Connecticut Labor Relations Statutes and Decisions: Differences from Federal Law

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CONNECTICUT LABOR RELATIONS
STATUTES AND DECISIONS:
DIFFERENCES FROM FEDERAL LAW

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I. INTRODUCTION: THE STATUTORY BACKGROUND

The original Wagner Act\(^1\) is now a familiar page in labor history. Passed in 1935, it guaranteed the right of employees to organize, to be represented by a union of their choice, and to bargain collectively through that union. It forbade employers to engage in certain practices, defined as "unfair labor practices," which would frustrate the employees' rights under the Act. And it set up the National Labor Relations Board [hereinafter referred to as NLRB] to enforce and administer the statute. The original Act did not contain any prohibitions against union activities and it did not forbid the parties to a collective bargaining agreement from including in the contract a provision requiring employees to join a union.

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Because this article is written by persons intimately connected with the Connecticut State Board of Labor Relations and in a position to participate in or to influence future decisions of that Board, the authors do not feel free to suggest future rulings or directions that the Board may take. Future decisions must await the litigation process which will give the Board the benefit of briefs and arguments made by parties in the concrete context of actual cases. The authors believe that the Board's obligation to future litigants and to the ideals of due process prevents it from making the psychological commitment involved in taking even tentative positions on questions that have not yet actually been decided and may be presented in future cases. Accordingly, this article scarcely touches upon the peculiar problems that will be presented by the Act Concerning Collective Bargaining for State Employees and the Act Concerning School Board-Teacher Negotiations, statutes under which the Board has rendered few decisions. Because the great bulk of the Board's decisions in the past twelve years has concerned the Municipal Employee Relations Act, the emphasis of this article will be on this Act and decisions under it.

In 1945 the Connecticut General Assembly enacted the State Labor Relations Act\(^2\) [hereinafter referred to as SLRA], modeled after the original Wagner Act, which had not then been amended in any way to change the salient features noted above. The SLRA created the State Board of Labor Relations [hereinafter referred to as the Board] and gave it functions similar to those of the NLRB.

In 1947 Congress passed the Taft-Hartley Amendments,\(^3\) which modified the Wagner Act by introducing unfair labor practices on the part of unions and by placing limitations on the right of the parties to contract for a requirement that employees join the union. Bills embodying these and other Taft-Hartley provisions were introduced in the Connecticut General Assembly at several sessions but were not adopted.\(^4\) To this day the SLRA remains essentially what it was at the beginning—a baby Wagner Act.

In 1965 the General Assembly enacted the Municipal Employee Relations Act\(^5\) [hereinafter referred to as MERA] which extended to employees of local governmental units rights similar to those conferred on private sector employees by the SLRA. The MERA differed from the SLRA in several important aspects. For example, the MERA forbade certain kinds of conduct on the part of unions by introducing the concept of “prohibited practices”\(^6\) on the labor side. It did not, however, limit the right of the contracting parties to include in their agreement a requirement of union membership or some similar clause.

The MERA departed from private sector statutes so as to accommodate essential differences between public and private sector bargaining. For example, a significant part of public sector collective bargaining is political in nature. Recognizing that the public must pay through taxes for collective bargaining agreements with public employees, the MERA leaves the ultimate control of the purse strings in

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2. CONN. GEN. STAT. §§ 31-101 to 111b (1977) (originally enacted as Supp. 1945 §§ 933h to 946h). The SLRA applies only to employees in the private sector whose employer's business is not large enough to bring it under the NLRB’s jurisdiction. See CONN. GEN. STAT. § 31-101(7) (1977).
5. CONN. GEN. STAT. §§ 7-460 to 479 (1977).
6. MERA coined the term “prohibited practice” as a euphemism for the usual term “unfair labor practice,” presumably out of deference to the dignity of a governmental entity.
the hands of elected representatives. Bargaining is to be conducted by the chief executive officer of a municipality, but if an agreement made with the union requires additional funds, the request for such funds must be submitted to the representative body of the municipality. This body may "reject such request as a whole" and return the matter to the parties for further bargaining. 7

Another departure made by the MERA from private sector statutes relates to the handling of impasse in bargaining. Traditionally, private employees may strike and employers may use economic weapons such as going out of business. Public employees, on the other hand, are forbidden to strike, 8 and municipalities can scarcely go out of business. The MERA originally sought to solve the impasse problem by providing for mediation and factfinding if the parties were unable to agree within a reasonable time. 9 But the factfinder's report and recommendations were advisory only. Although these recommendations often provided a catalyst for the parties' agreement, they were sometimes rejected by one or both parties, thus necessitating further bargaining. 10 Dissatisfaction with this provision led to Public Act 75-570, which provides for compulsory arbitration of issues which remain unresolved after factfinding. 11

In 1975 the General Assembly enacted a labor relations statute covering state employees 12 [hereinafter referred to as State Employees' Act]. Although this statute was largely patterned after the MERA, there are some differences: the State Employees' Act has no provision for compulsory arbitration; it has a different definition of appropriate units; 13 and it requires members of a bargaining unit who

7. Conn. Gen. Stat. § 7-474(b) (1977). Where the legislative body is the town meeting, the agreement by the selectmen binds the town and the board of finance. Id.
8. Id. §§ 5-279, 7-475, 10-153e(a).
9. Id. § 7-473.
10. Professor Joseph Glasser of the University of Connecticut School of Business Administration is conducting a study of the correlation between the factfinder's report and recommendation and the settlement of labor disputes. He has reported to the authors that more than 80% of the disputes were settled in accordance with the factfinder's recommendation. The average length of delay between the completion of the factfinder's report and the settlement of the dispute is not yet available.
11. 1975 Conn. Pub. Acts 75-570, §§ 6, 7 (codified at Conn. Gen. Stat. §§ 7-473(c), 7-474 (1977)). This act also makes changes in the factfinding process, which has been retained as a condition to compulsory arbitration. In particular, the factfinder's report will become binding if it is not rejected in writing within a specified time. Id. § 3.
13. Conn. Gen. Stat. § 5-275 bids the Board to take into consideration both the effects of over-fragmentation and the fact that the state will be bargaining on a statewide
do not join the union to pay to the union the equivalent of union dues and charges "as a condition of continued employment." 14

In 1976 the jurisdiction of the Board was extended to public school teachers when their representatives were given recourse to the State Labor Relations Board in prohibited practice cases. 15 This statute prohibits both the employer and employee organization from engaging in practices similar to those prohibited by the MERA. 16

Under all of the state statutes, except the Teachers' Act, 17 the Board has jurisdiction over elections for the choice of representatives and over complaints of unfair labor practice, or prohibited practice. The Board's jurisdiction over elections empowers it to determine appropriate bargaining units, conduct elections through its Agent, 18 and decide upon questions regarding the eligibility of any person whose vote is challenged.

The Board has three regular members and three alternates. 19 All petitions for election and all complaints presented to the Board are

basis. These directions, absent from the other state labor statutes, have resulted in the establishment of units by regulation rather than on the case-by-case basis that the Board has employed under the other statutes.

