

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

DECISION NO. 4673

CITY OF HARTFORD

AUGUST 14, 2013

-AND-

HARTFORD MUNICIPAL EMPLOYEES
ASSOCIATION

Case No. MPP-29,531

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

Attorney Catharine H. Freeman
for the City

Attorney Stephen F. McEleney
for HMEA

DECISION AND ORDER

On November 21, 2011, the Hartford Municipal Employees Association (the Union) filed a complaint, amended on May 3, 2012, with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the City of Hartford (the City) violated the Municipal Employee Relations Act (MERA or the Act) by unilaterally implementing a nepotism policy and by retaliating¹ against an employee for engaging in protected activity.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on May 3, 2012, July 19, 2012, October 3, 2012, and November 7, 2012. All parties appeared, were represented and were allowed to introduce

¹ As the Union has not briefed the original allegation of retaliation, we deem it abandoned. *State of Connecticut, Department of Social Services*, Decision No. 3652 (1999); *Town of Wallingford*, Decision No. 3601 (1998); *East Lyme Board of Education*; Decision No. 2430 (1985); *Town of East Haven*, Decision No. 2323 (1984).

evidence, examine and cross-examine witnesses, and make argument. The parties filed post-hearing briefs on January 31, 2013, and reply briefs on February 14, 2013. 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 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 been the exclusive bargaining representative of various classifications of City employees.
3. The City and the Union are parties to a collective bargaining agreement (Ex. 4) with effective dates of July 1, 2007 to June 30, 2013 which provides, in relevant part:

ARTICLE I RIGHTS AND RECOGNITION

Section 1.5 MANAGEMENT RIGHTS

Except as specifically abridged or modified by . . . this Agreement, the City . . . , will continue to have . . . all of the rights, powers and authority heretofore existing, including but not limited to the following . . . direct its employees, maintain the efficiency of governmental operations; determine the methods, means and personnel by which the City's operations are to be conducted . . . establish and revise or discontinue policies, programs and procedures to meet changing conditions and to better serve the needs of the public; . . . and fulfill all of its legal responsibilities. The above rights, responsibilities and prerogatives are inherent in the Court of Common Council and the Mayor by virtue of statutory and charter provisions and cannot be subject to any grievance or arbitration proceedings except as specifically provided for in this Agreement.

4. At all times relevant hereto the City charter (Ex. 20) provided, in relevant part:

CHAPTER V. THE MAYOR

Sec. 2. Powers and Duties of the Mayor

In addition . . . the Mayor shall:

- (q) assign any employee of one (1) department to the temporary performance of duties in another department; subject to the provisions of the applicable

collective bargaining agreements, and whenever the interests of the City require. No such temporary assignment shall last past the beginning of the next Fiscal Year.

5. At all times relevant hereto there existed a City ordinance providing for a code of ethics applicable to City employees and officers. Section 2-902(C) of the City's code of ordinances states, in relevant part:

A conflict of interest exists if an . . . official or employee . . . or their relatives . . . directly or indirectly, may receive financial gain or personal gain from the outcome of, or have a financial interest in, any matter under consideration before the individual in the individual's official capacity. . . .

Section 2-908 creates an ethics commission and its duties include:

To investigate and hear any reported allegations, make findings, and to take any appropriate disciplinary or enforcement actions pursuant to this code of ethics. . . .

(Exs. 35, 36).

6. At all times relevant hereto the City Treasurer has been an elected position responsible for the custody and investment of all City funds. The Custody of Funds Unit (CFU) exists within the Treasurer's Office and is responsible for payment disbursements, bank reconciliations, and short-term investing. The CFU is supervised by a Financial Systems Manager who reports to the Assistant City Treasurer who in turn reports to the City Treasurer. (Exs. 16, 18).

7. Nicole Plessy-Cloud (Plessy-Cloud) was hired as a junior accountant in the CFU in December of 1998 and in 1999 Plessy-Cloud married Adam Cloud (Cloud). In or around 2003, Plessy-Cloud was promoted to Financial Systems Manager and assigned to supervise the CFU.

8. In 2009 the City conducted an audit of the Treasurer's Office and on May 29, 2009, Chief Auditor H. Patrick Campbell issued a report (Ex. 18) which stated, in relevant part:

There is an inadequate level of segregation of duties over certain CFU functions. Good internal control requires an appropriate level of segregation of duties over cash receipt processing and related accounting functions. We noted that one CFU employee has access to cash and checks, is the back-up for preparing deposits and has bank reconciliation responsibilities. These control deficiencies could result in various risks and exposures. We recommend that Treasurer's Office management take the steps necessary to ensure that there is an adequate level of segregation of duties over cash receipt processing and related accounting functions. . . .

