

D.R. NO. 86-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

HUDSON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Public Employer,

-and-

NURSING SUPERVISORS, HUDSON
COUNCIL #2, CHAPTER #3,

Docket No. RO-86-87

Petitioner,

-and-

HUDSON COUNTY NURSING SUPERVISORS,
a/w DISTRICT 1199J, NUHHCE, AFL-CIO,

Intervenor.

Synopsis

The Director of Representation dismisses a Petition for Certification of Public Employee Representative filed by Nursing Supervisors, Hudson Council #2, Chapter #3. Due to the extraordinary circumstances present in this case, the Director extends the certification bar pursuant to N.J.A.C. 19:11-2.8, to guarantee a full year's negotiations between the certified representative and the public employer.

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a/w DISTRICT 1199J, NUHCE, AFL-CIO,

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Appearances:

For the Public Employer
Murray and Granello, Esqs.
(Karen Bulsiewicz, of counsel)

For the Petitioner
Victor Smarro, Recreation Supervisor

For the Intervenor
Oxford, Cohen & Blunda, Esqs.
(Arnold S. Cohen, of counsel)

DECISION

On December 4, 1985 Nursing Supervisors, Hudson Co. #2, Chapter #3 ("Petitioner" or "Chapter #3") filed a petition with the Public Employment Relations Commission, seeking certification in a unit of nursing supervisors in the Employer's Meadowbrook and Pollack

Hospitals. Hudson County Nursing Supervisors, a/w District 1199J, NUHHCE, AFL-CIO ("HCNS" or "Intervenor"), opposes the petition and requests its dismissal. The Commission certified HCNS as the exclusive representative of these employees on October 19, 1984 and HCNS argues that this certification still acts as a bar to Chapter #3's petition. The Employer argues that the certification bar has expired, that it may not be extended by voluntary agreement and that the petition therefore cannot be dismissed.

In July 1984, the Commission conducted a secret mail ballot election in the unit in question.^{1/} A majority of eligible voters selected Hudson County Nursing Supervisors and on October 19, 1984, we certified HCNS as the exclusive representative for purposes of collective negotiations. The County appealed the certification to the Superior Court, Appellate Division. On November 15, 1985, the Appellate Division affirmed the certification.^{2/} During the pendency of proceedings before the Appellate Division, the County and HCNS entered into an agreement wherein they deferred negotiations.^{3/}

The County asserts that the certification bar period is for 12 months and this period began on October 19, 1984, the date of

1/ The procedural history preceeding the conduct of the election is not relevant to this petition and is reviewed in the Appellate Division decision discussed infra.

2/ Hudson County Board of Chosen Freeholders and Association of Hudson County Nursing Supervisors, Docket No. A-989-84TF (November 15, 1985).

3/ Id. (slip opinion at p.4).

certification of HCNS as the majority representative. The Board argues that since the petition was filed more than 12 months after that date, the petition is not barred by HCNS's certification in accordance with the Commission's certification bar rule. N.J.A.C. 19:11-2.8(b) states:

Where there is a certified or recognized representative, a petition for certification or decertification will not be considered as timely filed if during the preceding 12 months an employee organization has been certified by the commission as the exclusive representative of employees in an appropriate unit, or an employee organization has been granted recognition by a public employer pursuant to N.J.A.C. 19:11-3.1 (Recognition as exclusive representative).

The County also relies on Mt. Olive Tp. Bd. of Ed., D.R. No. 83-29, 9 NJPER 633 (¶ 14271 1983), election directed, D.R. No. 84-16, 10 NJPER 64 (¶15036 1983). In Mt. Olive, we issued a certification of majority representative reflecting the results of a Commission conducted election. The employer filed a request for review with the Commission pursuant to N.J.A.C. 19:11-8.1. The parties agreed not to negotiate until the Commission ruled on the request. The Commission denied the request some ten weeks later. Subsequently, a second union filed a raiding petition. The majority representative argued that the certification period did not begin to run until the Commission ruled on the request for review. However, we declined to extend the certification bar for the additional two and one-half months. We relied on the Commission's express rule that "...the filing of a request for review shall not operate, unless otherwise ordered by the Commission, as a stay of any action

taken, ordered or directed by the Director of Representation."

N.J.A.C. 19:11-8.1(b).^{4/}

In Mt. Olive the Commission never ordered a stay pending results of the request for review, and the parties completed nine and one-half months of actual bargaining. We were also aware of the rights of third parties, that is, the extension of a certification bar delays the opportunity for third parties to file representation petitions. Therefore, we held that an agreement between the certified representative and the employer cannot, by itself, extend the certification period.