15. An Act Concerning School Board-Teacher Negotiations, 1976 Conn. Pub. Acts 76-403 (codified at CONN. GEN. STAT. §§ 10-153a to 156d (1977)) [hereinafter referred to as the Teachers' Act]. Public school teachers have had the right of collective bargaining since 1961, but the statute granting them this right contained no definition of prohibited practices and provided no machinery for policing the conduct of employers who might seek to frustrate collective bargaining. CONN. GEN. STAT. § 10-153e(b) (1977) [hereinafter referred to as Teacher Negotiation Act], prohibits certain practices by an employer. And subsection 10-153e(c) prohibits similar practices by an "organization of certified professional employees or its agents." Subsection 10-153e(e) authorizes complaints of prohibited practices to be made to the Board and subsections 10-153e(e)-(i) describe the Board's procedures for processing such complaints.

16. CONN. GEN. STAT. § 10-153e(b), (c) (1977). There are some differences. The MERA expressly prohibits refusal to discuss grievances and refusal to comply with grievance settlements or arbitration awards. CONN. GEN. STAT. § 7-470(a)(5), (6), (b)(3) (1977). The Teachers' Act does not contain these exact prohibitions but does forbid refusal to participate in mediation or arbitration, and forbids certified professional employees or agents to solicit or advocate support from students for union activity. Id. § 10-153e(b)(5), (c)(5).
18. See note 21 infra and accompanying text.
19. The Fiscal Note attached to 1976 Conn. Pub. Acts 76-403 appropriated funds for three additional alternate members of the Board which have not yet been appointed. The statute provides for alternates in such number and for such periods of time as the governor may determine necessary, but no longer than six months. CONN. GEN. STAT. § 31-102 (1977). 1977 Conn. Pub. Acts 77-610(b) created the positions of Counsel and Assistant Counsel to the Board, effective Oct. 1, 1977.
heard by a panel of three, comprising members or alternates.\textsuperscript{20} There are no hearing officers. There is an Agent of the Board and five Assistant Agents.\textsuperscript{21} The Agent or an Assistant Agent investigates all petitions and charges or complaints, holds informal conferences regarding these matters with the parties, and mediates all questions upon which agreement may be possible.\textsuperscript{22} In this way many disputed questions, or entire cases, are settled and the work of the Board kept (though barely) within manageable limits. Finally, the Agent decides what cases or issues should be presented to the Board either by issuing a complaint or by making a report recommending hearing of a party's complaint.\textsuperscript{23}

II. CONNECTICUT LABOR RELATIONS DECISIONS

The law developed by the NLRB and the federal courts under the original Wagner Act and later under the Labor Management Relations Act has been the subject of a substantial body of legal writing.\textsuperscript{24} Since Connecticut's statutes are in many ways patterned on these federal statutes, the Board and our state courts have relied heavily on federal decisions as guides to the interpretation of these state statutes.\textsuperscript{25}

\textsuperscript{20} The alternates, when they sit, have the same powers as regular members. CONN. GEN. STAT. § 31-102(b) (1977). The Board's regulations provide that two members shall constitute a quorum. STATE BD. OF LABOR RELATIONS, CONN. DEP'T OF LABOR, REGULATIONS § 7-471-30 (1975). As a matter of policy, however, every effort is made to provide a three-person panel for each hearing, and the Board is reluctant to compel parties to submit a case to two members.

\textsuperscript{21} CONN. GEN. STAT. §§ 31-102(a), -103 (1977).

\textsuperscript{22} CONN. GEN. STAT. § 31-103 (1977); STATE BD. OF LABOR RELATIONS, CONN. DEP'T OF LABOR, REGULATIONS § 31-101-7 (1975).

\textsuperscript{23} Under the SLRA it is the Agent's function to issue complaints; the parties file charges with the Board which are automatically referred to the Agent. CONN. GEN. STAT. §§ 31-103, -107(a), (b) (1977); STATE BD. OF LABOR RELATIONS, CONN. DEP'T OF LABOR, REGULATIONS §§ 31-101-14 to -22 (1975). Under the MERA, however, it is the parties who file the complaint which the Agent investigates and reports upon to the Board. CONN. GEN. STAT. § 7-471(1)(A) (1977); STATE BD. OF LABOR RELATIONS, CONN. DEP'T OF LABOR, REGULATIONS §§ 7-471-19 to -20 (1975). Under the State Employees' Act the procedure is the same as that under the MERA. CONN. GEN. STAT. § 5-274(a) (1977). The procedure under the Teachers' Act is similar to that under the SLRA. See CONN. GEN. STAT. § 10-153e(e) (1977).


\textsuperscript{25} See, e.g., West Hartford Educ. Ass'n, Inc. v. DeCourcy, 162 Conn. 566, 579, 295
Thus there are large areas in which labor law parallels federal law. These areas will not be the subject of this article except where the adoption of a parallel rule involves problems peculiar to public sector bargaining. Here we shall deal largely with those areas in which the Board’s decisions differ from those of the NLRB,26 or where they deal with problems of public sector bargaining that have no counterpart under the national statutes.

A. Differences Not Attributable to Unique Nature of Public Employment

1. Procedural Differences

Fundamental differences in the structure and operation of the NLRB and the Board, and consequent differences in the procedures adopted by them, are shown in one of the most recent and interesting cases the Board has decided. The case arose under the SLRA and involved two corporations that performed different functions at the Plainfield dog track.27 Together they employed about five hundred people.28 In February and March 1976 several unions filed petitions with the Board seeking representation elections. At the first hearing the employers argued that the evidence would show they had a collective bargaining agreement with Local 402 of the Dolls, Toys, Playthings, and Novelties Union (Race Track Division), AFL-CIO, covering the employees in the units claimed on the petitions. State law, like federal law, bars an election “during the term of a [valid] written


26. In a recent decision the Board said:

We do not believe . . . that acceptance of federal decisions should be blind.

When there are differences either in the statutes or in other important conditions which face the federal and the state boards, or when the federal decisions do not seem best to effectuate the policies of state statutes, then we believe that a state board should be free to fashion its own rules to accommodate its own different problems.


27. Id.

28. The NLRB will ordinarily take jurisdiction over businesses with as large a gross volume of business as these, and with this number of employees, but has declined to take jurisdiction over dog racing tracks. See Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975); NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED, 29 C.F.R. § 103.3 (1976).
collective bargaining agreement."29

The petitioners claimed that they would prove that Local 402 never in fact represented a majority of employees, that the racetrack attempted to foster and assist Local 402 to become the bargaining agent for the employees, and that the contracts set up as bars to the petitions were what is known in labor relations as "sweetheart" contracts and therefore invalid.

The racetrack and Local 402 objected to the Board's hearing any evidence tending to negate their contract bar defense on the ground that such matters can be considered only in an unfair labor practice proceeding.30 The Board overruled this claim of law, but both the employer and Local 402 continued to press it vigorously at all subsequent hearings.

