STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

STATE OF CONNECTICUT
-AND-
UNITED PUBLIC SERVICE EMPLOYEES UNION
-AND-
CSEA/SEIU LOCAL 2001
Case No. SE-29,394

DECISION NO. 4606

JULY 3, 2012

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 EMPLOYEES 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
-AND-
NATIONAL CORRECTIONAL EMPLOYEES UNION
-AND-
CSEA/SEIU, LOCAL 2001
Case No. SE-29,411

STATE OF CONNECTICUT
-AND-
UNITED PUBLIC SERVICE EMPLOYEES UNION
-AND-
LOCAL 749, AFSCME, AFL-CIO
Case No. SE-29,439

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DECISION AND DISMISSAL OF PETITIONS AND ORDER OF ELECTION

On August 31, 2011 the United Public Service Employees Union (UPSEU) filed petitions[1] with the Connecticut State Board of Labor Relations (the Labor Board) seeking, pursuant to the State Employee Relations Act (SERA or the Act), to represent certain bargaining units of employees of the State of Connecticut (the State). The petitioned-for units are currently represented by CSEA/SEIU Local 2001 (CSEA), AFSCME, Council 4, Local 749 (AFSCME), AFT/AFT-CT (AFT), and IBPO, Local 731 (IBPO). On August 31, 2011 the National Correctional Employees Union (NCEU) also filed a petition[2] with the Labor Board seeking to represent a bargaining unit of State employees currently represented by CSEA.

At investigatory conferences conducted by the Labor Board's Agent the incumbent unions objected claiming the petitions were barred by the so-called "six month rule" and both the State and the incumbent unions objected on the basis of the "contract bar rule" of Connecticut General Statutes §5-275(a). On September 27, 2011 the State Employee Bargaining Agent Coalition (SEBAC)[3] moved to intervene in all of the cases and on October 25, 2011 the Labor Board granted SEBAC party status limited to the issue of the application, if any, to the pending petitions of a certain provision in an agreement (the Revised SEBAC Agreement) between SEBAC and the State which was submitted to the legislature on August 22, 2011. The Agent consolidated the petitions for hearing and referred the matters to the Labor Board without recommendation.

Hearings were held before the Labor Board on December 29, 2011, January 11, 2012, February 9, 2012, and February 15, 2012. All parties appeared, were represented, and were allowed to introduce evidence, examine and cross-examine witnesses, and make argument. The parties filed post-hearing briefs on April 18, 2012 and reply briefs on May 7, 2012. Based on the entire record before us we make the following findings of fact and conclusions of law and dismiss the petitions in Case Nos. SE-29,394; 29,408; 29,409; 29,410; and 29,439 and order an election in Case No.SE-29,411.

FINDINGS OF FACT

1. The State is an employer within the meaning of the Act.

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[1] Case Nos. SE-29,394; 29,408; 29,409; 29,410; and 29,439.

[2] Case No. SE-29,411.

[3] SEBAC exists pursuant to Connecticut General Statutes §5-278(f) which provides, in relevant part:

> . . . collective bargaining negotiations concerning changes to the state employees retirement system . . . and collective bargaining negotiations concerning health and welfare benefits . . . shall be conducted between the employer and a coalition committee which represents all state employees who are members of any designated employee organization . . . (3) The provision of subdivision (1) of this subsection shall not be construed to prevent the employer and representatives of employee organizations from dealing with any statewide issue using the procedure established in said subdivision.

2. CSEA is has been the certified collective bargaining representative of a bargaining unit (P-4 – Engineering, Scientific and Technical) consisting of State employees in certain enumerated classifications.

3. The State and CSEA were parties to a collective bargaining agreement as to the P-4 unit with effective dates of July 1, 2009 to June 30, 2012.

4. AFSCME is an employee organization within the meaning of the Act and at all material times has been the certified collective bargaining representative of a bargaining unit consisting of Division of Criminal Justice (DCJ) employees in certain enumerated classifications.

5. The State and AFSCME were parties to a collective bargaining agreement as to the DCJ unit with effective dates of July 1, 2009 to June 30, 2012.

6. AFSCME is the certified collective bargaining representative of a bargaining unit (Judicial Professional) consisting of Judicial Branch employees in certain enumerated classifications.

