BOARD OF EDUCATION OF REGION 16 *v.* STATE BOARD OF LABOR RELATIONS ET AL.
(SC 18347)

Rogers, C. J., and Norcott, Palmer, McLachlan, Eveleigh and Vertefeuille, Js.

Argued September 8, 2010—officially released November 16, 2010

William R. Connon, with whom, on the brief, was *Brooke H. Sherer*, for the appellant (plaintiff).

Alexandra M. Gross, for the appellee (named defendant).

Ronald Cordilico, for the appellee (defendant Region 16 Education Association).

Kelly B. Moyher filed a brief for the Connecticut Association of Boards of Education as amicus curiae.

Opinion

ROGERS, C. J. The central issue in this case is whether an increase in the workload of certain teachers during the course of a school year constituted a unilateral change of a condition of employment under this state's collective bargaining law. The plaintiff, the board of education of Region 16, appeals[1] from the judgment of the trial court dismissing its appeal from the decision of the named defendant, the state board of labor relations (board), in which the board concluded that the plaintiff had violated General Statutes § 10-153e (b) when it unilaterally changed a condition of employment.[2] Specifically, the board concluded that the plaintiff acted unlawfully when it unilaterally and substantially increased the workload of certain employees who were members of the defendant Region 16 Education Association (union). In addition, the board concluded that the plaintiff had engaged in unlawful direct dealing with the employees.

The plaintiff claims that the trial court improperly: (1) upheld the board's conclusion that the union was not required to prove that there was a unit wide employment practice in order to establish a prima facie case of a unilateral change; (2) concluded that the board's determination that the union had established a prima facie case of a unilateral change of a definite and fixed employment practice was supported by substantial evidence; and (3) concluded that the board's ruling that the plaintiff had engaged in unlawful direct dealing with the employees was supported by substantial evidence. We conclude that the board's finding that the plaintiff had unilaterally and substantially changed a definite and fixed employment practice was not supported by substantial evidence and, therefore, we reverse the portion of the trial court's judgment relating to that issue.[3] We agree with the trial court, however, that the board's ruling that the plaintiff had engaged in unlawful direct dealing was supported by substantial evidence. Accordingly, we affirm the judgment to the extent that it upheld the board's conclusion that the plaintiff had engaged in direct dealing and ordered the plaintiff to cease and desist from such conduct.

The board found the following relevant facts. The plaintiff operates a high school known as Woodland High School (high school). The plaintiff also operates one middle school and three elementary schools. All of the schools provide both regular and special education programs. The length of the work year and work day of all teachers in the schools operated by the plaintiff is specified in the collective bargaining agreement (agreement) between the plaintiff and the union. The agreement also provides that "[t]eachers are expected to be available for student help, parent conferences, faculty meetings, general staff department or group meetings, committee work, and other activities of a

professional nature before and after regular school hours."[4]

At the beginning of the 2004–2005 school year, the high school had five special education teachers, including four "skills lab" teachers, each of whom was responsible for teaching a specific number of special education students, known as the teacher's "caseload," and one transition coordinator, who was responsible for placing students in jobs in the community. The skills lab teachers were Arthur Richardson, Deborah Flaherty, Tracy Brunelle and Melissa Dean, and the transition coordinator was Jessica Veneziano. Richardson's caseload was approximately seventeen students; Flaherty's caseload was ten students; Brunelle's caseload was sixteen students; and Dean's caseload was fifteen students. No students were specifically assigned to Veneziano.

In October, 2004, Richardson resigned from his teaching position at the high school. The plaintiff attempted to find a replacement for him, but, because of a shortage of special education teachers in the state, was unable to do so. Marna Murtha, the plaintiff's director of pupil personnel and the person in charge of the plaintiff's department of special education, met several times with the skills lab teachers and Veneziano to discuss the best way to service Richardson's former students. Ultimately, they decided to divide Richardson's caseload among the skills lab teachers. In addition, Veneziano took on several of Richardson's students. As a result, Flaherty's caseload increased from ten to fourteen students and her work hours increased by approximately fourteen hours per week; Brunelle's caseload increased from sixteen to twenty-one students and her work hours increased by approximately ten hours per week; and Dean's caseload increased from fifteen to twenty-one students and her work hours increased by approximately ten hours per week.[5] From the 2001–2002 school year through the 2005–2006 school year, special education teachers at the high school, middle school and elementary schools operated by the plaintiff had caseloads ranging from four to twenty-two students.

In January, 2005, the plaintiff hired a permanent, full-time substitute teacher to replace Richardson for the remainder of the school year. The substitute was not certified as a special education teacher, but had a "durational shortage area permit" authorizing him to teach special education students on a temporary basis.[6] After the substitute was hired, Murtha met with the skills lab teachers and Veneziano (special education teachers), and they decided that the substitute teacher would teach the self-contained history class, which had been one of Richardson's duties. Because they were "not comfortable" with allowing the substitute to take on Richardson's other duties, however, the four special education teachers retained his caseload. At either the initial meeting or at another meeting, Murtha suggested

that the special education teachers use the looping method employed by the middle school, in which teachers are assigned to students in a single grade level and move with the students when they progress to the next grade level. The union was not informed of the meetings at which these decisions were made. It was Murtha's standard practice when school employees left employment unexpectedly to attempt to hire replacements and to collaborate with the remaining staff, but not the union, to allocate the former employee's workload among the staff.

At some point after Richardson's departure, the special education teachers approached Murtha and complained that their workloads were too heavy. They did not ask Murtha directly for an increase in their compensation, but they asked the union to request an increase on their behalf. Thereafter, in late March, 2005, Murtha approached Brunelle and stated that the special education teachers should not proceed with "their complaint" because there was no point in pursuing it. Murtha also left a voicemail message for Brunelle in which she asked Brunelle to meet with the other special education teachers and to send a letter to Marguerite Shook, the plaintiff's superintendent of schools, stating that the union president, Catherine Mirabilio, had approached them regarding the complaint, not the reverse, and that they were not seeking a stipend for their increased workload. Brunelle responded by leaving a voicemail message for Murtha in which she stated that Mirabilio had not approached the special education teachers, but they had approached Mirabilio, and that they would not be sending a letter to Shook. Brunelle also forwarded Murtha's voicemail message to Mirabilio.

Thereafter, the union filed a complaint with the board alleging that the plaintiff had "unilaterally and substantially increased the case management workload of [the] special education teachers without notification and without negotiating with the [union]." After an evidentiary hearing, the board rendered a decision in which it concluded that the union had "demonstrated a fixed and definite practice among [the] special education teachers and a significant departure from that practice [and] . . . has established a prima facie case of unlawful unilateral change substantial enough to require bargaining." The board rejected the plaintiff's arguments that, because the caseload of special education teachers both at the high school and throughout the school district historically had fluctuated over the course of the school year as students were placed in or removed from the special education program, the union had failed to establish that the increased workload after Richardson's departure constituted an unlawful unilateral change. The board concluded that the former "sort of variation is anticipated by . . . teachers and thus permits them to plan for the natural ebb and flow of students in their caseload. Richardson's absence, however,

created an unexpected, sudden and fixed swelling in each [special education] teacher's caseload that lasted from the time of Richardson's departure in or about October of 2004 through the end of the school year in June 2005." The board also concluded that the plaintiff had engaged in unlawful direct dealing with the special education teachers. Accordingly, the board ordered the plaintiff to cease and desist from "[i]ncreasing the workload of the special education teachers without negotiating with the [u]nion" and from "[d]ealing directly with employees concerning mandatory subjects of bargaining."

Thereafter, the plaintiff appealed from the board's decision to the trial court. After a hearing, the trial court determined that the board properly had concluded that the plaintiff had unilaterally and substantially changed a fixed and definite employment practice and had engaged in unlawful direct dealing with the special education teachers. Accordingly, it dismissed the plaintiff's appeal. This appeal followed.[7]

I

We first address the plaintiff's claim that the trial court improperly concluded that the board's decision that the plaintiff unilaterally and substantially changed a fixed and definite employment practice when it reassigned Richardson's caseload to the other special education teachers was supported by substantial evidence. Specifically, the plaintiff claims that, because the union failed to present evidence either that the caseloads handled by the special education teachers or the hours that they worked per week were substantially greater after Richardson's departure than in the preceding school years, the union failed to establish a fixed and definite prior practice. We agree.

At the outset, we set forth the standard of review. "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 833, 955 A.2d 15 (2008). "An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . ."

(Internal quotation marks omitted.) Id., 833–34. "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . . The law is also well established that if the decision of the commissioner is reasonably supported by the evidence it must be sustained." (Internal quotation marks omitted.) Id., 834.

We next review the law governing unilateral changes to employment conditions. Under § 10-153e (b) (4), regional boards of education are prohibited from "refusing to negotiate in good faith with the employees' bargaining agent or representative which has been designated or elected as the exclusive representative in an appropriate unit in accordance with the provisions of said sections . . . ." This court previously has recognized that a unilateral change to an employment condition constitutes an unlawful refusal to negotiate under the statute. *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 596, 295 A.2d 526 (1972) (employer who unilaterally changes working conditions "is refusing to bargain in fact with the employee organization"); see also *In re Dept. of Motor Vehicles*, Conn. Board of Labor Relations Decision No. 3806 (January 29, 2001) p. 4 ("[a]n employer's unilateral change in a major term or condition of employment which involves a mandatory subject of bargaining will constitute a refusal to bargain and a prohibited practice under [§ 10-153e (b) (4)] unless the employer proves an adequate defense"); *In re Portland Board of Education*, Conn. Board of Labor Relations Decision No. 1670 (August 15, 1978) p. 3 (unilateral change in major condition of employment is subject to mandatory bargaining).[8] To establish a unilateral change of a condition of employment, the union must establish that the employment practice was "clearly enunciated and consistent, [that it] *endure[d] over a reasonable length of time*, and [that it was] an accepted practice by both parties." (Emphasis in original; internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 698, 719 n.33, 980 A.2d 880 (2009); see also *In re Dept. of Motor Vehicles*, supra, Conn. Board of Labor Relations Decision No. 3806, p. 6 ("[t]here is no question that [in order to constitute a condition of employment] the practice must be definite and fixed, rather than isolated and sporadic").

