CONNECTICUT DEPARTMENT OF LABOR
STATE BOARD OF LABOR RELATIONS

STATE OF CONNECTICUT JUDICIAL BRANCH	**Case No. SE-29,409**
-and-	
UNITED PUBLIC SERVICE EMPLOYEES UNION	
-and-	
JUDICIAL PROFESSIONAL EMPLOYEES, AFT/AFT-CT, AFL-CIO	**April 10, 2012**

UNION'S MEMORANDUM IN SUPPORT OF THE PETITION FOR DECERTIFICATION AND DESIGNATION OF REPRESENTATION

Pursuant to the State Employees Relations Act, Conn.Gen.Stat. § 5-270 et seq (hereafter known as SERA), the Union, Judicial Professional Employees, AFT/AFT-CT, AFL-CIO (hereafter referred to as JPE or Union), submits this memorandum of law in support of the petition for election (Decertification and Designation of Representative) filed by the United Public Service Employees Union (hereafter referred to as UPSEU or Petitioner) on August 31, 2011, received by the State Board of Labor Relations (hereafter referred to as the Board) on August 31, 2011 and now being heard by this Board as Case No. SE-29,409 (see Exhibits 3, 7, 8, 9, 10 and 11).

I. INTRODUCTION

Since the creation of collective bargaining rights afforded to state employees under SERA, it has been the demonstrated desire of Judicial Branch employees to be represented by designees of their own choosing. First, in November of 1977, in accordance with Board Case No. SE-3909 and Decision No. 1572-A, the Connecticut State Employees Association (hereafter known as CSEA) was democratically elected by the judicial employees as their representative in labor matters. Subsequently, in January of 1981, in accordance with Board Case Nos. SE-5972 and SE-5980 and Decision No. 1985, the judicial employees elected the American Federation of Teachers (hereafter known as AFT) as their collective bargaining representative.

In the case(s) before the Board, which very well may be unprecedented in scope and in potential impact upon State employee labor relations, JPE and its members have once again demonstrated a showing of interest in the process of establishing an elected collective bargaining representative. JPE understands that their position in these proceedings may be in conflict with their current representative, AFT. Nevertheless, SERA, like other private and public sector statutory collective bargaining enactments, contains provisions for employee self-determination rights and JPE members have exercised their rights under such provisions. For example, Conn.Gen.Stat. §5-271(a) provides, in pertinent part:

> "Employees shall have, and shall be protected in the exercise of the right of self-organization, to form, join or assist any employee organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment ..."

The exercise of such rights by JPE, however, should in no way be interpreted as an endorsement of the Petitioner over JPE's parent organization, AFT. Only a counting of cast ballots in a Board ordered election would demonstrate such an endorsement.

As established at the formal hearings conducted on December 19, 2011, January 11, 2012, February 9, 2012, and February 15, 2012, the issues in dispute on the subject petition(s) are as follows:

1. **Whether the Petitioner, UPSEU, is a valid labor organization pursuant to Conn.Gen. Stat. §5-275(a)(3), i.e., the "six month rule." Tr., 12/19/11, p. 14-15. That provision states, in pertinent part:**

   > "No employee organization shall be eligible to petition for or participate in a recognition election until it has been in existence in state employment for at least six months."

2. **Whether the subject petition is untimely or precluded by a valid and existing collecting bargaining agreement, i.e., the "contract bar doctrine." In accordance with C.G.S. 5-275(a)(3) Tr. 12/19/11, p. 124.**

   > "No election shall be directed by the board during the term of a written collective bargaining agreement, except for good cause."

II. STATE EMPLOYMENT and the "SIX-MONTH RULE"

Conn.Gen. Stat. §5-275(a)(3) states, in pertinent part, "No employee organization shall be eligible to petition for or participate in a recognition election until it has been in existence in state employment for at least six months."

During the hearing of December 19, 2011, the Petitioner's status as a valid labor organization pursuant to this statute was challenged. Tr. 12/19/11, pp. 98 – 102. However, testimony was adduced that the Petitioner had in fact been collecting intent cards from members of the Union in the months preceding the filing of its petition. Tr., 12/19/11, pp. 100 - 102. Moreover, the Petitioner provided testimony that 1) it had been engaged in the organization of state employees as early as 2005 and 2008, Tr. 12/19/11 p. 100, and 2) that the Petitioner currently was the exclusive bargaining agent for nearly one hundred municipal unions within the State of Connecticut. Tr. 12/19/11, p. 97.

