STATE OF CONNECTICUT
BOARD OF LABOR RELATIONS

STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION -AND- NATIONAL CORRECTIONAL EMPLOYEES UNION -AND- AFSCME, COUNCIL 4	:	CASE NO.: SE-29,381
STATE OF CONNECTICUT -AND- UNITED PUBLIC SERVICE EMPLOYEES UNION -AND- CSEA/SEIU LOCAL 2001	:	CASE NO.: SE-29,394
STATE OF CONNECTICUT, DIVISION OF CRIMINAL JUSTICE -AND- UNITED PUBLIC SERVICE EMPLOYEES UNION -AND- LOCAL 749, COUNCIL 4, AFSCME, AFL-CIO	:	CASE NO.: SE-29,408
STATE OF CONNECTICUT, JUDICIAL BRANCH -AND- UNITED PUBLIC SERVICE EMPLYEES UNION -AND- AFT/AFT-CT, AFL-CIO, PROFESSIONAL JUDICIAL EMPLOYEES	:	CASE NO.: SE-29,409
STATE OF CONNECTICUT, JUDICIAL BRANCH -AND- UNITED PUBLIC SERVICE EMPLOYEES UNION -AND- IBPO, LOCAL 731, JUDICIAL MARSHALS	:	CASE NO.: SE-29,410
STATE OF CONNECTICUT DEPARTMENT OF CORRECTION -AND- CSEA/SEIU, LOCAL 2001	:	CASE NO.: SE-29,411
STATE OF CONNECTICUT, JUDICIAL BRANCH -AND- UNITED PUBLIC SERVICE EMPLOYEES UNION -AND- LOCAL 749, AFSCME, AFL-CIO	:	CASE NO.: SE-29,439 MAY 7, 2012

RESPONSE TO POST-HEARING BRIEF OF THE UNITED PUBLIC SERVICE EMPLOYEES UNION

On April 19, 2012, United Public Service Employees Union ("UPSEU") filed a post-hearing brief in the above-captioned matter, and this is the response of Local 749, Council 4, AFSCME, AFL-CIO.

A. Whether or not UPSEU qualifies as a labor organization under 5-275(a)(3)

The argument offered by UPSEU regarding the burden of proof is quite irrelevant at this point. However, its logic is disjointed. UPSEU filed a petition seeking to represent employees represented by Local 749. C.G.S. 5-275(a) provides that no election shall be directed during the term of a written contract. Local 749 had a contract with the judicial branch and division of criminal justice of the State of Connecticut. Thus, no election can be held and the burden falls on the petitioner to overcome this mandate.

The argument by UPSEU in support of its claim that it satisfies the above-captioned statutory definition of a labor organization fails to provide any legal support for its position that it qualifies and satisfies 5-275(a)(3). Local 749 re-asserts its analysis with case citations in its post hearing brief. Therefore, this argument is repeated and should be credited.

B. A contract bar exists pursuant to Connecticut General Statutes §5-275(a) to the petitions filed by UPSEU in this instant case (Case No.: SE-29,408 and SE-29,439).

Initially, Connecticut General Statutes §5-275(a) provides that: "No election shall be directed by the Board during a term of a written collective bargaining agreement, except for good cause".

Collective bargaining rights are created by the legislature and may be restricted by the legislators. State of Connecticut (DAS), SBLR Decision No. 3427 (1996). The Labor Board adopted the Contract Bar Rule to promote stability of labor relations during the period when the valid collective bargaining agreement was in effect. It would protect employers and assure them that they will not have to negotiate terms and conditions of employment for the period of the contract. State of Connecticut (OLR), SBLR Decision No. 1913 (1980); State of Connecticut Executive Branch, Decision No. 1984 (1981); and State of Connecticut Department of Correction, Decision No. 4571 (2011).

The purpose of the Contract Bar Rule was to assure unions and the employers of having a sense of stability in the collective bargaining process. It was also to ensure that once a contract was in place, it would be protected and the parties could rely upon its continuity for the duration of the contract. State of Connecticut (OLR), SBLR Decision 1913 (1980); and City of Shelton, SBLR Decision No. 1065 (1972).

