

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

In the Matter of

COUNTY OF OCEAN,

Public Employer,

-and-

LOCAL 14, OFFICE OF PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION
AFL-CIO,

DOCKET NO. RO-82-21

Petitioner,

-and-

OCEAN COUNCIL NO. 12, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, dismisses a Petition for Certification of Public Employee Representative filed by the OPEIU because it was not timely filed. The Petition was barred by the Commission's contract bar rules since a current negotiations agreement existed between the County and Ocean Council No. 12, NJCSA. The Director concludes that various reopener provisions in the collective negotiations agreement did not remove the contract as a bar to the Petition.

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Appearances:

For the Public Employer
Berry, Summerill, Piscal, Kagan & Privetera, attorneys
(John C. Sahradnik, of counsel)

For the Petitioner
Schneider, Cohen, Solomon & DeMarzio, attorneys
(Bruce D. Leder, of counsel)

For the Intervenor
Kapelsohn, Lerner, Reitman & Maisel, attorneys
(Sidney Reitman, of counsel)

DECISION

On August 31, 1981, a Petition for Certification of Public Employee Representative, supported by a valid showing of interest, was filed with the Public Employment Relations Commission (the "Commission") by Local 14, Office and Professional Employees International Union (the "OPEIU"), seeking to represent

certain white collar employees employed by the County of Ocean (the "County").

Ocean Council No. 12, New Jersey Civil Service Association (the "Council") is the current majority representative of the unit in question, and has intervened herein on the basis of the submission of a collective negotiations agreement effective from April 1, 1980 until March 31, 1983, covering the petitioned-for unit.

At the time the Petition was filed, OPEIU argued that no contract bar existed because the Council's agreement contained a reopener clause for salaries and benefits as well as the potential for a reopener on four other contract terms. In addition, on the Petition form, the OPEIU stated that the Council was now defunct. In reply, the Council argues that it is not defunct, and that its contract operates as a bar to the Petition. The County has not taken a position with respect to the issues raised herein.

In accordance with N.J.A.C. 19:11-2.2(a), the undersigned has caused an administrative investigation to be conducted into the matters and allegations set forth in the Petition in order to determine the facts.

Based upon the administrative investigation to date, the undersigned finds and determines as follows:

1. The disposition of this matter is properly based on the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved after an evidentiary hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing,

where as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The County of Ocean is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.

3. Local 14, Office and Professional Employees International Union and Ocean Council No. 12, New Jersey Civil Service Association are employee representatives within the meaning of the Act and are subject to its provisions.

4. The OPEIU filed a Petition for Certification of Public Employee Representative on August 31, 1981 seeking to represent the unit of employees currently represented by the Council. Other than stating on the face of the Petition that the Council was now defunct, the OPEIU did not provide any additional information with respect to the defunctness issue.

5. Since the Petition on its face indicated that the Council and the County were parties to a collective negotiations agreement in effect until 1983 covering the instant unit, the undersigned, by letter dated September 1, 1981, requested a withdrawal of the Petition because of its apparent untimeliness. ^{1/}

^{1/} N.J.A.C. 19:11-2.8(c) provides in pertinent 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 or a petition for decertification of public employee representative normally will not be considered timely filed unless:

* * *

2. In a case involving employees of a county or a 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.

Thereafter, by letter dated September 9, 1981, the Petitioner declined to withdraw this matter and instead alleged that a reopener clause in the existing agreement prevented the agreement from operating as a bar to the Petition.

6. The pertinent clause in question is Article XXIX of the current agreement between the Council and the County and reads as follows:

ARTICLE XXIX
REOPENERS

There shall be contract reopeners on salaries and benefits for the contract years 1981 and 1982.

Both parties shall have the right to propose reopeners on four (4) Articles of Agreement other than those which concern salaries and benefits in each of the contract years.

7. By letters dated September 21 and 25, 1981, the Council argued that it was not defunct and that its agreement operated as a contract bar to the filing of the instant Petition. The Council also submitted a copy of the reopener agreement which the parties reached on September 19, 1981.

8. Thereafter, by letter dated October 2, 1981, the County indicated that it would abide by the Commission's determination concerning this matter.

OPEIU has not provided any other information or documentation concerning the defunctness argument. Accordingly, in the absence of an evidentiary proffer or argument to support this claim, OPEIU's contention is specifically rejected.

Regarding the contract bar issue, the undersigned, consistent with the Supreme Court's instruction in Lullo v. Int'l Ass'n. of Fire Fighters, 55 N.J. 409 (1970), and pursuant to Commission decisions in In re Cty. of Middlesex, D.R. No. 81-1, 6 NJPER 355 (¶ 11179 1980), request for review den. P.E.R.C. No. 81-29, 6 NJPER 439 (¶ 11224 1980), and In re Manalapan-Englishtown Reg. Bd. of Ed., D.R. No. 81-13, 6 NJPER 530 (¶ 11270 1980), has turned to the experience and adjudication of the National Labor Relations Board ("NLRB") in representation matters. The NLRB has also adopted contract bar rules. The NLRB has considered the issue now placed before the undersigned, i.e., the effect of a reopener or midterm modification on the application of the contract bar rule, and has held that the renegotiation or modification of a contract, if done by mutual consent during the original term of the contract, does not remove a contract as a bar to a prematurely filed representation petition.

