

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

In the Matter of

COUNTY OF ESSEX (ESSEX COUNTY
HOSPITAL CENTER),

Public Employer,

-and-

NEW JERSEY STATE FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION, LOCAL #75,

DOCKET NOS. RO-82-64
RO-82-139

Petitioner,

-and-

OVERBROOK EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation adopts the findings and recommendations of a Hearing Officer that a Petition be dismissed since it was not timely filed. Although the Petition was mailed a day before the close of the contractual "window" period, it was not received until several days later. The Director rejects the Petitioner's claims that the contract bar rules should be relaxed because the employees seek a separate firefighters' unit and would thus be entitled to binding interest arbitration. The Director also rejects requests that the filing deadline be relaxed due to the organization's inexperience, a claimed lack of disruptive affect upon the employer's labor relations, and a restriction upon filing of a new petition for three years.

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Intervenor.

Appearances:

For the Public Employer
Elaine Hyman, Assistant County Counsel

For the Petitioner
Rinaldo & Rinaldo, attorneys
(Gerald Martin of counsel)

For the Intervenor
Love & Randall, attorneys
(John Love of counsel)

DECISION

Two Petitions for Certification of Public Employee Representative, each seeking the same result, were filed with the Public Employment Relations Commission ("Commission") by the New Jersey State Firemen's Mutual Benevolent Association, Local #75 ("FMBA") on October 6, 1981 and February 11, 1982, respectively. ^{1/}

^{1/} The reason for the second filing was to meet claims that the first filing was not timely under Commission rules.

Through the Petitions, the FMBA seeks to represent assistant fire chiefs and firemen employed by the County of Essex ("County") at the Essex County Hospital Center. These employees are currently included in a broad-based unit of hospital employees represented by the Overbrook Employees Association ("OEA"). The County asserts that both petitions should be dismissed since they were not filed in accordance with time restrictions set forth in N.J.A.C. 19:11-2.8(c)(2).

Subsequent to the filing of the FMBA's initial petition, the undersigned caused the issuance of a Notice of Hearing. Upon the filing of the second petition, the matters were consolidated before Commission Hearing Officer Mark A. Rosenbaum for hearing and a Report and Recommendation. On May 20, 1982, the Hearing Officer issued his Report and Recommendations, attached hereto and made a part hereof, with regard to the County's Motions to Dismiss, recommending that the County's motions be granted. On June 3, 1982, the FMBA filed exceptions to the Hearing Officer's recommendation. ^{2/}

The undersigned has considered the entire record herein, including the Hearing Officer's Report and Recommendations, the parties' briefs and the Petitioner's exceptions and finds and determines as follows:

1. The County of Essex is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A.

^{2/} The OEA has not opposed the FMBA's petitions and it declined to participate in the instant proceedings.

34:13A-1 et seq. ("Act"), is the employer of the employees who are the subject of this Petition and is subject to the provisions of the Act.

2. The New Jersey State Firemen's Mutual Benevolent Association, Local #75 and the Overbrook Employees Association are employee representatives within the meaning of the Act and are subject to its provisions.

3. On October 6, 1981, the FMBA filed a Petition for Certification of Public Employee Representative with the Commission seeking to represent assistant fire chiefs and firemen employed by the County and represented by the OEA within a broad-based hospital employees' unit.

4. A collective negotiations agreement between the OEA and the County for the period December 31, 1978 to December 31, 1981, was in effect at the time of the filing and covered the petitioned-for employees.

5. N.J.A.C. 19:11-2.8(c)(2) provides that when a written agreement is in effect covering employees of a County, a Petition for Certification will normally not be considered timely unless it is filed not less than 90 days and not more than 120 days before the expiration or renewal date of the agreement. In the instant matter, for purposes of the contract bar rule the operative expiration date of the contract between the County and the OEA was December 30, 1981, ^{3/} and a petition could not be

^{3/} The Commission's rules allow an agreement to bar the filing of a petition for up to three years. The relevant agreement was for three years and one day.

considered timely filed unless it was filed between September 2, 1981 through October 1, 1981. The instant Petition was not received by the Commission until October 6, 1981. ^{4/}

6. The Hearing Officer noted that although the Commission's contract bar rule does not afford parties an absolute protection during the term of an agreement, ^{5/} and there may be extreme circumstances which would merit the waiving of the rule in certain instances, ^{6/} no extreme circumstances existed in this matter which warranted an extension of the time limits. Citing Atlantic City, supra, n.6, the Hearing Officer also stated that the Commission adheres to a rigid application of the rule.