Under national substantive law the facts claimed by the petitioning unions would invalidate the contract,31 but under NLRB procedures no facts which tend to show an unfair labor practice may be interposed in representation proceedings, even when such facts are offered to avoid a contract bar defense to the petition.32 A corollary to this rule is that the NLRB will presume the legality of a collective bargaining agreement.33

There was no unfair labor practice charge or complaint filed against the employers. The Board concluded that it would not therefore impose the sanctions peculiar to unfair labor practice proceedings

30. Representation proceedings are authorized by CONN. GEN. STAT. § 31-106 (1977), unfair labor practice proceedings by § 31-107. The procedures under each are separately outlined in the Board's general regulations. STATE BD. OF LABOR RELATIONS, CONN. DEP'T OF LABOR, REGULATIONS §§ 31-101-3 to 13 (1975) govern representation proceedings. Sections 31-101-14 to 32 govern unfair labor practice proceedings. There are some minor differences in the prehearing procedures and the differences in remedies are substantial. If a representation petition succeeds, an election and possible certification result. If an unfair labor practice complaint succeeds, a cease and desist order is issued in addition to other appropriate remedies such as the reinstatement of an improperly discharged employee, the awarding of back pay, and the like. CONN. GEN. STAT. § 31-107(c) (1977).
but that the facts which may constitute an unfair labor practice are available in determining a different issue under a different procedure. The Board reasoned:

It is an everyday occurrence in our law that facts which constitute a crime may also constitute (or form constituent parts of) a civil cause of action, or defense, or avoidance of a defense. If they do so, these facts are freely available in the civil action even though no criminal prosecution has been instituted and even though the safeguards of criminal procedure do not obtain in the civil proceeding. . . .

There is nothing, therefore, in our general law which would preclude the petitioners here from avoiding respondents' defense of contract bar by facts which have that legal effect simply because those facts might also support other remedies which must be pursued under different procedures. Nor are the rules governing these other procedures violated by such a practice any more than criminal procedural rules are violated by allowing arson to be shown as a defense to a fire insurance claim.34

The Board perceived that a principal reason for the NLRB rule is the difference in procedure between representation cases and unfair labor practice cases. It noted that NLRB decisionmaking authority is statutorily divided among the office of general counsel, regional directors, and the NLRB itself. The responsibilities of these various branches depend upon whether an unfair labor practice complaint or a representation petition is involved. The intermingling of these procedures would create conflicts of interest which the statutes sought to avoid. The Board understood that "[t]o enforce this allocation of decision making authority it is necessary to make a rule which requires that unfair labor practice charges be raised only under the procedure specifically created for their disposition."35

The Board distinguished its own procedures from those of the NLRB:

From the very beginning this Board has adopted a different set of procedures. Both representation and unfair labor practice cases are regularly tried before the full Board as adversary proceedings. All cases of both types are pre-

35. Id. at 8. See Baltimore Transit Co., 59 N.L.R.B. 159, 162-63 (1944).
sent to the Board by the parties themselves or their counsel. The Agent has no role in this presentation. There is no counterpart to NLRB's general counsel, or regional director. At the Board hearings the rules of evidence are used as a guide, and the atmosphere is not without formality though it is less formal than in trials before a jury. There is no difference in any of these respects between representation and unfair labor practice proceedings.\textsuperscript{36}

As a result, the Board has consistently "followed the procedure generally observed in civil litigation which allows all of the issues open under the substantive law to be tried in a single proceeding. We believe we should adhere to our own practice in this regard even though it differs from that of the NLRB."\textsuperscript{37} Moreover,

this is peculiarly true here because the rule involved is procedural (rather than substantive) and because NLRB's procedural rule itself deviates from the whole trend of modern procedure to accommodate a situation produced by peculiarities in the organization and practice of NLRB which do not obtain in this State.\textsuperscript{38}

Since the NLRB forbids the introduction of facts in a representation proceeding that may be evidence of an unfair labor practice, it also forbids inquiry into the validity of a contract urged as a bar to a representation proceeding; its validity is presumed.\textsuperscript{39} The Board rejected this presumption because it was unable to follow the broader NLRB rule and because such a presumption "would afford insufficient protection to the employees' rights under the Act to choose their own representatives and tend instead to afford protection to fraud, collusion between union and management, and other questionable dealings at the expense of the employees."\textsuperscript{40}

The Board found little merit to the presumption in the context of the case before it;\textsuperscript{41} the presumption did not accord with the actual

\textsuperscript{36} Connecticut Yankee Catering Co., at 8 (footnotes omitted).
\textsuperscript{37} Id. at 6.
\textsuperscript{38} Id.
\textsuperscript{39} Electro Metallurgical Co., at 1399.
\textsuperscript{40} Connecticut Yankee Catering Co., at 9.
\textsuperscript{41} The facts surrounding the employer recognition of Local 402 presented a serious question of credibility. The card count was made without checking the validity of the signatures on the cards; Local 401's business agent brought both the employer's list of employees and the union cards to the card count; the employer's representative at the card count was a nonlabor lawyer who was not informed that the card count would take
probabilities in a situation where the labor organization had not been certified by the Board or shown to be the majority choice by a card check conducted by the Board or in a manner which complies with the Board’s simple safeguards:

Nothing in our experience would justify a presumption on this ground. If a presumption does not rest on probabilities it is a legal fiction created to serve some substantive or procedural end. This explains it in the context of NLRB’s structure but as we have pointed out this justification is altogether lacking under our organization and procedure.42

The Board concluded that Local 402 was not shown by a preponderance of the evidence to have been chosen by a majority of employees to be their representative. Therefore, the contracts between the racetrack and Local 402 did not constitute a bar to the elections sought by the petitioners, and elections were ordered to take place.

2. Twenty Hour Rule

The Board has also differed from the NLRB on the question of when it is appropriate to include part-time employees in the same bargaining unit as full-time employees. The LMRA provides that a majority of employees in a unit appropriate for collective bargaining shall designate or select who shall exclusively represent them in the bargaining process.43 The SLRA, MERA, and the State Employees’ Act contain similar provisions.44 Under the LMRA and the three Connecticut statutes, it is the responsibility of the administering board to determine in each case what an appropriate unit shall be.45 The primary concern of each board in making unit determinations is to group together only employees who have substantial mutual interests in wages, hours and other conditions of employment. Stated another way, the determining board decides whether the employees

place before the participants entered his office; and Local 402’s business agent testified that he destroyed the union cards after the card count and that the employer’s list “just disappeared.” Id. at 5.

