

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

In the matter of	:	
	:	
STATE OF CONNECTICUT DIVISION	:	
OF CRIMINAL JUSTICE	:	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	:	May 7, 2012

**REPLY BRIEF OF THE DIVISION OF CRIMINAL JUSTICE**

The Division of Criminal Justice (the "Division"), hereby respectfully submits this brief in reply to the United Public Service Employees Union's ("UPSEU") brief in Case SE-29,408.

## I. ARGUMENT

### Point I

UPSEU's repeated references to each of the individual employer-respondents in these consolidated petition cases collectively as the "State" (UPSEU Brief, p. 4), and its attempts to attribute positions taken and statements made by some of parties to all of the parties is inaccurate and misleading. As previously stated in its initial brief, the Division is a separate employer under the State Employee Relations Act, Conn. Gen. Stat. § 5-270 et seq. ("SERA"). (Division's Brief, p. 6). Additionally, the July 1, 2011 through June 30, 2016 collective bargaining agreement (the "Contract") negotiated between the Division and Local 749, Council 4, AFSCME, AFL-CIO ("AFSCME Local 749") is a separate agreement from the agreement entered into between the State and the State Employee Bargaining Agent Coalition (the "SEBAC Agreement"). (Id.) It is also a separate agreement from the unit agreements negotiated by employer-respondents in the other pending petition cases.

In that regard, the Division has never taken a position with respect to UPSEU's existence in state employment or Attachment H of the SEBAC Agreement. The Division has made clear from the beginning that its opposition to the petition in Case SE-29,408 is based solely on the contract bar established by the Contract and the law. UPSEU's petition should be dismissed because the Contract ratified by a majority of AFSCME Local 749 members on August 16, 2011 (December 29, 2011 Tr., p. 135) and approved by the General Assembly on August 22, 2011 (Exhibits 27, 28, and 29) creates a statutory

contract bar pursuant to Conn. Gen. Stat. § 5-275(a) (“Section 5-275”).<sup>1</sup> (December 29, 2011 Tr., pp. 138-143). This position is not taken, as blindly suggested by UPSEU, to “limit and infringe” on the employees’ right to choose (UPSEU Brief, p. 9), rather this position is taken *because that is what the law unequivocally states under SERA*. Conn. Gen. Stat. § 5-275(a). Moreover, the Division is not seeking to close any window in this case. (UPSEU Brief, p. 9). To the contrary, the Division acknowledges the existence of a window created by the Contract between August 1 and August 31, 2015 as specifically set forth in section 5-273-10(b) of the Regulations of Connecticut State Agencies (“Section 5-273-10”).

It is imperative that the State Board of Labor Relations (the “Board”) understand the distinctions set forth above because at no time during the four days of testimony and at no point in its brief does UPSEU ever challenge the validity, enforceability, or applicability of the Contract between the Division and AFSCME Local 749. UPSEU does take the position that Attachment H to the SEBAC Agreement is invalid and unenforceable and in doing so attempts to interpose arguments never made by the Division and facts inapplicable to the Contract between the Division and AFSCME Local 749 into Case SE-29,408. Indeed, whether Attachment H applies and whether any provision of the SEBAC Agreement conflicts any with state statute or regulation (UPSEU Brief, pp. 28-39) is irrelevant to the Contract,<sup>2</sup> which is a wholly separate agreement properly ratified by both

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<sup>1</sup> Section 5-275, states, in relevant part, that “[n]o election shall be directed by the board during the term of written collective bargaining agreement, except for good cause.” As a reminder, for whatever reason(s), UPSEU did not file its petition in Case SE-29,408 until August 31, 2011. (Exhibit 2).

<sup>2</sup> There has been no claim by UPSEU that any provision of the Contract conflicts with any state statute or regulation.

the AFSCME Local 749 membership and the General Assembly. Thus, UPSEU cannot legitimately argue that a contract bar is not in place in this case.

## **Point II**

As anticipated by the Division in footnote five of its initial brief, UPSEU takes the position that the premature extension doctrine should apply in this case arguing, without any basis, that because the Board has had occasion to recognize the doctrine under the Municipal Employee Relations Act, Conn. Gen. Stat. § 7-467 *et seq.* (“MERA”), it must therefore be applicable under SERA. (UPSEU Brief, pp. 17-23).

