

Proceeding Before
State of Connecticut
Board of Labor Relations

In the Matter of:

STATE OF CONNECTICUT (P-4 Unit)

- and -

CONNECTICUT STATE EMPLOYEES
ASSOCIATION, SEIU LOCAL 2001

- and -

UNITED PUBLIC SERVICES EMPLOYEES
UNION, *petitioner*

Case No. SE-29,394 *

In the Matter of:

STATE OF CONNECTICUT (NP-8 Unit)

- and -

CONNECTICUT STATE EMPLOYEES
ASSOCIATION, SEIU LOCAL 2001

- and -

NATIONAL CORRECTIONAL EMPLOYEES UNION
petitioner

Case No. SE-29,411 *

REPLY BRIEF
for the
STATE OF CONNECTICUT

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* = consolidated with cases SE-29,408, SE-29,409, SE-29,410, SE-29,411 & SE-29,439

INTRODUCTION

The State Executive Branch Employer's initial brief addressed the petition filed by the United Public Services Employees Union ("UPSEU" or petitioner) regarding the Engineering & Scientific P-4 bargaining unit and focused on the contract bar rule and the negotiated and legislatively approved Attachment H. This brief will also offer some comments on the issue of the requirement in CGS Sec. 5-275(a) that any union seeking to represent state employees must have been "in existence in state employment for at least six months". The "six month rule" would affect both UPSEU in its multiple petitions as well as the National Correctional Employees Union ("NCEU"), which has filed a petition to represent the Correctional Supervisor NP-8 unit in the Executive Branch.

The State Executive Branch Employer ("State") is not be concerned about the identity of the particular union that represents a bargaining unit but is concerned about the stability of the collective bargaining relationship, the validity of the SEBAC and P-4 unit agreements that were approved by the legislature effective August 22, 2011 and the statutory prohibitions against holding an election during the term of a contract. The State Collective Bargaining Act contains a statutory contract bar rule and therefore, once the new unit contracts became effective upon legislative approval, the window period pursuant to the Board Regulations became August 2015. The UPSEU petition was unfortunately not filed until after there was legislative approval upon a new P-4 contract that was in effect from August 22, 2011 through June 30, 2016. The State would also point out that the SEBAC Agreement approved by the Legislature contains Attachment H which provides that "the contract bar for purposes of any constituent union of SEBAC accepting a contract extension or renewal ... shall be computed solely from the expiration date of such extension or renewal." (Ex. 23, last page) This provision further reinforces the fact that the new contract acts as a bar to the UPSEU petition. It should also be pointed out that UPSEU did not demonstrate any "good cause" to ignore the contract bar rule or any "compelling reason" that the new window period should be disregarded. Their focus seemed to be only on whether the bargaining unit employees had seen the language of Attachment H before their

ratification votes on the SEBAC Agreement. Challenges to contract ratification procedures, however, would be a type of claim to be raised, if at all, by a bargaining unit member and not another union.

There was also an issue of whether UPSEU or NCEU satisfied the statutory requirement in CGS Sec. 5-275(a)(1) that provided:

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.

The State Executive Branch Employer did not address the six month requirement in the initial brief but will offer a few comments in this reply brief because the State is concerned that any petitioning union should have to satisfy this requirement and that the requirement should mean more than merely gathering the cards necessary to have a showing of interest.

DISCUSSION

Before addressing the substance of the petitioners' arguments, there are a few factual corrections that should be noted. The UPSEU brief basically took the three affected State employers, the Executive Branch, the Division of Criminal Justice and the Judicial Branch and combined them into the phrase "the State". To do that only demonstrates their lack of knowledge about state government and their lack of involvement with state employment. One would certainly expect that if they had spent six months involved with state employees and state employment, they would know the entities that were the employers in the different bargaining units they were seeking to represent. Their brief on at least one occasion misquoted the "six month rule" as only requiring a union to be in existence for six months, which is all that is required under the Municipal Act. Their brief also repeatedly asserted that "the State", the incumbent unions and SEBAC knew that membership cards were being gathered with an intent to file a petition. The citations they referenced to support this assertion (Tr. 215-7, 330-31), however, were to the testimony of Linda Yelmini who testified that she had heard rumors about cards and was aware of cards being gathered. Not only did she not testify about any knowledge of intent to file petitions, she also did not testify that she was aware of cards in more than one bargaining unit. Additionally, Ms. Yelmini's knowledge cannot be attributed to the other employers, the SEBAC or the many incumbent unions. The UPSEU brief also repeatedly asserts that Attachment H was not finalized until August 22, 2012 and cites the e-mails. The e-mails and the testimony, however, made it clear that the final version of Attachment H was conveyed in an e-mail dated August 18, 2011 from Dan Livingston to Linda Yelmini. (Tr. 2-106; Ex. 46) It also should be noted that the Engineering P-4 agreement was signed on August 19, 2011 (Ex. 30) and all of the agreements were submitted to the legislature on August 22, 2011 (Ex. 27 & 28).