7. The FMBA has asserted that it placed the Petition in the regular mail on September 30, 1981, and that it has no knowledge as to why it was not received by the Commission until October 6, 1981. It has proffered that it is reasonable to assume that a letter posted September 30, 1981 will reach its destination within one to two days.

8. In its exceptions, the FMBA states that the time bar expressed in N.J.A.C. 19:11-2.8(c) provides for flexibility and that the rule may be relaxed in certain circumstances. The FMBA offers the following reasons as to why it would be appropriate

^{4/} N.J.A.C. 19:10-2.1(d) provides that the filing date is the date of receipt by the Commission.

^{5/} In re East Brunswick Bd. of Ed., D.R. No. 80-39, 6 NJPER 308 (¶ 11148 1980).

^{6/} In re City of Atlantic City, D.R. NO. 82-19, 7 NJPER 642 (¶ 12289 1981).

to grant its otherwise nontimely Petition: (a) consideration of the Petition would not disrupt or affect the County's stable negotiations relationship with the OEA, (b) the FMBA is not an experienced organization and was not represented by an attorney prior to the filing of the instant Petition; (c) if the Petition is dismissed, the next open period for filing will not occur until September 1984; ^{7/} and (d) the petitioned-for employees have no community of interest with the other members in the unit.

In considering the issues herein, the undersigned must examine whether the circumstances addressed by the FMBA present the "extreme circumstances" which would be necessary for the relaxation of the strict timetable set forth in the contract bar rule. ^{8/} No such showing is evident here. The fact that the postal service was "slow" in delivering the Petition cannot be considered an extreme circumstance. The FMBA must assume the responsibility for assuring timely receipt of the Petition, particularly in the instant circumstance where it was necessary

^{7/} On September 9, 1981, the County and OEA executed a three year successor agreement. The timing of this agreement would not have affected the viability of a timely filed petition during the September 1981 "window period" of the 1978-1981 agreement, but would foreclose a subsequently filed petition until September 1984.

^{8/} Notwithstanding the FMBA's attempt to distinguish the Atlantic City "extreme circumstances" requirement as not relating to petition filing, but rather to showing of interest filing, Atlantic City is squarely on point. A certification petition is not considered validly filed under any circumstances until a full 30% showing of interest is received. Thus, a showing of "extreme circumstances" is necessary to excuse the lateness of any element necessary to the valid filing of a petition.

to accomplish a valid filing within 24 hours of its mailing of the Petition. Second, as opposed to the FMBA's assertions, the petition has the effect of disturbing the stability of the County's negotiations relationships and employee relations as evidenced by the successor agreement which the County has entered into governing the employment conditions of petitioned-for employees. Third, the contract bar rule does not discriminate with respect to the relative "experience" of an employee representative, and adoption of such a policy would be unwise. All organizations, regardless of their experience, ought to be held knowledgeable and accountable to the requirements of Commission filing rules which affect their operation. Fourth, the wisdom of applying a three year bar to a subsequent petition is a matter controlled by the Commission's adoption of a rule permitting a bar for up to three years. ^{9/}

Finally, the FMBA claims that the employees involved in its petition are firefighting employees. The FMBA notes that under the Interest Arbitration Act, N.J.S.A. 34:13A-14 et seq., units exclusively comprised of firefighters are treated differently than other public employee units since interest arbitration is available to units of firefighting employees. The FMBA asserts that the five employees involved in its petition "have absolutely no community of interest with the other members in the unit currently represented by the OEA and OEA has expressed their

^{9/} The Commission follows the private sector experience of the National Labor Relations Board in this regard.

disinterest in the firefighting employees' attempt to sever themselves from the larger unit."