What UPSEU ignores, however, is that the Board has never applied the premature extension doctrine under SERA, and for good reason. Unlike contracts negotiated under MERA, under SERA, the General Assembly must ratify collective bargaining agreements entered into between state employers and the unions representing their employees, such as the Contract between the Division and AFSCME Local 749. Conn. Gen. Stat. § 5-278(b). To that end, the Contract ratified by the General Assembly on August 22, 2011 carries with it a presumption of validity irrespective of its premature extension. Significantly, the premature extension doctrine does not find its origins in any duly enacted statute or regulation, rather the doctrine is a unilateral creation of Board under MERA.<sup>3</sup> Thus, even if a contract negotiated pursuant to SERA is “prematurely extended,” under SERA that contract is valid under State law and the premature extension doctrine cannot be used to undermine the legislative approval of that contract.

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<sup>3</sup> The Division has expressed its opinion in its initial brief with respect to the Board’s power to promulgate new rules and regulations outside of the rulemaking procedures of the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 *et seq.*

To be sure, Section 5-275 simply states that a contract bar exists during the term of a written collective bargaining agreement, and Section 5-273-10 simply states that a petition can be filed between August 1 and August 31 inclusive of the year prior to the expiration of the collective bargaining agreement. Neither of those Sections, nor any other statute or regulation, negates the creation of a contract bar simply because a new collective bargaining agreement is ratified prior to the end of an existing collective bargaining agreement. Nor is there any statute or regulation that renders a petition timely if filed between August 1 and August 31 of the year prior to the expiration of an *earlier* collective bargaining agreement that is no longer in effect when the petition is filed. Accordingly, the General Assembly may, as it did with the Contract between the Division and AFSCME Local 749, approve a collective bargaining agreement, and thus create a statutory contract bar pursuant to Section 5-275, even if the agreement was prematurely extended. Such an action is well within the General Assembly's prerogative. Absent compelling reasons, the Board has no authority to subvert the General Assembly's action.

Perhaps realizing the flaws in its position, UPSEU argues that failing to "uphold" the premature extension doctrine in this case "essentially sets the proverbial 'slippery slope' in motion, in that it sets a dangerous precedent." (UPSEU Brief, p. 20). Notwithstanding the fact that the premature extension doctrine has no applicability in state employment, even if it did, there is little if any chance of a slippery slope being set in motion in this case. The Board, unlike the courts, is not bound by the doctrine of stare decisis with one case creating a precedent for another. Thus, the Board may limit its decision in this case to the facts and evidence before it, including: the \$7 billion budget deficit facing the State, and the reality of massive layoffs, perhaps 7,000 - 9,000 employees

(February 9, 2011 Tr., pp. pp. 283-284); and the bargaining unit members' ratification of the Contract with full knowledge of the benefits it conferred (i.e., job security), its five-year duration, and the contract bar it created.

Although UPSEU attempts to rely on State of Connecticut, SBLR Decision No. 2652 (1988) to support its position regarding the extension of a collective bargaining agreement under SERA, that case is inapposite. In State of Connecticut, the Board consciously chose not to apply the premature extension doctrine (likely for the reasons argued above), but rather found compelling reasons to consider the petition in that case timely filed. There, the Board was faced with a petition filed by the Connecticut State Employees Association ("CSEA") to include employees from the P-2 unit represented by AFSCME into the P-3B unit represented by CSEA. Prior to filing its petition, CSEA extended its contract with the State. The Board stated that "[w]e will not frustrate an employee group's attempt to gain self-determination when they have attempted to comply with *both* statutory requirements and special decision in State of Connecticut [OLR], [SBLR] Decision No. 1913 [1980], concerning the same parties and employee groups." Id. at 4 (emphasis added). Accordingly, that case turned on the very specific facts in front of the Board, including the fact that the very same parties were before the Board on the very same issue eight years earlier when the Board offered a factual scenario where compelling reasons may be found, and not simply because a contract was extended.

Moreover, in State of Connecticut, *supra*, the Board ordered that should the claimed employees vote to be included in the P-3B unit, CSEA would be their exclusive bargaining representative *only at the time negotiations began for a successor to the existing P-3B contract*. Id. Likewise, in this case, even if the Board was to direct an

election, should it prevail, UPSEU should not be allowed to represent the Division employees now represented by AFSCME Local 749 until negotiations begin for a successor to the existing July 1, 2011 through June 30, 2016 Contract. See City of Norwich, SBLR Decision No. 804 (1968) (“Even though an election is held prior to the termination of a contract, it is for the determination of the status of the bargaining agent after the termination of the contract. During the remainder of the contract term, the current representative retains the right to recognition and its authority to represent the employees, regardless of the outcome of the election”). Absent dismissal of the petition, this is the only appropriate remedy in order to maintain the wishes of the majority of unit members who ratified the Contract and to ensure the stability essential in the large scale and complicated labor relations of state employment.<sup>4</sup> State of Connecticut (OLR), SBLR Decision No. 1913 (1980).