In Western Electric Co., 94 NLRB 54, 28 LRRM 1002, 1003 (1951), the NLRB said:

In performing the Board's continuing function of effectuating the Board [broad?] purposes of the Act, we believe it necessary at this time further to adjust Board's contract bar rules by extending the principle enunciated in Republic Steel to cases where the parties voluntarily undertake modification of any of the provisions of their collective bargaining agreement during its term. Stated more specifically, we hold that whether or not an exclusive bargaining contract contains a provision for modification, and regardless of the scope of such a modification provision if provided for in the contract, the parties may renegotiate or modify any of the provisions of the contract during its term, if done by

mutual assent, without 'opening up' the contract to an otherwise prematurely filed petition. As in Republic Steel, rival union petitions will of course continue to be timely if appropriately filed in relation to the original contract term. [Sic]

The NLRB further enunciated this position in Deluxe Metal Mfg. Co., 121 NLRB 995, 43 LRRM 1470, 1476 (1958), when it said:

A mid-term modification provision, regardless of its scope will not remove a contract as a bar unless the parties actually terminate the contract. The Board believes it best to permit the parties to modify or amend any of the substantive provisions of their contract, in accordance with any modification clause -- whether broad or narrow in scope -- or by mutual assent at any time during its term. Thus, no mid-term modification clause, nor any action pursuant thereto short of actual termination, will remove a contract as a bar, except where a notice is given immediately prior to the automatic renewal date of such a contract. Modification clauses containing provision for unilateral termination by notice if agreement is not reached or permitting a strike or lockout in support of any demand made during the modification negotiations and the right to terminate thereafter, will be treated in the same manner as any other request for mid-term modification and will not remove the contract as a bar.

Based upon the evidence which has been submitted, it appears that the parties in the instant matter have not terminated the contract or altered the original term of the agreement, which is clearly set forth in Article XXX. ^{2/} The parties have, in accordance with their reopener clause, renegotiated wages, medical benefits, overtime, rest period and personnel file clauses within

^{2/} Article XXX -- Duration: "This agreement shall be effective on April 1, 1980, and shall continue in full force until March 31, 1983.

the term of the original agreement. The reopening and modification of the original agreement is the very type of midterm modification of provisions of a contract during its term, as cited in Western Electric and Deluxe Metal Mfg., which will not remove the contract as a bar, and "open up" the contract to an otherwise prematurely filed petition.

On October 16, 1981, the undersigned advised the parties of the results of the instant investigation and of the above analysis of the pertinent issues. The parties were provided an additional opportunity to present any documentary or other evidence which might raise substantial and material factual issues and were provided an opportunity to submit any additional statements of position. In the absence of the presentation of such submissions, the undersigned stated an intent to dismiss the OPEIU's Petition.

On November 10, 1981, the OPEIU submitted a short positional statement requesting that, under the particular facts of this matter, the contract bar rule should be relaxed and/or modified. OPEIU states that both it and the Communications Workers of America ("CWA"), another employee organization, are attempting to affiliate Council 12 to their respective organizations. Their competition has engendered three "affiliation" votes, and cross-filings of unfair practice charges with the Commission. These circumstances, OPEIU submits, "should compel PERC to exercise jurisdiction."

In support of its claims, OPEIU refers to NLRB v. Bernard Gloekler North East Co., 540 F.2d 197, 93 LRRM 2039 (CA-3 1976), in which, OPEIU asserts, the Court suggested that modification of

the contract bar rule may be warranted in a case involving affiliation questions. The undersigned has reviewed this decision and finds first, that its factual and legal context is quite different from the matter at hand, and second, that it is clear the Court was not suggesting a modification of the contract bar rule.

Gloekler arises from an unfair practice charge in which the NLRB had found that the employer wrongly refused to bargain with a UAW local which had affiliated the recognized representative, formerly an independent organization. The affiliation transpired only after the Board, under the contract bar rule, had dismissed a UAW representation petition seeking to unseat the independent organization. In reversing the Board's conclusion that the affiliation merely changed the name of the representative, as opposed to a change in control and representation, the Court noted, "It is paradoxical that the Board is supporting the substitution [of UAW as the representative] here, given the Regional Director's prior contract-bar determination." It is in this context that the Court also concluded:

If the Board wishes to allow powerful international unions to be substituted for independent locals while contracts are in force, it can modify or abolish the contract bar rule.

Although OPEIU has cited this language as support for the proposition that the Court suggested modification of the contract bar rule, OPEIU apparently failed to examine the remainder of this passage, where the Court states:

As applied by the Regional Director, the rule defines the appropriate time and manner for the palpable change of representation sought here. We do not believe it is our function to enforce such a result.

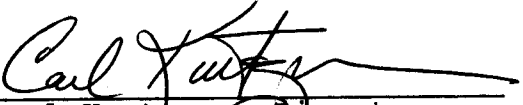
It is clear that both the Board and the Court agreed that a representation petition, filed during an insulated period, was untimely based on the application of the contract bar rule. Furthermore, the Court reversed the Board and found that the facts surrounding this affiliation raised the same question concerning representation and therefore was similarly barred by the existence of a current agreement. Rather than suggesting that the Board modify its contract bar rules in the context of affiliations, the Court appears to be critical of permitting a question concerning representation to be raised by alternative means to circumvent the stability engendered by the contract bar rule.

In the instant matter, Council 12, as a party to a contractual agreement with the County, and as the incumbent certified representative, has chosen to assert its contract to protect its relationship with the County and Council 12 has specifically rejected the relaxation of the contract bar rule. The Commission's rules are designed to protect the stability of a contractual relationship where either or both parties to the contract request such protection. The affiliation dispute between OPEIU and CWA is no cause under the instant circumstance to relax the contract bar rule. ^{3/}

^{3/} The undersigned notes that CWA and OPEIU are currently engaged in the private dispute settlement forum of the AFL-CIO, Article XX proceedings, to resolve their dispute.

Accordingly, OPEIU's Petition is hereby dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: December 18, 1981
Trenton, New Jersey