1. THE SIX MONTH RULE

There is a claim that neither UPSEU or NCEU satisfied the statutory requirement in CGS Sec. 5-275(a)(1) that provided:

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.

In the initial brief, the State Executive Branch Employer did not take a position or offer comments on this issue. Given the arguments that have been raised, the State needs to express its view of the statutory provision.

It was argued by UPSEU that the State or the Unions had the burden of showing that UPSEU was not involved with state employment for at least six months. The problem with this claim is that the respondents would not have access to the information related to this issue that was solely in the possession of the petitioner. The respondents would not know which and to what extent petitioner employees were involved with state employees or if meetings were being conducted with state employees or if other services were being offered to state employees by either of the petitioners. Thus, the burden for this issue should be placed upon the organizations which have full and exclusive access to the information relating to the issue, which means that the petitioners would have the burden of proving that they meet the statutory requirements for filing a petition or participating in an election.

The NCEU brief claimed that the CSEA interpretation of the six month rule would mean that the statute should be worded as requiring six months as a certified representative, which would be an impossible condition for any non-incumbent union to satisfy. The NCEU position that soliciting intent cards is sufficient to be "in state employment" is an interpretation even less supported in the language as only counting periods as a certified representative. Unless a union has gathered intent cards from bargaining unit members, there is no petition and thus nothing for the board to consider. To say that a union which takes 6 months to gather cards from 30% of the bargaining unit is more qualified or more involved in state employment than a union which takes

only 3 months to gather an equal number of cards is a totally unjustified conclusion and is not supported by the language of the statutory provision.

Additionally, if the requirement was only the gathering of intent cards, the statute could have been more easily expressed as "been involved in seeking to represent state employees for at least six months" or words to that effect. And while the Board expressed in an early decision that gathering cards was sufficient, it is important to point out that that decision was not subject to appeal by the Incumbent union (CSEA) which raised the issue since the petitioner's claims were dismissed on other grounds. **State of Connecticut**, Dec. No. 1682 (1978). It should also be noted that gathering cards is the minimum needed to file a petition and therefore it is not reasonable to assert that the legislature in enacting the State Act's six month rule (which is admittedly more restrictive than the municipal act) would mean only that the petitioner could qualify by starting their drive for cards at least six months prior to the window period.

The determination of what is considered sufficient to be "in existence in state employment" must be somewhere between only counting time as a certified representative and counting time spent only gathering cards. A challenging union could hold meetings and offer training or other information to state employees. Perhaps that union could represent state employees in proceedings such as the Commission on Human Rights and Opportunities, Unemployment Compensation appeals or Workers Compensation hearings that would not be limited to certified bargaining representatives. The State Employer is not saying that the challenger has to be involved with state employees in any particular way, only that it needs to involve more than just gathering the cards needed to file a petition. The only involvement in state employment cited by the petitioners were prior unsuccessful efforts at gathering cards and vague references about being in contact with some state employees. Therefore, it should be ruled that neither petitioner has been in existence in state employment as required by Sec. 5-275(a) and that the petitions should be dismissed.

2. THE CONTRACT BAR RULE

The Legislature created a statutory contract bar rule when they enacted the State Collective Bargaining Act and included the following, in CGS §5-278(a):

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

The fact that the contract bar rule under the State Act was established by the legislature (rather than by the Labor Board) supports the fact that exceptions should not be created by the Board except possibly in very limited and unique circumstances and there are not such circumstances in the current cases. The Labor Board has explained the rationale for the contract bar rule as:

That rule prevents the employees from exercising their free choice about a change of representative. It does so in the interest of stability and to promote labor peace by giving an incumbent union a fair opportunity to administer a contract the parties can live with for a period of time. Both the freedom of choice and stability serve the policies of the Act. ... The contract bar rule is an attempt by labor boards (and also by legislatures) to do this. When an incumbent union gets a contract (usually ratified by the membership) that covers the basic matters in dispute, then the members of the bargaining unit are required to forgo their right of free choice of representative for the life of the contract.