Then City Treasurer Kathleen Palm Devine (Devine) promptly made changes to address Campbell's concerns.

9. On January 7, 2011, Adam Cloud was hired as Assistant City Treasurer.

10. By letter (Ex. 14) to Devine dated January 31, 2011, Attorney Bruce Barth of the law firm of Robinson & Cole stated, in relevant part:

RE: Nicole Plessey-Cloud

Dear Kathleen:

You have asked for our opinion as to whether the promotion and continued employment of an employee within the City of Hartford's Treasury Office violates any employment or ethics ordinances or statutes, where the employee is married to another employee that is in a supervisory/managerial role within the same department . . .

Conclusion

Based upon our review of the applicable laws, rules and regulations, the continued employment of Plessey does not violate the City's Code of Ethics. However, if Cloud makes any decisions regarding Plessey's compensation or advancement such could violate the City's Code of Ethics. Accordingly, Cloud should recuse himself from any of those decisions and have those decisions made by another appropriate employee of the City.

11. On February 1, 2011, Devine retired and Cloud became City Treasurer.

12. By letter (Ex. 19) dated June 6, 2011, the members of the City's Internal Audit Commission² wrote City Mayor Pedro E. Segarra and Court of Common Council³ members stating, in relevant part:

The purpose of this letter is to address a number of matters raised by Marc Nelson, the City of Hartford Tax Collector, regarding potential personnel and control issues in the City of Hartford Treasurer's Office . . .

In light of these actual and potential control issues and even the possible appearance of a conflict of interest we feel that this working arrangement is not in the best interest of either the Treasurer's Office or the City of Hartford. It is our

² The Internal Audit Commission oversees the City's Audit Department and consists of a member appointed by the City's legislative body, a member appointed by the City Treasurer, and a member appointed by a taxpayer association.

³ The Court of Common Council is the City's legislative body

understanding that an effort is being made to transfer Mrs. Plessy-Cloud to a position outside of the Treasurer's Office. We encourage that this effort to transfer Mrs. Plessy-Cloud be expedited to the greatest extent possible . . .

We are also concerned that this situation could arise in other City departments and operations in the future. During the process of following-up on and addressing this matter we noted that the City of Hartford does not have a policy regarding nepotism. A policy on nepotism would have addressed this and other matters of this type . . .

We strongly recommend that consideration be given to developing and implementing a City of Hartford policy on nepotism . . .

13. By email (Ex. 5) on August 18, 2011 to Union President Ellen McCreery and other City union representatives, City Director of Human Resources and Labor Relations Santiago Malave (Malave) stated, in relevant part:

RE: New City Policies

Attached for your information and reading are the following new or revised City policies:

2 Policy for Nepotism

These policies will be implemented by the Mayor effective August 26, 2011. Distribution of the policies will begin thereafter. All current City employees will be asked to sign an acknowledgement of receipt statement certifying that they have received and read a copy of each new policy . . .

Among the attachments to the email was a document (Ex. 5A) which stated, in relevant part:

CITY OF HARTFORD POLICY FOR NEPOTISM

STATEMENT OF POLICY

Relatives of City of Hartford employees are eligible for employment at the City. However, to insure that the financial and professional integrity of the City is maintained, the employment of relatives shall not:

1. Create a direct supervisory relationship between relatives;
2. Create a situation where an individual who is appointed or elected into a supervisory role not of their creation continues to supervise a relative;
3. Allow one relative to influence job assignments, promotional

- opportunities, compensation, discipline, and performance review of another relative; or
4. Allow one relative to approve compensation of another relative.
 5. Create an actual conflict of interest or the potential for or appearance of conflicts of interest.

...
If two existing employees of the City work together in a supervisory relationship, and become related, as defined herein, a case-by-case analysis shall be made. In some circumstances, one of the employees may be transferred or otherwise reassigned. Exceptions may be made if there is a plan, approved by the Chief Operating Officer, that is designed to eliminate the conflict of interest or the opportunity for favoritism.