"However, not all unilateral changes made by an employer constitute a refusal to bargain, such as when the change does not amount to a substantial change in a major term or condition . . . or when the change solely concerns a matter fundamental to the operation of the public agency and falls within the realm of sole managerial discretion . . . or where the collective bargaining agreement gives express or implied consent to the type of unilateral action involved." (Citations omitted.) *In re Naugatuck*, Conn. Board of Labor Relations Decision No. 2874 (December 27, 1990) p. 4; see

also *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 162 Conn. 580 (number of hours per day that teachers are required to be in attendance at school and number of days in school year during which teachers may be assigned to duties are matters of educational policy that are reserved to board of education and are not subject to mandatory negotiation);[9] *In re Bloomfield Board of Education*, Conn. Board of Labor Relations Decision No. 2821 (July 3, 1990) p. 6 ("[i]f a change is de minimis or insubstantial in its impact upon a major term or condition of employment, [the board] will decline to find [that] a prohibited practice has occurred"). "[T]he burden is on the union as complainant to prove that there has in fact been a practice and that it has in fact been changed." *In re Enfield Board of Education*, Conn. Board of Labor Relations Decision No. 2580 (September 1, 1987) p. 5.

With these principles in mind, we address the plaintiff's claim that, because the union presented no evidence of a preexisting, fixed and definite practice concerning the special education teachers' workload, there was no basis for the board's finding that the increase in the number of hours that the special education teachers worked per week after Richardson's departure constituted a unilateral change. We agree. Although the union presented evidence that the weekly work hours of three of the special education teachers had increased by ten to fourteen hours after Richardson's departure, there was no evidence that the increased number of hours was substantially greater than the number of hours per week that they had worked *in previous school years*. Indeed, the only evidence regarding the workload of the special education teachers in prior years established that, from the 2001–2002 school year through the 2003–2004 school year, the caseload of three of the special education teachers had ranged from five special education students per teacher to twenty-one students.[10] This caseload was not substantially lower than the caseload of the special education teachers after Richardson's departure, which ranged from "several" students for Veneziano to twenty-one students for Brunelle and Dean. Moreover, even if we were to assume that the average caseload per special education teacher was somewhat greater after Richardson's departure than in previous years,[11] that would not necessarily mean that the average workload was greater. The students could have had fewer needs or, as the plaintiff pointed out to the trial court, the teachers could simply have spent less time servicing each student, within the parameters set by state and federal special education law and the school board's educational policy.[12]

It is clear, therefore, that the baseline that the board used to determine whether there had been a unilateral change to an employment condition was the number of hours that the special education teachers had worked

per week in the weeks immediately preceding Richardson's departure in October, 2004.[13] The union has provided no authority, however, for the proposition that, when an employment practice has been in place for years, the board can ignore the historic practice and consider a practice that has been in place for only a matter of weeks in determining whether there has been a substantial change from the practice. Indeed, the board's decisions support a contrary conclusion. See *In re East Hartford*, Conn. Board of Labor Relations Decision No. 2212 (May 27, 1983) p. 3 (when employer provided uniform benefit for approximately one year, benefit constituted condition of employment for purposes of unilateral change doctrine); *In re Portland Board of Education*, supra, Conn. Board of Labor Relations Decision No. 1670, pp. 3–4 (when employer had instituted requirement that teachers assume corridor duty five years prior to complaint, practice constituted condition of employment for purposes of unilateral change doctrine); *In re Dept. of Corrections*, Conn. Board of Labor Relations Decision No. 2729 (April 28, 1989) p. 4 (although some employees occasionally reported to work in civilian clothes during seven years prior to complaint, practice did not constitute condition of employment for purposes of unilateral change doctrine); *In re Dept. of Public Safety State Police*, Conn. Board of Labor Relations Decision No. 2761 (September 12, 1989) p. 5 (employer's occasional denial of leave requests during four years preceding complaint contradicted union's claim that granting of all leave requests was condition of employment for purposes of unilateral change doctrine). Accordingly, we conclude that, in the absence of any evidence establishing the hours that the special education teachers worked per week in the school years preceding Richardson's departure, the board's finding that three of them had been required to work ten to fourteen more hours per week after Richardson's departure than immediately before it was not sufficient to support its conclusion that the plaintiff had unilaterally changed a fixed and definite employment practice.

To the extent that the board claims that the evidence established that the plaintiff unilaterally changed a fixed and definite practice of not substantially increasing the work hours of the special education teachers suddenly during the school year, we are not persuaded.[14] As we have indicated, to establish a unilateral change of workload, the union must present evidence both that the employees' workload after the change was substantially greater than before it and that the preceding workload had "endure[d] over a reasonable length of time, and [that it was] an accepted practice by both parties." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, supra, 293 Conn. 719 n.33. Although we recognize that a sudden, unanticipated and substantial increase in workload may cause significant difficulties for an

employee in the short term,[15] the defendants have provided no authority for the proposition that, if an increased workload was not a substantial departure from a fixed and definite prior practice, the increase nevertheless can constitute an unlawful unilateral change because of its timing, or the fact that it was unanticipated.[16] We conclude in the present case that the evidence was insufficient to establish that the workload of the special education teachers immediately before Richardson's departure was a fixed and definite employment practice. We conclude, therefore, that the trial court improperly determined that the board's determination that the plaintiff had unilaterally changed an employment condition in violation of § 10-153e (b) was supported by substantial evidence.

II

We next address the plaintiff's claim that the trial court improperly concluded that the board's decision that the plaintiff had engaged in unlawful direct dealing was supported by substantial evidence. We disagree.

This court previously has recognized that, because "Connecticut statutes dealing with labor relations have been closely patterned after the National Labor Relations Act [codified at 29 U.S.C. § 151 et seq.]"; *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 162 Conn. 578; the federal statute "is of great assistance and persuasive force in the interpretation of our own acts."[17] Id., 579. "The National Labor Relations Act [act] makes it an employer's duty to bargain collectively with the chosen representatives of [its] employees, and since this obligation is exclusive, it exacts the negative duty to treat with no other. . . . After a duly authorized collective bargaining representative has been selected, the employer cannot negotiate wages or other terms of employment with individual workers. . . . Thus, an employer interferes with his employees' right to bargain collectively . . . when he treats directly with employees and grants them a wage increase in return for their promise to repudiate the union which they have designated as their representative. . . . The statutory obligation thus imposed is to deal with the employees through the union rather than dealing with the union through the employees. Attempts to bypass the representative may be considered evidence of bad faith in the duty to bargain. . . . The act does not prohibit an employer from communicating in noncoercive terms with [its] employees while collective negotiations are in progress. . . . The element of negotiation is critical. Another crucial factor in these cases is whether or not the communication is designed to undermine and denigrate the union." (Citations omitted.) Id., 592–93. Although "[a]n employer may speak freely to its employees about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position, and objectively supportable, rea-

sonable beliefs concerning future events . . . [it] cannot act in a coercive manner by making separate promises of benefits or threatening employees. Thus the employer may freely communicate with employees in noncoercive terms, as long as those communications do not contain some sort of express or implied quid pro quo offer that is not before the union." (Citations omitted.) *Americare Pine Lodge Nursing & Rehabilitation Center* v. *National Labor Relations Board*, 164 F.3d 867, 875 (4th Cir. 1999); see also *Service Employees International Union, AFL-CIO, Local 509* v. *Labor Relations Commission*, 431 Mass. 710, 717, 729 N.E.2d 1100 (2000) ("[a]n employer's communication with its employees is direct dealing if its purpose or effect is the erosion of the [u]nion's status as exclusive bargaining representative" [internal quotation marks omitted]); *Crete Education Assn.* v. *Saline County School District No. 76-0002*, 265 Neb. 8, 22, 654 N.W.2d 166 (2002) (elements of direct dealing are "[1] [t]he employer was communicating directly with union-represented employees; [2] the discussion was for the purpose of establishing wages, hours, and terms and conditions of employment or undercutting the collective bargaining unit's role in bargaining; and [3] such communication was made to the exclusion of the collective bargaining unit").

In the present case, the board concluded that, when Murtha met with the special education teachers to discuss the best way to handle Richardson's caseload after his departure and ultimately decided, in collaboration with the special education teachers, that the caseload would be divided among them, her conduct constituted unlawful direct dealing. The trial court concluded that the board's determination was supported by substantial evidence and, in addition, found that, when Murtha urged the special education teachers not to pursue their complaint to the union, that conduct also constituted unlawful direct dealing.