Bridgeport Housing Authority, Decision No. 1897 (1980), p. 2-3

The contract bar rule under the State Act was created by the State legislature rather than by the Labor Board and the Legislature also has the authority to approve or reject the contract. It should also be noted that the interests of stability and labor peace are even more compelling when there was an extended, very public concession discussion that left some employees angry about the settlement, despite the fact that the agreements were approved by sizeable margins of the employees in the units covered by the UPSEU petitions.

UPSEU's main argument in relation to the contract bar issue is that their petition was filed according to the window period in the regulations and that the new contract

was a premature extension that did not affect the window period. They also argued that allowing the new contract to end this window period would mean incumbents could negotiate contracts in the future to indefinitely avoid window periods. Any issues of future contract settlements and future window periods can be addressed if or when they occur in the future and have no bearing upon the present circumstances. And it should be noted that the Board decision upon which they rely (*State of Connecticut*, Decision No. 2652) involved the very unusual situation of a possible transfer between bargaining units with different window periods and the Board's effort to deal with that factor, its prior decision on a similar situation and the possible burden on the employer of having to bargain if the employees voted to switch units. That situation and that decision are totally different from the present case and thus would not serve as a precedent for the instant petition.

UPSEU claimed [based on Ms. Yelmini's knowledge] that SEBAC and all of the unions knew of the effort to gather cards. That might be possible, although not proven, but the Board can certainly take judicial notice of the extensive publicity regarding the SEBAC discussions and the voting on the tentative agreements, and recognize that UPSEU had to be aware that an agreement had been reached in these bargaining units and that it would be subject to member ratification votes in mid-August. It is also reasonable to conclude that UPSEU and/or their supporters would have known of the exact voting dates and perhaps would have even tried to urge rejection of the agreements. Additionally, it was certainly public knowledge that the legislature had established an August 30 deadline for any agreement to receive approval under the condensed approval process. (Public Act 11-1 June Special Session: Ex. 29) In any event, based on these facts, UPSEU certainly knew that the agreement, if ratified, would be submitted to the legislature as soon as possible and certainly prior to August 25, 2011. Therefore, UPSEU, assuming they had sufficient membership cards, could have and should have submitted their petition prior to the contract being submitted to the legislature if they wanted to argue that the petition was not affected by the new contract. While it would be the position of the State Executive Branch that the contract bar would preclude an election even if the petition had been filed before the contract was submitted to the legislature, then UPSEU would at least have some basis for claiming their petitions were filed in a window period.

Based on the terms of the Public Act, the agreements were considered approved effective as of the August 22, 2011 date of filing since they were not rejected by the legislature. Therefore, as of August 22, 2011, there was a new contract in effect covering the P-4 bargaining unit and the other bargaining units in the consolidated cases and it is these new contracts that serve as a bar to any election in these units. The new contracts also invalidate UPSEU's claim that their petitions were filed during the window period provided by the Regulations since that window period changed when there were new contracts with new expiration dates, particularly when one considers that they went into effect prior to the filing of the petitions. Additionally, the legislature was certainly aware of the duration of the May 2011 tentative agreement when they passed the first budget bill that included the condensed review process and subsequently knew that the revised tentative agreement would be very similar to the initial agreement. Thus, while the legislature did not formally vote on the agreements, they created a five day approval process [which certainly reflected an unlikelihood that their leaders would call them into special session to approve or reject the agreement] based on their understanding of what the agreement was likely to contain, including a five year duration through June 30, 2016.

UPSEU repeatedly claimed that the SEBAC and unit agreements were "premature extensions" that should not be granted the protections of the contract bar rule. The agreements were not reached to avoid the window periods or to frustrate UPSEU – they were reached to effect savings needed for the serious fiscal condition the State was facing and to enable the Governor and the Legislature to enact a balanced budget as required by the state statutes and constitution. The purpose of the unit agreements, as stated in the P-4 agreement, was "in order to assist in resolving the financial issues currently facing the State of Connecticut while preserving public services" (Ex. 30) The agreements also provided multi-year job security and prevented the possibility of thousands of state employee layoffs and major cuts in many state services and programs.