7. The State and AFSCME were parties to a collective bargaining agreement as to the Judicial Professional unit with effective dates of July 1, 2009 to June 30, 2012.

8. IBPO is an employee organization within the meaning of the Act and at all material times has been the certified collective bargaining representative of a bargaining unit (Judicial Marshals) consisting of Judicial Branch employees in certain enumerated classifications.

9. The State and IBPO were parties to a collective bargaining agreement as to the Judicial Marshals unit with effective dates of July 1, 2009 to June 30, 2012.

10. CSEA is an employee organization within the meaning of the Act and at all material times has been the certified collective bargaining representative of a bargaining unit (NP-8) consisting of Department of Correction employees in certain enumerated classifications.

11. The State and CSEA were parties to a collective bargaining agreement as to the NP-8 unit with effective dates of July 1, 2008 to June 30, 2012.

12. AFSCME is the certified collective bargaining representative of a bargaining unit (Judicial Non-Professional) consisting of Judicial Branch employees in certain enumerated classifications.

13. The State and AFSCME were parties to a collective bargaining agreement as to the Judicial Non-Professional unit with effective dates of July 1, 2009 to June 30, 2012.

14. UPSEU is a labor organization having as a primary purpose the improvement of wages, hours and other conditions of employment among state employees and others.

15. UPSEU does not now, nor has it ever represented a bargaining unit of State employees.

16. On August 5, 2005 UPSEU filed a petition with the Labor Board seeking to represent a new bargaining unit consisting of Department of Public Safety telecommunications employees. (Ex. 19). During the months prior to filing the petition UPSEU actively solicited "showing of interest" cards from State employees.

17. In 2008 UPSEU solicited "showing of interest" cards from Judicial Branch court reporters but did not obtain a sufficient number of cards to justify filing a petition with the Labor Board.

18. NCEU maintains its offices in Springfield, Massachusetts and represents several bargaining units in Massachusetts consisting of state, county and municipal employees.

19. NCEU does not now, nor has it ever represented bargaining units of State employees.

20. On February 8, 2008 NCEU filed articles of organization with the Massachusetts Secretary of the Commonwealth giving notice that NCEU existed as a corporation for the purpose of improving wages, benefits and working conditions through collective bargaining agreements. (Ex. 12).

21. In June of 2008 NCEU filed an application for certificate of authority as a foreign corporation with the Secretary of the State of Connecticut. (Ex. 21).

22. On July 24, 2008 NCEU filed a petition with the Labor Board seeking to represent a bargaining unit of Department of Correction employees and the Labor Board assigned Case No. SE-27,390 to the matter. (Ex. 16). During the months prior to filing the petition NCEU actively solicited "showing of interest" cards from State employees. (Ex. 17). The Labor Board did not order an election.

23. On May 22, 2011 representatives of SEBAC and the State executed a written tentative agreement (the SEBAC Agreement) (Ex. 40) effective to June 30, 2022, to which were appended Attachments A through D, that provided, in relevant part:

. . .

IV. JOB SECURITY

A. Job Security for Office of Labor Relations-Covered Units. The following job security provisions shall apply to all OLR Covered units which agree or have agreed to contracts or modified contracts in accordance with the 2011 Agreement Framework including the provisions for wages and other changes which are summarized in Attachment A.

. . .

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 wages and other matters which are summarized in Attachment A.

. . .

VI. TENTATIVE AGREEMENT, SUBJECT TO RATIFICATION AND APPROVAL BY THE GENERAL ASSEMBLY

. . . this tentative agreement has been . . . preliminarily recommended by SEBAC Leadership for ratification by the membership, subject to the employer(s) offering appropriate unit agreements to the bargaining units . . . SEBAC's final approval is subject to a post-membership vote by SEBAC Leadership in accordance with SEBAC rules . . .

. . .

ATTACHMENT A

State of Connecticut and SEBAC – Recommended Agreement on Savings Transformational and Financial issues and Framework for Job Security (hereinafter referred to as the "2011 Agreement Framework") concerning Wages and other matters

The State and SEBAC recognize that wages and other matters are negotiated on a bargaining unit basis by the union designated as the exclusive bargaining representative for that unit. However, the State and SEBAC have agreed that the following parameters shall apply to all units seeking the job security protections of the SEBAC 2011 Agreement.

