**STATE OF CONNECTICUT**
**CONNECTICUT STATE BOARD OF LABOR RELATIONS**

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| In the matter of | : | |
| | : | |
| STATE OF CONNECTICUT DIVISION | : | |
| OF CRIMINAL JUSTICE; STATE OF | : | Case SE-29,408 |
| Employer Respondent | : | |
| | : | |
| -and- | : | |
| | : | |
| UNITED PUBLIC SERVICE | : | |
| EMPLOYEES UNION | : | |
| Petitioning Union | : | |
| | : | |
| -and- | : | |
| | : | |
| LOCAL 749, COUNCIL 4, AFSCME, | : | |
| AFL-CIO | : | |
| Incumbent Union | : | |
| | : | |
| -and- | : | |
| | : | |
| STATE EMPLOYEE BARGAINING | : | |
| AGENT COALITION | : | |
| Intervenor | : | APRIL 18, 2012 |

**POST HEARING BRIEF OF THE DIVISION OF CRIMINAL JUSTICE**

## I. THE PROCEEDINGS

The Division of Criminal Justice (the "Division") and Local 749, Council 4, AFSCME, AFL-CIO ("AFSCME Local 749") are parties to a collective bargaining agreement (the "Contract") dated July 1, 2011 through June 30, 2016. (Exhibit 31). This contract was ratified by bargaining unit employees on August 16, 2011 and by the General Assembly on August 22, 2011. (December 19, 2011 Tr., p. 135; Exhibits 27, 28, and 29).

On August 31, 2011, the United Public Service Employees Union ("UPSEU") filed a petition for election and decertification of AFSCME Local 749 as the exclusive bargaining representative of the employees covered by the Contract. (Exhibit 2). The petition was served on Linda Yelmini, Director of Labor Relations for the State of Connecticut. (Id). The Division is the statutory employer of the employees in this case. Therefore, service by UPSEU should have been made on an official of the Division, and not on Ms. Yelmini, who is the head of the State's Office of Labor Relations. However, the Division is not pursuing improper service by UPSEU as a bar to the filing of the petition in this case.[1]

On or about September 27, 2011, the State Employee Bargaining Agent Coalition ("SEBAC") filed a Motion to Intervene in Case SE-29,408 and other pending petitions filed by UPSEU. (Exhibit 55). On October 25, 2011, the Board granted SEBAC's motion with limitations. (Exhibit 68).

On or about September 29, 2011, the Board's Agent, Katherine C. Foley, conducted an informal conference regarding Case No. SE 29,408 and the other petitions filed by UPSEU. At that conference, Agent Foley informed all parties that all of the petition cases would be consolidated for hearing by the Board on the issue of whether there was a contract bar to the petitions. Agent Foley also informed the parties that one of the cases (Case No. SE-29,381) involved a threshold question on whether commencement of binding interest arbitration barred the petition, and that a hearing on the interest arbitration bar would be heard first by the Board. (December 19, 2011 Tr., pp. 159-163). Agent Foley indicated that the Division and other respondents to UPSEU's petitions would be

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[1] The Division's made this decision based on the fact that a staff member of the State Board of Labor Relations (the "Board") apparently advised UPSEU to serve its petition on Ms. Yelmini.

afforded an opportunity to address the applicability of the statutory contract bar at a subsequent hearing. (Id). Accordingly, the Division was not given notice of and did not participate in the October 12, 2011 and October 31, 2011 hearings that resulted in the Board's Decision No. 4571, issued on December 14, 2011. (Id. at p. 162).

On October 18, 2011, the Board issued notice of hearing to be held on December 7, 2011, for Case No. 29,408 and the other cases with which it had been consolidated. (Exhibit 7). On November 1, 2011, the Board granted a request to postpone the hearing, and it was rescheduled to commence on December 19, 2011. (Exhibit 8). Subsequently, additional hearing notices were issued. (Exhibits 9, 10, and 11).

On December 19, 2011, January 11, 2012, February 9, 2012, and February 15, 2012, the Board held hearings in the consolidated cases, including Case No. SE-29,408. During the hearings, the parties appeared, were represented by counsel, and were given an opportunity to present evidence, examine and cross-examine witnesses, and make argument.