14. By letter (Ex. 5) to Malave dated August 19, 2011, Union attorney Stephen F. McEleney (McEleney) stated, in relevant part:

RE: HMEA New City Policies

...
It is respectfully submitted at least three of the four policies contain unilateral changes to mandatory subjects of bargaining which require negotiation with HMEA and may not be implemented unilaterally ...

...
Accordingly, this is to respectfully request the City not unilaterally implement any of the four policies without first negotiating with HMEA.

15. By email (Ex. 7) to Malave dated August 26, 2011, McEleney stated:

Please inform if the four new policies scheduled to go in effect today are in fact going into effect as to HMEA or you will recognize a duty to bargain and will hold off pending negotiations.

16. By email (Ex. 8) to McEleney dated September 1, 2011, Lynn M. LaChance (LaChance) of the City's Department of Human Resources stated, in relevant part:

The City would like to set up a meeting with you to discuss the potential impact of the new City policies referenced in your email ...

17. By email (Ex. 9) to LaChance dated September 1, 2011, McEleney stated, in relevant part:

We would be happy to negotiate ... however, we still need an answer to my questions, reiterated to Santiago day before yesterday:

1. Have the policies already been implemented as to HMEA?
2. Does the City recognize an obligation to negotiate ... the

provisions of the . . . policies . . .

. . . we are entitled to negotiate on an even (i.e. legal) playing field . . .

18. By email (Ex. 9) to McEleney dated September 1, 2011, LaChance stated, in relevant part:

Santiago is out of the office . . . but he informed me that he will contact you on Tuesday with responses to your questions . . . At that time, he will also work out a date to meet with HMEA.

19. Effective September 12, 2011, subsection (H) was added to Section 2-902 (Ex. 36) of the City's code of ordinances and states:

To insure that the financial and professional integrity of the City is maintained, employees shall abide by the City's nepotism policy which generally prohibits conferring benefits and privileges based upon familial relationships, rather than on merit.

20. At some point between September 1, 2011 and September 28, 2011 the City informed the Union that it would not implement the nepotism policy without bargaining impacts on mandatory topics. During this time period the City also informed the Union that Plessy-Cloud's assignment to the City Treasurer's Office may be in violation of the City's code of ethics.

21. By letter (Ex. 13) to City Treasurer Adam Cloud dated September 29, 2011, Mayor Segarra stated, in relevant part:

Several months ago I proposed that we transfer your wife, Nicole Plessy-Cloud, from the Treasurer's Office to the Finance Department so as to eliminate any and all concerns regarding claims of nepotism or favoritism. I am pleased to hear that you have agreed that this is a suitable solution. She will retain her title, but her duties and responsibilities will be somewhat altered . . .

Accordingly, I am authorizing the immediate transfer of Ms. Plessey-Cloud to the Finance Department. If you have any additional questions or concerns, please let me know.

22. At no point in time did Adam Cloud or Plessy-Cloud agree to Plessy-Cloud's transfer and/or reassignment from the Treasurer's Office.

23. Upon receipt of Mayor Segarra's letter, Plessy-Cloud worked one-half of her regular week at the City's Finance Department and the other half at the Treasurer's Office with the CFU and was under the supervision of Chief Financial Officer Julio Mollada (Mollada).

24. On October 16, 2011, Union and City representatives met and were unable to reach agreement as to the City's nepotism policy.

25. On November 18, 2011, Adam Cloud was elected City Treasurer.

26. In mid March, 2012, Plessy-Cloud requested Molleda's permission to return to the Treasurer's Office on a full time basis as the junior accountant in the CFU was absent on maternity leave. Molleda approved the request and Plessy-Cloud ceased working at the Finance Department and returned to the CFU on a full time basis.

27. On July 9, 2012 Carmen Sierra (Sierra) was sworn in as Assistant Treasurer.

28. On July 16, 2012, and after the CFU junior accountant's return from maternity leave, Molleda informed Plessy-Cloud that he wanted her back as there was work for her to perform in the Finance Department. Plessy-Cloud, however, continued to work full time in the Treasurer's office.

29. By email (Ex. 32) dated July 25, 2012, Molleda wrote Sierra with copies to Plessy-Cloud and Adam Cloud and stated, in relevant part:

Attached please find a draft of some of the duties that Nicole may want to consider if a transfer to Finance Department is eventually made.

I would suggest that we schedule a one-to-one meeting at your convenience . . .