The Labor Board has already ruled and recognized the viability of a contract bar statutory provision when it wrote "It is an election within the terms of a contract that Section 5-275(a) bars" State of Connecticut (Executive Branch), SBLR Decision No. 1984 (1981). It is a statutory bar prohibiting a representation election during the term of a collective bargaining agreement. State of Connecticut (Department of Corrections), SBLR Decision No. 4571 (2011). There was a contract in effect between the Division of Criminal Justice and Local 749, Council 4, AFSCME which was ratified by the bargaining unit membership on August 16, 2011, (December 19, 2011 Transcript, p. 135) and the Judicial Branch of the State of Connecticut and Local 749, Council 4, AFSCME which was ratified on August 16, 2011 (Id). Both were ratified by the General Assembly on August 22, 2011 (Exhibits 27, 28, and 29; December 19, 2011, Tr.

p. 135). It should be noted that while reference is made to the National Labor Relations Act and the implementation of its Contract Bar Rule, the National Labor Relations Act does not contain any provision similar to Section 5-275(a) of the Connecticut General Statutes. Thus, as of August 22, 2011, a valid contract was in place between the State of Connecticut Judicial Branch and the Division of Criminal Justice and Local 749. The relevant petitions of UPSEU were filed on August 31, 2011 (Exhibits 1, 2, 3 and 4). The collective bargaining agreements cited above were effective July 1, 2011, which clearly eliminates the window period that UPSEU alleges was in existence in 2011. General Corp., 139 NLRB 123 (1962); and City of Bridgeport, SBLR Decision No. 3338 (1995).

The Board's decision in Case No. 4571 is not dispositive of the contract bar issue before the Board in these particular cases. The Board wrote that the statutory election bar would exist under SERA. State of Connecticut (Department of Correction), SBLR Decision No. 4571, supra. First, which will be discussed later, an issue is raised as to whether or not the three-year rule has to follow the administrative rule making process. Secondly, the Labor Board in Decision No. 4571 did not determine whether the three-year contract bar rule would apply under the unique circumstances of the instant petitions that are now being discussed.

It is clear that a statutory bar was in effect enacted by the Legislature on August 22, 2011, nine days prior to the petitions filed by UPSEU on August 31, 2011. Therefore, the petitions should be dismissed based on the Contract Bar Rule. The Board need only apply the law to the circumstances that existed at the filing of the petition and conclude that there was a bar to the petition being filed. Thus, there was no window period in August 2011, when the petitions were filed, as the contract duration was from July 1, 2011 to June 30, 2016.

C. There is no exception to CGS 5-275(a) regarding a "good cause" to order an election.

Section 5-275(a) does contain an exception to the prohibition of an election during the existence of a collective bargaining agreement and that is "for good cause". The Board has recognized that this exception should be applied narrowly. Thus, there must be a strict interpretation of the statute rather than a more liberal interpretation State of Connecticut (OLR), SBLR Decision No. 1913 (1980). The Board applied a strict interpretation to this statutory provision recognizing the importance of stability in the large scale and complicated labor relations of state employment. (Id) Thus, there is a very short and designated window period. The contracts ratified by the Legislature clearly provided for a window period in August 1st through August 31st, 2015.

UPSEU has not presented any evidence demonstrating compelling reasons that would satisfy the good cause standard. UPSEU argues in a manner which is inconsistent. On the one hand, it admitted that the contracts were in effect and that they would be bound by those provisions (December 19, 2011 Transcript p. 158). That being so, the statutory window period would be in 2015. This is clearly contrary to UPSEU's assertion that the window period is August 2011. Analysis of UPSEU's presentation leads to the conclusion that it has presented no facts to satisfy the good cause standard. It spent a considerable amount of time dealing with the development of Attachment H. However, no facts were presented that warranted a conclusion that Attachment H was not created with the full agreement of the parties and as Linda Yelmini said, in accordance with the law.

The testimony was that all of the bargaining units voted on the proposed contracts. Initially, it should be pointed out that even though some members of a labor organization may

wish to change their representation, this does not establish good cause, and the petition should be dismissed. Town of Wilton, SBLR Decision No. 1995 (1981). Additionally, Salvatore Luciano testified that through various meetings that he and his staff held with the membership of Local 749 no one ever objected to the duration of the contract being five years (February 15, 2011 Transcript pp. 478-479, 481). Had a majority of any of the bargaining units been opposed to the duration of the contract, they could have rejected it and sent the union officers back to negotiating a contract with a shorter duration. They did not. There is good reason for that. There was a contract that provided job security, safety from layoffs, wage increases and other benefits. The cases cited by UPSEU really do not support the proposition that they are offering regarding the window period. City of Bridgeport had "a unique set of circumstances". The contract had expired four years earlier.