The parties are filing briefs, due April 18, 2012, with reply briefs due April 30, 2012.

## II. PROPOSED FINDINGS OF FACT

1. The Division is an employer within the meaning of the Act Concerning Collective Bargaining for State Employees, also known as the State Employee Relations Act ("SERA"). C.G.S. § 5-270 et seq.

2. AFSCME Local 749 is an employee organization within the meaning of SERA.[2]

3. SEBAC is a coalition of State employee unions, including AFSCME Local 749, which bargains as to retirement and health benefits for all organized state employees. SEBAC exists pursuant to General Statutes § 5-278(f).

4. In order to assist in resolving the budget deficit facing the State of Connecticut and to, in part, preserve the jobs of thousands of state employees (February 9, 2012 Tr., pp. 283-284), on July 22, 2011, SEBAC and the State of Connecticut entered into an agreement (the "SEBAC Agreement") addressing retirement and health and welfare benefits effective through 2022. (Exhibit 23).

5. The SEBAC Agreement states, in relevant part:

> **IV. JOB SECURITY**
> **C. Job Security for Units Not Covered by OLR.**
> Job security for other units has been or shall be negotiated on a unit-by-unit basis consistent with the 2011 Agreement Framework, including the provisions for wage and other matters which are summarized in Attachment A.

(Exhibit 23).

6. The provisions for wages and other changes summarized in Attachment A of the SEBAC Agreement apply through June 30, 2016. (Compare Exhibit 23 and Exhibit 31).

7. The Division and AFSCME Local 749 negotiated a collective bargaining agreement for the period July 1, 2011 through June 30, 2016 with provisions consistent with Attachment A of the SEBAC Agreement. (Exhibit 31).

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[2] No challenge to AFSCME Local 749's status as a labor organization within the meaning of SERA was raised in the proceedings.

8. The Contract between the Division and AFSCME Local 749 is a separate agreement from the SEBAC Agreement. (Id).

9. The Division is a separate employer under SERA and bargained separately with AFSCME Local 749 with respect to the Contract. (December 19, 2011 Tr., pp. 139-140).

10. On August 16, 2011, the Contract between the Division and AFSCME Local 749 was ratified by the bargaining unit members. (December 19, 2011 Tr., p. 135).

11. During the negotiations of the Contract, up to and including the ratification date, bargaining unit members were aware of the five-year duration of the Contract. (February 15, 2012 Tr., p. 481).

12. There were multiple meetings with bargaining unit members regarding the Contract and there was never an objection by any member as to the five-year duration of the Contract. (Id).

13. On July 1, 2011 Public Acts, Spec. Sess., June 2011, No. 11-1 became law. Section 11(a) states, in relevant part:

> Not later than five calendar days after an agreement between the state and the State Employee Bargaining Agent Coalition, signed by both parties is filed with the clerks of the Senate and the House of Representatives, or August 31, 2011, whichever occurs first, the General Assembly may call itself into special session for the purpose of approving or rejecting any such agreement . . . . [I]f the General Assembly does not call itself into special session in accordance with this subsection, such agreement and any appendices filed with such agreement shall be deemed approved by the General Assembly as of the date such agreement was filed with the clerks . . . .

(Exhibit 29).

14. By letters dated August 22, 2011, the SEBAC Agreement and the Contract between the Division and AFSCME Local 749 were submitted to the clerks of the Senate and House of Representatives respectively. (Exhibits 27 and 28).

15. The General Assembly did not call itself into special session within five calendar days after August 22, 2011 for the purpose of approving or rejecting the SEBAC Agreement or the Contract between the Division and AFSCME Local 749.

15. Accordingly, both agreements were deemed ratified by the General Assembly retroactive to August 22, 2011. (Exhibit 29).

16. On August 31, 2011, 15 days after bargaining unit members ratified the Contract between the Division and AFSCME Local 749, and nine days after the Contract was ratified by the General Assembly, UPSEU filed a petition for election and decertification of AFSCME Local 749 as the exclusive bargaining representative of the employees covered by the Contract. (Exhibit 2).

## III. ARGUMENT

### A. THE CLEAR AND UNABMIGUOUS LANGUAGE OF SECTION 5-275 OF THE CONNECTICUT GENERAL STATUTES BARS THE PETITION IN CASE NO. SE-29,408.