UPSEU's assertions that the agreements were "premature extensions" and its reliance upon a few municipal decisions are not consistent with or supported by the

different language in the State Act. CGS Sec. 5-276a(a), Timetable for negotiations, provides that negotiations can begin as early as 330 days prior to the expiration of the contract, as follows:

In the event that either the employer, ... or a designated employee organization, ... may desire negotiations with respect to an original or successor collective bargaining agreement, such party, not more than three hundred thirty days prior to the expiration of the existing collective bargaining agreement or less than one hundred fifty days prior thereto, shall serve written notice thereof upon the other party. Negotiations shall commence within thirty days of such service.
(emphasis added)

This possible starting date for successor contract negotiations is significantly earlier than the timetable in the Municipal Act and it basically allows either party to demand successor contract negotiations as early as August 4 of the year prior to the June 30 expiration of the contract. Therefore, it cannot be claimed that there was a premature extension of the contract when the new contract was ratified by the members and approved by the legislature during the time period specifically provided for successor negotiations under the State Act.

The earliest starting time for negotiations was changed by Public Act 05-277 from 180 days to 330 days prior to contract expiration. After that change in the State Act, the Labor Board probably should have updated its regulations to shift the window period earlier so that any petitions would be filed well before the possible starting date for negotiations between the employer and the incumbent union. The fact that the window period in the regulations has not been updated, however, does not provide a basis for claiming that there was a premature extension of the contract when it occurred during the period of time specified in the Act for successor contract negotiations. And it certainly cannot be considered as promoting the stability of collective bargaining relationships by effectively penalizing parties who reach agreements during the time period specified for negotiations under the Act and prior to contract expiration.

There are a few additional comments that should be made on the contract bar rule. As pointed out in the initial brief, the case involving the Correction NP-4 unit petition (Case No. SE-29,381) was limited by the Board's written ruling and the Board

Agent to the issue of the interest arbitration bar. Therefore, it cannot serve as an appropriate ruling on any other issues, particularly those involving the remainder of the pending petition cases, such as the contract bar rule, and the petitioner's reliance on that decision should be disregarded. Furthermore, if the Board feels that there is a need to create a "three year rule" or a "four year rule" under the State Act, it should be done by declaratory ruling or by regulation so that all of the employers and affected unions would have an opportunity to offer comments and it would be subject to review by legislative staff if done by regulation. There are substantial differences in the negotiations under the State Act (as compared to the Municipal Act), including the size of the bargaining units, the length of the budget term, the normal length of contracts and the process and timing of approvals, that would justify longer contracts and those issues should be fully explored and weighed before any ruling or regulation that effectively creates a limit on the contract bar rule. The contract bar rule was created by the legislature and therefore any blanket change in the rule should also be done by the legislature, or at least reviewed and approved by the legislatively created regulation review process.

The Labor Board has stated that its use of the phrase "compelling reason" in its Regulations under the State Act was meant to express that "the great importance of stability in the large scale and complicated labor relations of State employment required a fairly short window period with narrow exceptions". ***State of Connecticut Office of Labor Relations***, Decision No. 1913, p. 2 (1980) With a few exceptions, the State employee bargaining units have over 500 members and many units have thousands of members. Additionally, there has been no claim that these SEBAC or unit discussions went for months without action or years without conclusion, unlike some of the cases of the municipal bargaining units cited in some of the Board decisions referenced by the petitioners. The existence of the new contracts created a change in the window period and the UPSEU petition was therefore not filed during the window period and should be dismissed.

3. ATTACHMENT H

UPSEU has claimed that Attachment H was in conflict with the statutes and regulations and that it was void because the legislature was not notified of this conflict. If the Board finds that Attachment H was not in conflict and did not require supersedence notification, then UPSEU is claiming that Attachment H was not valid since it was not voted upon by the members. Their arguments are not supported by the language of the statutes and should be disregarded. It should also be noted that their reliance upon the opinion of one state senator regarding Attachment H and the need to supersede statute or regulations is misplaced because the legislature viewpoint is determined by their statements in legislative hearings and the actions of the legislature as a whole. The position of the legislature is not determined by an individual legislator's opinions, particularly those that were formed only after discussion with the petitioner and without any consultation with the State employer representatives.

The first two paragraphs of Attachment H basically provide that the State and SEBAC will not file or pursue any legal action against each other as a result of the agreement and that SEBAC and the constituent unions will not aid or assist any individual employee who files such an action against the State. While these provisions are very important to the State and SEBAC, it is the third paragraph that has generated the most argument in the present cases:

Effective on and after July 1, 2012, the contract bar for purposes of any constituent union of SEBAC accepting a contract extension or renewal in accordance with Appendix A of this agreement shall be computed solely from the expiration date of any such extension or renewal. (Ex. 23, last page)

This language makes it clear that the contract bar and the window period would not be based upon the original contract expiration date of June 30, 2012 or any other date but instead would reflect the new contract expiration date of June 30, 2016. Therefore, pursuant to this language, the next window period for filing representation petitions would be August 1 to August 31 of 2015.

Despite UPSEU's claims, Attachment H was not in conflict with any statute or regulation and therefore was not required to have a supersedence notification to the legislature. CGS §5-278(b) provides

The agreement, together with a request for funds necessary to fully implement such agreement and for approval of any provisions of the agreement which are in conflict with any statute or any regulation of any state agency, ..., shall be filed by ... the employer with the clerks of the House of Representatives and the Senate within ten days after the date on which such agreement is reached (Ex. 53)

CGS Sec. 5-278(a) provides that: "No election shall be directed by the board during the term of a written collective bargaining agreement, except for good cause." Regulation 5-273-10 provides that

A notification [petition] 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.

Attachment H does not conflict with the statutory or regulation provisions that there is a contract bar rule or that the window period falls during the month of August prior to the expiration of the contract. Attachment H provides that the calculation of the appropriate August will be based upon the new expiration dates of these unit agreements.

Therefore, even if it is viewed as being more specific than the contract bar rule, it is clearly at most a supplement or a clarification of the regulation and not in conflict with the regulation. In fact, the legislative approval of the agreements with Attachment H basically had the effect of changing the contract expiration dates and therefore changing the particular August that would serve as the window period. Furthermore, the Regulations do not provide that contracts cannot be extended or successor contracts cannot be reached prior to [or after] the filing of a challenger's representation petition. Since Attachment H was not in conflict with an statute or regulation, there was no need for the employer to submit notice of supersedence for Attachment H to the legislature.

UPSEU's arguments about the employees not having seen Attachment H prior to their ratification vote ignore the fact that often the information provided to employees by their union prior to voting could be in the form of a bulleted list or a chart of the most important changes in the contract and not necessarily the exact language or details of every change. Furthermore, Attachment H does not deal with wages, hours or working condition and instead deals with issues of importance to the employers and the unions and their relationship, particularly the commitments to no litigation by either party. UPSEU's refusal to acknowledge these commitments and their importance to the employers seems to only further demonstrate their lack of understanding of state government collective bargaining issues. And the assertion by UPSEU (with their self-serving testimony and boiler-plate "affidavits") that large numbers of employees would not have voted for the SEBAC agreement if they had seen Attachment H is both unjustified and irrelevant. It should also be pointed out that UPSEU's references to mutual understanding between the parties are misplaced because the parties are the State and SEBAC or the particular employer with the union representing its employees -- the parties to the agreement are not the employer and the employees [since the employer cannot negotiate with the employees under the Act]. It is also important to note that a dispute about improper ratification might be an issue that a member could raise in a duty of fair representation complaint, but it is not an issue that UPSEU would have standing to raise.

CONCLUSION

While the State Executive Branch Employer does not have a preference about which union may represent a particular bargaining unit, the State does have a concern that any such union has satisfied the statutory requirement of being "in existence in state employment for at least six months" and that such existence would have to involve more than just the mere gathering of cards, without which there could not even be a petition. The State is also concerned about the stability of the collective bargaining relationship, the validity of the SEBAC and P-4 unit agreements that were approved by the legislature and the statutory prohibitions against holding an election during the term of a contract. The Act contains a statutory contract bar rule and the UPSEU petition was unfortunately not filed until after there was legislative approval for a new P-4 contract that was in effect from August 22, 2011 through June 30, 2016. Also, the SEBAC Agreement contains Attachment H which provides that "the contract bar for purposes of any constituent union of SEBAC accepting a contract extension or renewal ... shall be computed solely from the expiration date of such extension or renewal." (Ex. 23, last page) This provision further reinforces the fact that the new contract acts as a bar to the UPSEU petition. It should also be pointed out that UPSEU did not make any showing of "good cause" or present any testimony or substantive arguments regarding any claimed "compelling reason" that the new window period in August 2015 should be disregarded. Thus, for the reasons set forth in this brief and in the reply brief, the State respectfully requests that the Board find that neither petitioner satisfied the statutory requirements to file a petition or participate in an election and/or find that the UPSEU petition for the P-4 bargaining unit was not timely under the statutory provisions of the Act and that the petitions should therefore be dismissed.

For the State of Connecticut,

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