We have concluded that the evidence did not support the board's conclusion that the increase in the special education teachers' workload constituted a substantial change to a fixed and definite employment practice. It necessarily follows that the evidence was insufficient to support the board's conclusion that Murtha's initial meetings with the special education teachers and her collaboration with them on the question of how best to reallocate Richardson's caseload constituted unlawful direct dealing with the teachers on a subject of mandatory negotiation. We conclude, however, that, after she became aware that the union intended to file a complaint to the board on the teachers' behalf, Murtha's suggestion to Brunelle that the special education teachers withdraw the complaint and her request that they write a letter to Shook stating that they had not approached the union and that they were not seeking a stipend for the additional workload constituted direct

dealing.[18] Although Murtha did not expressly offer a quid pro quo, she implied that the special education teachers would be better off if they did not pursue their formal complaint with the union. At the very least, her dealings with Brunelle clearly were intended to influence the special education teachers on a matter in which the union was representing them and, thus, to undermine the union's role as the teachers' exclusive bargaining representative.[19] See *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 162 Conn. 592–93; see also *Mattina* v. *Ardsley Bus Corp.*, United States District Court, Docket No. 10 Civ. 2474 (LTS) (S.D.N.Y. May 12, 2010) (when agent of employer solicited concessionary letters from employees on matter that was subject of pending union grievance, employer engaged in unlawful direct dealing); *Warwick* v. *Pennsylvania Labor Relations Board*, 671 A.2d 1199, 1201 n.4 (Pa. Commw.) ("Among the specific obligations contained within the general mandate to collectively bargain is the duty to process grievances with—but only with—the employee representative. . . . This exclusive duty follows the general rule that where there is a majority representative, the employer is guilty of an unfair labor practice when it engages in direct dealing with its employees rather than through the majority representative." [Citations omitted.]), appeal denied, 545 Pa. 666, 681 A.2d 180 (1996). Even though the union ultimately could not prevail on its claim that the increased workload was subject to mandatory negotiation because it failed to establish that the plaintiff had substantially changed a fixed and definite employment practice, once the teachers had invoked their right under the collective bargaining agreement to have the union represent them in connection with the claim, the plaintiff could no longer deal with the teachers directly on the matter. We conclude, therefore, that the trial court properly concluded that the board's conclusion that the plaintiff had engaged in unlawful direct dealing was supported by substantial evidence.

The judgment is reversed with respect to the trial court's dismissal of the plaintiff's claim challenging the board's ruling that the plaintiff had unilaterally changed a condition of employment in violation of § 10-153e (b), and the case is remanded to the trial court with direction to render judgment sustaining the plaintiff's appeal on that issue; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 10-153e (b) provides: "The local or regional board of education or its representatives or agents are prohibited from: (1) Interfering, restraining or coercing certified professional employees in the exercise of the rights guaranteed in sections 10-153a to 10-153n; (2) dominating or interfering with the formation, existence or administration of any employees' bargaining agent or representative; (3) discharging or otherwise discriminating against or for any certified professional employee because such employee has signed or filed any affidavit, petition or complaint under said sections; (4) refusing to negotiate in good faith with the employees' bargaining agent

or representative which has been designated or elected as the exclusive representative in an appropriate unit in accordance with the provisions of said sections; or (5) refusing to participate in good faith in mediation or arbitration. A prohibited practice committed by a board of education, its representatives or agents shall not be a defense to an illegal strike or concerted refusal to render services."

[3] Accordingly, we need not reach the plaintiff's first claim that the trial court improperly upheld the board's conclusion that the union was not required to establish a unit wide employment practice. Likewise, we need not reach the plaintiff's subordinate claims that, if this court concludes that the trial court properly concluded that the board properly determined that the union had established a prima facie case of unilateral change, the trial court improperly determined that: (1) the board properly had rejected the plaintiff's defenses; (2) the board properly had excluded certain evidence from the hearing; and (3) the board's decision did not violate state and federal special education law and federal law governing the privacy of student educational records.

[4] Article 9 of the agreement provides in relevant part: "A. Commencing with the 2001–02 school year, the standard teacher workday is seven hours [and] fifteen . . . minutes, including the required time stated in [s]ection B of this article. The teacher [work year] shall be . . . 186 . . . days and will include two professional development . . . days and at least one . . . non-student day in addition to the student year. At the [plaintiff's] option, a second semester parent-teacher conference day . . . may be converted into a third professional day.

"B. All teachers will be expected to be on duty before the opening of school and closing of school long enough to plan and fulfill their individual responsibilities. Under normal circumstances, all teachers should be in their assigned buildings fifteen . . . minutes before the scheduled beginning of the student day and shall remain thirty . . . minutes after the scheduled end of the student day. Teachers are expected to be available for student help, parent conferences, faculty meetings, general staff department or group meetings, committee work, and other activities of a professional nature before and after regular school hours. . . ."

[5] Dean testified that her caseload increased to twenty-one students, but the plaintiff presented documentary evidence that her caseload increased to twenty-two students.

[6] When there is a severe shortage of qualified candidates for a teaching position, the state department of education may issue a special durational shortage area permit that allows individuals without full certification to teach for up to forty days. During the 2004–2005 school year, school districts were permitted to apply for an extension of that period if no qualified teacher could be found.

[7] After this appeal was filed, the court granted the application of the Connecticut Association of Boards of Education to file an amicus curiae brief in support of the plaintiff's appeal.

[8] Although this court has had little occasion to address the standards that apply in determining whether a union has established a violation of labor law under the unilateral change doctrine, the board has applied the doctrine in many cases over many years. The parties disagree as to how the standards that the board has adopted apply to the facts of this case, but neither the plaintiff nor the union contends that the standards themselves are unreasonable. Accordingly, we defer to the board's interpretation of the law. *Vincent* v. *New Haven*, 285 Conn. 778, 784 n.8, 941 A.2d 932 (2008) (when agency's interpretation of statute is both reasonable and time-tested, it is entitled to deference by this court).

[9] Because we conclude that the board's determination that the plaintiff had unilaterally changed a condition of employment was not supported by substantial evidence, we need not address the thorny questions of whether the reallocation of Richardson's caseload to the special education teachers was in the plaintiff's sole discretion and, if so, whether a substantial increase in their workload as the result of the reallocation would, nevertheless, be subject to mandatory negotiation. See *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 162 Conn. 586–87 (although "board of education alone is empowered to determine whether there shall be extracurricular activities and what such activities shall be . . . assignment of teachers to such activities and the question of compensation for such extracurricular activities [are] mandatory subjects of negotiation"); *In re Bloomfield Board of Education*, Conn. Board of Labor Relations Decision No. 3130 (August 10, 1993) p. 7 (although employer is not required to negotiate "concerning any elimination [of a position] that entails transfer of duties to the remaining employees" and

"it is the sole province of management to determine how many employees to retain to perform the functions selected by its policy-makers . . . when employees are laid off and the remaining unit employees perform the residual work, the collective bargaining process . . . is protected because at the point where the added [workload] becomes substantial, the employer must bargain with the [u]nion over the [workload] increases"); *In re Bloomfield Board of Education*, Conn. Board of Labor Relations Decision No. 2821 (July 3, 1990) p. 7 ("boards of education have the right to determine educational policy and unilaterally implement such policy decisions, but where this implementation impinges in some substantial way upon a major term or condition of employment, there arises a duty to bargain the impact"); *In re New Canaan Board of Education*, Conn. Board of Labor Relations Decision No. 2400 (June 4, 1985) p. 4 (although, under *DeCourcy*, length of school day and school year are not subject to negotiation, additional compensation for increase in school day or school year is subject to negotiation).

[10] The board found that "[b]etween 2001 and 2006, special education teachers throughout Region 16 were responsible for anywhere from four to twenty-two students at any given time." In support of this finding, the board relied on a spreadsheet that the plaintiff had introduced into evidence. It is clear, therefore, that the board accepted the accuracy of that spreadsheet. Accordingly, although the board in its findings of fact did not specifically address the range of caseloads *before* Richardson's departure in October, 2004, which is the relevant time period for purposes of determining whether the union established a fixed and uniform employment practice, and did not focus exclusively on the range of caseloads managed by high school special education teachers, even though it ultimately determined that the practices of special education teachers in other schools were not relevant to its analysis, this court may rely on the spreadsheet to make that determination. As we have indicated, we assume, without deciding, that, in determining whether the union had established a fixed and definite employment practice, the board properly limited its consideration to high school special education teachers.

[11] The plaintiff contends that the evidence established that, in the 2002–2003 school year, the four special education teachers were responsible for sixty-four students. It further contends that, after Richardson's departure, those four teachers were responsible for only fifty-eight students. Accordingly, the plaintiff contends that the average caseload of the special education teachers after Richardson's departure was less than in previous years. Although the defendants do not expressly dispute this contention, because the evidence on this question is not entirely clear, we decline to resolve this factual dispute. See *Wellswood Columbia, LLC* v. *Hebron*, 295 Conn. 802, 808 n.7, 992 A.2d 1120 (2010).

[12] We emphasize that the evidence amply supported the board's finding that the special education teachers had worked an additional ten to fourteen hours per week after Richardson's departure than they had in the immediately preceding weeks. In addition, the evidence shows that these teachers willingly and professionally performed the additional work so as to ensure that the needs of the special education students were met. What the evidence does not show is that the special education teachers performed substantially more hours of work per week after Richardson's departure than they had in previous school years.