State employees have no fundamental right to collective bargaining as the right exists only by statute. See State Management Ass'n of Connecticut v. O'Neill, 204 Conn. 746 (1987). Thus, collective bargaining rights and all other rights attendant thereto, including the right of self-determination for employees to choose a bargaining representative, may be curtailed as deemed appropriate by the General Assembly. State of Connecticut (DAS), SBLR Decision No. 3427 (1996) ("Collective bargaining rights are created by the legislature and my be restricted by the legislature"), aff'd Connecticut State

Employees Ass'n v. State of Connecticut, et al., Judicial District of Hartford-New Britain at New Britain, Dkt. No. HHD-CV-96-0056307 (July 18, 1997).

Section 5-275(a) of the Connecticut General Statutes ("Section 5-275"), states, in pertinent part, that "[n]o election shall be directed by the board during the term of written collective bargaining agreement, except for good cause." C.G.S. § 5-275(a). This contract bar rule, as it is colloquially known, reflects a clear legislative intent "to assure unions of some stability in their relationship to bargaining units they represent . . . [and] to protect employers and assure them that they will not have to renegotiate basic terms and conditions for the period of the contract." State of Connecticut (OLR), SBLR Decision No. 1913 (1980); see also City of Shelton, SBLR Decision No. 1065 (1972) (it is the responsibility of the Board to stabilize relations between employee organizations and employers). As cogently stated by the Board, "it is an election within the term of a contract that [Section 5-275] bars." State of Connecticut (Executive Branch), SBLR Decision No. 1984 (1981); see also State of Connecticut (Department of Corrections), SBLR Decision No. 4571 (2011) ("The so called 'contract bar' rule arises by statute and prohibits a representation election during the term of a collective bargaining agreement").

In this case, the facts unequivocally establish the existence of a valid contract bar. The Contract between the Division and AFSCME Local 749 was ratified by the bargaining unit membership on August 16, 2011 (December 19, 2011 Tr., p. 135) and by the General Assembly effective August 22, 2011 (Exhibits 27, 28, and 29). That the General Assembly ratified the five-year Contract with full knowledge of rights and obligations set forth in SERA carries with it a presumption of validity. See Miller v. Eighth Utilities District, 179

Conn. 589, 594(1980) ("the legislature is presumed to be aware and to have knowledge of all existing statutes and the effect which its own action or non action may have on them").

For whatever reason(s), UPSEU did not file its petition until August 31, 2011.[3] (Exhibit 2). At that time, however, the Contract and the contract bar, by operation of law, were already in effect.

Given the lack of any ambiguity in the law or the facts, this is not a case that requires the Board to engage in any interpretation of Section 5-275. Instead, this is a simple case that requires the Board to dismiss the petition in Case No. SE-29,408 because it was filed during the first year of a valid collective bargaining agreement and thus, is barred as a matter of law.

In addition to the foregoing, UPSEU failed to present even a scintilla of evidence from which the Board could find good cause to deviate from the statutory proscription of Section 5-275 in Case SE-29,408. During the course of the hearings, UPSEU spent an inordinate amount of time questioning witnesses about the creation of Attachment H to the SEBAC Agreement. However, UPSEU never once attacked the efficacy of the Contract between the Division and AFSCME Local 749.

To the contrary, counsel for UPSEU repeatedly affirmed the validity and applicability of the individual unit contracts by stating that "those provisions of the contract that were voted on and passed by the members, would still be binding legal documents and legal contracts, and we would be looking to represent these members under those existing contracts . . . ." (December 19, 2011 Tr., p. 158).

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[3] UPSEU presented no evidence explaining the timing of its actions.

As Sal Luciano, Executive Director of AFSCME Council 4, testified, no bargaining unit member ever objected to the five-year duration of the Contract between the Division and AFSCME Local 749 or the bar it created following ratification. (February 15, 2011 Tr., pp. 478-479 and 481). To that end, it is wholly inconsistent for UPSEU to argue on the one hand that it is willing to administer the Contract ratified by bargaining unit members with full awareness of its duration, but on the other hand argue that good cause exists to ignore the statutory bar created by the very same Contract.