A similar challenge to the status of a petitioning labor organization was dismissed by this Board in *State of Connecticut and International Union of Operating Engineers and Connecticut State Employees Association, Decision No. 1682, September 20, 1978.* In that case, the CSEA urged this Board to dismiss the petition of the International Union of Operating Engineers ("IUOE") when IUOE attempted to organize and force a vote of representation among the state employee "NP2" bargaining unit. CSEA claimed that the IUOE had not been in existence in state employment for at least six months, thus making them ineligible to petition the Board. Although IUOE's petition for exclusive representation rights was ultimately dismissed by the Board on other grounds, the Board, under Chairman Fleming James, Jr., held that IUOE was an employee organization within the meaning of SERA and was eligible for file its petition. This holding was based upon the finding that IUOE had actively engaged in soliciting "intent cards" from members of the unit before the 1976 election but did not receive enough cards to be put on the ballot.

> "CSEA urges that the Petitioner is ineligible "to participate for or participate in a recognition election" because it has not "been in existence in state employment for at least six months." But the evidence shows it solicited intent cards among State employees as early as 1976. We hold that at that time it came for use in an organizational campaign." *Id.*, p. 4-5.

The Board's analysis and Chairman James' words are as applicable now as they were then. The evidence in the present case shows that UPSEU had solicited intent cards among State employees as early as 2005. As such, and bolstered by the fact that the Board has recognized UPSEU as an employee organization under the Municipal Employee Relations Act, C.G.S. 7-470 et seq (hereafter known as MERA), UPSEU is an employee organization pursuant to SERA and

had been in existence for at least six months prior to the petition filed on August 31, 2011. Therefore, objections to Petitioner's status as a valid labor organization under SERA are without merit.

III. "CONTRACT BAR" , "THREE-YEAR RULE" and TIMELINESS

The Collective Bargaining Agreement between JPE and the Judicial Branch in effect at the time of the "open window period" had a duration period of July 1, 2009 through June 30, 2012 . Exhibit 33. However, Article 33,Duration, § 1 of the Memorandum of Agreement between the Judicial Branch and JPE/AFT clearly states the following . . .

"Except as otherwise provided, this Agreement shall be effective on approval by the General Assembly through June 30, 2016." Exhibit 33, p.3.

It is this precise time line that it is at the heart of controversy before the Board. The issue in this case is whether the "open window period" of August 1st through August 31st of the year prior to the expiration of the collective bargaining agreement (Connecticut Administrative Code, Regulation of State Agencies § 5-273-10) remains intact or is superseded by the "new" expiration date created by the negotiated SEBAC contract extension.

"Contract Bar" Rule

The analysis begins with a review of the Board's case law under both MERA and SERA. The so-called "contract bar" rule arises by statute and prohibits a representation election during the term of a collective bargaining agreement. Specifically, Conn. Gen. Stat.§5-275(a)(3) states, "No election shall be directed by the Board during the term of a written collective bargaining *agreement* except for good cause." MERA contains *identical* language at Conn. Gen. Stat. § 7-471(1). " ....no precise definition of good cause exists ...." *City of Bridgeport and Local 1303, AFSCME, Co. 4,* Dec. No. 3338, September 21, 1995. "This Board has previously recognized its considerable latitude in analyzing 'good cause' in a contract bar situation." *Id., p. 5, citing, West Hartford Board of Education,* Dec. No. 1183 (1973).

The Board has historically supported the fundamental right of choice and has articulated clear reasons for their position. The Board has opined that employees must be allowed certain times to express their wishes concerning their bargaining representatives, as the Board has always provided for a "window period" at a fixed point in time prior to the expiration of the collective bargaining agreement (see Regs., Conn. State Agencies § 7-741-8(b); *Woodstock Board of Education,* Decision No. 1992 (1981). The window period, "serves the dual purpose of allowing employees the opportunity to express their choice of representative," while limiting the

disruption that such a change can bring by only allowing a petition to be filed during a finite time near the end of a contract. *City of Bridgeport*, Decision No. 3338 p. 4 (1995).

In *City of Bridgeport, supra,* at least four years had passed since the employees had an opportunity to express their choice for elected representative during an open window period. The prolonged delay was due to pending litigation and no definite end to the proceedings was in sight. Although the Board could have exercised their authority to order an election under the "good cause" provisions of 7-741-8(b), the Board sought and found solid legal precedent This Board adopted the "three year rule" in the *City of Bridgeport* case.

"Three-Year Rule"

The "Three-Year Rule" was spawned by the National Labor Relations Board (hereafter known as the NLRB) in *General Cable Corp.*, 139 NLRB 1123 (1962). *See, Town of Winchester v. Connecticut State Bd. of Labor Relations,* 175 Conn. 349, 402 A.2d 332 (1978)(Judicial interpretation accorded National Labor Relations Act is of great assistance and persuasive force in interpretation of the State Employee Labor Relations Act and the Municipal Employees Relations Act in that state statutes dealing with labor relations are closely patterned after the NLRA and because language of three acts is essentially the same.).