[13] The union suggested at oral argument before this court that it was implicit, in the special education teachers' testimony that their weekly workload had increased by ten to fourteen hours after Richardson's departure, that the immediately preceding workload had existed over an extended period of time. In its brief to this court, however, the board states that it considered "the length of time [that] the working conditions of . . . [the] special education teachers had existed, which the [p]laintiff argued was not long enough to have created a past practice. The . . . [b]oard rejected this argument; although the length of time a condition has existed is a factor in the analysis, a relatively short existence is not fatal to a claim of unlawful unilateral change in a past practice." Thus, the board appears to concede that it compared the number of hours that the special education teachers worked per week after Richardson's departure to the number of hours the teachers had worked per week immediately before Richardson's departure, rather than to the number of hours that they had worked in previous school years.

[14] The board concluded that the increase in the weekly work hours after Richardson's departure was different from "the typical variation in caseload in any given year caused by students entering and exiting the special education program" because Richardson's departure "created an *unexpected, sud-*

den and fixed swelling in each [special education] teacher's caseload that lasted from the time of [his] departure . . . through the end of the school year . . . ." (Emphasis added.) The board also concluded that "the *surprise* increase in each [special education] teacher's caseload [constituted] a substantial impact on their workload." (Emphasis added.)

[15] For example, if the workload of school employees in a particular school year were substantially lower than in preceding years, and the employees had reason to believe that the workload would remain constant over the course of the year, they might order their personal affairs, such as child care, carpooling, recreational activities and other such matters, accordingly. A sudden increase in workload to the historic level could disrupt these plans and cause significant inconvenience or expense to the employees. A sudden increase could also cause a temporary surge in workload above historic levels as the teachers attempted to get up to speed. These impacts would not, however, constitute a unilateral change to a fixed and definite employment practice.

[16] Moreover, in the present case, the board found as a factual matter that, when an employee of the plaintiff leaves unexpectedly during the school year and a substitute either cannot be found or cannot take on all of the former employee's duties, the plaintiff's ordinary practice is to allocate the former employee's duties among the remaining employees.

[17] None of the parties has identified the specific provision of state law that prohibits employers from negotiating directly with employees who have chosen a bargaining representative. We presume, however, that the board found that direct dealing with school employees violates § 10-153e (b) (1), which prohibits regional boards of education from "[i]nterfering, restraining or coercing certified professional employees in the exercise of the rights guaranteed in sections 10-153a to 10-153n . . . ." See *In re New London*, Conn. Board of Labor Relations Decision No. 4187 (October 3, 2006) pp. 1, 4 (direct dealing violates General Statutes § 7-470, which governs municipal employers and is substantially similar to § 10-153e).

[18] We would reach this conclusion even if we were to assume Murtha actually believed that the union had approached the teachers, and not the reverse, and that the teachers were not seeking a stipend for the additional workload. Once the union became involved in the dispute, the plaintiff was required to deal exclusively with it and not with the teachers.

[19] Although the board did not expressly conclude that this conduct by Murtha constituted unlawful direct dealing with the teachers, it expressly found that she had engaged in the conduct. It would elevate form over substance to conclude that the board's determination that the plaintiff had engaged in unlawful direct dealing was not supported by substantial evidence merely because, in its analysis of the claim, the board did not expressly refer to this particular conduct, which was a clearer case of direct dealing than the conduct to which it did expressly refer. Cf. *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 588, 628 A.2d 1286 (1993) (this court has held in certain contexts it is improper for reviewing court to reverse agency decision simply because agency failed to state reason for decision on record).

NO. CV 08 4016239S	:	SUPERIOR COURT
REGION 16 BOARD OF EDUCATION	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
V.		
STATE OF CONNECTICUT BOARD OF LABOR RELATIONS, ET AL.	:	OCTOBER 23, 2008

MEMORANDUM OF DECISION

The plaintiff, Region 16 Board of Education, appeals from a November 29, 2007, decision of the Connecticut State Board of Labor Relations (the board) upholding the complaint of the Region 16 Education Association (the union) that the plaintiff had violated General Statutes § 10-153e (b) of the Teacher Negotiation Act (TNA) by failing to negotiate with the union over the workload of Region 16 special education teachers.

The board conducted a public hearing on the union's complaint and made the following relevant findings of fact and conclusions of law. (Return of Record [ROR], Item 9, pp. 3-8.)

> 4. Region 16 has one high school, Woodland High School, which opened for the 2001-2002 school year. . . . Like the Region 16 elementary and middle schools, Woodland has both regular and special education programs.
>
> 6. Federal mandates encourage schools to follow a more inclusive model of special education, in which special education students have as much access to the general

curriculum as possible by being placed in the Least Restrictive Environment (LRE) practicable. Region 16 attempts to follow these mandates, mainstreaming special education students as much as possible. Region 16 also utilizes resource rooms, where all the students in that classroom are special education students.

7. Special education is managed very differently at the elementary, middle, and high school levels. [In the elementary schools, the children are removed from regular classes only occasionally and in the middle schools, the approach is team teaching and staying with the students through each grade (a practice known as "looping").] . . . At the high school, . . . each special education teacher teaches new students each school year and teaches both specific subjects and resource room periods across four grades each year.

8. Teaching special education at the high school level requires more time and work than teaching special education at the middle school level because there are more parents and teachers to meet with at the high school level and because the high school does not use team teaching or looping.

9. At the beginning of the 2004-2005 school year, Woodland had five special education teachers . . . Caseloads generally vary each school year, as new students enter and exit the special education program, but on average a Woodland special education teacher has a caseload in the teens. By contrast, a regular education teacher at the high school may have up to 100 students in his or her classes.

10. The special education teachers worked with their supervisor . . . Director of Pupil Personnel for Region 16 . . . the person in charge of the Region 16 Department of Special Education, prior to the beginning of the 2004-2005 school year to divide up the special education students and create their caseloads for the year.

11. Each teacher is responsible for case management for each student in his or her caseload. "Case management" is defined as the services required by a special education student, and includes writing IEPs, holding PPTs, writing behavioral intervention plans, meeting with social workers and parents, and collaborating with regular education teachers . . . .

12. In or about October 2004, . . . a special education skills lab teacher with approximately a seventeen-student caseload, resigned from his position at Woodland.

13. The Region 16 school district attempted to find a permanent replacement for [this teacher], posting the job internally and placing advertisements in several newspapers throughout October 2004.

14. Despite interviewing several candidates, Region 16 was unsuccessful at finding a permanent replacement [the teacher] for the 2004-2005 school year because the State of Connecticut has a shortage of special education teachers. Furthermore, the school year was already underway when [the teacher] left.

15. [The Director of Pupil Personnel] met with the remaining three skills lab teachers several times to decide how to best service the students in [the teacher's] absence. [The Director of Pupil Personnel] did not meet with or involve the Union at any time.

17. In or about January 2005, Woodland hired a permanent, full-time substitute teacher to replace . . . for the remainder of the school year. [The substitute had a limited Department of Education license or DSAP].

19. At a meeting between [the Director of Pupil Personnel] and the Woodland special education teachers, it was decided that the permanent substitute would teach the self-contained history class, something that had been one of [the

departed special education teacher's] former duties. The group was not comfortable with the substitute taking on a lot of the other duties, so the four teachers kept [the departed teacher's] caseload. The Union was not informed or nor invited to this meeting.

21. Despite the hiring of the substitute, the remaining special education teachers kept [the teacher's] caseload and case management responsibilities for the remainder of the 2004-2005 school year, resulting in an average workload increase of ten hours per week beyond the regular school week for each teacher.

26. Between 2001 and 2006, special education teachers throughout Region 16 were responsible for anywhere from four to twenty-two students at any given time.

27. On or about March 23, 2005, [a special education teacher at the high school] received a letter from [the Superintendent] complimenting her on her performance in [the teacher's] absence.

28. At some time after [the teacher's] departure and the reallocation of his work, the special education teachers approached [the Director of Pupil Personnel] and complained that their workloads were too great. At no point did any of the special education teachers approach [the Director of Pupil Personnel] directly to ask for more money to compensate for the increase in workload after [the teacher's] departure. However, the teachers did ask the Union to do so.

29. Sometime in or about late March 2005, [the Director of Pupil Personnel] asked to speak with [a teacher] after observing her classroom. [The Director of Pupil Personnel] stated to [the teacher] that she and the other special education teachers should not go forward with "their complaint" because there was no point in pursuing it.

30. On March 29, 2005, [the Director of Pupil Personnel] left [the teacher] a voicemail message regarding the special education teachers' "complaint." [The Director of Pupil Personnel] asked [the teacher] to meet with the others to write a letter to [the Superintendent] stating that . . . the Union President approached them about the complaint, not the reverse, and that the teachers were not looking for a stipend for their workload increase. [The teacher] returned the phone call the same day, but did not speak to [the Director of Pupil Personnel] or leave a voicemail. She called [the Director of Pupil Personnel] again the next day and left a voicemail stating that the teachers had contacted [the Union president] themselves, that [the Union President] had not approached them, and that they would not be writing a letter to [the Director of Pupil Personnel]. Also on March 30, 2005, [the teacher] forwarded [the Director of Pupil Personnel's] original voicemail message to [the Union President].

32. Region 16 has had other employees leave during the course of a school year. For example, two social workers took maternity leaves at different times, a speech pathologist left, and a psychologist left her position in the middle school to become the assistant principal of the middle school. Each time, [the Director of Pupil Personnel] followed the same approach she utilized when [the special education teacher] left: she attempted to hire someone, hired a substitute in one case, and collaborated with the remaining staff, but not the Union, to allocate the departing individual's student load.

Based on these findings of fact, the board reached the following conclusions:

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

2. An employer is required to bargain with the union representing its employees concerning terms and conditions of employment and may not bargain directly with its employees on these subjects.