The undersigned has previously examined the essence of the FMBA's claim that the contract bar protections can only be available to appropriate units. In re Jersey City Medical Center, D.R. No. 80-11, 5 NJPER 504 (¶ 10260 1979). In the cited matter, the petitioner claimed that security guards could not appropriately be included in the existing unit of center personnel because they were guard employees, and, therefore, a contract covering the unit employees could not act as a bar to the filing of a petition. The undersigned stated that even if guard employees were found to be police employees who would normally be entitled to separate unit representation, the Act's exception of "special circumstances" at N.J.S.A. 34:13A-5.3 would permit the continued inclusion of the employees in the existing unit until the expiration of the current agreement. Accordingly, the unit was deemed prima facie appropriate until the existing agreement covering the employees expired. Thereafter, a timely petition could be filed in accordance with the timeliness rules for a determination as to whether severance should be permitted on the basis of the appropriate unit claim. In the instant matter, the undersigned notes that there is no claim of a lack of community of interest existing between other county employees and the claimed firefighter employees other than the availability of interest arbitration to firefighting employees when they are in units exclusively comprised

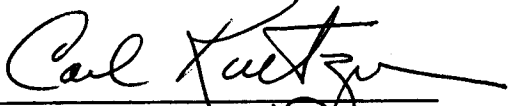
of firefighting employees. There is nothing in the Interest Arbitration Statute that compels the exclusion of firefighting employees from units containing other municipal, county, or state employees. Just as claims asserted by any group of employees within a negotiations unit to form a separate unit are limited by the Commission's timeliness rules, so too the argument of firefighting employees that as a result of interest arbitration availability they may be entitled to a separate appropriate collective negotiations unit, must be asserted in a timely fashion pursuant to N.J.A.C. 19:11-2.8. Assuming for the moment that the OEA does not oppose at this time the severance of the petitioned-for employees from its unit, the employer, nonetheless, is entitled to object to such severance and to assert the contract as a bar to a petition. See In re Clinton Tp. Bd. of Ed., D.R. No. 82-44, 8 NJPER 206 (¶ 13086 1982).

Accordingly, the undersigned is satisfied with the conclusion of the Hearing Officer in this matter and does not believe that the circumstances found here warrant a relaxation of the time limitations as set forth in the Commission's contract bar rule. The Petition in Docket No. RO-82-64, filed October 6, 1981, is dismissed since it was not filed during the applicable "window period". The Petition in Docket No. RO-82-139, filed February 11, 1982, is barred by the successor agreement executed September 9, 1981, and effective January 1, 1982.

Based upon the foregoing, the undersigned finds that the Petitions for Certification of Public Employee Representative

were not timely filed in accordance with N.J.A.C. 19:11-2.8(c)
and grants the County's motion to dismiss.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: July 13, 1982
Trenton, New Jersey

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RO-82-139

Petitioner,

-and-

OVERBROOK EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the County's motions to dismiss two petitions for certification of public employee representative be granted. The Hearing Officer finds that the petitions were not timely filed in accordance with N.J.A.C. 19:11-2.8(c), and that the Petitioner did not demonstrate extreme circumstances which could cure its untimely filings.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Elaine Hyman, Asst. County Counsel

For the Petitioner
Rinaldo & Rinaldo, Esqs.
(Gerald Martin, of Counsel)

For the Intervenor
Love & Randall, Esqs.
(John Love, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On October 6, 1981, New Jersey State Firemen's Mutual Benevolent Association, Local #75 (the "Petitioner") filed a petition for certification of public employee representative with the Public Employment Relations Commission (the "Commission"), seeking to represent assistant fire chiefs and firemen employed by the Essex County Hospital Center (the "County"). On January 12, 1982, the Director of Representation issued a Notice of Hearing in this matter, pursuant to

N.J.A.C. 19:11-2.6(c).

On February 11, 1982, the Petitioner filed an identical petition for certification for employee representative. Pursuant to N.J.A.C. 19:11-6.9, the County moved prior to hearing to dismiss both petitions, ascertaining that neither petition was timely filed within the meaning of N.J.A.C. 19:11-2.8(c)(2). The Director of Representation referred both motions to the undersigned Hearing Officer for a Report and Recommendations, pursuant to N.J.A.C. 19:11-6.9(d). ^{1/}

ANALYSIS

RO-82-64

The original petition in this matter was filed by the Petitioner and received by the Commission on October 6, 1981. It is undisputed by all parties that, at the time of this filing, the petitioned-for employees were represented for the purposes of collective negotiations by the Overbrook Employees Association (the "Intervenor"). Moreover, an agreement between the Overbrook Employees Association and the County of Essex covering the period of December 31, 1978 - December 31, 1981 was then in effect and covered the petitioned-for employees (See Schedule A of said Agreement).