^{4/} This rule, as well as the N.J.A.C. 19:11-8.2, emphasizes that a request for review is an extraordinary process. N.J.A.C. 19:11-8.2 states:

(a) The commission will grant a request for review only where compelling reasons exist therefore. Accordingly, a request for review may be granted only upon one or more of the following grounds:

1. That a substantial question of law is raised concerning the interpretation or administration of the act or these rules;

2. That the director of representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;

3. That the conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or

4. That there are compelling reasons for reconsideration of an important commission rule or policy.

Although there was an agreement to suspend negotiations in this matter, Mt. Olive is not controlling. The facts surrounding the suspension of negotiations here are far different. The appeal was not the discretionary procedure envisioned in the Commission's rules. The appeal of the certification was to the Appellate Division, and invoked the standards for appellate review of a final administrative order. Cty. of Gloucester v PERC, 55 N.J. 333 (1970) and AFSCME Local 159 v PERC, 114 N.J. Super 463 (App. Div. 1971).

Appellate review of a Commission certification portends a potentially time consuming and certainly final outcome. The appeal itself involved a basic issue of interpretation of statutory language that was a matter of first impression before the Appellate Division. The Commission itself was a party to the litigation. There was a reasonable chance that the final outcome of this litigation might permanently preclude HCNS from representing the employees in this unit. Given the nature of the appeal and the surrounding circumstances, meaningful negotiations would have been almost impossible. The parties recognized this and at the initiative of the employer, they suspended negotiations.

In In re City of Jersey City, P.E.R.C. No. 63 (1971), the Commission extended a certification bar under circumstances similar to the instant matter. The employer in Jersey City had appealed the Commission's certification to the Appellate Division, which affirmed the Commission's certification almost a year later. In the interim, the Appellate Division issued a two-week stay of negotiations, followed by dissolution of the order

with a caveat: "Execution of a contract is stayed pending disposition of the appeal."

Under the facts presented in Jersey City, the Commission determined that the certified representative "...did not receive the full benefit of the certification year...." The Commission went on to state:

[u]nless an appeal were patently frivolous, there may be a serious question that constructive negotiations would take place in the face of a challenge to a certification. The Commission concludes that the 'reasonable' period of freedom to contract intended by the rule was not available until the merits of the appeal were denied. By that time, however, the twelve (12) month period allowed under a literal reading of the rule, i.e. beginning with Commission certification, had for the most part been exhausted. Under these circumstances and in order to give effect to the rule, the Commission finds that good cause exists and that fairness requires a liberal construction of the rule.^{5/}

The same reasoning must be applied here. There was a serious question whether meaningful negotiations could take place in the face of a serious challenge to certification. The Commission's certification bar rule does not contemplate such a challenge and does not, by a literal reading, afford a reasonable period to consummate an agreement under this particular set of facts.

Accordingly, it is appropriate here to invoke the provisions of Commission rule N.J.A.C. 19:10-3.1(a) which provides:

^{5/} In support of this ruling, the Commission cited the predecessor rule to present Commission rule N.J.A.C. 19:10-3.1(a), reviewed supra.

Whenever the commission or a designated officer finds that unusual circumstances or good cause exists and that strict compliance with the terms of these rules will work an injustice or unfairness, the commission or such officer shall construe these rules liberally to prevent injustices and to effectuate the purposes of the act (N.J.S.A. 34:12A-1 et seq.).


In this case, the Commission's certification bar rule must be construed liberally to effectuate its purpose, i.e., to afford a certified representative a reasonable period to engage in meaningful negotiations with the public employer.

Private sector case law is similar.^{6/} In Mar-Jac Poultry Co., 136 NLRB 85, 49 LRRM 1854 (1962), the National Labor Relations Board extended a certification bar to grant a full one year period of actual bargaining . In Chicago Health and Tennis Club, 251 NLRB No. 18, 105 LRRM 1009 (1980), the Board dismissed a decertification petition filed more than a year after Board certification of the majority representative. Under the circumstances of the case, where the employer filed an appeal of the bargaining order to the Seventh Circuit Court of Appeals and refused to honor the certification, the Board extended the certification for a period of one year from the date the employer commenced good faith bargaining. See also J.P. Stevens Co., 239 NLRB No. 95, 100 LRRM 1052 (1978).

^{6/} However, Certifications of Representative are not treated as final administrative orders subject to appellate review under the N.L.R.A.. Accordingly, the private sector cases reviewed infra, involve refusal to negotiate in good faith allegations subsequent to certifications.

Accordingly, I extend the certification bar here to guarantee a full year's negotiations between the certified majority representative and the public employer. The certification bar shall run for one year from the date of this decision. In accordance with this certification bar, the petition filed by Chapter 3 is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: March 13, 1986
Trenton, New Jersey