42. Id. at 9.
44. Conn. Gen. Stat. §§ 31-106(a), 7-468(b), 5-271(b) (1977), respectively.
45. Conn. Gen. Stat. §§ 31-106(a), 7-471(3) and 5-275(b) (1977). However, Conn. Gen. Stat. §§ 31-106(a) requires the Board to designate a craft unit as an appropriate unit if the members of the craft so decide, and § 7-471(3) requires the Board to create a separate unit of professional employees unless the professionals vote for inclusion in a nonprofessional unit.
share a sufficiently similar community of interests.\textsuperscript{46}

The NLRB exercises considerable discretion in deciding whether full- and part-time employees share a community of interest sufficient to warrant inclusion in the same bargaining unit. Some factors which have been considered important include regularity of work, quantum of work, nature of work, and similarity of pay scale.\textsuperscript{47} These guidelines are quite broad and some cases which arrive at one conclusion are difficult to distinguish from cases reaching the opposite conclusion.\textsuperscript{48} The Connecticut Board is also vested with discretion in making determinations of appropriate units and the four factors listed above are similarly important to the decisionmaking. The basic difference between the approach of the two Boards is in the application of the second factor—quantum of work.\textsuperscript{49}

In 1948 the Connecticut Board departed from the NLRB when it decided that there was a danger presented to full-time employees by including in the same bargaining unit part-timers who worked less than half time.\textsuperscript{50} The Board determined that part-time employees often have a full-time job elsewhere and may have substantially less of a stake in their second job than have full-time employees. Thus, the Board concluded, the voting strength of the full-timers should not be diluted by including in the same unit part-timers who work less than fifty percent of the normal work week.\textsuperscript{51}

In \textit{Norwich City Cab Co.}\textsuperscript{52} the Board reconsidered the question. The average work week for Norwich City Cab drivers was sixty hours. The “fifty percent rule” would have excluded from the unit all employees who did not average at least thirty hours weekly. The Board recognized the unusual length of the employer’s work week and decided that the purposes of its fifty percent rule would be fulfilled if the measure were applied to the then prevailing work week


\textsuperscript{47} C. Morris, \textit{supra} note 46, at 212.

\textsuperscript{48} Id.


\textsuperscript{50} Davidson & Leventhal, Inc., State Bd. of Labor Relations Dec. No. 120 (Feb. 3, 1948).

\textsuperscript{51} Id.

of forty hours. As a result of Norwich City Cab, part-time employees who work regularly and average at least twenty hours a week for a period of weeks (usually thirteen) prior to the filing of the petition have consistently been included in a unit with regular full-time employees.53

At the time of its creation, this "twenty hour rule" had no counterpart in the labor relations law of any other state or in the federal labor law.54 Even the Connecticut rule did not continue without modification. Careful exceptions were allowed where the danger to full-time employees did not exist. Because hardship is often imposed upon part-time employees when they are excluded from the unit, the Board did not want to impose the twenty hour rule where it was not necessary. In Yankee Silversmith Inn, Inc.55 virtually the entire labor force was comprised of part-time employees. The Board declined to apply the rule, believing that there existed no significant conflict between part-time and full-time employees and that, therefore, a community of interest existed. A second departure from the rule was made where the employer himself had established a "sharp distinction" between regular part-time employees working at least sixteen hours weekly and those working less. Those employees working at least sixteen hours weekly were classified by the employer as "permanent part-time" employees and enjoyed substantial fringe benefits not provided to those employees classified as "temporary part-timers."56 In Terminal Taxi Co.57 the Board responded to arguments made by the employer that the twenty hour rule and its application were arbitrary:

It is true that the twenty-hour rule is arbitrary in the same sense that the rule terminating a person's minority at twenty-one years is arbitrary. Whenever a line is drawn problems appear in the borderland. Nevertheless the Board finds that by and large those whose employment is substantial as well as regular have a common interest in hours, wages, and working conditions, and that their interests are likely to differ materially from the interests of those who are employed only a few hours a week, even regularly. The lat-

53. See cases cited in notes 49-51, supra.
ter tend to regard such employment as incidental, or a side
dine. The Board also finds that the twenty-hour rule is a
reasonable one in the instant case and that it promotes sta-
bility and predictability in the administration of the Act to
apply it uniformly, except in very unusual circumstances.
The Board finds that such very unusual circumstances do
not exist in this case. 58

In Meriden-Wallingford Hospital 59 the Board was confronted for
the first time with the issue of whether a unit comprised entirely of
employees who worked less than twenty hours per week was an ap-
propriate unit for purposes of collective bargaining under the SLRA.
The Board had already noted the tendency of the twenty hour rule to
"disenfranchise" part-time workers, 60 but had never stated whether
their disenfranchisement stemmed from the practical reality that a
union probably would not be interested in representing a small unit
of part-time employees, or from the notion that employees excluded
by the twenty hour rule were not employees within the meaning of
the Act and therefore excluded from collective bargaining altogether.
In Meriden-Wallingford Hospital 61 the petition sought recognition of
a unit of nurses working less than twenty hours a week. The em-
ployer argued that they were not employees as defined by section
31-101(6) of the SLRA. 62 The Board found that employees working
less than twenty hours a week were not statutorily excluded from
coverage and that it did not have the discretionary power to exclude
them from the benefits of the SLRA. Because there could be no con-
fl ict between full-time and part-time employees in the claimed unit,
the Board found the unit appropriate. 63

Two of the Connecticut labor relations statutes have taken a
more restrictive view of whether a unit of employees who work less
than twenty hours a week is an appropriate unit. The MERA defines
an "employee" so as to exclude those working less than twenty hours

58. Id. at 2.
60. Town of Thompson Bd. of Educ., State Bd. of Labor Relations Dec. No. 978
(Mar. 17, 1971), rev'd on other grounds, Town of Thompson Bd. of Educ. v. Local 1303
Am. Fed'n of State, County & Mun. Employees (Super. Ct. Windham County, 1971);
1974).
per week. Unlike the original twenty hour rule developed by the Board under the SLRA, this MERA rule is a test of coverage rather than a test for the appropriateness of a bargaining unit. The LMRA has no counterpart to this rule. Read literally, this language allows no room for the exceptions worked out under the SLRA, or for a unit like that in Meriden-Wallingford Hospital. Similarly, the State Employees' Act defines "employee" as excluding "part-time employees who work less than twenty hours per week."

3. Parity Clauses

The validity of parity clauses has been one of the important issues recently facing the Board. A parity clause in a collective bargaining agreement binds the employer to give additional benefits to the contracting union in the event that a later contract with another union affords more favorable treatment than did the earlier contract. Such clauses are occasionally found in the private sector, but their principal use has been by unions representing firefighters in order to raise their general wage level to that of policemen, who were generally better paid.

In City of New London the Board noted that even in the absence of a parity clause the negotiator for a municipality "must consider traditional and equitable relationships among the various groups of its employees and it is a common practice for such negotiator to

64. CONN. Gen. Stat. § 7-467(2) (1977) provides as follows: "'Employee' means any employee of a municipal employer, whether or not in the classified service of the municipal employer, except . . . part-time employees who work less than twenty hours per week . . . ."


