

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

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. RO-80-154

LOCAL 2, AFL-CIO,

Petitioner,

-and-

EAST BRUNSWICK EDUCATION
ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a Petition for Certification of Public Employee Representative which was not timely filed. Although the Petitioner claimed that the existing contract covering employees was indefinite, the Director finds that the parties fixed the term of the collective negotiations agreement. However, inasmuch as the duration clause of the agreement did not fix the term of the contract with certain predictability, the current representative and public employer were not entitled to the full protections of the Commission's contract bar rule. The Director designates those periods during the contract during which a representation petition may be filed.

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Intervenor.

Appearances:

For the Public Employer
Rubin, Lerner & Rubin, attorneys
(Frank J. Rubin of counsel)

For the Petitioner
Craig & Edelstein, attorneys
(Stephen J. Edelstein of counsel)

For the Intervenor
Rothbard, Harris & Oxfeld
(Nancy I. Oxfeld of counsel)

DECISION

On March 11, 1980, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") by Local 2, AFL-CIO

("Local 2") with respect to a proposed unit comprised of custodians, maintenance, groundsmen, bus drivers and cafeteria workers employed by the East Brunswick Board of Education (the "Board"). The above employees are currently included in a collective negotiations unit consisting of professional and nonprofessional Board employees represented by the East Brunswick Education Association (the "Association"), which has intervened in this proceeding.

The Association objects to the Petition, in part arguing that it has not been timely filed pursuant to N.J.A.C. 19:11-2.8. This Commission rule restricts the filing of certification petitions to certain "window" periods when employees are covered by a written agreement setting forth terms and conditions of their employment. The undersigned has caused an administrative investigation to be conducted into the matters involving the "contract bar" claim. Local 2 and the Association have provided statements of position in support of their respective positions. ^{1/} Accordingly, the limited issue of whether the instant Petition is untimely pursuant to the contract bar rule contained in N.J.A.C. 19:11-2.8 is properly before the undersigned at this time for determination.

N.J.A.C. 19:11-2.8 restricts the filing of Petitions for school district employees to the September 1 - October 15 period immediately preceding the expiration of an existing

^{1/} The Board initially stated that it would not take a position as to the Petition. The Board was provided with an additional opportunity to provide a statement of position regarding the instant the instant issue, but has not made a submission.

contractual agreement. The bar encompasses contracts up to three years in duration. A contract for an indefinite term is treated as a one year agreement. ^{2/}

The Association's agreement with the Board contains the following "Duration" clause:

This agreement shall be effective as of July 1, 1978, and shall continue in effect until June 30, 1980, or until a successor agreement has been negotiated.

It is further agreed that the following designated Articles shall be closed through the 1980-81 contract: Articles I, II, III, V, VI, VIII, XI, XII, XIV, XV, XVI, XVII, XIX, XX XXI, XXIII.

Further, the reopener for the 1980-81 contract shall be limited to the following Articles: IV, VII, IX, X, XIII, XVIII, XXII, XXIV, XXV, XXVI and all salary guides.

2/ N.J.A.C. 19:11-2.8(c) provides:

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 or a petition for decertification of public employee representative normally will not be considered timely filed unless:

* * *

3. In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

N.J.A.C. 19:11-2.8(d) provides:

For the purposes of determining a timely filing, an agreement for a term in excess of three years will be treated as a three-year agreement; an agreement for an indefinite term shall be treated as a one-year agreement measured from its effective date.

The Association asserts that the duration clause establishes that the agreement is for three years, and therefore, the contract is a three year agreement for contract bar purposes. Local 2 asserts that the parties entered into an agreement for an indefinite term which barred the filing of the Petition for only one year after its effective date. Local 2's arguments primarily rely upon the language of the duration clause which provides: "until a successor agreement has been negotiated." The undersigned shall examine these positions in reverse order.

