours worked from 1:00 p.m. to the end of their work shifts.

7. In 2001, 2004, 2010, and 2011, Judicial Branch units did not operate with skeleton crews on the day preceding the Christmas Day holiday and/or the New Year's Day holiday and employees were not afforded granted time off on the dates preceding the holidays in those years.

8. By email to all Judicial Branch staff (except judges and Supreme and Appellate Court staff) on December 21, 2015, the Judicial Branch administrative services unit announced, in relevant part:

> We have learned that Judicial Branch offices will go to skeleton crew beginning at 1:00 pm on Thursday, December 24th.
>
> The correct attendance code to utilize in JASMIN[9] is **G**.
>
> Employees are expected to work until 1:00 p.m. (**no** lunches prior to 1:00 are to be taken).
>
> . . .
>
> Skeleton crew employees must be posted with G prior to any comp time posting.
>
> . . .
>
> Happy Holidays!

(Emphasis in original).

The email was substantially similar to emails sent on December 20, 2012, December 23, 2013, and December 22, 2014, by the Judicial Branch human resource management unit.

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[7] Compensatory time was earned at a straight time rate.

[8] E.g. vacation time, personal leave, or compensatory time.

[9] JASMIN is an acronym for Judicial Administrative Services Management Information Network, a time keeping system utilized by certain Judicial Branch divisions.

(Exs. 7, 8, 9, 10).

9. By email to administrative judges on December 23, 2015 at 11:06 a.m., Kim Stone (Stone),[10] of the office of Chief Court Administrator in Hartford, stated, in relevant part:

> All courts and offices will be allowed to go to skeleton crews commencing at 1:00 PM on the 24th, but employees who elect to depart early, consistent with the Executive Branch, will be required to use [personal leave] or [vacation] time for such early departure.

At 11:19 a.m., Judicial Branch director of court operations Tais Ericson (Ericson) forwarded Stone's email to sixty-eight other persons. At 11:32 a.m. judicial district chief clerk William Sadek sent New Haven judicial district employees an email that stated, in relevant part:

> **All courts and offices will be allowed to go to skeleton crews commencing at 1:00 PM on the 24th but employees who elect to depart early, consistent with the Executive Branch, will be required to use [personal leave] or [vacation] time for such early departure.**

(Emphasis in original)(Ex.10).

10. By email (Ex. 11) to all Judicial Branch staff (except judges and Supreme and Appellate Court staff) on December 23, 2015, the Judicial Branch administrative services unit stated, in relevant part:

> *To clarify the work schedule for Thursday, December 24, 2015, all courts and offices will be allowed to go to skeleton crews commencing at 1 pm. Any employee who chooses to leave from that point on will be required to use their accrued Personal, Vacation or Comp Time Leave Accruals to cover their remaining scheduled work hours. The "G" Granted Time Off is no longer applicable.*
>
> ...

(Emphasis in original).

11. On or after December 24, 2015, the Union demanded bargaining over the issue and no bargaining took place.

[10] The email was forwarded that same day to various other individuals by Judicial Branch director of court operations Tais Ericson and chief clerk William Sadek.

CONCLUSIONS OF LAW

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

2. A controlling provision in a collective bargaining agreement is an adequate defense to a claim of unlawful unilateral change.

3. The State violated the Act when it unilaterally discontinued the practice of affording employees additional paid leave time or wages when skeleton crews were authorized before the Christmas and New Year's holidays.

DISCUSSION

The Union contends that the State violated Section 5-272(a)(4)[11] of the Act by unilaterally changing a past practice of releasing some employees early on Christmas Eve and/or New Year's Eve, without charging such absences to the employees' accrued leave balances and affording remaining employees compensatory pay or time. In response, the State argues that since the Union failed to meet its burden to establish a clearly enunciated and consistent past practice there was no change of substance to negotiate. In addition, the State claims that its actions were authorized by the parties' collective bargaining agreement. Based on the entire record before us, we find that the Union has met its burden to establish a violation of the Act and we order relief.

> 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***

[11] Conn. Gen. Stat. § 5-272(a)(4) states, in relevant part:

> (a) Employers or their representatives or agents are prohibited from . . . (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 . . .

> ***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).

Town of Plymouth, Decision No. 4890 p. 3 (2016). See also ***City of Stamford***, Decision No. 4832 (2015); ***City of Ansonia***, Decision No. 4836 (2015).