This is not a case where any bargaining unit member's right to express his or her wishes concerning bargaining representation has been hijacked due to years of pending litigation. Nor is this a case where any bargaining unit member's right to express his or her wishes concerning bargaining representation will be denied for an indefinite period of time. Instead, this is a case where bargaining unit members ratified a contract with full knowledge of the benefits it conferred (i.e., job security), its five-year duration, and the contract bar it created. That some members may wish to change their minds as to representation does not establish good cause and thus, the petition should be dismissed.[4] See Town of Wilton, SBLR Decision No. 1995 (1981) ("[W]e do not think good cause is shown by a change of mind on the part of some of the members").

### B. THE PROPER WINDOW FOR FILING A PETITION IN THIS CASE IS THE PERIOD BETWEEN AUGUST 1 AND AUGUST 31, 2015.

Recognizing that employees should be allowed certain times to express their wishes concerning representation, the Board has promulgated a regulation to create a workable

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[4] Aside from the fact that UPSEU has failed to establish good cause in this case, the Board should refuse to direct an election during the first year of the Contract if for no other reason but that to do otherwise would go against the Board's history of allowing petitions "only at times when the filing will be the least disruptive to the collective bargaining relationship and process." Town of West Hartford, SBLR Decision No. 4062 (2005).

window period for the filing of election petitions. Pursuant to Section 5-273-10(b) of the Regulations of Connecticut State Agencies ("Section 5-273-10"):

> 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 . . . . The board may consider petitions filed at other times if compelling reasons are shown for deviation from the above rule.

Conn. Agencies Regs. § 5-273-10(b).

Given the validity of the Contract between the Division and AFSCME Local 749, which includes a five-year term from July 1, 2011 through June 30, 2016, the petition in Case No. SE-29,408 is untimely under the Board's regulations because the proper window for filing such a petition is the period between August 1 and August 31, 2015. Accordingly, the Board cannot direct an election in this case, and the petition should be dismissed.[5]

Further, in its regulations, the Board requires a petitioner to establish a "compelling reason" to consider timely a petition filed outside of the defined window period. State of Connecticut (OLR), SBLR Decision No. 1913 (1980). The phrase "compelling reason" was meant to express the Board's understanding of "the great[er] importance of stability in the large scale and complicated labor relations of state employment." Id. This is further reason to find that UPSEU did not establish "good cause" for deviation from the statutory contract bar.

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[5] The Board has never recognized the premature extension doctrine with respect to SERA. Moreover, the Board should refrain from considering such a doctrine under SERA, which should be construed as placing greater emphasis on stability in labor relations. See State of Connecticut (OLR), supra. In light of the events leading up to the ratification of the Contract between the Division and AFSCME Local 749, including the budget deficit facing the State and the reality of mass lay-offs, even if the Board were to consider the premature extension doctrine under SERA, it should not apply to the facts of this case nor should it apply without going through the proper administrative rulemaking procedures.

UPSEU has not established a compelling reason to deviate from the August 1 through August 31, 2015 window period created by the Contract and Section 5-273-10 and thus, the petition should be dismissed in order to properly preserve the element of stability central to labor relations in the State.

### C. THE THREE-YEAR RULE UNDER MERA CANNOT BE EXTENDED TO SERA AND THEREFORE, DOES NOT APPLY TO UPSEU'S PETITION IN THIS CASE.

#### 1. The Three-Year Rule Cannot Be Applied To This Case Or The Contract Between The Division And AFSCME Local 749.

As indicated earlier in this Brief, Agent Foley assured the Division that there would be a full opportunity to argue the applicability of the contract bar rule under SERA as applied to Case No. SE-29,408. (December 19, 2011 Tr., pp. 159-163). Despite this assurance, in Decision No. 4571, the Board, in dicta[6] and without analysis, announced that "[w]e also find the adoption of the three year rule in SERA reasonably accommodates preservation of stability in collective bargaining relationships and employee freedom to choose a bargaining representative." State of Connecticut (Department of Corrections), SBLR Decision No. 4571 (2011).

To the extent the Board has already decided that under SERA a petition for election may be filed after the third year of a collective bargaining agreement, the Board cannot and should not apply that rule to this case.