Additionally, Connecticut Agency Regs. §5-273-10(b), defines the window period in which a petition may be filed. The August 1 through August 31 inclusive of the year prior to the expiration of the collective bargaining agreement. Also, it may consider petitions filed at other times if compelling reasons are shown for deviation from the above rule. The agreements and the approval by the Legislature clearly establishes the window period as August 1st through August 31st, 2015. UPSEU has offered no compelling reasons why there should be a deviation therefrom. The Labor Board should look for guidance from State of Connecticut (OLR), SBLR Decision No. 1913 (1980), which stated that the phrase "good cause" should be interpreted strictly and requires the petitioner to demonstrate compelling reasons to deviate from the rule. The compelling reason was meant to enunciate the Board's understanding of "the greater importance of stability in the large scale and complicated labor relations of state employment" (Id). Thus, it appears as if the strongest element that must be considered is the stability of labor

relations in state employment. These agreements did avoid massive layoffs, reduce a huge budget deficit and provide stability to the State of Connecticut.

D. Attachment H is a valid statement of Legislative approval of a window period being August 1st through August 31st, 2015.

Attachment H was drafted by Linda Yelmini along with representatives of SEBAC. At the hearing, Yelmini testified that she believed Attachment H reflected, and was fully consistent with, existing law. Additionally, the Legislative approval of the duration of the contracts and Attachment H places the agreements in statutory form, and this would supercede any ruling of the Labor Board. The Board has clearly recognized that "the legislature is fully empowered to modify the statutory schemes when administered and it does not violate those schemes submitted by exercising this power." See State of Connecticut, SBLR Decision 3751 (2000); State of Connecticut Board of Trustees of State Colleges, SBLR Decision 2028 (1981); and Department of Public Safety, SBLR Decision 4550 (2011).

E. The Three-Year Rule should be established through the administrative rule-making process.

Section 5-273(b) of SERA states that "The Board should have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out provisions of 5-270 to 5-280 inclusive. Such rules and regulations shall be effective upon their passage and conformance with the terms of Chapter 54". Chapter 54 is commonly known as The Uniform Administrative Procedures Act, CGS 4-166 et seq. (UAPA). The Board's exception to the Contract Bar Rule must follow the normal regulatory development process under the Uniform Administrative Procedures Act and not by a decision of the Labor Board. The Contract Bar Rule is a statutory provision of the State Employee Relations Act. This is totally different

than the NLRB where the rule was established by a case decision. Thus, an exception to this should be developed through the Uniform Administrative Procedures Act.

It is clear that the Legislature in §5-273 made it unequivocally clear that any regulations have to be promulgated through the Uniform Administrative Procedures Act. The Three-year Rule is a statement by the State Board of Labor Relations establishing law and policy as well as having a substantial impact on the rights and obligations on the parties that appear before the Board. Thus, it has to be promulgated in accordance with the Uniform Administrative Procedures Act, Salmon Brook Convalescent Home, Inc., 177 Conn. 356, 362 (1979)); and Texaco Inc. v. Federal Power Commission, 412 Fd 2d. 740, 744 (3rd Cir 1969).

There can be no question that the Three-year Rule has a substantial impact on the rights and obligations of parties that appear before it. The cases cited by the Labor Board in Decision No. 4571 are inapplicable in the particular situation at bar. The NLRB ruling established the three-year rule through case law and no statutory direction existed regarding three-year contract bar. Additionally, this is contrary to the situation that exists here. Likewise, the Three-year Rule of the NLRB does not contradict any statutory language in effect at that time. Case law has established that when a statute is in effect, agency's are not allowed, except through the rule making process, to establish regulations that contradict the substantive directives of the statute, i.e., the statute cannot be contradicted.

There is a difference between the premature extension doctrine enunciated in Wilton Public Schools, SBLR Decision No. 2104 (1981) and the instant situation. There, an extension of a contract was agreed to between the labor organization and the employer. However, this occurred under the Municipal Employee Relations Act, and thus the Board could issue a decision regarding the premature extension doctrine. This is not the same situation that exists in the

instant case. In this particular case, while the State of Connecticut, the employer, and Local 749 agreed to the contract duration with Attachment H, the Legislature approved it, thereby, giving it effect of law. That is a different situation than when the contract is extended prematurely between a union and a municipal employer.

In conclusion, the representation petitions of UPSEU should be dismissed as untimely.

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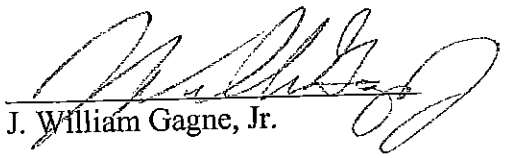

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