3. The School Board failed to bargain in good faith when it unilaterally and substantially increased the workload of the special education teachers at Woodland High School.

4. The School Board violated the Act when it dealt directly with the Woodland High School special education teachers regarding the increase in workload.

The board ordered the plaintiff to cease and desist from: (a) increasing the workload of its high school special education teachers without negotiating with the union; and (b) dealing directly with employees concerning mandatory subjects of bargaining. The plaintiff was ordered to bargain immediately with the union over any increase in the workload for these teachers, including the increased workload of the 2004-2005 school year, post a notice of a copy of the board's decision, and notify the board of steps taken to comply with its orders. This appeal followed.[1]

The plaintiff's administrative appeal is resolved under the "substantial evidence rule." *Board of Education* v. *Connecticut State Board of Labor Relations*, 190 Conn. 235, 243, 460 A.2d 1255 (1983). Judge McWeeny has succinctly summarized this rule in the context of the TNA as follows: "Judicial review of an administrative agency decision

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The plaintiff is aggrieved by the order of the board, finding a violation of § 10-153e. *Board of Education v. State Board of Labor Relations*, 217 Conn. 110, 584 A.2d 1172 (1991).

requires the court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable . . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency. . . . It is the function of the courts to expound and imply governing principles of law . . . however, great deference is traditionally shown to the construction and application of the statute by the agency charged with its administration. Accordingly, great weight is given to the labor board's interpretations and application of the Teacher Negotiation Act. . . . Courts have traditionally granted labor boards a very large degree of discretion." (Citations omitted; internal quotation marks omitted.) *Board of Education* v. *Connecticut State Board of Labor Relations*, Superior Court, judicial district of New Britain, Docket No. CV 05 4007860 (April 13, 2007, *McWeeny, J.*) (43 Conn. L. Rptr. 240, 241).

Turning to the plaintiff's grounds for appeal, the plaintiff does not dispute that an employer's unilateral change in the conditions of employment involving a mandatory subject of bargaining constitutes an illegal refusal to bargain and a prohibited practice, where the change is not insubstantial. *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 295 A.2d 526 (1972); *Bloomfield Board of Education*, Labor Board Decision No. 2821 (1990). Further, work load is a mandatory subject of bargaining.

West Hartford Education Assn., Inc. v. *DeCourcy*, supra, 586.

The plaintiff's first point of appeal is, however, that the union failed to present a prima facie case that the increase in workload made with regard to the special education teachers was a change in a *unit-wide* past practice of less duties and a clear departure from that practice without bargaining. The general rule, as recognized by the board in its decision; (ROR, Item 9, p.10); and central to the plaintiff's argument, is that the union "must show that there has been a unit-wide existing fixed practice and a clear departure for that practice absent bargaining." *Portland Board of Education*, Labor Board Decision No. 1670 (1978). Thus in *Winchester Board of Education*, Labor Board Decision No. 4130 (2006), where the union claimed that the school board had unilaterally changed the teachers' non-instructional duties at a middle school, the board held that the union had not presented a prima facie case. "Although the bargaining unit members at the Middle School experienced a change in the total amount of prep time from a total of three hundred seventy five minutes per week to three hundred minutes per week, the record is clear that bargaining unit members at the three other schools received varying amounts of teacher prep time." Thus there was no showing of a "unit-wide practice."

Here the board chose not to follow its *Portland* decision, concluding that the high school special education teachers were "unique." "The nature and volume of the work performed by the high school's special education teachers and the method by which it is performed are to unique as to set these teachers apart from other Region 16 teachers.

Thus the Union in this case does not need to establish the existence of a unit-wide practice, because it demonstrated a fixed and definite practice among the unique special education teachers at Woodland." (ROR, Item 9, p. 11.)

The board relied on its decision in *State of Connecticut, Dept. of Motor Vehicles*, Decision No. 3806 (2001), which involved a dress code for union members. The board stated: "Many different dress codes have been established by agencies and the representative of the P-4 unit. Under the circumstances, it would seen unlikely, if not impossible, that a unit-wide practice would exist. If we were to adhere to the unit-wide practice principle with respect to multi-agency bargaining units, it would be very difficult to establish an unlawful, unilateral change even where a definite, fixed practice existed within an agency." Thus there are situations in which the board has recognized an exception to its unit-wide rule.

The plaintiff argues that the board was incorrect to analogize the special education teachers at one school to the situation in *Dept. of Motor Vehicles*, which involved several agencies. It points to the language in *Dept. of Motor Vehicles* stating that the unit-wide rule applies where an employer negotiates with a union with respect to one bargaining unit at a single location. (Plaintiff's brief, p. 10.) The court, however, defers to the uncontested facts found by the board that the elementary schools and middle schools manage special education differently, that special education at the high school requires more time than elementary and middle school, and a caseload for a special

education teacher averages in the teens and a regular education teacher may have up to 100 students. (ROR, Item 9, p. 4, findings 7, 8, 9.) The facts found by the board logically allowed it to conclude that the "unit-wide" rule should not be imposed, and that the union met its prima facie case in this particular factual circumstance.[2]

The plaintiff further contends that the board erred at the hearing of this matter by refusing to admit a study that it had undertaken of class size and workload of non-special education teachers in the school district. The plaintiff contends that the study supported its argument that teachers often are faced with fluctuations in student numbers. The record shows that the board did allow the business manager of the plaintiff to summarize the exhibit, but did not find the exhibit itself relevant to the re-assignment of special education students. (ROR, Item 1, October 13, 2006 transcript, pp. 112-119.) The board had the discretion to decide whether to admit the document based on its relevancy. General Statutes § 4-178 (1) of the Uniform Administrative Procedure Act; *Pet* v. *Department of Health Services*, 228 Conn. 651, 661, 638 A.2d 6 (1994).

The plaintiff next argues that the board did not have sufficient evidence to support its conclusion that the imposition of increased duties was significant. It further argues that any increase in workload was not a change in a past practice, because the special education teachers were used to changes in the number of students year to year. The

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The record supports that the special education teachers at the high school have non-typical duties. See, e.g., ROR, Item 1, October 13, 2006 transcript, pp. 60, 63-64.

record does not support the plaintiff's argument. First there is sufficient evidence that the teachers, after the re-assignment of students, faced an average of an additional ten hours of work. (ROR, Item 1, October 13, 2006 transcript, pp. 32, 50; Item 2, January 10, 2007 transcript, pp. 126-28.) In addition, as the board pointed out in its decision: "The situation created by [the teacher's] departure is clearly distinguishable from the typical variation in caseload in any given year caused by students entering and exiting the special education program at Woodland. That sort of variation is anticipated by the teachers and thus permits them to plan for the natural ebb and flow of students in their caseload. [The teacher's] absence, however, created an unexpected sudden and fixed swelling in each teacher's caseload . . . ." (ROR, Item 9, p. 10.)

The court also does not accept the argument made by the plaintiff that the board improperly rejected its defenses. First the contract language relied upon (Article 24 A) merely expresses the goal of the plaintiff to have appropriate class size subject to the availability of qualified teachers. It does not concern the issue of workload that was addressed by the board. The second defense again raises the issue of substantiality of the increase in workload. As indicated, the record supports the board's conclusion that there was an increase in workload that required bargaining. Finally the plaintiff contends that responding to a departing teacher constitutes a management prerogative. The court agrees with the board's decision: "In *Bloomfield Board of Education*, while affirming management's right to determine its staffing levels, we clearly state that when the duties

of an eliminated position are spread amongst remaining employees, an employer has a responsibility to bargain with the union over that increase." (ROR, Item 9, p. 12.)

The plaintiff claims that the second ground on which the board issued its order – that the director of pupil personnel unlawfully dealt directly with the special education teachers – never happened. The employee was only "collaborating" with the teachers in an effort to resolve the situation. The record indicates otherwise. The plaintiff's employee met with the teachers to obtain their consent to her resolution of the problem of the departing teacher. She also urged them not to continue with their complaint to the union. The board had a factual basis to find direct dealing. *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 162 Conn. 593.

It also contends that the board procedurally erred by taking up the issue as the union raised the issue for the first time in its brief. The record shows, however, that the issue arose during the hearing held by the board. The board by its regulation § 10-153e-52 may allow a variance between the pleading of a prohibited practice and the proof at the hearing, unless "it prejudicially misleads any party or the Board." In light of the fact that considerable evidence was presented regarding direct dealing both by the union and the board, the court cannot find a procedural violation in the board's taking up the matter. See *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 828, 955 A.2d 15 (2008) ("material prejudice to the complaining party must be shown").

The final contention raised by the plaintiff is that the order of the board directing

it to negotiate with the union would lead to a violation of state and federal special education laws. The court has reviewed the citations to state law, such as General Statutes § 10-76d, and federal regulations, such as 34 C.F.R. § 99.1 (relating to the right of privacy for special education students) and 34 C.F.R. §§ 300.320-324 (relating to duties of school boards in developing an IEP for special education students). None of these provisions directly conflict with the board's order regarding mandatory bargaining. Therefore the board's order imposing of the duty to bargain on the plaintiff would not be affected by "restrictions and limitations of public policy as manifested in constitutions, statutes and applicable legal precedents." *Local 1186 of Council No. 4* v. *State Board of Labor Relations*, 224 Conn. 666, 672, 620 A.2d 766 (1993), quoting *Lieberman* v. *State Board of Labor Relations*, 216 Conn. 253, 264-65, 579 A.2d 505 (1990).