A. The following parameters shall apply to wage agreements through June 30, 2016:

. . .

D. Expiration date of individual collective bargaining agreements. All individual collective bargaining agreements shall expire effective June 30, 2016.

24. In June of 2011 eleven of SEBAC's fifteen member unions voted to accept the SEBAC Agreement which was insufficient for full ratification under SEBAC's then existing bylaws and so the SEBAC Agreement was rejected.

25. On July 1, 2011 the General Assembly enacted Public Acts, Spec. Sess., June 2011, No. 11-1, §11(a) (Ex. 29) which states, in relevant part:

(a) Not later than five calendar days after an agreement between the state and

> the State Employees Bargaining Agent Coalition . . . is filed with the clerks of the Senate and 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 . . . if the General Assembly does not call itself into special session . . . 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 . . .

26. On various dates in July prior to July 22, 2011 representatives of the State and SEBAC met and discussed another potential SEBAC agreement.

27. On July 22, 2011 representatives of SEBAC and the State executed another written tentative agreement (the Revised SEBAC Agreement), the first fourteen pages of which were largely[4] identical to the May 22, 2011 SEBAC Agreement and to which were appended certain attachments that did not include an Attachment H. (Ex. 23).

28. On or about August 16 and 17, 2011 individual collective bargaining agreements adopting the "2011 Agreement Framework" set forth in Attachment A to the Revised SEBAC Agreement were ratified by the P-4 unit, DCJ unit, Judicial Professional unit, Judicial Marshals unit, and Judicial Non-Professional unit.

29. On August 18, 2011 all SEBAC member unions voted to approve the Revised SEBAC Agreement including Attachments A through I of which Attachment H states, in relevant part:

> Effective on and after July 1, 2011, 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.

(Exs. 23, 24).

30. By transmittal letter to the General Assembly clerks of the House and Senate dated August 22, 2011, OLR Director Linda Yelmini (Yelmini) gave notice that she had delivered a package which included the Revised SEBAC Agreement, individual collective bargaining agreements (including those for the P-4 unit, DCJ unit, Judicial Professional unit, Judicial Marshals unit, and Judicial Non-Professional unit), "[e]stimates of the savings produced and the costs of implementing" the agreements, and "a list of sections of the General Statutes and State Agency Regulations superseded by the SEBAC agreement and related provisions of individual unit agreements."[5] (Ex. 27).

[4] The Revised SEBAC Agreement differs from the May 22, 2011 SEBAC Agreement as to its title and date of execution.

[5] This latter document was entitled "Supersedence Appendix."

31. Attachment H was appended to the Revised SEBAC Agreement which accompanied Yelmini's August 22, 2011 transmittal letter.

32. Attachment H was not submitted for review to the members of the P-4 unit, DCJ unit, Judicial Professional unit, Judicial Marshals unit, and Judicial Non-Professionals unit on or prior to August 16 and 17, 2011.

33. The collective bargaining agreements which accompanied Yelmini's August 22, 2011 transmittal letter reflect consent to the 2011 Agreement Framework summarized in Attachment A to the Revised SEBAC Agreement.

34. The Supersedence Appendix which accompanied Yelmini's August 22, 2011 transmittal letter makes no reference to Attachment H, Connecticut General Statutes §5-275, or Regs., Conn. State Agencies §5-273-10.

35. The General Assembly did not call itself into special session within five days after August 22, 2011 for the purpose of approving or rejecting the Revised SEBAC Agreement or any individual unit collective bargaining agreement which accompanied Yelmini's August 22, 2011 transmittal letter.

DISCUSSION

The objecting incumbent unions[6] contend that UPSEU and NCEU are not eligible to participate in recognition elections because neither was "in existence in state employment for at least six months" as required under Connecticut General Statutes §5-275(a).[7] UPSEU and NCEU respond that each has existed as a labor organization representing public sector employees for several years and that each meets the standard for eligibility as applied by the Board in the past. SEBAC, the incumbent unions, and the State (collectively "objectors") also contend that UPSEU's petitions should be dismissed as untimely under the contract bar rule of C.G.S. §5-275(a).[8]

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[6] In Case No. SE-29,304 a brief was filed by incumbent "Judicial Professional Employees, AFT/AFT-Connecticut, AFL-CIO" objecting to the petitions. A brief was also filed by "the Executive Board and members of the Judicial Professional Employees" in support of the petitions at issue. Hereinafter, "incumbent unions" shall not refer to those persons on whose behalf the latter brief was filed and which brief the Labor Board afforded full consideration.