The Contract between the Division and AFSCME Local 749 has a five-year term from July 1, 2011 through June 30, 2016. (Exhibit 31). The General Assembly has made clear that with respect to that Contract, a statutory contract bar exists for the duration of the

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[6] It was not necessary for the Board to reach this issue in that decision, since it found the petition barred by the pendency of interest arbitration proceedings. Decision No. 4571, at 8.

Contract term. (Exhibits 23, 27, 28, and 29). To that end, any application of a rule that undermines the statutory contract bar in this case is an application of a rule that contradicts the unambiguous will of the General Assembly. The Board plainly has no power to modify a statute. See e.g., State of Connecticut (Department of Public Safety), SBLR Decision No. 4550 (2011).

Furthermore, just as the three-year rule announced under the Municipal Employee Relations Act ("MERA") did not apply to the facts of the case in which it was first announced,[7] the three-year rule announced in Decision No. 4571 should not apply to this case despite its consolidation with Case No. SE-29,381 because Agent Foley assured the Division that it would be afforded an opportunity to fully address the contract bar rule in Case No. SE-29,408.

Accordingly, not only should the petition be dismissed in this case, but the Board should refrain from applying a three-year rule to any case under SERA, and particularly to this case involving the Contract between the Division and AFSCME Local 749.

**2. At The Very Least, The Board Must Use The Administrative Rulemaking Process To Establish A Three-Year Contract Bar Rule Under SERA.**

Even if the Board arguably has authority to establish a three-year limitation on the contract bar for filing petitions under Section 5-275, the Board must do so by rulemaking and not by a decision in a contested case.

Section 5-273(b) of SERA ("Section 5-273") states that:

> [t]he 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

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[7] In City of Bridgeport, Decision No. 3338 (1995), the Board decided the case on the grounds that good cause existed to deviate from the statutory contract bar. Although not required to, the Board went on to state that "[w]e also believe that the adoption of the three-year rule . . . is in order."

> provisions of sections 5-270 to 5-280, inclusive. ***Such rules and regulations shall be effective upon passage, in conformance with the terms of chapter 54.***[8]

C.G.S. § 5-273(b) (emphasis added). Under the UAPA, a "'[r]egulation' means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. . . ." C.G.S. § 4-166(13). Additionally, "[w]here a rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future, it is a substantive rule, i.e., a 'regulation' requiring compliance with the UAPA." Salmon Brook Convalescent Home, Inc. v. Commission of Hospitals and Health Care, 177 Conn. 356, 362 (1979) (citing Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969)).

Without question, the three-year rule is an agency statement that prescribes law or policy and has a substantial impact on the rights and obligations of the parties that appear before the Board and is thus a "regulation" that must be passed in conformance with the UAPA's rulemaking process pursuant to Section 5-273. That process includes giving notice of the intended action and holding hearings prior to adoption. See C.G.S. § 4-168; see also Salmon Brook Convalescent Home, Inc., surpra, 177 Conn. at 362 (citation omitted) ("Such provisions were enacted not only to give the public an opportunity to participate in the rule-making process but also to enable the agency promulgating the rule to educate itself before establishing regulations which have a substantial impact on those regulated"). Finally, and most importantly in this case, the proposed rule or regulation

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[8] Chapter 54 of the Connecticut General Statutes is the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 et seq. ("UAPA").

would require review and approval by the Legislative Regulation Review Committee of the General Assembly. C.G.S. § 4-170.

In enacting Section 5-273, the General Assembly made clear that the Board is not free to unilaterally determine the manner in which it announces a new rule affecting the rights of parties that come before it. See e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Therefore, the three-year rule announced in Decision No. 4571 may not be binding on the Division in this case.

In Decision 4571, the Board stated its position on this issue as follows:

> [w]e do not agree that such adoption [of the three-year rule] should only be effected through the administrative rule-making process and note that the initial application of the three year rule were [sic] announced by the NLRB and the Labor Board in *General Cable Corp.*, 139 NLRB 1123 (1962) and *City of Bridgeport, supra*, respectively. . . .