30. By letter (Ex. 34) to Ethics Commission Chairman Barbara Ness (Ness) dated October 2, 2012, Director of Human Resources and Labor Relations Valda Washington (Washington) stated, in relevant part:

. . . I respectfully request an advisory opinion concerning the scope of the City's Anti-Nepotism Policy and the ethical implications, appropriate remedial action, and professional obligations of the parties, if any, required by the City Ethics Code where an elected official serves as the immediate supervisor of his spouse.

The requested opinion involves the Office of the City Treasurer . . . As Treasurer, Mr. Cloud acts as the immediate supervisor of his wife . . .

. . . On its face the supervisor/subordinate relationship between husband and wife within the Treasurer's Office violates the provisions of the City's Anti-Nepotism Policy and thus the provisions of Section 2-902(H). . .

31. As of November 7, 2012, Plessy-Cloud was still working full time at the Treasurer's Office in the CFU under Finance Director Molleda's supervision.

CONCLUSIONS OF LAW

1. An employer's unilateral change in an existing condition of employment that is a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a violation of the Act unless the employer establishes an adequate defense.
2. A policy which prohibits employees from holding positions entailing supervision of or by relatives is a mandatory subject of bargaining.
3. The City violated the Act when it unilaterally implemented a nepotism policy with respect to a bargaining unit member in the Treasurer's Office.

DISCUSSION

The Union contends that the City unilaterally implemented a nepotism policy and seeks an order requiring the City to cease and desist from moving Plessy-Cloud from the Treasurer's Office until such time as the City has negotiated with the Union pursuant to the Act. The City denies that it has implemented a nepotism policy and claims that it acted pursuant to its existing ethics ordinance as well as the mayor's authority under the charter to temporarily reassign an employee to another department. The City also claims that the Union's complaint is not ripe because Plessy-Cloud continues to perform her CFU duties, no other employees were transferred, and the City has agreed to engage in impact bargaining with the Union.

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 prohibited practice unless the employer proves an adequate defense. *Southeast Area Transit District*, Decision No. 4641 (2013); *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). It is the Union's initial burden to make a *prima facie* case establishing that a change in an existing condition of employment has in fact occurred, for if no change is proven, no further inquiry is warranted. *Town of Hamden*, Decision No. 2364 (1985). There are several well recognized defenses to claims of unlawful unilateral action by an employer. A prohibited practice will not be found where the complaining union failed to timely demand bargaining, where the action at issue is *de minimus* or wholly within the scope of managerial discretion, or where the collective bargaining agreement gives express or implied consent to the type of unilateral action involved. *Region 16 Board of Education v. State Board of Labor Relations*, 299 Conn. 63, 74 (2010); *City of Norwich v. Norwich Firefighters*, 173 Conn. 210 (1977).

It is by now well settled that nepotism policies are mandatory subjects of bargaining. *Waterbury Board of Education*, Decision No. 4337 (2008); *Town of Newington*, Decision No. 2957 (1991). This is because a nepotism policy "has a direct effect on conditions of employment" in that it "has the potential to affect wages, foreclose the possibility of promotion or transfer, or lead to demotion or termination, among other employment-related actions." *Waterbury Board of Education, supra* at p. 7. As such, we have little difficulty finding that the City's August 18, 2011 nepotism policy involved mandatory topics or that the City had a duty to negotiate with the Union prior to enforcing its prohibition against direct supervisory relationships between relatives where one of the employees involved is a member of the bargaining unit.

We conclude on the basis of the record before us that the City did apply its new nepotism policy to Plessy-Cloud. Contrary to the City's claim that it refrained from implementation in response to the Union's demand to bargain, less than one month after Malave distributed the policy to City unions, the City amended its ethics ordinance to add a requirement that "employees . . . abide by the City's nepotism policy . . ." In alleging a violation of the new ordinance, Washington's request for an Ethics Commission advisory opinion admits both the existence and implementation of the nepotism policy at issue. Nor can we ignore that Mayor Segarra's stated basis for Plessy-Cloud's September 29 transfer was his "concern[] regarding claims of nepotism or favoritism" or that he ordered the transfer shortly after the originally stated effective date of the new policy. Since the evidence reflects a unilateral change⁴ in a condition of employment, the Union has established its *prima facie* case and we turn to the City's defenses.