For the foregoing reasons, the plaintiff's appeal is dismissed.

Henry S. Cohn, Judge

STATE OF CONNECTICUT
LABOR DEPARTMENT
CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
REGION 16 BOARD OF EDUCATION

DECISION NO. 4270

-and-

November 29, 2007

REGION 16 EDUCATION ASSOCIATION

Case No. TPP-25,352

APPEARANCES:

Attorney William R. Connon
For the School Board

Attorney Ronald Cordilico
For the Union

DECISION AND ORDER

On April 20, 2005, the Region 16 Education Association (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Region 16 Board of Education (the School Board) violated § 10-153e(b) of the School Board Teachers Negotiation Act (TNA or the Act) by unilaterally and substantially increasing the workload of special education teachers without negotiating with the Union.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on October 13, 2006, January 10, 2007, and March 28, 2007. Both parties appeared, were represented, and were allowed to introduce evidence, examine and cross-examine witnesses, and make argument. Both parties filed briefs and reply briefs, the last of which was received on June 6, 2007. 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 School Board 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 relevant times has represented a bargaining unit of certified teachers employed by the School Board that includes high school special education teachers.

3. The Union and the School Board were parties to a collective bargaining agreement with effective dates of August 15, 2004 through August 14, 2007 (Ex. 5), that contained the following relevant provisions:

ARTICLE 9
EMPLOYMENT YEAR AND WORK DAY

A. Commencing with the 2001-02 school year, the standard teacher workday is seven hours-fifteen (7 hours 15 minutes) minutes, including the required time stated in Section B of this article. The teacher workyear shall be one hundred eighty-six (186) days and will include two professional development ("CEU") days and at least one (1) non-student day in addition to the student year. At the Board's option, a second semester parent-teacher conference day (see Article 16) may be converted into a third professional day.

B. All teachers will be expected to be on duty before the opening of school And closing of school long enough to plan and fulfill their individual responsibilities. Under normal circumstances, all teachers should be in their assigned buildings fifteen (15) minutes before the scheduled beginning of the student day and shall remain thirty (30) minutes after the scheduled end of the student day. Teachers are expected to be available for student help, parent conferences, faculty meetings, general staff department or group meetings, committee work, and other activities of a professional nature before and after regular school hours.

C. On Fridays, and on school days immediately prior to legal holidays and on up to four (4) days of scheduled Region No. 16 Education Association meetings, teachers shall be able to depart immediately after student dismissal, provided their duties have been completed.

D. In the event the Board increases the length of the work year, rather than negotiate the impact of the increase, the parties agree the annual salary of each affected teacher will be changed proportionately. For example, if the annual salaries of all teachers are based upon one hundred eighty-six (186) workdays, and all teachers are required to work one (1) more day, all teachers will be paid an additional 1/186th of their annual salaries.

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ARTICLE 13
PREPARATION PERIODS

A. All teachers shall have a minimum of one individual preparation period per day for a total of five preparation periods per week.

B. Middle School Team teachers shall have additional preparation periods for team planning.

ARTICLE 24
CLASS SIZE AND TEACHING RESPONSIBILITIES

A. It is recognized by the Board that pupil-teacher ratio is an important aspect of an effective educational program. The Board agrees to continue its efforts to keep class sizes at an acceptable number as dictated by the financial condition of the Region, the building facilities available, the availability of qualified teachers and the best interests of the Region as deemed administratively feasible.

B. The Board of Education shall assign a teaching/student schedule to high school and middle school academic teachers of english, foreign language, mathematics, science, social studies, reading, music, art, related arts, and physical education, so that such teachers shall have:

1. Five teaching periods
2. Four class preparations
3. Fifty or fewer students to supervise in an assigned study hall.

C. In the event more than twenty (20) students are enrolled in a home economics class, an aide will be provided for that class.

4. Region 16 has one high school, Woodland High School, which opened for the 2001-2002 school year. Woodland serviced only 9th and 10th graders that school year, expanding to include the 11th grade for the 2002-2003 school year, and the 12th grade for the 2003-2004 school year. Region 16 has one middle school, Long River Middle School, encompassing grades 6 through 8, and several elementary schools: Laurel Ledge (pre-Kindergarten through 5th grade), Community (4th and 5th grades), and Algonquin (pre-K through 3rd grade). Like the Region 16 elementary and middle schools, Woodland has both regular and special education programs.

5. Special education teachers have a number of responsibilities that differ from regular education teachers. However, they work the same employment year and work day as regular education teachers. By law, every student enrolled in special education must have an Individualized Educational Placement (IEP) written specifically for him or her based on the individual's disability and needs. An IEP includes goals, objectives, modifications, and the

specifics that must be in that student's learning program. After an IEP is written, a meeting is held to review it. The document is then revised and finalized after the meeting. The law also requires special education teachers to attend Planning and Placement Team (PPT) meetings on an annual basis. However, PPTs are often held more frequently, from several times a year to several times a month, if a parent requests them or if there is a significant change in a student's program.

6. Federal mandates encourage schools to follow a more inclusive model of special education, in which special education students have as much access to the general curriculum as possible by being placed in the Least Restrictive Environment (LRE) practicable. Region 16 attempts to follow these mandates, mainstreaming special education students as much as possible. Region 16 also utilizes resource rooms, where all the students in that classroom are special education students.

7. Special education is managed very differently at the elementary, middle, and high school levels. For example, the elementary schools follow a "pull out" model, meaning children referred to special education are pulled out of their regular education classes for academic support in the resource room, the goal being to keep the children in a regular education classroom as much as is feasible. On the other hand, the middle school has four special education teachers and takes a "team teaching" approach to special education. Team teaching consists of three academic teachers on one team, with three teams per grade level. On average, a special education teacher meets with a team on a weekly basis. By contrast, the high school does not use team teaching, but rather "co-teaching," which entails a special education teacher working in the classroom with a regular education teacher. The middle school also utilizes "looping," meaning that each of three special education teachers are assigned a group of students who they stay with through each grade, thereby teaching only one grade level per year. The fourth special education teacher teaches life skills to the more cognitively or physically challenged students. At the high school, however, each special education teacher teaches new students each school year and teaches both specific subjects and resource room periods across four grades each year.

8. Teaching special education at the high school level requires more time and work than teaching special education at the middle school level because there are more parents and teachers to meet with at the high school level and because the high school does not use team teaching or looping.

9. At the beginning of the 2004-2005 school year, Woodland had five special education teachers: four skills lab teachers and one transition coordinator. Each skills lab teacher is responsible for his or her own "caseload," the number of students each teacher must teach. Transition coordinators, who are responsible for placing students in jobs in the community, do not have caseloads. Caseloads generally vary each school year, as new students enter and exit the special education program, but on average a Woodland special education teacher has a caseload in the teens. By contrast, a regular education teacher at the high school may have up to 100 students in his or her classes.

10. The special education teachers worked with their supervisor, Marna Murtha (Murtha), Director of Pupil Personnel for Region 16 and the person in charge of the Region 16 Department of Special Education, prior to the beginning of the 2004-2005 school year to divide up the special education students and create their caseloads for the year.

11. Each teacher is responsible for case management for each student in his or her caseload. "Case management" is defined as the services required by a special education student, and includes writing IEPs, holding PPTs, writing behavioral intervention plans, meeting with social workers and parents, and collaborating with regular education teachers. This collaboration begins at the start of a school year (and again at the beginning of the second semester, if a student takes a new class), when a special education teacher must hold individual meetings with each regular education teacher of each child – approximately six or seven per student – to ensure that the regular education teachers have seen and understood each student's IEP. The teachers then continue to meet throughout the year as the need arises, for modification or co-teaching purposes; on average each special education teacher meets with regular education teachers three times per week. This ongoing collaboration includes modifying tests for special education students, contacting parents if needed, and handling discipline.

12. In or about October 2004, Art Richardson (Richardson), a special education skills lab teacher with approximately a seventeen-student caseload, resigned from his position at Woodland.

13. The Region 16 school district attempted to find a permanent replacement for Richardson, posting the job internally and placing advertisements in several newspapers throughout October 2004. (Ex. 9).

14. Despite interviewing several candidates, Region 16 was unsuccessful at finding a permanent replacement for Richardson for the 2004-2005 school year because the State of Connecticut has a shortage of special education teachers. Furthermore, the school year was already underway when Richardson left.

15. Murtha met with the remaining three skills lab teachers several times to decide how to best service the students in Richardson's absence. Jessica Veneziano (Veneziano), the transition coordinator, also attended most of the meetings. Murtha did not meet with or involve the Union at any time. The teachers and Murtha were hopeful that a permanent replacement would be hired. The teachers and Murtha decided that the teachers would take over Richardson's caseload in the meantime. In addition, Murtha requested that Veneziano, who normally did not have a caseload, volunteer to take a few of Richardson's former students, which she did.

16. Due to critical shortages in certain subject areas, including special education, the Connecticut Department of Education (DOE) issues a special Durational Shortage Area Permit (DSAP) certification to allow individuals without full certification to teach in those subject areas where there is a severe shortage of qualified candidates. When candidates still

cannot be found, the DOE will permit school districts to hire a substitute without certification in the subject to be taught for up to forty days. If a candidate still cannot be found after forty days, the school district has to replace that substitute with another substitute. During the 2004 – 2005 school year, school districts were also permitted to apply for a substitute-use extension in an emergency situation.