The first issue before us is whether the condition of employment established by the past practice at issue is a mandatory subject of bargaining. Staffing level decisions are committed by law to the employer's discretion absent substantial impacts on mandatory topics, such as employee safety. ***City of Stamford***, Decision No. 4832 (2015); ***City of Stamford***, Decision No. 4551 (2011); ***State of Connecticut***, Decision No. 4577 (2012); ***Town of East Lyme***, Decision No. 3836 (2001); ***Town of North Haven***, Decision No. 3143 (1993); ***Town of Winchester***, Decision No. 2259 (1983); ***City of Hartford***, Decision No. 1850 (1980); ***City of Bristol***, Decision No. 1485 (1977). It is, however, well settled that "paid leave is a mandatory subject of bargaining and cannot be changed unilaterally without negotiations." ***State of Connecticut, Dept. of Public Safety***, Decision No. 2761, p.4 (1989)(citation omitted); *See e.g.* ***Shepaug Valley Regional School District No. 12***, Decision No. 4765 (2014 (2014)(vacation leave); ***Southeast Area Transit District***, Decision No. 4641 (2013)(union business leave); ***Board of Trustees for State Technical Colleges***, No. 2997 (1992)(personal leave); ***Oxford Board of Education***, Decision No. 4763 (2014); ***State of Connecticut***, Decision No. 2663, p. 11 (1988). Since the gravamen of the Union's complaint concerns unilateral withdrawal of benefits that had been afforded when skeleton crew staffing was authorized before the Christmas and New Year holidays, we proceed to assess whether an enforceable past practice existed under our standards.

The record reflects that from 2001 through 2014, employees assigned to units staffed with skeleton crews on the afternoons before certain holidays were afforded additional paid leave. Relying on evidence that skeleton crews were not authorized every year, that crew makeup differed depending upon location and the unit supervisor involved, and that staffing levels in the juvenile detention center were unchanged, the State contends that the Union has failed to establish that a consistent practice was in place for a reasonable period of time prior to 2015. We disagree. The practice at issue is not discretionary staffing reduction in connection with certain holidays, but rather the benefits afforded members of the bargaining unit in the event reductions were authorized.

This case is similar in this regard to ***Board of Trustees for State Technical Colleges,*** *supra,* which involved a practice of granting certain college employees time off from work, without charge to accrued leave time or to wages, when classes were

cancelled due to inclement weather. There, as here, the issue was whether the alleged benefits were clearly and consistently afforded for a substantial period of time when employee absence was authorized, not whether the employer's staffing level decisions were uniformly made or implemented. Since we find that in December, 2015, the State unilaterally rejected a past practice involving a matter negotiable under the Act, the Union has established its *prima facie* case and we turn to the State's affirmative defense.

The State argues that its actions were permitted by the collective bargaining agreement to the extent that employees "would perform bargained-for hours of work in exchange for the bargained-for rate of pay" and which contained a "detailed set of terms governing time off from work, whether with or without pay." State's brief p. 8. The contract defense to unilateral change claims is long recognized.

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

State of Connecticut, Department of Correction, Decision No. 4589 p. 7 (2012); *appeal dismissed*, Superior Court, judicial district of New Britain, Docket No. CV126015310S, 2013 WL 4046615 (2013). The defense is not available, however, where the contract language relied upon neither authorizes the respondent's actions nor is inconsistent with the practice at issue.

The wage and work schedule provisions of the collective bargaining agreement do not prohibit or otherwise conflict with the practice of granting employees unaccrued paid leave when their units were reduced to skeleton crews before certain holidays. Unlike the practices at issue in ***City of Hartford***, Decision No. 3792 (2000) and ***Town of East Windsor***, Decision No. 2334 (1984), the practice in this case only encompassed the impacts or effects on employees of managerial staffing decisions. Since the State was free at all times to forgo skeleton crew staffing and to require employee attendance in accord with the applicable wage and hour provisions in the contract, those provisions are not a defense to the practice before us. Similarly, we do not find authorization for the State's actions in the collective bargaining agreement's leave provisions absent compelling evidence that those provisions were intended to be exclusive under all circumstances and contrary to the maxim that a condition of employment need not be set forth in an active collective bargaining agreement and may be established by past practice. *See, e.g.* ***Town of Milford***, Decision No. 1168 (1973); ***Town of Newington***, Decision No. 1116 (1973).