[7] C.G.S. §5-275(a) contains the so-called "six month rule" and states, in relevant part:

> . . . 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.

[8] C.G.S. §5-275(a) states, in relevant part:

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

Objectors argue that UPSEU's petitions are untimely by virtue of the legislature's enactment of Public Act 11-1 §11(a) and by the legislature's approval of Attachment H to the Revised SEBAC Agreement. UPSEU responds that Public Act 11-1 §11(a) is devoid of legislative intent to alter the regular window period for representation petitions under SERA and, in any event, the legislature was denied necessary notice of conflict between Attachment H and existing statutes or regulations. Based on our review of the record before us in the context of existing law we overrule those objections based on the six month rule and we sustain those objections based on the contract bar rule.

We agree with petitioners that they had sufficient statutory existence to establish eligibility to pursue the petitions at issue. As in ***State of Connecticut***, Decision No. 1682 (1978), "[t]he evidence shows that . . . [petitioners are] . . . labor organization[s] having as a primary purpose the improvement of wages, hours and other conditions of employment among state employees." *Id.* at p. 4 (internal quotation marks omitted). Similarly, as petitioners "solicited intent cards among State employees" more than six months prior to filing the petitions at issue, "[w]e hold that at that time . . . [petitioners] . . . came into existence in state employment within the meaning of . . . [C.G.S. §5-275(a)(3)]." *Id.* (internal quotation marks omitted).

Incumbents do not dispute that petitioners have existed as labor organizations representing employees of municipalities or other states well in excess of six months. Incumbents would have us interpret the phrase "in existence in state employment" to require prior tenure as a certified representative of State[9] bargaining units. This requirement, however, was part of SERA as originally enacted in 1975 and incumbents have failed to articulate how any labor organization (including incumbents) would be eligible to petition under such a construction. When faced with "the proverbial chicken and egg conundrum, logic dictates . . ." ***Picco v. Town of Voluntown***, 295 Conn. 141, 151 (2010). Construed in the context of other provisions in SERA, the phrase "in state employment" clearly does not summarily deny all labor organizations the right to petition[10] just as it does not require that a petitioning labor organization demonstrate that it has, itself, been employed by the State in the past.[11] The statute, reasonably construed, does require past involvement with State employees. We find, as we did in ***State of Connecticut***, *supra*, that an active, albeit unsuccessful prior campaign to solicit a showing of interest establishes a sufficient level of past involvement. Since the record

[9] We agree with incumbents that the word "state" as used in Section 5-275 is limited to the state of Connecticut given the definition of "Employer" in Connecticut General Statutes §5-270(a) which provides, in relevant part: "When used in sections 5-270 to 5-280, inclusive: (a) 'Employer' means the state of Connecticut . . ."

[10] Connecticut General Statutes §5-271(a) states, in relevant part: "Employees . . . shall be protected in the exercise of the right of self organizations, to form, join or assist *any* employee organization . . ." (emphasis added).

[11] Bargaining unit members, not labor organizations, are ordinarily "in state employment" and State employment of a labor organization is barred by Connecticut General Statutes §5-272(a) which provides, in relevant part: "Employers . . . are prohibited from . . . (2) dominating or interfering with the formation, existence or administration of any employee organization."

reflects such prior campaigns by petitioners and since petitioners have otherwise long existed as labor organizations, we overrule incumbents' objections to the extent that such are based on the six month rule.