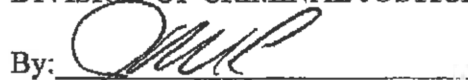
The Division maintains that the Board's reliance on General Cable Corp. is misplaced. The National Labor Relations Act (the "NLRA") does not contain a legislative pronouncement equivalent to Section 5-275, which states, in pertinent part, that "[n]o election shall be directed by the board during the term of written collective bargaining agreement, except for good cause." C.G.S. § 5-275(a). To that end, when the NLRB announced its three-year limitation on a contract bar, it was not directly contradicted by the express language of the NLRA. SERA, however, expressly requires the Board to refrain from directing an election during the term of a written contract, except for good cause. A determination of the "good cause" necessary to disregard the unambiguous proscription set forth in SERA requires analysis of the facts applicable to a particular petition; it cannot be

assumed that "good cause" applies to deviate from the statute in all cases.[9] See e.g., Clifton v. Federal Election Comm'n, 114 F.3d 1309, 1312 (5th Cir. 1997) ("Agencies often are allowed through rule-making to regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted").

## IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Board dismiss the petition filed by UPSEU in Case No. SE-29,408.

THE RESPONDENT,
DIVISION OF CRIMINAL JUSTICE



By: ____________________

Saranne P. Murray
Jarad M. Lucan
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Tel.: (860) 251-5000
Fax: (860) 251-5215
Its Attorneys

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[9] Contrary to the Board's understanding, the NLRB's decision in General Cable Corp., actually supports the Division's position that the Board must use the administrative rulemaking process before announcing any sort of per se rule under SERA effecting the statutory contract bar. Prior to General Cable Corp., the NLRB's rule had been that a contract will serve as a bar to an election petition for only so much of its term that does not exceed two years. Pacific Coast Association of Pulp and Paper Manufacturers, 121 NLRB 990 (1958). In determining that three years was more appropriate, the NLRB considered factors such as the economic developments resulting from unemployment, the international setting, technological changes, the need to respect the provisions of collective bargaining agreements, the desirability of discouraging raids among unions, the wisdom of granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from their relations with their employers, and the imperative for long-range planning responsive to the public interest and free from any unnecessary threat of disruption. General Cable Corp., 139 NLRB at 1126. In addition, and perhaps of "greatest significance," the NLRB looked at the trend of collective bargaining agreement length and determined that the majority of contracts were negotiated for terms of three years. Id. at 1127. For the Board to make a similarly educated determination regarding the applicability of a rule under SERA, the rulemaking process is paramount. Should the Board still insist that rulemaking is not required, the Board need only look to the length of each individual unit collective bargaining agreement in the consolidated petition cases (Exhibits 30-34) to realize that its three year rule simply fails to reflect the reality and trend in state employment; the factor the NLRB found to be of "greatest significance."

**CERTIFICATE OF SERVICE**

The undersigned certifies that an original and four copy of the foregoing brief was hand delivered this 18th day of April, 2012 to:

State Board of Labor Relations
Connecticut Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

I hereby certify that a copy of the foregoing brief was mailed, via U.S. Mail, postage prepaid, this 18th day of April, 2012, to:

John M. Walsh, Jr.
Licari, Walsh & Sklaver, LLP
105 Court Street, 4th Floor
New Haven, CT 06511-6957

Ellen Carter
Office of Policy and Management
450 Capitol Avenue, MS#530LR
Hartford, CT 06106-1379

George Kelly, Jr.
Siegel, O'Connor, O'Donnell & Beck
150 Trumbull Street
Hartford, CT 06103-2406

Robert Krzys
P.O. Box 207
New Hartford, CT 06057-0207

Barry Scheinberg
50 Columbus Boulevard
Hartford, CT 06106

Barbara Resnick
UPSEU
P.O. Box 2
Clinton, CT 06413-0002

Douglas Hall
NAGE/IBPO
346 Main Street
Cromwell, CT 06416-2305

Brian Doyle
Ferguson & Doyle
35 Marshall Road
Rocky Hill, CT 06067-1400

Morris J. Busca
Busca Law Firm, LLC
300 State Street
New London, CT 06320-6152

J. William Gagne, Jr.
Gagne & Associates
15 North Main Street
West Hartford, CT 06107-2134

John O'Connor
73 State Street, Suite 310
Springfield, MA 01103-2096

Jarad M. Lucan

2206721v2