We do not find authorization in either Art. 6 or Art. 33 § 2(a) for the State's actions. Unilateral termination of an established past practice involving a mandatory topic of bargaining under the Act is neither a "prerogative[]" nor a "right" that the State could reserve under Art. 6. In order for Art. 33 § 2(a) to operate as a waiver of the Union's statutory right to negotiate changes in conditions of employment it must be clear and unmistakable. ***NLRB v. Metropolitan Edison*** 460 U.S. 693, 708 (1983); ***West Hartford Board of Education***, Decision No. 4838 (2015); ***City of Hartford***, Decision No. 4673 (2013); ***Waterbury Board of Education***, Decision No. 4337 (2008); ***State of Connecticut***, Decision No. 2419 (1985); ***City of New Haven***, Decision No.1425 (1976). Such a waiver will be found where the contact language makes "specific reference to the subject of the change." ***City of Torrington***, Decision No. 3273 p. 6 (1995); see ***Redding Board of Education***, Decision No. 1922 (1980); ***City of New Haven***, supra; ***City of Hartford***, Decision No. 1425 (1976); ***City of New Haven***, Decision No. 1342 (1975). While we have found the requisite specificity in provisions voiding at the outset all past practices not expressly incorporated in the collective bargaining agreement, *see* ***State of Connecticut, Department of Mental Retardation***, Decision No. 3107 (1993); ***Town of Redding***, Decision No. 1922 (1980), we have not before been faced with an employer's continuing contractual "right to add to, alter, or eliminate such practices." We find that Art. 33 § 2(a), like the "Entire Agreement" language[12] in ***State of Connecticut, Department of Mental Retardation***, *supra*, is so broad as to contravene the policies underlying the Act:

> Generally, the legitimate purpose of an entire agreement clause is to insulate either party to the agreement from a demand by the other party that a provision included in the agreement be renegotiated during its term . . . The purpose of such a clause is only to protect those items upon which the parties have reached agreement. We believe that the stability of collective bargaining and the collective bargaining agreement would be seriously eroded if we permitted the State to assert the "Entire Agreement" clause as a license to alter unilaterally the unwritten terms and conditions of employment during the contract term.

Id at pp.14-15. In short, we find that Art. 33 § 2(a) is not sufficiently specific to serve as a clear and unmistakable waiver of the Union's right to negotiate elimination of the parties' practice of allowing employees unaccrued leave when staffing levels were reduced on the afternoons prior to the Christmas and New Year's holidays.

ORDER

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

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[12] Two contract provisions were offered in ***State of Connecticut, Department of Mental Retardation***, *supra,* as defenses to the change at issue, an "Entire Agreement" provision waiving the right to bargain over any matter and a "past practices" clause voiding all past practices not expressly incorporated in the collective bargaining agreement.

ORDERED that the State of Connecticut shall:

I. Cease and desist from refusing to afford unaccrued paid leave to bargaining unit employees assigned to Judicial Branch units other than the juvenile detention center, for those afternoons in which the chief court administrator has authorized skeleton crew staffing immediately preceding the Christmas and New Year's holidays. For purposes of this paragraph, the term "unaccrued paid leave" as to employees allowed to leave shall mean absence from work without concomitant reduction in pay or benefits and as to skeleton crew members the term shall mean compensatory time at the member's straight-time rate.

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

A. Credit members of the bargaining unit assigned to units in which the chief court administrator authorized skeleton crew staffing in 2015 for the afternoons immediately preceding the Christmas holiday with compensatory time at each member's straight-time rate for that amount of time such staffing was in effect.[13]

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, 28 Wolcott Hill Road, Wethersfield, Connecticut within thirty (30) days of receipt of this Decision and Order of the steps taken by the State of Connecticut to comply herewith.

Patricia V. Low
Patricia V. Low
Chairman

Wendella Ault Battey
Wendella Ault Battey
Board Member

Ann F. Bird
Ann F. Bird
Alternate Board Member

[13] Since December 15, 2016 and January 1, 2017, fell on Sundays, we order no make-whole relief in connection with those dates.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 16th day of February, 2017 to the following:

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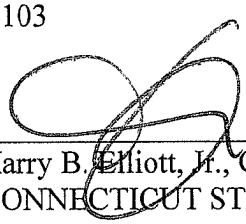

Harry B. Elliott, Jr., General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS