

STATE OF CONNECTICUT, JUDICIAL BRANCH : CASE NO. SE-29,439
-AND-
UNITED PUBLIC SERVICE EMPLOYEES UNION :
-AND-
LOCAL 749, AFSCME, AFL-CIO : MAY 7, 2012

**POST-HEARING REPLY BRIEF OF UNITED PUBLIC
SERVICE EMPLOYEES UNION**

Submitted By: _____

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I. Introduction

The United Public Service Employees Union (hereinafter “UPSEU”) submits this instant reply brief in response to the factual and legal arguments advanced by the State, SEBAC, and the Incumbent Unions (hereinafter the “respondents”) in their post-hearing briefs to the Connecticut State Board of Labor Relations (hereinafter “Board”).

II. LEGAL ARGUMENT

UPSEU will only address the most egregious misstatements of law in the respondents’ briefs. UPSEU is confident that all of the respondents’ legal theories and analysis were addressed at great length in UPSEU’s post-hearing brief.

A. It is clear UPSEU satisfied the requirements of C.G.S. § 5-275(a)(3).

In the respondents’ briefs they advance the argument that UPSEU did not satisfy the criteria of C.G.S. § 5-275(a)(3)¹, namely that UPSEU had not been in existence in State employment for at least six months prior to the petition being filed². The respondents’ assert that “in state employment” should be interpreted to mean that a petitioning union must represent or work for the State. This is an impossible and improbable criterion for new unions seeking to represent state employees to fill. The respondents are effectively requesting the

¹ The respondents’ do not dispute in their briefs that UPSEU is an employee organization.

² Not all of the briefs addressed the six months rule. It can only be deduced that the Incumbent Unions who chose not to discuss the six months rule are waiving that objection.

Board to solidify that the Incumbent Unions can never be ousted from their position as the State employees' representatives. The respondents are seeking to foreclose UPSEU's and all other labor organizations, which do not currently represent State employees, right to compete to represent State employees now and in the future. Moreover, most of the Incumbent Unions have "no raid agreements" which provide that Incumbent Unions will not seek to represent other Incumbent Unions' employees. Therefore, permitting the interpretation advanced by the Incumbent Unions would effectively create a monopoly and secure their position as the bargaining unit representatives for all of eternity.

It is axiomatic, when the legislatures established SERA and adopted C.G.S. § 5-275(a)(3) requiring "in state employment" they did not intend to limit the employees' freedom of choice to a "first come first serve" basis. This Board stated it best in its only decision addressing this issue when it held "existence in state employment" began when the union solicited intent cards and "[a]ny stricter construction of this requirement would raise doubts about its validity which should be avoided if possible." State of Connecticut Dec. No. 1682. The respondents are merely attempting to twist SERA and the spirit of the Act in a perverse and repugnant way in order to create an exclusive club in which no new unions are allowed entry.

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It is clear UPSEU has been in continuous existence in state employment since 2005. (Ex. 19 & Tr. Vol. I p 88-89). In May of 2005 UPSEU COPS began a continuously campaign, in 2008 UPSEU expanded and continued its campaign, and that very campaign is still going on through today and is the subject of this instant matter. (Ex. 20 & Tr. Vol. I p 89-90, 92, & 106). Thus, it is clear that UPSEU has been in existence in state employment for the past six years and it more than met the burden of C.G.S. § 5-275(a)(3).

B. UPSEU is not barred by the contract bar rule.

The respondents' assert that the elections cannot be ordered because the contract bar rule, which prohibits elections from taking place during the term of a written CBA, prevents the elections from being ordered. *See State of Connecticut*, Dec. No. 2652 (1988). It is undisputed by *all* parties that the original window period for which the elections could be ordered was August 1, 2011 through August 31, 2011. It is further undisputed that UPSEU filed the petitions on August 31, 2011³. Therefore, in accordance with the C.G.S. and Connecticut Regulations, UPSEU timely filed the petitions during the open window period, and the Board is

³ The respondents' raised a question regarding the date on which the petitions were filed by UPSEU. Specifically, they questioned why UPSEU filed the petitions on August 31, 2011 and not prior to August 22, 2011 when the SEBAC Agreement and the CBA's were submitted to the General Assembly. This is a red herring. Pursuant to § 5-273-10 of the Connecticut Regulations, UPSEU could have filed its petitions anytime between August 1, 2011 through August 31, 2011. The fact that it filed the petitions August 31, 2011 is irrelevant and UPSEU is not required to explain its actions. Moreover, it is noteworthy that the respondents' claim the extended CBA's were effective as of July 22, 2011 so even if UPSEU submitted its petitions prior to August 22, 2011 they would still raise the same objections. Again, the respondents are engaging in the proverbial smoke and mirrors game to dissuade the Board from ruling on the merits of the case.

required to order the elections. Moreover, even if the Board was to determine there was not an open window period at the time the petitions were filed “good cause” exists and the Board must order the elections be held.

1. The Board is not required by the Uniform Administrative Procedures Act to go through the Rulemaking Process in order to apply the three year rule or the premature extension doctrine to SERA.

The Board is well within its power and authority to adopt the three year rule and the premature extension doctrine to SERA. Pursuant to C.G.S. § 5-273(b) the Board has the authority to carry out the provisions of SERA. The Board has the authority to hold hearings and issue Board decisions. In order to do so the Board is required, at times, to interpret the C.G.S. and Connecticut Regulations. The Uniform Administrative Procedure Act (hereinafter “UAPA”) does not require the Board to go through the Rulemaking Process every time it interprets the C.G.S. and the Connecticut Regulations, as the respondents’ contend. To require this would render the Board’s ability to issue decisions an ineffective and long cumbersome process, because the Board would be required to go through the Rulemaking Process every single time it issued a decision. Contrary to the respondents’ assertions § 5-273(b) only requires that the Board engage in the Rulemaking Process when establishing new regulations it does not require the Rulemaking Process when establishing a directive or interpreting C.G.S. and Connecticut Regulations.

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Moreover, the respondents would like the Board to believe that every decision it makes that has a precedential effect should be considered a regulation and reduced to the Rulemaking Process. However, the Connecticut Supreme Court has held not

every administrative decision which may have precedential significance beyond the facts and party before it becomes ipso facto a regulation. Instead, administrative agencies must necessarily interpret statutes which are made for their guidance, and they may do so without reference to regulations. To rule otherwise would be to ignore the subtle and intricate interaction of law and fact. It is inherent in our judicial system of dispute resolution that the interpretation of statutes, like the development of the common law, grows out of the filtering of a set of facts through the law, as seen by the administrator or judge. The result of this application is a hybrid, composed in part of fact, in part of law, which by its existence contributes to the interpretation of a statute.

Sweetman v. State Elections Enforcement Comm'n, 249 Conn. 296, 317 (1999) (internal citations and quotations omitted). In Sweetman, the board for the State Elections Enforcement Commission issued a decision which held that the mailing sent out advocating a budget referendum was improper. Id. The board arrived at this decision by interpreting the pertinent statutes. Id. Shortly after the decision the Commissioner issued a memorandum articulating the new standard as a result of the board's recent decision. The Connecticut Supreme Court held that the board could properly rely on the decision and the memorandum articulating the new standard because it was in fact not a regulation but an interpretation of a statute. Id. As such,

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the board did not have to go through the Rulemaking Process. Id. The Supreme Court further held the board and the commissioner were simply carrying out their duty of interpreting a statute which it was charged with administering. Id. at 318. Failure to do so would be in violation of the board's explicit duty. Here, pursuant to the C.G.S. the Board is charged with carrying out and administering SERA. Part of that duty includes interpreting the C.G.S. and Connecticut Regulations. The three year rule and the premature extension doctrine are simply an interpretation of the C.G.S. and the Connecticut Regulations. Accordingly, the Board is well within its rights to apply both to SERA.

Specifically, § 5-273-10 of the Connecticut Regulations provides, in part, “[a] notification will be considered timely if 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 subjection of the petition.” The premature extension doctrine simply interprets the Connecticut Regulation to mean that a premature extension of a CBA will not close the window period provided for in the Connecticut Regulations. Further, the three year rule is merely an interpretation of the C.G.S. and Connecticut Regulations. C.G.S. § 5-275(a) provides, “no election shall be directed by the board during the term of a written collective bargaining agreement, except for good cause” and § 5-273-10 of the Connecticut Regulations provides, “[t]he board may consider petitions filed at other times if compelling reasons are

shown. . . .” Again, the three year rule is merely an interpretation of the definition of “good cause” and “compelling reason”. Moreover, the NLRB and this Board’s decisions support UPSEU’s contention. Both the Board and the NLRB have found the three year rule is not required to go through the Rulemaking Process. *See State of Connecticut, Department of Correction*, Dec. No. 4571 (2011); *City of Bridgeport*, Dec. No. 3338 p. 5 (1995); & *General Cable Corp.*, 139 NLRB 1123 (1962).

The respondents’ as they do throughout their briefs, are merely engaging in the proverbial smoke and mirrors game to dissuade the Board from ruling on the merits. It is clear based on the previous ruling of this Board, the NLRB, and the Connecticut Supreme Court the Board is well within its power to adopt the premature extension doctrine and the three year rule to SERA. Failure to do so would create a repugnant anomaly contrary to the Spirit of the Act

2. The Board must apply the premature extension doctrine to the instate matter.

Based on the facts of the instant case it is clear that the Board must apply the premature extension doctrine⁴. As discussed at length in UPSEU’s post-hearing brief, the premature extension doctrine provides that “a prematurely extended contract does not act as a bar to a petition.” *Wilton Public Schools*, Dec. No. 2104 p. 2 (1981). Here, it is undisputed the Incumbent Unions extended their original 2009 agreements through June 30, 2016. It is further

⁴ Curiously, out of every one of the respondents’ briefs submitted only one brief even made mention of the premature extension doctrine and that mention was only in a footnote. (*See Murray Brief* at p 10 FN5).

undisputed that the contract extension was done so prematurely. Specifically the contract was due to expire on June 30, 2012, sixteen (16) months prior to the expiration of the CBA's the respondents began negotiations for the extensions, and the CBA's were extended effective July 22, 2011, nearly one full year prior to the expiration of the original CBA. Now, the Incumbent Unions, whom extended the CBA's, are attempting to shield themselves from an election by claiming the premature extension eliminated the window period in August of 2011 and they are not vulnerable to an election until August of 2015. This type of shielding and manipulation is the very conduct the premature extension doctrine seeks to eliminate.

Although, this Board has only had the opportunity to apply the premature extension doctrine one other time in a case regarding the Municipal Employee Labor Relations Act, the National Labor Relations Board (hereinafter "NLRB") has had the opportunity to apply it in several cases and considers the doctrine to be "necessary" and "well established". (*See Exhibit A attached National Gypsum Company and United Gas, Coke and Chemical Workers of America, CIO, Petitioner (holding "[t]he premature extension doctrine is necessary to preserve employees the important right to challenge the representatives status of an incumbent unions at predictable and reasonable intervals".)*)

As discussed *supra*, at page 6, it is clear the Board has the authority to apply the premature extension doctrine to SERA without going through the Rulemaking Process.

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Moreover, UPSEU submits that there has not been any case that has come before this Board that is more appropriate for the premature extension doctrine to be applied. This instant matter encompasses the very spirit of this doctrine. To not apply the premature extension doctrine to this case would be a gross miscarriage of justice. Therefore, in order to protect the integrity and the spirit of SERA the Board must apply the premature extension doctrine in this case.

3. The State's difficult economic times are not a bar to the election.

The respondents' briefs are filled with the assertion that the Board should not order the elections to be held and should find the window period was closed and moved to August of 2015 because of the difficult economic times the State was facing. While UPSEU is sensitive to the difficult economic times and understands the precarious position the State and its employees were in, the Incumbent Unions cannot use the difficult economic times as a windfall for them to secure their position as the employees bargaining representatives. If anything the difficult economic times are more of a reason to ensure the employees' right to choose is preserved. The employees must have the ability to choose which labor organization assists them in navigating through these difficult economic times. Moreover, the employees should not be forced to choose between their job security and their right to choose representation. The premature extension doctrine ensures that is not permitted to happen.

Moreover, the NLRB has held that difficult economic conditions do not provide an exception to the premature extension doctrine. Id. Specifically, in National Gypsum Company the incumbent union sought to have the doctrine curtailed due to the abnormal economic times the country was under as a result of the Korean Conflict. The incumbent union argued it prematurely extended the contract in order to preserve financial stability, and to allow the premature extension doctrine to apply during the difficult economic times would cause instability to the employer-employee relationship. Id. at 677. The NLRB held that the right to choose a representative must be preserved despite the tough economic challenges the country was facing. It further held that it has long been established, since the difficult economic times during the post-World War II era, that changes can be made to a CBA and the agreement itself can be prematurely extended as deemed necessary by fluctuating economic conditions but that does *not* mean the employees loose or forfeit their right to the freedom to choose their representative. Id. 677-78. As such the NLRB applied the premature extension doctrine and found the right to exercise their freedom of choice and select a representative was an important and necessary right. Id. at 678. Therefore, based on the aforementioned an election was ordered.

Here, as in National Gypsum Company, despite the difficult economic times the premature extension doctrine must be applied to this matter. The incumbent unions should not be

permitted to hide behind the difficult times facing the economy simply by prematurely extending the CBA to protect their status as union representatives. To allow such would permit the incumbent unions to effectively foreclose window periods forever. An incumbent union would have the power to continuously close a window period by simply extending the contract right before or during the open window period and claim that the economy required such.