The NLRB, under its authority granted in Section 9 of the National Labor Relations Act (hereafter known as the Act) opined that considering its responsibilities to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act , the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" a contract in excess of a three year term cannot bar a representation petition filed after the first three years of the contract. This Board adopted the "three year rule" in the *City of Bridgeport* case.

In the present case, JPE and the Judicial Branch were in the second year of a three year agreement. UPSEU, in accordance with § 5-273-10 of the Regulations of State Agencies, filed the petition within the authorized window period allowable under the agreement in place prior to the ratification of the succeeding agreement (see Exhibit 3). Other incumbent unions will argue that the negotiation and ratification of the successor agreement with a duration period of nearly five years *into* the future and a total contractual duration of seven years would successfully preclude UPSEU from filing a petition and in essence would move the window period from 2011 to 2015. This argument flies in the face of the decision rendered in the *City of Bridgeport* case. Whereas the facts in the present case are not exactly similar to *City of Bridgeport*, the spirit is the same. In both cases, whether by litigation or unusually prolonged contractual terms, the "three-year" rule is applicable. The "three-year" rule "provides for a reasonable period of time in which an incumbent union and an employer can enjoy a collective bargaining relationship without the pressures of an emotionally taxing and disruptive organizing campaign . . . [yet it] . . . prevents a

contract from indefinitely denying to employees the freedom to change or chose a bargaining representative." *Id* at p. 5. As such, UPSEU has met the intent of the "three-year" rule thus making the petition valid and must be honored and an election held.

Timeliness

In light of the NLRB's "three-year" rule and the dismissal of any preclusion to petitioning under the contract bar rule, the final matter to be addressed is the timeliness of the petition itself. It is clear from the evidence provided that UPSEU's petition was filed on August 31, 2011 (see Exhibits 3, 7, 8, 9, 10 and 11). The date of filing is within the proscribed window period provided in Connecticut Administrative Code, Regulation of State Agencies § 5-273-10. However, as this date period was for the preceding agreement rather than the one artificially created by the succeeding agreement, the underlying issue is which window period should be applied. Should it be the first, August of 2011, consistent with the traditional application of the regulation or should it be a second period of August of 2012, consistent with the language of the "three-year" rule articulated in *General Cable Corp*? JPE will offer two arguments (one as primary and the other in the alternative) to show that the August 2011 window period is the correct and just time frame.

First, the provisions of Conn.Gen.Stat. § 5-273 and the regulations created by the statute, 5-273-10 *inter alia*, are clear and unambiguous. Conn.Gen..Stat.§ 5-273(b) states, in pertinent part,

"The board shall have authority, from time to time, to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of sections 5-270 to 5-280, inclusive."

The Code of Administrative Agencies § 5-273-10(b) states, in pertinent part,

"A notification will be considered timely if it is filed between August 1 and August 31 inclusive of the year prior to the expiration of the collective bargaining contract covering the employees who are the subject of the petition."

These statutory and regulatory provisions are clear and unambiguous. The highest Connecticut Courts have opined that "In interpreting the language of a statute, the words must be given their plain and ordinary meaning and their natural and usual sense unless the context indicates that a different meaning was intended.... When the language is plain and unambiguous, we need look no further than the words themselves because we assume that the language expresses the legislature's intent.... Indeed, [a] basic tenet of statutory construction is that when a statute ... is clear and unambiguous, there is no room for construction...." *Gural v. Fazzino*, 45 Conn.App. 586, 588, 696 A.2d 1307 (1997). "We presume that the legislature had a purpose for

each sentence, clause or phrase in a legislative enactment, and that it did not intend to enact meaningless provisions.... It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions.... Accordingly, care must be taken to effectuate all provisions of the statute.... [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant...." *Ferrigno v. Cromwell Development Associates*, 244 Conn. 189, 196, 708 A.2d 1371 (1998).

The Petitioner was timely within the meaning of the regulation as they had complied with the 31 day window and that window period was valid at the time of the petition drive and no superfluous words or insignificant phrases exist. Admittedly, a new **extension contract** was ratified by the General Assembly prior to the UPSEU petition being recorded with the Board. However, the petition (see Exhibit 3) conveys two pieces of important information, 1) a 30% show of interest was conducted and 2) the contract duration described in the petition is "7-1-09 – 6-30-12". As the aforementioned regulation clearly shows that August 1 through August 31 is the correct window period and as Exhibit 3 demonstrates the contract addressed by the Petitioner had a duration of three years expiring in June of 2012. Thus, the Petitioner complied with the regulation and as such the petition is timely. Any contrary interpretation of the facts vitiates the clear and unambiguous language of this provision allowing for employee free choice of collective bargaining representative.