N.J.A.C. 19:11-2.8(c) provides, in relevant part:

During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative...normally will not be considered

^{1/} By letter of March 3, 1982, the Director of Representation indicated that a formal hearing would be held in this matter to hear oral argument on the motions presented. Due to the unavailability of the undersigned Hearing Officer, that hearing was cancelled. Subsequently, the parties agreed to the disposition of the matter by the undersigned Hearing Officer based upon the written submissions of the parties.

timely filed unless...[i]n a case involving employees of a county or municipality, any agency thereof, or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement....

The above provision is known as the Commission's contract bar rule. In applying this contract bar rule, the Commission takes guidance from the National Labor Relations Board. In re East Brunswick Board of Education, D.R. No. 80-39, 6 NJPER 308 (¶ 11148 1980); Lullo v. Int'l Assoc. of Firefighters, 55 N.J. 409 (1970). "The two objects of the Board's contract bar policy are to afford parties to collective bargaining agreements an opportunity to achieve for a reasonable period industrial stability free from petitions seeking to change the bargaining relationship, and to provide employees the opportunity to select bargaining representatives at reasonable and predictable intervals." Union Fish Company, 156 NLRB 30, 61 LRRM 1012, 1014 (1965).

In the instant matter, the petition in question was not filed during the predictable interval described in N.J.A.C. 19:11-2.8(c). The contract between the County and the Intervenor covered the period of December 31, 1978 to December 31, 1981 (cover page of contract). Thus, the contract spanned a period of three years and one day. The contract bar rule applies only to agreements having a term of three years or less, N.J.A.C. 19:11-2.8(c). However, the Commission's contract bar rules provide that "[f]or the purposes of a timely filing, an agreement for a term in excess of three years will be treated as a three year agreement...." N.J.A.C. 19:11-2.8(d).

Thus, in the instant matter, the operative expiration date of the contract between the County and the Intervenor was December 30, 1981. Accordingly, the open period for timely petitions for employees covered by the above contract was from September 2, 1981 to and including October 1, 1981. The instant petition was received by the Commission on October 6, 1981.

Petitioner argues that the time bar expressed in N.J.A.C. 19:11-2.8(c) is inapplicable to this matter for several reasons. First, Petitioner points out that the language of N.J.A.C. 19:11-2.8 admits of exceptions to the contract bar rule. Specifically, Petitioner makes reference to the use of the word "normally" as an indication that the contract bar rule may be relaxed in certain circumstances. Petitioner goes on to argue that such circumstances exist in the instant matter.

The undersigned acknowledges that the Commission's contract bar rule does not afford absolute protection during the terms of the agreement. For example, where a contract's duration is not defined with sufficient clarity to afford parties full protection, the contract bar rule will not apply. ^{2/} The Commission will also consider whether or not extreme circumstances exist which would merit the waving of the contract bar rule in a given matter. ^{3/} Accordingly, the undersigned proceeds to review the reasons proffered by the Petitioner to determine whether or not extreme circumstances exist which would merit the waiver of the contract bar rule in this case. In making this inquiry, the

^{2/} In re East Brunswick Board of Education, D.R. No. 80-39, 6 NJPER 308 (¶ 11148 1980).

^{3/} In re City of Atlantic City, D.R. No. 82-19, 7 NJPER 642, (¶ 12289 1981); see also In re Roselle Park Board of Education, D.R. No. 81-44, 7 NJPER 327 (¶ 12144 1981).

undersigned is aware that "...the Commission adheres to a rigid application of the contract bar period." In re City of Atlantic City, supra.