68. Borough of Naugatuck (Fire); City of New London (Police Department), supra note 67.

stress the implications which any concession would have in terms of similar demands by other groups.” 70 The Board also observed that even in the absence of a parity clause “there is a widespread but not uniform tradition among American cities of observing parity in fact between policemen and firemen.” 71 Despite this tradition, the Board found that the presence of a parity clause was particularly beneficial to employees for two reasons: “(1) [I]t binds the city legally to give firemen whatever is later given to policemen (within the scope of the parity clause); (2) it requires that such concessions be made to the firemen forthwith, even though their contract may have a year or more to run.” 72

Although the Board concluded that the parity clauses in question were illegal, its holding was limited. In particular, the Board declined to hold that parity between policemen and firemen was forbidden, that the existence of a parity clause was in and of itself unlawful, or that the police and fire units could not agree upon or bargain for equal benefits.73 However, the Board did find the clause under consideration to be objectionable because of its inevitable impact on a third party not participating in the collective bargaining discussions:

What we find to be forbidden is an agreement between one group (e.g., firemen) and the employer that will impose equality for the future upon another group (e.g., policemen) that has had no part in making this agreement. We find that the inevitable tendency of such an agreement is to interfere with, restrain and coerce the right of the later group to have untrammeled bargaining. And this affects all the later negotiations (within the scope of the parity clause) even though it may be hard or impossible to trace by proof the effect of the parity clause upon any specific terms of the later contract (just as in the case before us). The parity clause will seldom surface in the later negotiations but it will surely be present in the minds of the negotiators and have a restraining or coercive effect not always consciously realized.74

70. Id. at 4.
71. Id.
72. Id. at 8.
74. Local 1219, Ass'n of Firefighters, at 9. Parity clauses are illegal subjects of bar-
B. Problems Peculiar to the Nature of Public Employee Bargaining

1. The Right of Free Speech and Political Action

Two important values in a democracy are freedom of expression and its correlative, the public's right to know about all matters which may bear on the decisions an individual may need to make in a free society. These complementary rights—to speak and to hear—have been involved in recent Board decisions in several ways. For example, one policy cuts across the field of private sector bargaining: the Board has followed NLRB decisions which forbid electioneering within twenty-four hours before an election begins.

The interplay—and sometimes competition—between freedom of speech and hearing on the one hand and the rights and policies protected by labor laws on the other, looms large in public sector bargaining. Not only does public sector collective bargaining impinge more directly on the public than does private sector bargaining, but the final phases of public sector bargaining are left to the political process. The first important decision within this area was Town of Stratford. The town had adopted an ordinance in 1971 requiring the "initial entire salary and other proposals" in bargaining to be filed with the town council and town clerk. When the town negotiators insisted on applying this ordinance to the bargaining proposals submitted at the next round of negotiations with some eight separate unions, the unions brought prohibited practice complaints. The town claimed that collective bargaining proposals fall within the public's

gaining because of their effect on third parties. An employer would be provided sufficient protection if a parity clause were a permissive subject of bargaining because he could refuse to discuss the subject matter with the union during negotiations for a collective bargaining agreement. The third party union, however, would be hampered in its negotiations by this rule of equality, even though it was not a party to the agreement which created the rule. The only way to protect these third parties is to void such clauses when they appear in a collective bargaining agreement.

75. "Freedom of discussion... must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940). Cf. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).


78. When filed with the town clerk these proposals would have become public information under Conn. Gen. Stat. § 1-19 (1977).
"right to know" statute.79 The Board held that such proposals did not fall within this statute,80 and that the publicity to be given to ongoing labor negotiations was a ground rule for bargaining, and itself a mandatory subject of bargaining. The town’s passing and seeking to implement the ordinance without negotiation and over objection therefore constituted a failure to bargain in good faith and a violation of the Act.

The Stratford case poses a question involving more than statutory interpretation. Where, as in the usual case, the parties do not agree to immediate publicity for bargaining proposals, this fact does impede the free flow of information to the public about a matter of legitimate concern. But such impairment or postponement may be justified. The familiar testimonial privileges also impede the flow of information. They represent a judgment that in some situations and relationships the public interest is better served by encouraging free and uninhibited confidential communication than by full public disclosure.81 Speech and action become stilted and distorted when people are operating in a goldfish bowl. Thus, the giving of a privilege against disclosure involves a balancing of competing values, and it has been the Board's judgment that the give and take needed for successful bargaining would be seriously cramped by immediate publicity in much the same way that deliberations of a jury or of judges would be.82 The question whether such protection would be appropriate

79. Conn. Gen. Stat. § 1-19 (1977), the "right to know" statute, then read as follows:

Except as otherwise provided by any federal or state statute or regulation, all records made, maintained or kept on file by any executive, administrative, legislative or judicial body, agency, commission or any political subdivision thereof, whether or not such records are required by any law or by any rule or regulation, shall be public records and every resident of the state shall have the right to inspect or copy such records at such reasonable time as may be determined by the custodian thereof.

80. The Board's judgment was later vindicated by Conn. Gen. Stat. § 1-19(b)(8) (1977) which expressly exempts from the operation of the "right to know" statute "records, reports and statements of strategy or negotiations with respect to collective bargaining."

81. See 8 Wigmore on Evidence § 2285 (McNaughton rev. 1961). Cf. id. § 2192 (duty to give testimony).

82. Cf. Town of Stratford, State Bd. of Labor Relations Dec. No. 1069 at 11 (May 30, 1972). But see City of Hartford, State Bd. of Labor Relations Dec. No. 1353 (Dec. 18, 1975), wherein the Board gave a narrow construction to an agreement not to make statements to the public or news media "during negotiations regarding specific demands on the bargaining table . . . ." Id. at 2. The Board said:

Since the privilege for communications between bargaining parties creates a pocket of secrecy in a field wherein public discussion should generally be free,
after bargaining sessions have ended has not been presented.

In one respect the Board has found that the policies of the MERA call for the fullest freedom of political expression and action. Because the legislative body has the last say in deciding how much of the taxpayers' money is to be spent for a negotiated labor agreement, the final stage of public sector bargaining is committed to the political process. A necessary corollary of this fact is that all parties concerned must have wide latitude in entering the political arena to influence political action upon bargaining positions involving money.

The problem first came before the Board in City of Shelton. While the mayor and the police union were deadlocked in bargaining, the mayor put an advertisement in the local paper stating, in effect, that (1) the union had taken a highhanded attitude in bargaining, its president having declared that "management has no rights"; (2) the president had conducted a barrage of attacks upon the administration, upon groundless claims; and (3) the union did not want a professional police force dedicated to good performance but one dominated by political influence or union pressure. The Board found that the advertisement did not violate the MERA, at least in the absence of a showing that the statements were knowingly false or made in reckless disregard for their truth. The Board reasoned that "[t]o hold that it constitutes a prohibited practice for either side of a municipal labor dispute to lay his case before the electorate comes perilously close to violating the First Amendment."

This approach was followed in City of Hartford where the union complained of certain statements made by city councilmen during the course of negotiations conducted in a period of financial diffi-

then an agreement to exercise that special privilege should be narrowly construed so that it will not encroach unnecessarily on the public's right to know which is the essence of the First Amendment and a cornerstone of a free democratic society.

Id. at 4.

