I.R. NO. 2002-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JUDICIARY OF THE STATE OF NEW JERSEY,

Respondent,

-and-

PROBATION ASSOCIATION OF NEW JERSEY, Docket No. CO-2002-88

Respondent,

-and-

COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Communications Workers of America filed an unfair practice charge accompanied by an application for interim relief in which it sought an order requiring the Judiciary to provide it with equal access to employees included in the professional, case-related collective negotiations unit during what the CWA alleged was an upcoming open period during October 2001. The CWA asserted that an unsigned memorandum of agreement arising out of successor negotiations covering the period from July 1, 1999 through June 30, 2004 serves as a contract, and, under N.J.A.C. 19:11-2.8, that memorandum will no longer act as a contract bar to a competing employee organization's organizing efforts in the third year of that 5 year agreement.

The Probation Association of New Jersey argued that they entered into two separate contracts, one covering the period July 1, 1999 through June 30, 2001, and the other for the period of July 1, 2001 through June 30, 2004. PANJ and the Judiciary contend that the memorandum of agreement is not the operative document for purposes of calculating the open period, but rather the 2001-2004 contract.

The Commission Designee considered the competing principles of the contract bar rule: the employees' right to select its negotiations representative versus the employer's and incumbent employee organization's right to stability. He found that under Agency cases, the 2001-2004 contract appeared to be the operative document for calculating the open period rather than the memorandum of agreement. Consequently, he found that the CWA did not establish a likelihood of success. The CWA's application for interim relief was denied.

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Appearances:

For the Respondent - Judiciary,
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Frederick T. Danser III, of counsel)

For the Respondent - PANJ,
Fox and Fox, attorneys
(David I. Fox, of counsel)

For the Charging Party - CWA,
Weissman and Mintz, attorneys
(Steven P. Weissman, of counsel)

INTERLOCUTORY DECISION

On October 3, 2001, the Communications Workers of America, AFL-CIO (CWA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Judiciary of the State of New Jersey (Judiciary) and the Probation Association of New Jersey (PANJ) committed unfair practices within

the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (2) and (3)[1/] and 5.4b(1)[2/], respectively. CWA alleges that the Judiciary and PANJ entered into a three year collective negotiations agreement on September 21, 2001 for the sole purpose of preventing the CWA from filing a representation petition with the Commission during the October 2001 open period and to prevent the CWA from obtaining equal access to employees included in the collective negotiations unit covered by that collective agreement during the open period. CWA also claims that representatives of PANJ have told employees included in the negotiations unit at issue here that it is illegal to sign authorization cards designating CWA as their collective negotiations representative. Additionally, CWA claims that representatives of PANJ and the Judiciary have coerced and intimidated supporters of CWA for the purpose of discouraging them from designating the CWA as their negotiations representative.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ This provision prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

The unfair practice charge was accompanied by an application for interim relief and sought temporary restraints. On October 5, 2001, I contacted the parties' attorneys and scheduled a time whereby the parties could provide oral argument on the CWA's application for temporary restraints. That argument was initially scheduled for October 9, 2001; but, at PANJ's request, and with the other parties' acquiescence, it was rescheduled to October 10, 2001. By that date, the Respondents had the opportunity to submit briefs, affidavits and exhibits setting forth their respective positions. Consequently, at oral argument, the parties agreed to treat the proceeding as the return date on the CWA's application for interim relief rather than merely oral argument regarding whether a temporary restraining order should issue. The following facts appear.

FACTS

PANJ is the exclusive collective negotiations representative for all non-supervisory, case-related professional employees of the Judiciary. During the period January 1, 1995 through June 30, 1999, the Judiciary and PANJ were parties to a collective negotiations agreement setting forth the terms and conditions of employment applicable to unit employees. Before that collective agreement expired, the parties commenced negotiations for a successor agreement. Successor negotiations were protracted and were not completed until June 2001, nearly two years after the

predecessor contract expired on June 30, 1999. During the course of those two years, numerous issues were resolved, memorialized in writing and initialed. Ultimately, the only changes agreed to by the parties affecting terms and conditions of employment covering the period of July 1, 1999 through June 30, 2001 concerned retroactive wage increases. All of the other changes in conditions of employment agreed to by PANJ and the Judiciary cover the three future years beginning July 1, 2001 and extending through June 30, 2004. Those changes included prospective wage increases and changes in several other employment conditions.