A proper disposition of the contract bar objections before us requires a review of our case law and its genesis. Both SERA and the Municipal Employees Relations Act (MERA) prohibit representation elections during the term of a collective bargaining agreement "except for good cause." Connecticut General Statutes §§5-275(a), 7-471(1). The Labor Board has promulgated regulations under SERA and MERA recognizing fixed windows for the timely filing of petitions. Regs., Conn. State Agencies §§5-273-10(b), 7-471-8(b);[12] *See* ***West Hartford Board of Education***, Decision No. 1183 p. 3 (1973). This approach "serves the dual purposes of allowing employees the opportunity to express their choice of representative but limits the disruption that such a change can bring by only allowing a petition to be filed during the finite period near the end of a contract." ***Fairfield Board of Education***, Decision No. 4329 p. 3 (2008); *see* ***State of Connecticut, Department of Correction***, Decision No. 4571 (2011); ***Woodstock Board of Education***, Decision No. 1992 (1981); ***West Hartford Board of Education***, *supra*. This approach is also consistent with that of our federal counterpart.[13]

Under these regulations the window is determined by the contract expiration date which the parties dispute in the instant cases, petitioner UPSEU relying on the original scheduled expiration dates of the individual collective bargaining agreements in June

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[12] Regs., Conn. State Agencies §5-273-10(b) states, in relevant part:

> (b) 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.

Regs., Conn. State Agencies §7-471-8(b) provides, in relevant part:

> "A petition will be considered timely if it is filed between 180 and 150 days prior to the expiration of the collective bargaining agreement."

[13] Although the contract bar rule is not expressly set forth in the National Labor Relations Act (NLRA), in 1938 the National Labor Relations Board (NLRB) adopted the rule in ***Superior Electrical Products***, 6 NLRB 19, 22 (1938), finding that elections should not occur during the term of a collective bargaining agreement of reasonable duration. ***Local 1545 v. Vincent***, 286 F.2d 127, 130 (2nd Cir. 1960). The NLRB contract bar rule has long recognized a fixed "open period" or window prior to the expiration of a collective bargaining agreement during which representation petitions will be considered timely. ***Deluxe Metal Furniture Co***., 121 NLRB 995, 999 (1958).

> As the Board explained in [***Union Fish***, 156 NLRB 187, 191 (1965)], its contract-bar is designed to accommodate two objectives – giving the parties to a contract a "reasonable period" of "industrial stability free from petitions seeking to change the bargaining relationship," while, at the same time providing "employees the opportunity to select bargaining representatives at reasonable and predictable intervals."

Tinton Falls Conva Center, 301 NLRB 937, 939 (1991).

2012 and objectors relying on the expiration dates of those agreements as extended[14] to June 2016. We agree with the objectors' calculation of the window given the record before us. Since the contract extension agreements were filed with the legislature's clerks on August 22, 2011, we must find that they were deemed approved by the legislature on August 28, 2011 by operation of Public Act 11-1 §11(a).[15] Because the petitions at issue[16] were filed on August 31, 2011 (a date *not* "of the year prior to the expiration of the collective bargaining agreement[s] covering the employees who are the subject of the petition[s]") an application of the regulation here does not establish "good cause" for directing an " . . . election . . . during the term of a written collective bargaining agreement . . ." *See* Regs., Conn. State Agencies §5-273-10(b); C.G.S. §5-275(a).

UPSEU argues that its petitions are timely if the filing window is calculated either under the premature extension rule[17] of ***Wilton Public Schools***, Decision No. 2104 (1981) or the three year rule[18] recently adopted under SERA in ***State of Connecticut, Department of Correction***, Decision No. 4571 (2011). It is, however, undisputed that neither rule had been adopted under SERA, nor had the petitions been filed, at the time the legislature approved the contact extensions at issue and the unambiguous language in Attachment H to the Revised SEBAC Agreement. We conclude that absent the legislature's approval of the Revised SEBAC Agreement and its attachments, the petitions would have been timely filed. We are not at liberty to adopt retroactive rules which circumvent the legislature's actions as to these specific contracts. "This is consistent with our recognition that the legislature is fully empowered to modify the statutory schemes we administer and it does not violate those schemes merely by exercising this power." ***State of Connecticut***, ***Department of Public Safety***, Decision No. 4550 p. 4 (2011). *See* ***State of Connecticut***, Decision No. 3751 (2000); ***State of***

[14]The 2011 Agreement Framework proposed in the Revised SEBAC Agreement included an extension date of June 30, 2016 as one of its terms.

[15] Public Act 11-1§11(a) provides that the Revised SEBAC 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 [if the General Assembly does not call itself into special session within five (5) days of such filing] . . ." Unlike the dissent, we have no difficulty finding that the contract extension agreements were "appendices" within the meaning of Public Act 11-1 given the language in Attachments A and H to Revised SEBAC Agreement.

[16] The petition in Case No. SE-29,411 is not at issue under the contract bar rule because that bargaining unit rejected the 2011 Agreement Framework proposed in the Revised SEBAC Agreement and the collective bargaining agreement is still scheduled to expire on June 30, 2012. In short, the parties to that case do not dispute that the petition in that case was filed during the proper window in August of 2011.

[17] Under this rule a prematurely extended contract will not bar an otherwise timely petition and "[a] contract will . . . be considered prematurely extended if during its term the contracting parties execute an amendment thereto or a new contract which contains a later terminal date than that of the existing contract . . ." ***Deluxe Metal Furniture Co***., *supra*,121 NLRB at 1001.

[18] "Under this rule a contract in excess of a three year term cannot bar a representation petition filed after the first three years of the contract." ***City of Bridgeport,*** Decision No. 3338, p. 4 (1995) (*citing* ***General Cable Corp.*** 139 NLRB 1123 (1962)).

Connecticut, Board of Trustees of State Colleges, Decision No. 2028 (1981), *appeal dismissed*, 197 Conn. 91 (1985).

UPSEU further argues that we should disregard Attachment H as it was never presented to the incumbents' respective members prior to their ratification votes. Unlike the statutory process for legislative approval of tentative collective bargaining agreements, SERA does not dictate the internal ratification process for labor organizations. *See* ***Connecticut State Employees Association (John Soloman)***, Decision No. 1704 (1979). Under federal law such internal procedures are considered nonmandatory subjects and an employer may not refuse to execute a collective bargaining agreement on the grounds that it was not ratified in accordance with the union's constitution or bylaws. ***NLRB v. Borg-Warner Corp.***, 356 U.S. 342 (1958); ***Newtown Corp.***, 280 NLRB 350, 351 (1986), *enfd.* 819 F.2d 677 (6th Cir. 1987). There is nothing in the record before us that impugns the apparent authority of incumbents' representatives as regards the Revised SEBAC Agreement or the individual contract extensions at issue and as such, we find that Attachment H existed as part of those tentative agreements when they were submitted to the legislature for approval.

UPSEU also contends that Attachment H conflicts with SERA's contract bar statute and related window period regulation and since these conflicts were not identified in the Supersedence Appendix, Attachment H was never approved by the legislature in accordance with Connecticut General Statutes §5-278(b).[19] We agree that to the extent Attachment H conflicts with existing law, failure to afford the legislature notice of such conflict would preclude recognition or enforcement of Attachment H pursuant to Connecticut General Statutes §5-278(e).[20]

> [Section] 5-278(b) implicitly requires that, in order for the legislature to 'approve or reject' a collective bargaining agreement term in conflict with law, the particular contract term must be stated distinctly and correctly by the employer in the transmittal of the contract to the legislature. If the notification required by §5-278(b) did not apprise the legislature of the conflicting . . . term, then that term . . . would be ultra vires. Put another way, a term at variance with law, not approved

[19] C.G.S. §5-278(b) states, in relevant part:

> (b) Any agreement reached by the negotiators shall be reduced to writing. The agreement, together with a request . . . 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 bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days after the date on which such agreement … The General Assembly may approve any such agreement as a whole by a majority vote of each house or may reject such agreement as a whole by a majority vote of either house. . . .

[20] C.G.S. §5-278(e) states, in relevant part:

> (e) Where this is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail.

> by the legislature in accordance with . . . §5-278(b), does not enjoy the preferential position provided for legislatively approved conflicting terms by §5-278(e), but is rendered a nullity. Neither party to the agreement is therefore entitled to enforce that term.

Cox v. Aiken, 278 Conn. 204, 216 (2006). In order to be operative, the "supersedence" notice to the legislature must specifically identify the conflicting provision in the collective bargaining agreement at issue and the statute or regulation involved. ***Cox v. Aiken***, *supra*, 278 Conn. at 217-218; ***State College American Assn. of University Professors v. State Board of Labor Relations***, 197 Conn. 91, 99 (1985); *see also* ***Nagy v. Employees' Review Board***, 249 Conn. 693, 707 (1999); ***Board of Trustees v. Federation of Technical College Teachers***, 179 Conn. 184, 191 (1979).