Local 2 errs initially when it equates contracts of indefinite term with contracts providing for the extension of an expired agreement until a successor agreement is negotiated. This is not accurate. Contracts of an indefinite term lack duration or termination provisions, or terminate upon the occurrence of events which cannot be predicted with certainty. The Commission treats indefinite term contracts as one-year agreements for contract bar purposes. Agreements reached for the sole purpose of providing for contract extensions of an indefinite term until a successor agreement is negotiated are not recognized for contract bar purposes. However, it is not unusual in the public sector for parties to fix the duration of their agreement, and then to provide a contingency for the contract's continued viability after its expiration until a successor agreement is reached. ^{3/} Local 2's position ignores that immediately preceding

^{3/} This, in fact, is the state of the law. See In re Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975).

the contingency language employed herein, the parties inserted a duration period of two years, and therefore, had at the very least earned for themselves the Commission's contract bar protection granted to two year agreements. In the context presented, the period from October 16, 1979 through June 30, 1980 was an insulated period, and the extension agreement would only assume significance after July 1, 1980.

The relevant issue presented herein is whether the parties have earned two years of contract bar protection or three years. Although the first paragraph of the duration clause clearly provides for a two year agreement, the second and third paragraphs, with equal forcefulness, reflect the intent of the parties to achieve a three year agreement.

The Association would have the Commission apply three year contract bar protection based upon its assertion that the contract is a valid three year agreement. The validity of the contract as a three year agreement, however, is not the determining factor with respect to contract bar protection. ^{4/} The compelling consideration is whether the contract's duration has been defined with sufficient clarity to afford the parties full three year protection and thus restrict the rights of employees to petition to change their negotiations representative.

The Commission's contract bar rule is a concept patterned after the experience of the National Labor Relations Board.

^{4/} The Commission's contract bar rule does not afford absolute protection during the term of the agreement. N.J.A.C. 19:11-2.8(c) provides that filings are normally prohibited during the term of an agreement.

See General Cable Corp., 139 NLRB 1123, 51 LRRM 1444 (1962).

The Board has stated:

Two objects of the Board's contract bar policies 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. To properly achieve these objects, in determining whether an existing contract constitutes a bar, the Board looks to the contract's fixed term or duration because it is this term on the face of the contract to which employees and outside unions look to predict the appropriate time for the filing of a representation petition (footnote omitted)

Union Fish Co., 156 NLRB No. 33, 61 LRRM 1012 (1965)

Although Union Fish concerned the inadmissability of parole evidence to establish the intent of the parties as to contract duration, its precepts are applicable to the instant matter. It is doubtful that employees or outside unions can predict with reasonable certainty this contract's fixed term. Employees or outside unions would be confused as to whether this agreement terminates on June 30, 1980 or June 30, 1981. Due to this contract's ambiguity, interested parties could interpret the duration clause as providing either one of two "window periods" during the life of the agreement as the appropriate period for the filing of petitions.

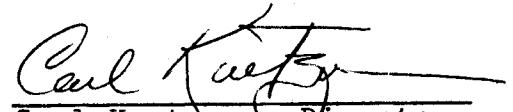
In summary, the undersigned determines that the instant agreement is not of an indefinite duration since it provides for

a fixed term. However, the agreement may not protect the Board and the Association from the filing of a certification petition for a three year term since it fails to provide the object of certain predictability necessary for the full protection of the contract bar rule.

Since the instant matter does not present circumstances which can result in the routine or normal application of the contract bar rule, the undersigned concludes that the dual objects of providing stability of relationships and certain predictability for the filing of representation petitions can be accomplished by treating, for contract bar purposes, the contract under review as providing two "window periods" for the filing of a petition -- September 1 through October 15, 1979; and September 1 through October 15, 1980. Furthermore, due to the contract's ambiguity as to whether it expires on June 30, 1980, unless the Board and the Association execute an agreement for a period commencing July 1, 1980, a representation petition will be considered timely filed, if filed, on July 1, 1980 or thereafter. Nevertheless, the September 1 through October 15, 1980 period will be considered a "window period" during which the filing of a representation petition will be considered timely notwithstanding any agreement of any duration which may have been reached between the Board and the Association prior thereto.

Accordingly, since the instant Petition was filed on March 11, 1980, it is untimely and is hereby dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: May 23, 1980
Trenton, New Jersey