83. Conn. Gen. Stat. § 7-474(b) (1977) provides:
[A] request for funds necessary to implement such written agreement and for approval of any provisions of the agreement which are in conflict with any charter, special act, ordinance, rule or regulation adopted by the municipal employer . . . shall be submitted . . . to the legislative body which may approve or reject such request as a whole by a majority vote of those present and voting on the matter . . .

cully for the city. The challenged statements included expressions of opposition to tax increases, of preference for wage cuts over layoffs, and the like. The Board dismissed the complaint, noting the political nature of the final stages of public bargaining and declaring that "when a council member tells his constituency how he stands on a matter which will properly come before the council for action, he is saying what he has a right to say and (more important) what the public has a right to hear." 88 The Board suggested that if a union thinks the views of the legislature are impolitic or benighted, the remedy is to be sought through political means, not by gagging the legislator. 89

The interest of the union in free expression was presented in City of Stamford, 90 wherein the city sought to impose sanctions on members of the firefighters' union for engaging in political activity in violation of a city ordinance. During a mayoralty election campaign, the union had put an advertisement in the paper opposing the incumbent mayor because of his stance in pending negotiations with the union. The Board held that the city violated the MERA by enforcing the ordinance in this situation. The Board noted its recent Hartford decision and continued:

This reasoning is not a one way street; what is sauce for the goose is sauce for the gander. We clearly recognized in the Hartford case that "the way to counteract [unfavorable statements by a legislator] is by political means" and that public employees must put up with public attitudes in a democracy "if the employees cannot change the attitude by political means." If the people control the purse strings in the last analysis then it is part of the bargaining process to try to persuade the people to loosen them and under our system this is done through the ballot—by voting for officials and legislators who will be more likely to accede to or compromise with union demands.

From this it follows that political activity may well be an integral part of the bargaining process. It is so where it is directed toward the election of officials and legislators who are thought to (more or less) be favorable to union demands in pending labor negotiations. When political activity is of this kind it is protected by the Act; it is among the "con-

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88. Id. at 5.
89. Id.
certed activities for the purpose of collective bargaining” which employees have the right to engage in “free from actual interference, restraint or coercion.” Section 7-468(a).

From the above reasoning it becomes clear that the sections of the Stamford charter which forbid employees to engage in political activity and the attempts to enforce those sections which were made in this case constituted actual interference with an activity protected by the Act and, therefore, practices prohibited by the Act.91

2. Impasse in Public Sector Bargaining

Final impasse is the point at which the parties are deadlocked in bargaining so that further negotiation is futile.92 The impasse problem is not the same in the public and private sectors.93 The difference has given rise to a problem in the public sector that has been the subject of the recent Board decision in City of Willimantic.94 The NLRB has long had a rule that unilateral action by an employer upon a mandatory subject of bargaining currently under negotiation constitutes an unfair labor practice whether that action consists of conferring or withdrawing a benefit.95 This rule has had a limited application to unilateral changes made during the term of a contract.96 The Board has consistently followed this line of decisions.97 However, the NLRB rule has always been subject to a limitation: after final impasse in bargaining the employer is free to make unilateral changes in existing conditions which were previously offered to the union but which the union has rejected.98 The NLRA does not forbid unilateral action as such, but only action that violates the statute in some other way—

91. Id. at 4.
93. See notes 8-11 supra and accompanying text.
here by refusal to bargain.99

The Board has adopted the NLRB's impasse rule as part of its unilateral action rule, in both the private and the public sector, and has consistently included in its orders to cease and desist from unilateral action a provision that the order is effective only until final impasse is reached.100 In the aspects of public sector bargaining formerly committed to their initial jurisdiction, our state courts have also followed both lines of NLRB decisions.101

In City of Willimantic102 the Board for the first time found an impasse to exist in the municipal sector. There the union challenged the applicability of the impasse rule to public sector bargaining, urging that the employer's right to take unilateral action after impasse in the private sector is a correlative of the employees' right to strike and that it should not therefore be transplanted to the public sector, where employees are forbidden to strike. The Board rejected this contention and applied the impasse rule. In doing so the Board considered both the history of the bargaining (including a former decision holding that impasse had not been reached at that time) and the straitened financial condition of the city in the light of the Act's express provision that the obligation to bargain "shall not compel either party to agree to a proposal or require the making of a concession."103

The Board based its decision on statutory construction. It recognized that although there might be a rational ground for adopting a different rule in public sector bargaining, the legislature had not done so. The Board concluded that the General Assembly must have known of the NLRB's impasse rule and the strong tendency of the Board and our courts to follow federal construction of labor relations statutes; the Assembly made express provision for handling impasse in the original Act and again in 1975, yet on neither occasion did it seek to preclude the application of the NLRB's final impasse rule to the situation. Moreover, the Board indicated that there is nothing in the history of the federal impasse rule to suggest that the NLRB

103. Id. at 4-5 (quoting CONN. GEN. STAT. § 7-470(c) (1977)).
adopted it in order to give employers a right which would be reciprocal to the employees' right to strike.\(^{104}\)

3. **Mandatory Subjects of Bargaining**

In administering the federal statutes the NLRB has developed the concept of mandatory subjects of bargaining—a concept based on the statutory obligation to bargain collectively with respect to wages, hours, and other conditions of employment.\(^{105}\) This contrasts with the concept of managerial prerogative under which management need not bargain about decisions which "lie at the core of entrepreneurial control" even though they may have an indirect effect on wages, hours, and other conditions of employment.\(^{106}\) In the early days of the

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104. *Id.* It may well be that impasse will not occur in cases subject to the compulsory arbitration provisions of 1975 Conn. Pub. Acts 75-570. See CONN. GEN. STAT. §§ 7-473a to 473c(e) (1977).

105. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Items which the Connecticut Board has recently found to be mandatory subjects of bargaining include: Subcontracting, Southington Bd. of Educ., State Bd. of Labor Relations Dec. No. 1221 (May 10, 1974), Plainville Bd. of Educ., State Bd. of Labor Relations Dec. No. 1192 (Jan. 18, 1974); a substantive change in a method of computing pensions, City of Norwich, State Bd. of Labor Relations Dec. No. 1239 (July 11, 1974); general terms and conditions of retirement, pensions and disability plans, Town of Hamden, State Bd. of Labor Relations Dec. No. 1277 (Jan. 16, 1975); terms and conditions of clothing allowance, college incentive programs and step increments, City of Danbury, State Bd. of Labor Relations Dec. No. 1291 (March 21, 1975); requirement of a doctor's certificate for sick leave, City of New London, State Bd. of Labor Relations Dec. No. 1307 (May 30, 1975); transfer of a bargaining unit employee to a position in a nonbargaining unit, Housing Auth. of Meriden, State Bd. of Labor Relations Dec. No. 1308 (May 30, 1975); impingement upon the work schedule of individual officers caused by creation of a new shift, City of Bridgeport, State Bd. of Labor Relations Dec. No. 1319-A (Nov. 4, 1975); hairstyle rules and attachment of a penalty to an existing rule, City of Waterbury, State Bd. of Labor Relations Dec. No. 1320 (July 31, 1975); amount of deductions withheld from employees' pay when the deductions are not mandated by state or federal law, Town of East Haven, State Bd. of Labor Relations Dec. No. 1337 (Oct. 15, 1975); retroactivity of benefits, City of Willimantic, State Bd. of Labor Relations Dec. No. 1338 (Oct. 15, 1975); transfer of bargaining unit work to nonbargaining unit employees, West Haven Bd. of Educ., State Bd. of Labor Relations Dec. No. 1363 (Jan. 30, 1976); elimination of gasoline furnishment, City of Stamford, State Bd. of Labor Relations Dec. No. 1473-A (Jan. 5, 1977); compensation to be paid to bargaining unit employees given temporary promotions, Board of Police Comm'rs, Town of Hamden, State Bd. of Labor Relations Dec. No. 1484 (Jan. 27, 1977); secondary effect upon workload or safety conditions of bargaining unit employees when other employees are reassigned, City of Bridgeport, State Bd. of Labor Relations Dec. No. 1485 (Jan. 24, 1977); residency requirement for municipal employment, City of Bridgeport, State Bd. of Labor Relations Dec. No. 1500 (Feb. 10, 1977).

106. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 217, 223 (1964) (Stewart, J., concurring). Items which the Connecticut Board has recently ruled to be within the area of managerial prerogative include: Decision to establish a new division within an existing department, Town of East Haven, State Bd. of Labor Relations Dec. No. 1279
NLRB, employers argued for a broad interpretation of managerial prerogative and strongly resisted what they regarded as inroads upon the inherent rights of management. As the Connecticut Supreme Court has noted, however, the decisions of the NLRB and the federal courts "have consistently expanded the number of items which fall within the penumbra of the phrase 'other conditions of employment.'" ¹⁰⁷

This problem has its counterpart in public sector bargaining. Statutes vest various public bodies with broad powers to control departments under their jurisdiction. Boards of education and of police or fire commissioners, for example, often guard the powers vested in them with a protective jealousy reminiscent of the private employers' attitude toward management prerogatives in the early days of the Wagner Act. However, collective bargaining statutes do, to some extent, invade the fields once reserved for management or statutory prerogative, and the Connecticut Supreme Court has recognized that such labor laws "divest boards of education of some of the discretion which they otherwise could exercise." ¹⁰⁸ This change has been a hard pill to swallow for conscientious administrators bred in an older school of thought, particularly in agencies with a paramilitary tradition like police and fire departments. ¹⁰⁹ But if, as the Board believes, public employee bargaining is here to stay, the administrators' attitude is likely to change as time goes on.

Board decisions on mandatory subjects of bargaining have closely followed NLRB rulings and the pattern set by the Connecticut Su-

¹⁰⁸ Id. at 584, 295 A.2d at 536.
premee Court in *West Hartford Educ. Ass'n, Inc. v. DeCourcy*. In *DeCourcy*, a case involving teachers, the Connecticut Supreme Court imported much of the federal labor law on this topic into Connecticut public sector labor relations. The court determined that the scope of negotiations should be relatively broad and sufficiently flexible to accommodate the changing needs of the parties. Accordingly, police rules and regulations as to many items have been held within the field of mandatory bargaining. In *Town of East Haven*, the Board reasoned as follows:

As *DeCourcy* recognizes there is an area of overlap between what have traditionally been thought managerial functions and what concerns conditions of employment for the employees. In drawing the line within that area between those items that must be bargained over and those which the employer may act on without bargaining, a balance must be struck. And in striking it the tribunal should consider, we believe, the directness and the depth of the item's impingement on conditions of employment, on the one hand, and, on the other hand, the extent of the employer's need for unilateral action *without negotiation* in order to serve or preserve an important policy decision committed by law to the employer's discretion.

Nonetheless, the Board believes *DeCourcy* makes clear that the duty to negotiate does not deprive the employer of the power to take unilateral action when negotiation has failed.

In the recent case of *City of New Haven* the Board recognized that in the public sector the concept of managerial prerogative necessarily becomes intertwined with public policy. By executive order, the mayor of New Haven required municipal employees to file an affidavit disclosing their financial interests in firms doing business with the city. The Board concluded that in view of the sanctions likely to result from employee noncompliance, that is, dismissal or discipline, the filing of the affidavit was a major condition of employment. But this did not lead to the conclusion that the matter was a

110. 162 Conn. 566 (1972).
112. *Id.*
113. *Id.* at 6 (original emphasis deleted; authors' emphasis added).
115. *Id.* at 4.
mandatory subject of bargaining. The Board held that the affidavit requirement was not a mandatory subject of bargaining because "[t]he employees' interest in not disclosing the information is outweighed by the strong public policy against employees having private interests conflicting with their public duties." 116

4. Conflict Between the Bargaining Obligation and Civil Service Systems

Civil service systems present a dilemma unique to the public sector. Although civil service systems are designed to eliminate political patronage and assure selection and promotion of personnel on the basis of merit, these objectives are compromised to the extent that a union is allowed to bargain over the content and implementation of civil service rules. Unions have interests, such as the preservation of the seniority system, which may directly conflict with the principles of civil service. On the other hand, the extension of civil service into areas of traditional union concern is a threat to the unions' right to bargain collectively.

The legislature has resolved this dilemma in the municipal sector, enacting legislation that provides in part: "The conduct and the grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists and any provision of any municipal charter concerning political activity of municipal employees shall not be subject to collective bargaining." 117

An interpretation of this section was involved in Town of Stratford (Police). 118 In Stratford the union objected to the town's unilateral change in the basis for promotion in the police department. The town claimed that the subject of promotion was not a bargainable item under section 7-474(g). The town urged that the charter designated the office of town manager as personnel agency and that a civil service system had been set up administratively. The Board found, however, that this system had not been "established by statute, charter or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence . . ." 119 as section 7-474(g) requires. Because this provision created an exception to the MERA's broad purpose of ensuring collective bargaining on matters

116. Id. at 5.
117. CONN. GEN. STAT. § 7-474(g) (1977).
119. Id. at 4.
within its scope (including bases for promotion), the Board thought the exception should be construed strictly to cover only those cases within its literal terms. There must be not only an agency which applies civil service principles, but the agency must be "established by statute, charter or special act." 120

In the case of City of New Haven (Fire and Police) 121 a civil service system was undisputedly in existence. The unions contended that a resolution of the civil service commission requiring all candidates for promotion in the police and fire departments to submit to agility tests was a unilateral change in violation of the city's duty to bargain. Because section 7-474(g) provides that "[t]he conduct and the grading of merit examinations . . . shall not be subject to collective bargaining," the Board held that the prohibition against unilateral changes does not apply because the change was on a subject which was not a mandatory subject of bargaining. 122 The unions argued that the exemption for the grading of examinations does not permit a city to make any part of the examination (e.g., a physical agility test) a condition of eligibility for promotion. The Board rejected this argument, noting that the "authority to conduct and grade examinations has traditionally, both in academe and in the civil service, included the authority to decide what weight to give to individual parts of the examination." 123

In Town of East Haven (Board of Education) 124 the town created and implemented a civil service system during the term of a collective bargaining agreement with a union representing custodians. The civil service rules for filling of vacancies conflicted with the provisions of the contract. Nevertheless, the Board held that section 7-474(g) exempted the town's actions from the duty to bargain with the union.