17. In or about January 2005, Woodland hired a permanent, full-time substitute teacher to replace Richardson for the remainder of the school year. The substitute had a DSAP for special education.

18. Also in January 2005, Murtha hired a substitute fully certified in special education to replace a departing resource teacher at the elementary level. That particular substitute did not want to work at the high school level.

19. At a meeting between Murtha and the Woodland special education teachers, it was decided that the permanent substitute would teach the self-contained history class, something that had been one of Richardson's former duties. The group was not comfortable with the substitute taking on a lot of the other duties, so the four teachers kept Richardson's caseload. The Union was not informed of nor invited to this meeting.

20. At either that meeting or another meeting between Murtha and the special education teachers, Murtha suggested that the teachers switch to the looping model used by the middle school special education teachers. The Union was not informed of nor invited to this meeting. The school also bought a copy machine for the skills lab, to give the teachers more time and flexibility to make the voluminous copies their positions required. After speaking with Superintendent of Schools Maggie Shook (Shook), Murtha offered the teachers the option to use substitute teachers periodically to give the teachers additional time to complete paperwork or meet with other teachers (substitute teachers used on a sporadic basis do not have to have special education certification). Murtha also offered to have a retired school psychologist come in to assist with the academic testing, and suggested the paraprofessionals take on some of the clerical work. In the end, the teachers decided against Murtha's proposals.

21. Despite the hiring of the substitute, the remaining special education teachers kept Richardson's caseload and case management responsibilities for the remainder of the 2004-2005 school year, resulting in an average workload increase of ten hours per week beyond the regular school week for each teacher.

22. Deborah Flaherty (Flaherty) is a special education skills lab teacher at Woodland. Her caseload increased from ten to fourteen students when Richardson left, resulting in approximately fourteen hours of extra time spent working per week.

23. Tracy Brunelle (Brunelle) is a special education skills lab teacher at Woodland. Her caseload increased from sixteen to twenty-one students and her work hours increased roughly ten hours per week beyond the regular school week after Richardson left. Over her six years

as a special education teacher at Woodland, Brunelle never had a caseload greater than seventeen students, except for the 2004-2005 school year.

24. Melissa Dean (Dean) is a special education skills lab teacher at Woodland. Dean had fifteen students prior to Richardson's departure; after Richardson left, she was responsible for twenty-one students. Her work hours increased by approximately ten hours per week. In her prior years at Woodland, her caseload each year was between fifteen and nineteen students.

25. Veneziano, who normally did not maintain a caseload, took responsibility for several of Richardson's former students upon his departure.

26. Between 2001 and 2006, special education teachers throughout Region 16 were responsible for anywhere from four to twenty-two students at any given time. (Exs. 6 – 6H).

27. On or about March 23, 2005, Flaherty received a letter from Shook complimenting her on her performance in Richardson's absence. (Ex. 4). The letter read:

> I have heard numerous compliments on you and your fellow resource teachers for the outstanding job you are doing this year. You and your peers have had some obstacles come your way. Art Richardson left early in the year and a full-time substitute came in. Your team worked with this substitute to ensure there was no gap in service for any students.
>
> During this process, even realizing that no permanent teacher could be found to replace Art, all of you stepped up and did what was necessary to ensure program compliance for every student. I want to thank you for your 'can do' attitude and for all your efforts to make sure everything went smoothly during this school year. I will name you as an exemplary person at our next Board of Education meeting. Please continue your efforts to finish this school year and know that many people, including myself, notice the good job that all of you are doing.

28. At some point after Richardson's departure and the reallocation of his work, the special education teachers approached Murtha and complained that their workloads were too great. At no point did any of the special education teachers approach Murtha directly to ask for more money to compensate for the increase in workload after Richardson's departure. However, the teachers did ask the Union to do so.

29. Sometime in or about late March 2005, Murtha asked to speak with Brunelle after observing her classroom. Murtha stated to Brunelle that she and the other special education teachers should not go forward with "their complaint" because there was no point in pursuing it.

30. On March 29, 2005, Murtha left Brunelle a voicemail message regarding the special education teachers' "complaint". Murtha asked Brunelle to meet with the others to write a

letter to Shook stating that Catherine Mirabilio (Mirabilio), the Union President, approached them about the complaint, not the reverse, and that the teachers were not looking for a stipend for their workload increase. Brunelle returned the phone call the same day, but did not speak to Murtha or leave a voicemail. She called Murtha again the next day and left a voicemail stating that the teachers had contacted Mirabilio themselves, that Mirabilio had not approached them, and that they would not be writing a letter to Shook. Also on March 30, 2005, Brunelle forwarded Murtha's original voicemail message to Mirabilio.

31. On April 8, 2005, Flaherty sent Murtha an email with the subject line "case groupings at the high school." (Ex. 8). The email stated:

> The above attachments are something I have been working on to try and group the resource caseloads by grade for next year, and Tracy and Melissa thought I should send you a copy. Basically, it would work that one person would take freshman, the next sophomores, the last juniors, and then we would equally divide the senior case-list. The thinking is that it would be easier to work with two grades instead of four. The above tables are the students' classes grouped by what they were recommended for and what electives they picked. We are hoping to be able to use that data, along with [Assistant Principal] Maureen Carroll and guidance, to group skills labs by grade as well. We still have yet to sit down and really take a look at the groupings. Any feedback or ideas you have are definitely welcome!

32. Region 16 has had other employees leave during the course of a school year. For example, two social workers took maternity leaves at different times, a speech pathologist left, and a psychologist left her position in the middle school to become the assistant principal of the middle school. Each time, Murtha followed the same approach she utilized when Richardson left: she attempted to hire someone, hired a substitute in one case, and collaborated with the remaining staff, but not the Union, to allocate the departing individual's student load.

33. The Union filed the present complaint on April 20, 2005.

CONCLUSIONS OF LAW

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

2. An employer is required to bargain with the union representing its employees concerning terms and conditions of employment and may not bargain directly with its employees on these subjects.

3. The School Board failed to bargain in good faith when it unilaterally and substantially increased the workload of the special education teachers at Woodland High School.

4. The School Board violated the Act when it dealt directly with the Woodland High School special education teachers regarding the increase in workload.

DISCUSSION

The Union alleges in the instant matter that the School Board violated the Act by unilaterally and substantially increasing the workload of the special education teachers at Woodland High School without negotiating with the Union. In its brief, the Union also argues that the School Board violated the Act by directly dealing with Woodland's special education teachers regarding the workload increase.

The School Board argues that the Union has failed to establish a *prima facie* case that there had been a practice of maintaining a certain workload level in Woodland's special education classes and that it had been changed. The School Board further alleges that even if the Union had made its case, the School Board's actions can be defended on several grounds. First, the School Board argues the contract language regarding class size and teacher responsibilities permits it to alter class size when a teacher departs. Second, the School Board claims that any change to the special education teachers' workloads was *de minimus*, causing no substantial change in class size responsibilities. Lastly, the School Board alleges that its actions merely amounted to a legitimate exercise of management prerogative to determine how to handle the departure of an employee.

Concerning the direct dealing allegation, the School Board argues that due process considerations should prevent the Union from adding the allegation in its brief. In this case we agree with the Union for the following reasons.

It is by now well established that 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. ***Norwalk Third Taxing District***, Dec. No. 3695 (1999); ***Bloomfield Board of Education***, Dec. No. 2821 (1990); ***Greenwich Board of Education***, Dec. No. 1580 (1977).

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***, Dec. No. 2364 (1985). Here, the Union argues that the workload of Woodland's special education teachers was substantially increased subsequent to Richardson's departure. We have previously determined that workload is a condition of employment and a mandatory subject of bargaining. ***City of Hartford***, Dec. No. 4113 (2006); ***West Hartford Education Association, Inc. v. DeCourcy***, 162 Conn. 566 (1972). In addition, we have held that for a change in workload made during the term of a collective bargaining agreement to require bargaining, it must be shown to have

a substantial impact. ***Bloomfield Board of Education***, *supra*; ***City of Bridgeport***, Dec. No. 1485 (1977).

The School Board first argues that the Union has failed to make its *prima facie* case of unlawful unilateral change. In so arguing, the School Board alleges that special education class size at Woodland and throughout the Region 16 school district varies, even in the course of a given school year, as students are placed in special education classes or returned to regular education classes, and that Richardson's departure simply created another variation. We disagree. The situation created by Richardson's departure is clearly distinguishable from the typical variation in caseload in any given year caused by students entering and exiting the special education program at Woodland. That sort of variation is anticipated by the teachers and thus permits them to plan for the natural ebb and flow of students in their caseload. Richardson's absence, however, created an unexpected, sudden and fixed swelling in each teacher's caseload that lasted from the time of Richardson's departure in or about October of 2004 through the end of the school year in June 2005. Thus the School Board's first argument must fail.

The School Board next argues that the Union has failed to make its *prima facie* case because it failed to prove that there had been a unit-wide past practice of a specific teacher workload and that the absence of Richardson created a departure from that practice. In so arguing, the School Board relies in large part on our decisions in ***Plainfield Board of Education***, Dec. No. 4131 (2006) and ***Winchester Board of Education***, Dec. No. 4130 (2006) in which we stated that in order for a union to establish a *prima facie* case of unlawful unilateral change under the Act it must show that there has been a unit-wide fixed practice and a clear departure from that practice without bargaining. However, we find the unique circumstances of this case place it outside the parameters of that general language and make those cases inapposite.