After concluding negotiations, PANJ proceeded to conduct a ratification vote among eligible unit employees. PANJ issued notices concerning ratification on June 21, 22, and 23, 2001. Meetings were held in Cherry Hill, Newark, and New Brunswick, New Jersey. The ratification vote took place between June 21 and June 28, 2001. During this time, PANJ officials through newsletter articles and in meetings with unit members referenced a contract term covering five years, beginning July 1, 1999 through June 30, 2004. A "contract summary" distributed to attendees of the ratification meetings shows a "duration" of July 21, 1999[3/] through June 30, 2004. The contract summary also indicates the "pay increases" listing the various effective dates of wage changes

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3/ The parties do not dispute that the July 21, 1999 date shown in the contract summary is a typographical error and should read July 1, 1999.

through the five year period. Certain other provisions listed in the contract summary, e.g., recognition, hours of work, bilingual duties, lay-off and recall, damage to personal property, discipline/grievances, etc., do not indicate effective dates.

A "Memorandum of Agreement" was provided to certain employees at the time of the ratification meetings. It references the July 1, 1999 through June 30, 2004 period. The memorandum of agreement contains this provision:

> Term of agreement - the new contract between the Judiciary and PANJ shall be for a period of five years from July 1, 1999 through June 30, 2004.

The upper right hand corner of the first page of the memorandum bears the hand written notation, "agreed to by AOC and PANJ," and is followed by what appears to be the initials "GPC." The individual is presumably George P. Christie, President of PANJ. However, the memorandum contains a blank signature page and is neither dated, signed, nor otherwise initialed by any Judiciary representative. Also attached to the memorandum are various articles that appear to have been negotiated during successor negotiations, some of which have been initialed and dated and some of which have not. One of the articles is entitled "effective negotiations" and contains a paragraph entitled "Terms of Agreement." That paragraph reads:

> The term of this agreement shall be 7/1/99 to 6/30/04 subject to the re-opener provisions as herein set forth.

The dates 7/1/99 and 6/30/04 are hand-written along with hand-written initials "RD", presumably the initials of Rick Danser,

Special Counsel to the Judiciary and its lead negotiator. Other side letters of agreement, both signed and unsigned, refer to a contract between the Judiciary and PANJ covering the period July 1, 1999 through June 30, 2004.

In early June 2001, probation officers and the CWA formed a probation officers organizing committee for the purpose of soliciting support among unit members which would result in CWA's designation as majority representative. Following the formation of the committee, it and CWA learned that PANJ and the Judiciary had completed negotiations for a successor agreement covering a five year period. Based on the information obtained from newsletter articles, statements from PANJ officials and representatives, and documents such as the contract summary and memorandum of agreement, the CWA and the committee concluded that PANJ and the Judiciary had entered into a single collective agreement for a duration of five years beginning July 1, 1999 through June 30, 2004. According to the CWA, they further assumed that an open period would occur in October 2001 and that it could file a representation petition then. Therefore, the CWA asserts, the organizing committee decided not to oppose ratification. The memorandum of agreement was ratified by a vote of 953 to 349 (additionally, there were 86 challenged ballots). Certain economic provisions included in the memorandum of agreement were implemented.

In July, August, and September 2001, CWA and its supporters conducted and participated in organizing meetings, distributed

leaflets and engaged in other forms of solicitation. During that time, CWA also collected petitions and authorization cards from unit employees designating it as their preferred negotiations representative. CWA planned its organizing campaign to culminate during the open period which would occur in October 2001, when it could obtain equal access to communicate with unit employees.

On September 20, 2001, Steven P. Weissman, Counsel to CWA, contacted Elaine Dietrich, Counsel to the Administrative Director of the Courts, to advise her that CWA would seek access to unit employees during the October 2001 open period. Weissman told Dietrich that there would be an open period in October 2001 based upon the five-year contract commencing July 1, 1999. Dietrich indicated that CWA would be contacted by Joseph Orlando, a Judiciary employee working in the Administrative Office of the Courts.

On September 24, 2001, Orlando advised the CWA that the Judiciary and PANJ had signed two successor collective agreements on September 21, 2001. The first contract covered the two years from July 1, 1999 through June 30, 2001. The second contract covered the three years from July 1, 2001 through June 30, 2004. Orlando further informed the CWA that there would not be an open period in October 2001 because the three year contract from July 1, 2001 through June 30, 2004 barred a representation petition until October 2003.

ARGUMENTS

The CWA contends that on or about June 13, 2001, PANJ and the Judiciary concluded negotiations for a single five year collective agreement which, after both parties' ratification, established the duration of the contract for purposes of calculating the open period. CWA argues that the duration of the collective agreement as ratified by PANJ and the Judiciary commenced July 1, 1999 and will expire June 30, 2004. Under N.J.A.C. 19:11-2.8, that contract may only bar the filing of a representation petition until the open period for the third year of the contract, i.e., October 2001. CWA argues that the two collective negotiations agreements signed by PANJ and the Judiciary on September 21, 2001, do not change the open period established by what it contends is a single five year collective agreement covering 1999 through 2004.