UPSEU's reliance on lack of notice in the Supersedence Appendix is misplaced because, as previously noted, Attachment H *did not conflict* with Section 5-275(a) of SERA or Section 5-273-10(b) of the regulations or our case law when it was transmitted to the legislature. The August 2011 window changed to August 2015 pursuant to the regulation when the legislature approved the contract extensions. While Attachment H would conflict with the premature extension rule or the three year rule, neither rule had been adopted under SERA, nor had the petitions at issue been filed, when Yelmini submitted the tentative agreements and Attachment H to the legislature. In short, on August 22, 2011 Attachment H was consistent with and a codification of then existing law under SERA. As such we cannot ignore legislative approval of its provisions on the basis of a supersedence notice the statute did not require.

In sum, we find that petitioners UPSEU and NCEU had sufficient prior existence under the six month rule to establish their eligibility to pursue the petitions at issue. As such, we find that NCEU's petition in Case No. SE-29,411 was timely filed and we direct that an election be conducted as to that bargaining unit. As to Case Nos. SE-29,394; 29,408; 29,409; 29,410; and 29,439 we sustain the objections before us on the basis of the contract bar rule and dismiss the petitions as untimely.

DISMISSAL OF PETITIONS AND ORDER OF ELECTION

By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Act Concerning Collective Bargaining for State Employees, it is hereby **ORDERED AND DIRECTED,** that

I. The petitions filed in Case Nos. SE-29,394, SE-29,408, SE-29,409, SE-29,410 and SE-29,439 herein be dismissed without prejudice to refiling at an appropriate time.

II. An election by secret ballot be conducted under the supervision of the Agent of the Board within thirty (30) days of the issuance hereof, among employees holding the positions of Correctional Lieutenants, Correctional Captains, Correctional Training Officers, and Correctional Counselor Supervisors to determine whether they desire to be

represented by Connecticut State Employees Association or the National Correctional Employees Union.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Patricia V. Low
Patricia V. Low
Chairman

Wendella Ault Battey
Wendella Ault Battey
Board Member

DISSENT OF MEMBER DELLAPINA

I dissent from the majority opinion because I feel that the record does not support an application of the contract bar rule to any of these cases and that an order of elections is warranted under the Act.

I do not believe the legislature intended to change the window period for these bargaining units nor do I feel that the issue of such a change was ever properly submitted for legislative approval. As the majority recognizes, MERA and SERA afford the Labor Board authority to determine what constitutes good cause for directing an election during the term of a collective bargaining agreement. The Labor Board has consistently made such determinations through sound rules it has adopted from long-standing federal labor law. The instant petitions are timely under two of these rules, the so-called three year rule and the premature extension rule. While I refrain from discussing the three year rule other than to say it should have been applied here given the underlying policies recently discussed in ***State of Connecticut, Department of Correction***, Decision No. 4571 (2011),[1] I feel that further discussion of the premature extension rule is warranted given the undisputed facts in these cases.

In ***Wilton Public Schools***, Decision No. 2104 (1981) the Board adopted the premature extension rule applied by the National Labor Relations Board (NLRB) as a sensible means of preserving the contract bar rule's accommodation of competing interests.[2] Under this rule a prematurely extended contract will not bar an otherwise timely petition. The purpose of the rule is "to protect petitioners in general from being faced with prematurely executed contracts at a time when the Petitioner would normally be permitted to file a petition. . . . if a petition is filed during the open period calculated from the expiration date of the old contract, the premature extension will not be a bar." ***H.L. Klion, Inc.,*** 148 NLRB 656, 660 (1964). In adopting the rule under MERA we stated:

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[1] I do not afford any weight to the argument of the Division of Criminal Justice in Case No. SE-29,408 that we should ignore ***State of Connecticut, Department of Correction***, *supra*, because the Labor Board's Agent assured the parties in the consolidated cases that that case would not address any legal issue other than the so-called interest arbitration bar. All parties were afforded a full opportunity to be heard in the instant cases and no argument of merit, in my opinion, against adoption of the three year rule in SERA was raised.

[2]We have long looked to federal law for guidance in applying our state labor relations acts. *See* ***State of Connecticut, Department of Correction***, Decision No. 2902 (1991).