Second and alternatively, it is not often that iconic American case law finds its way into briefs submitted to the Board. Rather, local jurisprudence is used to make the finer points of law. But in this case, the holdings of *Roe v Wade*, 41 U.S. 113 (1973), resonate well with the current situation. In *Roe*, it was argued that after the birth of the child the question related to the termination of the pregnancy was moot. But the learned Court found reason and cause to rule on the case through a new legal doctrine known as "capable of repetition, yet evading review." The Justices in *Roe*, knew that dismissing the case on procedural grounds would have cleared their docket without creating a political firestorm, but they knew that denying justice today would only make for additional litigation tomorrow. That is the precise issue here.

In the progeny of cases that followed *City of Bridgeport*, the Board has routinely held that "the disruption caused by [this] petition is outweighed by the employees' rights", *Fairfield Board of Education*, Decision No. 4329 (2008). It can be anticipated that if the Board dismisses UPSEU's petition, UPSEU will reorganize and file again after the completion of the third year of the contract which will be August, 2012. There is no need to forego a decision and evade review if the exact circumstances in the case will be repeated in less than six months. As such, the Board must continue to support employee rights to self-determination, deem the petition to be timely and order an election.

IV. ECHOES OF *DURA ART STONE*

In 2005, the National Labor Relations Board, ruled on case entitled *Dura Art Stone, Inc.*, 346 N.L.R.B., No. 14 (2005). In that case, the General Counsel for a petitioning union argued that the employer, Dura Art Stone, Inc., and the incumbent union, Amalgamated Industrial Workers Union, Local 61, violated the Act because they entered into a new contract, containing a union security clause with the knowledge that the incumbent union, Local 61, no longer represented a majority of the unit employees. The General Counsel relied on a consistent line of NLRB decisions commencing with *Hart Motor Express*, 164 NLRB 382 (1967), that hold an employer and incumbent union violate the Act by entering into a new contract after acquiring knowledge that the union no longer enjoys majority support.

In the present case, the Judicial Branch and AFT-CT had knowledge of representation discontent of their respective employees and members over the efforts by both to reconstitute the failed SEBAC agreement because intent cards were being solicited by the Petitioner . Tr. 12/19/11, testimony of Ronald Suraci, p. 102.

In May of 2011, JPE had originally voted against the first concession agreements. Tr. 2/15/12, testimony of John Satti p. 502. Following the failed vote, the employer and the incumbent union(s) continued to negotiate modified concession terms to include the now infamous Attachment H. Tr. 2/9/12, testimony of Linda Yelmini p. 262. In the weeks prior to the second ratification vote, UPSEU was soliciting intent cards from a variety of State unions, including JPE. Tr. 12/19/11, testimony of Ronald Suraci, p. 102.

According to the testimony of Attorney Dan Livingston, Chief SEBAC negotiator, he and Ms. Yelmini, Linda Yelmini, Director of the Office of Labor Relations for the State of Connecticut, discussed with other SEBAC members, that they should incorporate an express "contract bar" provision in the agreements that were to be forwarded to the General Assembly for ratification. Tr. 2/9/12 , testimony of Linda Yelmini p. 262. Attachment H is incorporated into an agreement signed by the employer and the coalition representative of the incumbent union(s). Exhibit 23.

It should be noted, Attachment H does more to bar actions between the employers and the incumbent union(s) than it does to solidify the "contract bar" rule as the duration clauses of the unit agreements do more for that purpose. In light of the public policy inherent in the previously cited provisions supporting state employees' right to self-determination, the "contract bar" component of Attachment H should be held invalid and deemed inoperative. Further, it does not comport with NLRA case precedent, i.e., the holdings of *General Cable Corp*, 139 NLRB 1123 (1962), as it restricts the employees' right of free choice and self-determination of an elected representative beyond the "three-year" rule.

In *Dura Art Stone,* management and the union, despite the knowledge that competing unions were now in play, negotiated and renegotiated collective bargaining agreements that

included protection provisions for the incumbent union. The facts are similar to the instant case. It is important to note that one of the remedies ordered in *Dura Art Stone* was, *inter alia,* to hold an NLRB supervised election to determine the employee's representative.

V. CONCLUSION

For the reasons set forth herein, the Judicial Professional Employees, through their legal representative, request that this Board dismiss objections to the instant petition and an order an election for the members of JPE in order to enforce their right to choose their bargaining representative.

Respectfully submitted,

for the Executive Board and members of the Judicial Professional Employees.

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CERTIFICATION

This is to certify that a copy of the foregoing Union's Memorandum In Support Of The Petition For Decertification and Designation of Representation was mailed postage prepaid, this 13th day of April, 2012, to the following counsel of record:

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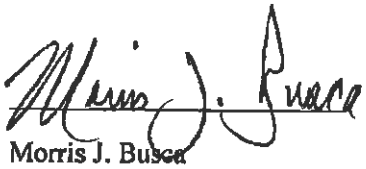

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