

D.R. NO. 85-15

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

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

FRATERNAL ORDER OF POLICE,

DOCKET NO. RO-85-55

Petitioner,

-and-

ESSEX COUNCIL NO. 1, N.J.C.S.A.,

Intervenor.

Synopsis

Based upon an administrative investigation, the Commission Designee finds that a timely petition was filed in this matter. Additionally, he directs a hearing be conducted to determine whether "police guards" are "employees engaged in performing police services" within the meaning of N.J.A.C. 34:13A-15.

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Appearances:

For the Public Employer
Lucille LaCosta-Davino, Esquire
Assistant Corporation Counsel

For the Petitioner
Markowitz & Richman, Esquires
(Stephen Richman, of counsel)

For the Intervenor
Fox and Fox, Esquires
(David I. Fox, of counsel)

DECISION
BACKGROUND

On October 5, 1984, the Fraternal Order of Police ("FOP") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission"). The FOP seeks to represent all prison guards employed by the City of Newark ("City"), formerly entitled "police matrons" and now known as "police guards." The petition is supported by an adequate showing of interest. The police guards are currently included in a city-wide

unit of white collar employees represented by Essex Council No. 1, New Jersey Civil Service Association ("Council No. 1"). Council No. 1 has intervened in this matter pursuant to N.J.A.C. 19:11-2.7, on the basis of its recently expired contract with the City covering these employees (January 1, 1979 through December 31, 1982).

Both the City and Council No. 1 have declined to enter into an Agreement for Consent Election. Both contend that the petition was not timely filed because there is an agreement between Council No. 1 and the City covering police guards for the period January 1, 1982 through December 31, 1984, which serves as a bar to the filing of this Petition. (See N.J.A.C. 19:11-2.8). At an informal conference conducted by a Commission staff agent, Council No. 1 submitted several memoranda and documents in support of its position on the contract bar question. Alternatively, the City and Council No. 1 argue that severance of police guards from the city-wide nonprofessional white collar unit is inappropriate.

Pursuant to N.J.A.C. 19:11-2.6(e), the Commission Designee authorized the conduct of an administrative investigation into the matters and allegations involved in this Petition in order to determine the facts.

In correspondence dated November 1, 1984, the Chief Assistant advised the parties that it appeared that the Petition had been timely filed and that a memorandum signed by Council No. 1 and the City was not sufficient to bar this Petition pursuant to subsection 2.8(c). The parties were reminded of their obligation under N.J.A.C. 19:11-2.6 to present documentary or other evidence relevant to the instant petition. The parties were further advised that in the absence of any

evidence or materials which raised substantial and material factual disputes the petition would be processed.

In response to our November 1, 1984 letter, both Council No. 1 and the City submitted written statements of position. Council No. 1 submitted additional documentary evidence in support of its contract bar claim. ^{1/}

FACTS

Upon review of all of the parties' submissions, the undersigned finds the following facts:

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

2. The FOP is an employee representative within the meaning of the Act and is subject to its provisions.

3. Council No. 1 is an employee representative within the meaning of the Act, is subject to its provisions and is the majority representative of the city-wide unit of white collar employees of the City of Newark.

4. Council No. 1 is the exclusive majority representative of the subject employees. Council No. 1 is a party to a contract with the City which expired on December 31, 1982. This contract describes the collective negotiations unit as "all white collar workers employed by the City of Newark, New Jersey but excluding inspectors as identified in RO-102, craft and professional employees, managerial

^{1/} Prior to the issuance of the November 1, 1984 letter, the parties were orally apprised of the issues being raised herein and their obligation to present evidence relevant to those issues. Accordingly, the parties presented the Commission with materials on an ongoing basis throughout the investigation.

executives, department heads and deputy department heads, and policemen covered in the aforementioned certification and more specifically enumerated by job titles in Appendix A." (PERC certification dated April 15, 1971, Docket No. RO-78). "Police guards" are listed in Appendix A of the contract as "police matrons."

5. Council No. 1 submitted several documents on which it bases its claims of a contract bar. ^{2/} One of these documents, a writing signed April 27, 1982, states that "the following represents an offer by the City of Newark to Civil Service Association, Essex County [sic] No. 1 for contract years 1982, 1983 and 1984." The next four sections in the document set forth provisions for yearly salary increases and various fringe benefits for "1982" "1983" and "1984". The document is signed by persons for the City and for Council No. 1. The signatures appear at the bottom of the document and are dated April 27, 1982.

6. Another document was an Agreement between the City and Council No. 1 for the period January 1, 1982 through December 31, 1984. However, this agreement was not signed until October 18, 1984.

7. The instant petition was filed on October 5, 1984; the open period for filing petitions for employees of a municipality whose collective negotiations agreement expires on December 31, 1984, was from September 3 through October 2, 1984.

^{2/} These documents include: a copy of the Commission's Certification issued April 15, 1971; undated memo titled "Tentative Agreement" setting economic benefits for January, 1979 through January, 1982, which was subject to ratification by the parties; a contract for the period January 1, 1979 - December 31, 1982; a document signed April 27, 1982; a Memorandum of Agreement in settlement of two prior unfair practice charges, Docket Nos. CO-84-263 and CE-84-26, signed August 15, 1984; a memo signed October 1, 1984 setting salaries for 1985 and 1986; a contract signed October 18, 1984 for the period January 1, 1982 - December 31, 1984; and copies of letters to the Commission dated October 19, 1984 and October 26, 1984

LAW

I

Concerning the Petition's timeliness, the undersigned determines that the disposition of this matter is properly based upon the administrative investigation, it appearing that no substantial and material factual issues exist which may have appropriately been resolved in a hearing. N.J.A.C. 19:11-2.6.