4. The three year rule should be extended to SERA and should apply in this case.

The respondents' argument that the employees were not denied their freedom of choice because they voted for the extended CBA's and were aware of the term is a disingenuous argument. It is clear based on the testimony by union representatives the employees were unaware of the extended window period and were unaware that the new contract would terminate their right to choose a representative for at least another four years or more. (Tr. Vol. III p 327; Vol. IV. p 477; 489; 490; 513; 519, & 521-523). Furthermore, it was clear that a number of employees would *not* have voted to ratify the new CBA's had they been aware that the Incumbent Unions would assert their right to choose representation has been foreclosed. (Tr. Vol. IV p 541-542).

Moreover, the argument advanced by the respondents that the three year rule should not apply to this case because they were not involved in the hearing concerning Case No. SE-29,381 is insincere. Simply because they were not involved in a case does not mean the

respondents' are not bound to the rules established by the Board resulting from the case. The Board is authorized to announce new principals in a proceeding by which current parties and future parties will be bound by. (See Exhibit B attached Local 1378, Council 4, AFSCME, AFL-CIO v. Conn. State Board of Labor Relations and City of New Haven, Dckt No. 85-0313031-S at 10). Moreover, even if the Board were to believe that based on the representations of Kathy Foley, the instant matter cannot be bound by the Board's decision in Case No. SE-29,381, nothing would prevent the Board from establishing the three year rule in this case based on the good cause presented at the hearings and further established in UPSEU's post-hearing brief.

The Board held in State of Connecticut, Department of Correction, the three year rule is adopted to SERA. State of Connecticut, Department of Correction Dec. No. 4571 p 8 (2011). Specifically the Board held, "[w]e also find that 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. The parties have not identified a policy or rationale for affording representation petitions different treatment in this regard under SERA than such are afforded under MERA or in the private sector by our federal counterpart." Id. Similarly, in this case the respondent' who now have the opportunity to demonstrate why the three year rule should not be applied to SERA have failed to do so. Throughout their briefs the respondents do not identify one reason why the three year rule should not be adopted to SERA.

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C. Attachment H “clearly” conflicts with the regulations and is therefore void by law.

As extensively discussed in the UPSEU brief, it has long been established that if a provision of the SEBAC Agreement is to enjoy C.G.S. § 5-278(b) preferential treatment the appropriate procedures *must* be followed. Cox v. Aiken, 278 Conn. 204, 216 (2006) (emphasis added). The statute provides that the legislatures *must* be expressly notified of a conflicting term between the agreement and the C.G.S. or the Connecticut Regulations. Id. Failure to do so will render the conflicting term a nullity and neither party will be entitled to enforce the conflicting term. Id.

It is clear that the language of Attachment H was in direct conflict with the C.G.S. and Connecticut Regulations. The C.G.S. and Connecticut Regulations provide that the open window period would be August 1st through August 30th, 2011. The language of Attachment H attempted to effectively change the window period by closing it for four additional years until August of 2015. It is agreed by a majority of the respondents, who chose to address Attachment H in their briefs, that the language of Attachment H altered, modified or changed the window period. (See Krzys brief on behalf of SEBAC p 8; Krzys brief on behalf of Local 2001 p 37; Carter Brief p 11; & Kelly p 10). Moreover, the respondents’ lead advocate Attorney J. William Gagne, Jr., so eloquently stated “Attachment H *clearly* was in conflict with regulations 5-273-10 which provides a window period in August 2011 for the employees in

dispute.” (Gagne Brief p 15) (emphasis added). Thus, it is “clearly” in conflict with the current state of the law and was therefore required to be included in the Supersedence Appendix in order to be afforded § 5-278(b) preferential treatment. However, it is undisputed that the Supersedence Appendix failed to list C.G.S. § 5-275 and Connecticut Regulations § 5-273-10 as a statute or regulation that the agreement sought to supersede. (Ex. 25).

Therefore, based on the aforementioned; UPSEU’s post-hearing brief; the respondents’ briefs, most notably the brief by the respondents’ lead advocate, it is “clear” the terms of Attachment H are in conflict with C.G.S. and the Connecticut Regulations. The Board is, therefore, bound by the rule of law and the clear precedent of the Connecticut Supreme Court and is required to hold that the language of Attachment H a nullity. Thus, the Board must follow the current state of the law and order the petitioned for elections.

IV. CONCLUSION

Based on the foregoing arguments and the arguments advanced in its brief, UPSEU urges the Board to conclude that the UPSEU is not bared from participating in an election pursuant to the six month bar rule, the contract bar rule does not bar the Board from ordering an election, and Attachment H does not bar the Board from ordering an election. UPSEU further urges the Board to order an election forthwith.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed on this 7th day of May, 2012 to all counsel and pro se parties of record as follows:

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