Related to this position is the reality that since the window period for the current Contract opens between August 1 and August 31, 2015, it is more than possible that UPSEU could be decertified prior to it ever representing a single employee of the Division. Thus, the Board should avoid this undue disruption and dismiss the petition in Case SE-29,408. See Town of West Hartford, SBLR Decision No. 4062 (2005) (petitions should be allowed “only at times when the filing will be the least disruptive to the collective bargaining relationship and process”).

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<sup>4</sup> Despite UPSEU’s claims that it would honor the terms of the Contract negotiated between the Division and AFSCME Local 749, there is no rule of law obligating it to do so. Moreover, it is questionable whether Attorney Resnick, who made this representation, had any authority to do so. Intent cards generally authorize a union to represent employees for purposes of collective bargaining. Would not the members expect UPSEU to negotiate for them and to present the outcome of that negotiation to the membership for a vote? Thus, UPSEU’s claims are simply illusory and should be taken for nothing more than an affirmation of the validity and enforceability of the Contract between the Division and AFSCME Local 749.

### Point III

USPEU argues that good cause and compelling reasons exist in this case such that its petition is not precluded by Section 5-275 or Section 5-273-10. By taking this position, UPSEU expressly assumes the burden of proof. UPSEU has failed to meet that burden.

USPEU relies on the Board's decision in City of Bridgeport, SBLR Decision No. 3338 (1995),<sup>5</sup> which it claims "has an analogous fact pattern," and the three-year rule.<sup>6</sup> (UPSEU Brief, p. 24). The fact pattern in City of Bridgeport could not be any less analogous to the case at bar. In that case, bargaining unit members were precluded from expressing their wishes concerning bargaining representation due to years of pending litigation. Moreover, there was "no end in sight to the current unsettled situation," *id.* at 5, and thus bargaining unit members' rights to express their wishes concerning bargaining representation would be denied for an indefinite period of time. In contrast, the facts of this case establish that there was a \$7 billion budget deficit facing the State, and approximately 7,000 - 9,000 employees were imminently in jeopardy of losing their jobs. (February 9, 2011 Tr., pp. pp. 283-284). Just weeks prior to UPSEU filing its petition in this case, bargaining unit members overwhelmingly ratified the Contract between the Division and AFSCME Local 749 with full knowledge of the benefits it conferred (*i.e.*, job security), its five-year duration, and the contract bar it created. Further, a definite open window period is set for the time between August 1 and August 31, 2015. Conn. Agencies. Regs. § 5-273-10(b). Based on these facts, it is clear that UPSEU has not met its

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<sup>5</sup> In City of Bridgeport the Board noted there is no precise definition of good cause. *Id.* at 5.

<sup>6</sup> The Division's position with respect to the three-year rule is amply set forth in its initial brief and need not be repeated here. Suffice it to say, the rule has no applicability under SERA or this case and cannot be relied on by UPSEU to argue good cause or compelling reasons.

burden of establishing the existence of good cause or compelling reasons, and its petition in Case SE-29,408 should be dismissed.

UPSEU also takes the position that “[f]urther evidence of good cause and compelling reasons is that the Incumbent Unions, State and SEBAC were well aware that other labor organizations were soliciting intent card and intended on petitioning for an election during the open window period.” This broad statement is misleading and relates back to the Division’s argument in Pont I that UPSEU improperly attempts to impute statements by one party to all of the parties in these consolidated petition cases. There was absolutely no evidence presented at the hearings through testimony, documents, or otherwise that either the Division or AFSCME Local 749 was aware of UPSEU’s solicitation efforts. Therefore, even if the Board finds merit in this argument as to other cases, it has absolutely no applicability to Case SE-29,408.

## **II. CONCLUSION**

For the foregoing reasons, the Division respectfully requests that the Board dismiss the petition filed by UPSEU in Case SE-29,408.

THE RESPONDENT,  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that an original and four copies of the foregoing brief were hand delivered this 7th day of May, 2012 to:

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