The City's reliance on its Code of Ethics is misplaced. The earlier version of the ordinance does not prohibit work relationships between spouses. As Attorney Barth's well-reasoned opinion notes, Plessy-Cloud's employment in the CFU preceded her husband's appointment and his recusal from compensation or advancement decisions readily addressed potential conflicts. The Audit Commission's June 6 letter to the mayor appears to admit that existing rule did not encompass Plessy-Cloud and, as noted above, Washington's opinion request to the Ethics Commission relies on the new nepotism policy rather than existing rules. In short, we do not find that the City's Code of Ethics authorized the City's actions as to Plessy-Cloud independently of the nepotism policy at issue.

Nor do we find authorization for the City's actions in the management rights provision of the collective bargaining agreement. We have long held that management rights clauses are to be strictly construed and we will not read a waiver of the union's right to negotiate into such a clause unless it is clear and unmistakable. *Waterbury Board of Education, supra*; *East Hartford Housing Authority*, Decision No. 3733 (1999); *Amity Board of Education*, Decision No. 1845 (1979); *City of New Haven*, Decision No.

⁴ Plessy-Cloud's subsequent return to the Treasurer's Office is not significant to our assessment of whether a unilateral change occurred given the factual context of this case. The City does not contend that her return was other than temporary or that she is not permanently assigned to the Finance Department under the direct supervision of the Finance Director.

1342 (1975); *Murphy Diesel Co. v. NLRB*, 454 F. 2d 303 (7th Cir. 1971). As such, we find no contractual waiver of the Union's right to bargain.

The City's reliance on the mayor's authority under the Charter to temporarily reassign an employee to another department is also misplaced. Chapter V § 2(q) only authorizes "temporary" assignments within a fiscal year yet Plessy-Cloud's transfer to the Finance Department continued to the subsequent fiscal year and appears to be permanent. More important, the Union's collective bargaining rights exist by statute and prevail over conflicting charter provisions. *State Management Ass'n of Connecticut v. O'Neill*, 204 Conn. 746, 753 (1987); *Carofano v. City of Bridgeport*, 196 Conn. 623 (1985); *Caulfield v. Noble* 178 Conn. 81, 87 (1979).

The City claims that the Union's claims are not ripe because the City was willing to negotiate the secondary impacts of its nepotism policy. A case is not ripe if it "present[s] a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citation and internal quotation marks omitted). *St. Paul Travelers Companies, Inc. v. Kuehl*, 299 Conn. 800, 816 n. 7 (2011). Mayor Segarra's order transferring Plessy-Cloud was neither abstract nor conditioned on some future occurrence. See, e.g., *Town of Rocky Hill*, Decision No. 3050 (1992). While the City did indicate its willingness to engage in impact bargaining, it did so *after* Plessy-Cloud was transferred and the new nepotism policy was implemented by ordinance. Since the Union was entitled to negotiate⁵ prior to implementation, its claims are not hypothetical and the case is ripe. *Norwalk Board of Education*, Decision No. 3163 (1993); *Town of Middlebury*, Decision No. 2434 (1985).

With respect to the issue of remedy we find that traditional restoration of the *status quo ante* would best effectuate the policies of the Act.

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 Hartford

- I. Cease and desist from unilaterally applying a nepotism policy to members of the bargaining unit;
- II. Take the following affirmative action which we find will effectuate the purposes of the Act:

⁵ The City's willingness to negotiate impact ignores our case law holding that nepotism policies, *in themselves*, concern mandatory topics of collective bargaining. In short, a Union faced with a proposed nepotism policy need not identify bargainable impacts. See *City of Bridgeport*, Decision No. 4651 (2013); *City of Torrington*, Decision No. 3345 (1995); *Town of Hamden*, Decision No. 2145 (1982).

- A. Restore Nicole Plessy-Cloud to the position she held immediately prior to September 29, 2011, until such time as the parties have completed bargaining as required by the Act.
- B. Bargain in good faith with the Union over any proposed nepotism policy.
- C. 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 the Decision and Order in its entirety.
- 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 receipt of this Decision and Order of the steps taken by the City of Hartford to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Patricia V. Low
Patricia V. Low
Chairman

Wendella Ault Battey
Wendella Ault Battey
Board Member

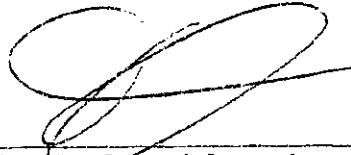
Robert A. Dellapina
Robert A. Dellapina
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 14th day of August, 2013 to the following:

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CONNECTICUT STATE BOARD OF LABOR RELATIONS