The ***Plainfield*** and ***Winchester*** cases involved changes to the amount of time teachers spent doing morning patrol and preparing for classes, respectively. The amount and nature of the work performed in each case was the same or similar for every teacher in the school district. Here, however, the evidence is clear that the work performed by the high school special education teachers differs markedly in both quality and quantity not only from regular education teachers but also Region 16's other special education teachers. The unrefuted testimony presented on the matter clearly established that teaching special education students at the high school level requires more time and work than teaching special education students at the lower levels, in part because, unlike at the middle school, the high school special education teachers do not loop with their students nor do they team teach. They further lack the additional preparation period the collective bargaining agreement grants middle school team teachers. Comparing these high school special education teachers with other teachers in Region 16 amounts to comparing apples to oranges and does not make sense in the context of this case. Because of these marked differences, we believe it is more appropriate to view the work of the High School special education teachers separately for purposes of the unilateral change analysis.

We have previously approached this issue in the manner described above. In ***State of Connecticut, Department of Motor Vehicles***, Dec. No. 3806 (2001), a case arising under the State Employee Relations Act, we found that

> Where a bargaining unit includes employees working in several agencies and where there is a history of differing practices among the agencies, the union's *prima facie* case of unilateral change does not require establishing the existence of a unit-wide practice, but only requires establishing the existence of a definite, fixed practice in the agency applicable to the bargaining unit in question.

In so finding, we reasoned that

> ...the principle that a unit-wide practice is required in all circumstances to support a charge of unilateral change requires re-examination. There is no question that the practice must be definite and fixed, rather than isolated and sporadic. Requiring that it be unit-wide is something else again.

We find the situation presented in this matter to be analogous to the situation presented in ***Department of Motor Vehicles, supra***. Like the agencies discussed in that case, here there is a clear history of differing practices among the teachers at Region 16's five schools. The nature and volume of the work performed by the high school's special education teachers and the method by which it is performed are so unique as to set these teachers apart from other Region 16 teachers. Thus the Union in this case does not need to establish the existence of a unit-wide practice, because it has demonstrated a fixed and definite practice among the unique special education teachers at Woodland.

Furthermore, we find the surprise increase in each teacher's caseload to constitute a substantial impact on their workload. The uncontroverted evidence presented in this case indicated that the average increase in workload per Woodland special education teacher was ten hours per week after Richardson left. We find ten hours of additional work per week over this extended period of time constitutes a substantial change in existing conditions of employment for the affected teachers. As the Union has demonstrated a fixed and definite practice among Woodland's special education teachers and a significant departure from that practice, it has established a *prima facie* case of unlawful unilateral change substantial enough to require bargaining.

We turn now to the School Board's defenses. First, the School Board argues that the applicable contract, specifically Article 24, "Class Size and Teacher Responsibilities," permitted its actions. In this regard, the School Board claims that Article 24 provided the grounds for its response to Richardson's departure in that the language only requires it to make an effort to keep class sizes at an acceptable number as constrained by various factors, including the availability of qualified teachers. Even accepting the School Board's interpretation of this language as correct, we do not believe it excuses the School Board from its duty to negotiate over a substantial increase in teacher workload, regardless of the cause of such increase.

The School Board next argues that the changes to the remaining special education teachers' workloads in the wake of Richardson's departure were *de minimus*, and therefore did not require bargaining. The special education teachers testified credibly for the Union regarding the nature of and amount of work that they must put in for each and every special education student, from creating IEPs to parent-teacher meetings to PPTs, and the School Board did not refute this testimony. In addition, the School Board's own witness, Murtha, agreed with the Union's testimony that the workload of her remaining special education staff at Woodland increased by an average of ten hours per week from approximately November 2004 through June 2005. As we stated above, we do not find such a workload increase to be *de minimus* but in fact substantial. Thus we reject this defense.

Finally, the School Board argues that it was merely exercising management prerogative in the manner in which it responded to Richardson's departure, that it was not responsible for Richardson's departure or for the remaining employees' workload increase in his absence. In making this claim the School Board relies upon our decision in ***Bloomfield Board of Education***, Dec. No. 3130 (1993) in which we state that in the absence of a restrictive clause or unusual factor, it is management's sole province to determine how many employees to retain. However, the School Board's reliance upon that decision is misplaced. In ***Bloomfield Board of Education***, while affirming management's right to determine its staffing levels, we clearly state that when the duties of an eliminated position are spread amongst remaining employees, an employer has a responsibility to bargain with the union over that increase. Therefore this final defense must fail.

Based on the entirety of the record before us, we find that the School Board unilaterally increased the workload of the High School special education teachers after Richardson's departure and for the remainder of the 2004-2005 school year in violation of the Act.

Finally, we find this to be an unambiguous case of unlawful direct dealing.[1] It is well established that once an exclusive bargaining representative has been selected by a group of

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[1] As noted above, the Union raised this allegation for the first time in its brief. In its reply brief, the School Board urges the Labor Board to limit the evidence and its decision in this case to the charge of unilateral change alleged by the Union in its pleading. However, the Labor Board can consider charges outside of the pleadings:

Conn. Reg. Sec. 10-153e-52. Variance between pleading and proof

(a) A variance between the 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 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.

Evidence relating to the charge of direct dealing was presented at length at the hearing in this matter. In fact, it was the School Board's own witness whose testimony established the violation. The parties had ample

employees, an employer must bargain through that agent concerning mandatory subjects of bargaining. The employer may not circumvent the bargaining agent and negotiate directly with the employees. ***City of New London***, Dec. No.4187 (2006); ***Town of Trumbull***, Dec. No. 3928 (2003); ***DeCourcy***, *supra*. We have recognized that this prohibition does not preclude an employer from communicating directly with employees and that it may do so in non-coercive terms; the element of negotiation is critical to the analysis of unlawful direct dealing. ***Town of Trumbull***, *supra*; ***Town of Farmington***, Dec. No. 3237 (1994); ***DeCourcy***, *supra*. Furthermore, we have consistently held that there is no such thing as *de minimus* direct dealing; once a bargaining representative has been established an employer cannot evade its obligation to bargain with that representative, no matter how minor the employer believes the transgression to be. ***City of New London***, *supra*.

In this case it is clear that the School Board engaged in unlawful direct dealing with the Woodland special education teachers. In this regard, the School Board was acutely aware of the staffing shortage created by Richardson's absence and although it made every effort to replace Richardson with a fully certified special education teacher, it ultimately had to make do with a less qualified substitute teacher. Thus it was forced to fully service Richardson's special education students in accordance with federal and state law with inadequate staff levels.

The School Board claims that the four teachers volunteered to increase their own caseloads in Richardson's absence. The evidence presented establishes otherwise. The record here clearly indicates that Murtha, who was the Director of Pupil Personnel and the teachers' supervisor, conducted a series of meetings with the four teachers to discuss how to handle Richardson's former caseload in light of the fact that the school had been unsuccessful in finding a fully qualified replacement for Richardson. After Murtha informed them that an underqualified substitute was the best the school could do, she "suggested" that Veneziano take responsibility for a few students and the other teachers stated they would increase their own caseloads for the remainder of the school year. The teachers told Murtha that the workload was too heavy. In response, Murtha made a number of offers in an attempt to lessen the effects of the increase including hiring a retired psychologist to perform testing and transferring work to the clerical staff.

First, we will not allow the School Board to use the teachers' cooperation in this situation against them. A plain reading of the evidence indicates that a supervisor met with her underlings several times without their collective bargaining representative to discuss the fact that Woodland had a large number of special education students without a teacher and that she "suggested" that at least one teacher "help out" by taking on a case load. She further made several suggestions/offers regarding the increased work load including transferring some of the work to others outside the bargaining unit. Ultimately, the solution to this conundrum was left up to the teachers themselves who were faced with the unenviable task

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opportunity to address the evidence. Therefore we find that, as no party will be prejudicially misled by doing so, the uncontroverted evidence presented in this case requires us to consider a charge of direct dealing despite not being part of the pleading in this matter.

of absorbing substantial increases in work or failing to perform their duties. Even if true volunteerism is a defense to a direct dealing charge, we fail to see how these circumstances can legitimately be deemed "volunteering." The reality is that the School Board constructively required the remaining special education teachers to substantially increase their own workloads with Richardson's former students, while offering ways to alleviate some of the associated work. The agreement to increase the workload of these teachers was reached and implemented directly with the affected employees without the knowledge or input of the Union. We find such action to constitute direct dealing and a clear violation of the Act.

ORDER

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

ORDERED that the Region 16 Board of Education:

I. Cease and desist from:

A. Increasing the workload of Woodland High School special education teachers without negotiating with the Union;

B. Dealing directly with employees concerning mandatory subjects of bargaining.

II. Take the following affirmative action which the Labor Board finds will effectuate the policies of the Act:

A. Bargain immediately with the Union regarding any increase in workload of the Woodland High School special education teachers, including the increased workload of the 2004 – 2005 school year.

B. Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees of the bargaining unit customarily assemble, a copy of this Decision and Order in its entirety.

C. Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 38 Wolcott Hill Road, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the Region 16 Board of Education to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

John W. Moore, Jr.
John W. Moore, Jr.
Chairman

Patricia V. Low
Patricia V. Low
Board Member

Wendella A. Battey
Wendella A. Battey
Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 29th day of November, 2007 to the following:

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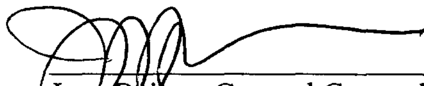

Jaye Bailey, General Counsel
Connecticut State Board of Labor Relations