N.J.A.C. 19:11-2.8 states:

(c) 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 will normally not be considered timely filed unless:...2. In 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;

Thus, section 2.8 bars the filing of a certification petition during the period of an existing written agreement containing substantive terms and conditions of employment, unless the petition is filed during the designated "window period."

In In re East Brunswick Board of Education, D.R. No. 80-39, 6 NJPER 308 (¶11148 1980), the Commission noted the policy considerations underlying the contract bar process. The Commission cited a National Labor Relations Board decision:

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 terms 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. (footnotes omitted). In re Union Fish Co., 156 NLRB No. 33, 61 LRRM 1012 (1965).

In an earlier matter concerning the City of Newark (In re City of Newark, D.R. No. 84-23, 10 NJPER 369 (¶15177 1984)), the Administrator of Representation directed that an election be conducted in the unit petitioned-for therein and rejected the assertion of a contract bar by the City and the incumbent union representative, inasmuch as the contract bar claim was predicated upon a signed memorandum of agreement which was limited solely to economic terms.

The document herein submitted by Council No. 1 and signed on April 27, 1982, does not state a specific length or term. The document does not make reference to a prior written agreement containing a recognition clause or other substantive terms and conditions of employment. Although it lists certain changes in salaries and fringe benefits for certain periods, the document fails to "chart with adequate precision the course of the bargaining relationship or the actual terms and conditions of employment to which the parties can look for guidance in their day-to-day problems." Appalachian Shale Products Co., 121 NLRB No. 149, 42 LRRM 1506 (1958); In re Mt. Olive Township, D.R. No. 83-29, 9 NJPER 633 (¶14271 1983). Thus, it fails to state substantive terms and conditions of employment with the "degree of sufficiency necessary to stabilize the parties' negotiations relationship" id. Therefore, the undersigned concludes that the document submitted by Council No. 1

(signed April 27, 1982) does not constitute an existing written agreement sufficient to bar the FOP's petition pursuant to N.J.A.C. 19:11-2.8(c).

The Commission, as part of its decision-making process in representation matters, may look to National Labor Relations Board ("Board") guidelines and precedent. Lullo v. Int'l Association of Firefighters, 55 NJ 409 (1970). Generally, the Board's case law has established the principle that contracts or memoranda of agreement executed after the expiration of a prior contract will not bar an election where the Petition was filed before the execution date of the successor agreement. Under the contract bar rule, a written agreement must exist at the time the Petition is filed. Deluxe Metal Furniture Co., 121 NLRB No. 135, 42 LRRM 1470 (1958) ("Deluxe Metal").

In the instant matter, Council No. 1 has submitted its contract executed on October 18, 1984 as evidence of an existing contract sufficient to bar the instant FOP petition. Council No. 1 alleges that this actual contract evidences further the existence of a contract for which the April, 1982 memorandum was first submitted as evidence.

In the instant case, the last written contract executed by Council No. 1 and the City expired December 31, 1982. The document offered by Council No. 1 as a successor agreement (the April, 1982 writing) has already been found insufficient to bar the FOP petition filed October 5, 1984. Thus, the remaining question is whether the document executed October 18, 1984 bars the instant petition.

With regard to Council No. 1's assertion that the October 18, 1984 contract is a bar to the instant petition, the principles

of Deluxe Metal appear applicable herein. That agreement was not in existence on October 5, 1984. Accordingly, I find that the agreement executed on October 18, between Council No. 1 and the City for the period commencing January 1, 1982 had no retroactive effect to bar the instant petition. ^{3/} Therefore, I find that the Petition is timely.

II

Police guards are currently included in the city-wide white collar unit. The instant petition is an attempt to remove the police guards from this larger unit. See, In re Jefferson Township Board of Education, P.E.R.C. No. 61 (1975).

At the investigatory conference held October 15, 1984, the FOP argued that the police guards were "police" and should not be included in a unit with nonpolice employees. ^{4/} Council No. 1 and the City both argued to the contrary, that the police guards are not "police" within the meaning of the Act and are appropriately included in the existing white collar unit.

Accordingly, while it appears that the FOP's petition is not barred on the basis of timeliness, there does exist a question concerning the appropriateness of the severance of the police guards from the existing unit of white collar employees.

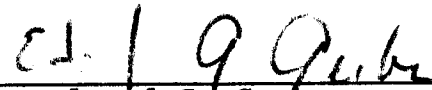
It appears that substantial and material factual issues exist concerning this issue which may more appropriately be resolved after an evidentiary hearing. N.J.A.C. 19:11-2.6(c).

^{3/} As for the memorandum of October 1, 1984 concerning salary and benefits for the years 1985 and 1986, we note that the terms of this memo are for a period of time subsequent to December 31, 1984 and therefore the memo cannot act as a bar to this petition. See, Deluxe Metal.

^{4/} N.J.S.A. 34:13A-5.3 states: "...except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership."

CONCLUSIONS

Therefore, based upon the foregoing, I find that the Petition is timely. Additionally, I direct that a hearing be conducted to determine whether "police guards" are "employees engaged in performing police services" within the meaning of N.J.A.C. 34:13A-15. This issue shall be litigated pursuant to the Notice of Hearing issued simultaneously herewith.



Edmund G. Gerber
Commission Designee

DATED: February 13, 1985
Trenton, New Jersey