Civil service rules arose in a different context in Board of Police Comm'rs, Hamden. 125 The town had a civil service commission, and rule 9(2)(c) provided that "the Civil Service Commission may authorize temporary appointment, not to exceed five (5) months, to a vacancy in any position class pending examination. . . ." 126 This rule was in existence prior to the then current collective bargaining

120. Id. at 4-5.
122. Id. at 3.
123. Id.
126. HAMDEN, CONN., RULES AND REGULATIONS OF THE CIVIL SERVICE COMMISSION, Rule 9 § 2(c) (effective Oct. 9, 1974) (publication of Town of Hamden).
agreement between the town and the police union. There was nothing in that contract which conflicted with rule 9(2)(c). Nor was there an established practice of the parties which contradicted the language of rule 9(2)(c). The management rights clause in the contract was broad and unspecific, but it did retain for the town the rights to manage that the town previously possessed. Dismissing the union’s complaint regarding the town’s refusal to bargain collectively on the issues of temporary transfers and promotions, the Board concluded: “In this situation, Rule 9(2)(c) represented the status quo which the Town could implement when the need arose. There was no unilateral change in conditions of employment so the Town’s contract did not violate the Act.”

5. Contract Bar; Timely Filing of Petition

Both the NLRB and the Board will ordinarily refuse to order a new election during the effective period of an existing collective bargaining agreement. This is known as the contract bar rule; its purpose is to promote stability in labor relations. Both Boards recognize, however, that the desire for stability should not prevent employees from exercising their right to choose a new representative when deep-seated and longstanding dissatisfaction with an incumbent union has developed. To protect this right both Boards have developed time periods for the filing of representation or decertification petitions in cases where the contract bar rule would apply. However, the Connecticut Board’s time limits are different from those of the NLRB, and this difference is largely due to unique characteristics of public sector bargaining.

The NLRB’s rule is fairly rigid; it allows a petition to be filed between ninety and sixty days before the expiration of an existing contract, and at any time after expiration if no new contract is made. The Connecticut Board’s rule under the MERA is more flexible. It allows a petition filed either (1) within thirty days before the time when negotiations for a successor contract would normally

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128. See note 29 supra and accompanying text.

129. Leonard Wholesale Meats, 136 N.L.R.B. 1000 (1962). Since Leonard the NLRA has been amended to include health care institutions and the NLRB has ruled that for that particular type of business petitions filed not more than 120 days or less than 90 days prior to contract expiration shall be timely. See Trinity Lutheran Hospital, 218 N.L.R.B. 199 (1975).
begin where such time is fixed by the existing contract, by past practice, or, perhaps, by statute,\textsuperscript{130} or (2) after a notice requesting negotiations but before such negotiations actually begin.\textsuperscript{131} However, the Board will disallow a petition filed after the expiration of a contract if negotiations for its successor were begun in time and are being prosecuted with reasonable diligence by the incumbent union.\textsuperscript{132}

In \textit{Town of Manchester}\textsuperscript{133} the Board identified the different needs in the public sector and began developing a new approach to meet those needs. The Board noted that both national and state boards agreed on the basic notion that "the appropriate time for a petition for an election is in that period prior to the end of the contract when a change in the bargaining representative can be most smoothly effectuated with the least disruption of the bargaining process."\textsuperscript{134} The Board agreed that the NLRB's rules were well adapted to serve that purpose in private sector bargaining, but continued:

Collective bargaining in the public sector raises different considerations. Experience during the last two years has suggested that the bargaining process in public employment is often more protracted than in private employment. This means that bargaining for a new contract may begin longer in advance of the end of the contract term. If there is to be a change of the bargaining representative, that change can be most smoothly made at the time when contract negotiations would normally begin. Therefore, a petition filed

\textsuperscript{130} Town of Manchester, State Bd. of Labor Relations Dec. No. 813 at 5 (July 11, 1968).
\textsuperscript{131} City of New London, State Bd. of Labor Relations Dec. No. 1297 (April 24, 1975); Town of Westport, State Bd. of Labor Relations Dec. No. 1232-A (June 25, 1974). The Board has found that, under unusual circumstances, there may be other proper times for the filing of a petition. \textit{See, e.g.}, City of Norwich, State Bd. of Labor Relations Dec. No. 804 (May 14, 1968) (petition filed five months and one day before expiration of existing contract held timely; effective date of new contract coincided with beginning of fiscal year and required early negotiations in order that collective bargaining mesh smoothly with city's budget-making process); City of Hartford, State Bd. of Labor Relations Dec. No. 971 (Jan. 8, 1971) (petition filed five months and eight days before expiration of existing contract held timely under facts similar to \textit{City of Norwich}). In a more recent case, the Board held that a wage re-opener in a contract cannot create a contract bar. Bridgeport Housing Auth., State Bd. of Labor Relations Dec. No. 1420 (July 22, 1976).
\textsuperscript{133} State Bd. of Labor Relations Dec. No. 813 (July 11, 1968).
\textsuperscript{134} Id. at 3.
somewhat more than ninety days prior to the end of the contract would be at an appropriate time. Our experience is too limited to now fix limits with certainty, but we are presently persuaded that a petition filed as much as four months prior to the end of that contract should not be considered premature.

Collective bargaining in the public sector often requires quite different time limits for filing petitions for another reason. Collective agreements are often timed to expire at the end of the fiscal year. In that case, the parties usually contemplate that negotiations for a new contract will be held while the budget is being prepared so that when the budget is presented and adopted, it will reflect the costs of the new collective agreement.

Where the collective bargaining process is thus coordinated with the budget-making processes, the normal time for beginning negotiations may be as much as five or six months before the end of the contract term. This time is considered necessary to complete negotiations, get the results of the negotiations reflected in the budget and have the budget adopted before the end of the fiscal year. A petition filed for a change of representatives at the time when negotiations for a new contract normally begin, cannot be considered to be premature. On the contrary, it might well be considered to be at the most appropriate time. It would avoid having negotiations disrupted in midcourse by a change of bargaining representatives.\textsuperscript{135}

All of the cases referred to above were decided before the legislation of 1975 which mandates a timetable for the beginning of and certain other steps in negotiation\textsuperscript{136} and also provides that an existing contract shall continue in effect during negotiations for its successor.\textsuperscript{137} The Board has not yet decided how this legislation affects the time for filing petitions for election or decertification.

III. CONCLUSION

Public employee bargaining and its peculiar problems stand at the frontier of labor law today. The law in this field has much in

\textsuperscript{135} Id. at 4-5.
common with private sector bargaining where the National Labor Relations Board has built up a substantial body of law, but the overlap is far from complete. Where the public sector presents different and unique problems, the law needed to meet them is being developed largely by state legislatures and state boards. The Connecticut experience described in this article represents a part of this developing labor law.¹³⁸

¹³⁸ A particular problem in the public sector at this stage of development is the lack of published decisions by state labor boards. Thus the decisions cited in this article cannot be found through normal research methods. The Board is seeking to remedy this problem through a grant application under the Intergovernmental Personnel Act of 1970, 42 U.S.C. §§ 4701 to 4772 (1970), which is administered by the U.S. Civil Service Commission. Hopefully, through regional cooperation, a New England data-base for public sector labor relations will be developed in the near future.