By affidavit of one of its members, the Petitioner certifies that the petition in this matter was mailed by regular mail on September 30, 1981. The affiant further asserts that he has "no personal knowledge of any reason for the delay between the date of mailing, September 30, 1981 and the date of receipt, October 6, 1981." The Petitioner further "...maintain[s] that it is reasonable to assume that a letter posted September 30, 1981 will reach its destination within one to two days." Letter brief of the Petitioner, March 31, 1982. In support of this proposition, Petitioner relies on Central Supply Co. of Virginia, 217 NLRB 108, 89 LRRM 1117 (1980).

In Central Supply Company, a representation petition was received by a Regional Office of the National Labor Relations Board one day after the end of the open period. The petitioner in Central Supply demonstrated that it sent the petition by certified mail six days prior to the end of the open period. Under those circumstances, the Board found "...that it would be inequitable to penalize the Employer-Petitioner here, who mailed the petition under circumstances where it had the right to assume the petition would be timely received at the Board's Regional office [sic] in the due course of the mails."

In the instant matter, the Petitioner does not assert that it took the precaution of mailing the petition by certified mail. Furthermore, the Petitioner, by its own assertion, allowed only one day for its petition to be mailed from Essex County to the Commission's offices in Trenton. Under these circumstances, the Petitioner did

not have the right to assume that the petition would be timely filed. Indeed, a party which procrastinates in the face of a distinct deadline operates at its own peril. The undersigned concludes that, in the absence of extreme circumstances which prevented the petitioner from filing in a timely manner, the petitioner's reliance on the mails alone does not merit the waiver of the contract bar rule.

Petitioner also argues that, since the Intervenor does not voice any objection to the instant petition, the contract bar rule should be waived in this matter. The undersigned acknowledges that the Intervenor has declined to participate in this matter and voices no objection to the petition herein. However, the contract bar rule exists not only to protect the majority representative which is a party to a collective agreement, but it also serves to protect the interests of the employer which is a party to that agreement. In the instant matter, the County has asserted the contract bar and seeks to protect its interest in a stable negotiations relationship. The County's interest herein is a valid one and clearly outweighs the arguments presented by the Petitioner. Accordingly, the undersigned recommends that the County's motion to dismiss the Petition in Docket Number RO-82-64 be granted.

RO-82-139

On February 11, 1982, the Petitioner filed a petition identical to the petition in RO-82-64. The County submits that this petition is barred by the contract bar doctrine, based upon the fact that the County and the Intervenor have negotiated a collective negotiations agreement covering the petitioned-for employees for the period January 1, 1982 through December 31, 1984. The County moves

that this petition be dismissed as untimely pursuant to N.J.A.C. 19:11-2.8(c).

The collective agreement covering the period January 1, 1982 through December 31, 1984 was formally executed by the parties on September 9, 1981. The undersigned finds that the contract contains substantive terms and conditions of employment and is of definite duration. Accordingly, it is a proper contract for application of the Commission's contract bar rule. N.J.A.C. 19:11-2.8(c); East Brunswick, supra.

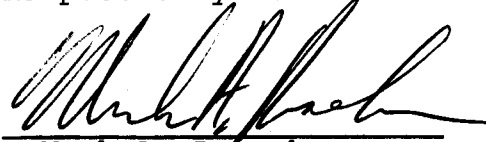
The petitioner has not argued that exceptional circumstances exist here which would merit the waiver of the Commission's contract bar doctrine in the instant matter. In the absence of such extreme circumstances and having found the current collective negotiations agreement between the County and the Intervenor to be valid for the purposes of the contract bar rule, the undersigned recommends that the Director of Representation grant the County's motion in this matter. 4/

4/ The undersigned is aware that the successor agreement herein was entered into during the open period for the timely filing of a representation petition herein. Where a timely petition is filed during the open period, a successor agreement entered into by an incumbent majority representative and an employer during the open period will not serve as a bar to a representation election under what is known as the "premature extension" doctrine. Deluxe Metal Furniture Corp., 121 NLRB 135, 42 LRRM 1470, 1474 (1968).

Recommendation

For the above stated reasons, the undersigned recommends that the County's motions to dismiss the Petitions in Docket Numbers RO-82-64 and RO-82-139 be granted.

Respectfully submitted

A handwritten signature in cursive script, appearing to read 'Mark A. Rosenbaum', written over a horizontal line.

Mark A. Rosenbaum
Hearing Officer

DATED: May 20, 1982
Trenton, New Jersey