> We believe the premature extension doctrine presents a sensible rule. It protects the employees' right to choose their collective bargaining representative and the challenging union's right to file election petitions. At the same time, the doctrine goes no further than the contract rule itself in its effect on the stability of collective bargaining relationships.

Wilton Public Schools**, supra at p. 2.* ***In State of Connecticut, Decision No. 2652 (1988) the Board applied the rule in a SERA case and directed an election despite a contract extension lest employees "be unnecessarily delayed in their attempts to achieve self determination." *Id.* at p. 4.

Applying these principles to the cases before us I find that the petitions were timely filed. It is undisputed that the objectors were parties to collective bargaining agreements scheduled to expire in 2012 and the petitions at issue were 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." *See* Regs., Conn. State Agencies §5-273-10(b). It is also undisputed that each individual collective bargaining agreement which accompanied Yelmini's transmittal letter to the General Assembly on August 22, 2011 was executed during the term of a prior agreement and was "an amendment thereto or a new contract which contains a later terminal date than that of the existing contract . . ." ***Deluxe Metal Furniture Co***., 121 NLRB 995, 1001 (1958). In short, the instant facts fall squarely within the premature extension rule and I find that employee attempts to achieve self determination would be unreasonably delayed were these otherwise timely petitions barred on the basis of the extended and/or new agreements submitted to the General Assembly in August of 2011.

While I agree with the majority that Attachment H unambiguously purports to postpone the window period for these bargaining units to August of 2016, I also believe it clearly conflicts with both the premature extension rule and the three year rule and as such is "rendered a nullity" because it was not listed in the Supersedence Appendix as required by Connecticut General Statutes 5-278(b). *See* ***Cox v. Aiken,*** 278 Conn. 204, 216 (2006). Since the legislature was not afforded proper notice, Attachment H is unenforceable.[3]

I disagree with the majority's reasoning that because the Labor Board had not formally adopted the three year rule or the premature extension rule prior to Yelmini's

[3] I question whether Attachment H is valid even if it had been identified in the Supercedence Appendix. Connecticut General Statutes 5-278(e) only allows supersedence of existing law by contract provisions on "matters appropriate to collective bargaining." Attachment H may concern an otherwise illegal topic of collective bargaining to the extent it represents a contractual waiver of the rights of employees to exercise their choice of collective bargaining representative. Federal courts have declined to enforce such provisions, noting that a union's authority arises from its status as representative and unlike a waiver of employee economic rights, "[w]hen the right to . . . choice [of bargaining representative] is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." ***NLRB v. Magnavox,*** 415 U.S. 322, 325 (1974); *see also* ***Lee v. NLRB***, 393 F.3d 491 (4th Cir. 2005).

filing, there was no conflict to list on the Supersedence Appendix. Labor Board case law in representation matters under SERA is sparse due to a paucity of past disputes. Both rules have a sound policy basis and have been observed by our federal counterpart for decades, let alone by the Labor Board itself under MERA where necessary to avoid indefinite delay of employee self determination. In other words, "[t]he rules simply 'level the field' so that employees are allowed the legitimate right to choose their bargaining representative." ***City of Bridgeport***, Decision No 3338 p.6 n. 6 (1995). I am convinced that the legislature did not intend to change the window periods for State bargaining units by enacting the automatic approval provision in Public Act 11-1 §11(a).[4] The last window for these bargaining units was in August of 2007. I believe a five year postponement of employee opportunity to select representatives is contrary to the spirit and purpose of the Act and accordingly, I dissent.

Robert A. Dellapina
Robert A. Dellapina
Alternate Board Member

[4] I question whether this provision even encompassed the individual bargaining agreements extensions at issue. Section 11(a) of Public Act 11-1 only provided for "deemed" approval of "an agreement between the state and the State Employees Bargaining Agent Coalition . . . *and any appendices filed with such agreement* . . ." While Attachment H and the Supercedence Appendix are clearly encompassed, I have difficulty viewing each individual collective bargaining agreement that accompanied Yelmini's filing as a mere appendix to the Revised SEBAC Agreement. If not encompassed, these agreements would not be "deemed" approved until thirty days after commencement of the General Assembly's next regular session. *See* Connecticut General Statutes §5-278(b).

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 3rd day of July, 2012 to the following:

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