PANJ argues that the July 1, 2001 through June 30, 2004 collective agreement which it and the Judiciary signed on September 21, 2001, is the operative document for calculating the open period. PANJ concedes that it negotiated and reached agreement on terms and conditions of employment for unit members for a period covering five years. In order to expedite implementation of the salary increases and certain other benefits, which provided for substantial retroactivity, the negotiated changes from the predecessor collective agreement were summarized for ratification in the context of a five year timeframe. However, PANJ argues the nature of the changes clearly provide for two distinct time periods: (1) July 1, 1999 through June 30, 2001, providing only for

wage retroactivity; and (2) July 1, 2001 through June 30, 2004, including numerous complex changes in terms and conditions of employment requiring prospective application and prospective wage increases. PANJ argues that no document was fully executed until after ratification. The ratification process was designed to promptly inform unit employees of the significant areas of change from the predecessor agreement so as to allow for speedy implementation of certain retroactive salary payments. Consequently, at the time of the ratification, no documents were actually executed but a summary of the terms was provided to the employees in order that the concepts could be explained by PANJ leadership. PANJ contends that only the two signed final contracts serve as the effective collective negotiations agreements between PANJ and the Judiciary and it is only the second of those agreements that can be identified as properly establishing the open period. PANJ asserts that there was no effective implementation of the provisions contained in the memorandum of agreement. Accordingly, PANJ argues that the July 1, 2001 through June 30, 2004 collective agreement signed on September 21, 2001 constitutes a contact bar applicable to any employee organization attempting to organize unit employees during any asserted open period in October 2001.

The Judiciary contends that the collective agreement executed on September 21, 2001 covering the period July 1, 2001 through June 30, 2004 serves as a contract bar to any competing representation claim asserted against PANJ, the incumbent majority

representative. It argues that any employee organization wishing to assert a competing representation claim had two opportunities to do so before the execution of the 2001-2004 collective agreement. According to the Judiciary, a competing organization could have filed a representation claim during the open period (October 1998) established pursuant to the predecessor collective agreement that expired on July 30, 1999, and it could have filed a claim at any time during the two years after the predecessor agreement expired in June 1999 and before the execution of the successor agreements. However, the Judiciary contends that upon the execution of the 2001-2004 agreement on September 21, 2001, a contract bar to competing representation claims was created and any open period is governed by the terms of the executed collective agreement. Thus, the Judiciary argues that in accordance with the terms of the successor collective agreement, the next open period will arrive in October 2003, the third year of the successor contact.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126,

132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

I first consider whether the CWA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. For the reasons that will ensue, I conclude it has not. In particular, I believe that it is likely that the Commission will ultimately hold that the three-year contract executed on September 21, 2001 constitutes a contract bar and that it is unlikely that the Commission will accept the CWA's counter-arguments that the unsigned memorandum of agreement constituted a contract bar setting an immutable five-year term.

N.J.A.C. 19:11-2.8 addresses the timeliness of a representation petition. N.J.A.C. 19:11-2.8 provides in relevant part as follows:

> (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 normally will not be considered timely filed unless:
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> 1. In a case involving employees of the State of New Jersey, any agency of the State or any State authority, commission or board, the petition is filed not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement;
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> * * *

> (d) For the purpose 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.

This regulation embodies the concept of a "contract bar," a doctrine long established in both private and public sector labor law as a way to balance two goals of labor relations statutes: (1) to enable public employers and majority representatives to achieve labor relations stability for extended periods if they so desire, but (2) to permit employees an opportunity at reasonable intervals to select a new representative or no representative. The contract bar doctrine reflects:

> ...the Commission's concern that the filing of a petition raising a question concerning representation often disrupts the stability and the predictability of the negotiations relationship which the parties sought to create by agreement. While the ability to select or to refrain from selecting an employee representative is a matter within the public interest, so too is the public concern that an existing negotiations relationship not to be subject to continuous and untimely disruptions. Therefore, the Commission has constructed a contract bar rule to provide for the protection of both parties during the period of an existing written agreement. The Commission rule limits the filing of petitions seeking to change the negotiation unit or its representative to a prescribed period shortly before the agreement expires. [Clearview Reg. HS Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 249 1977).]

To bar an otherwise timely representation petition, a contract must meet certain criteria. The contract must contain substantial terms and conditions of employment sufficient to

stabilize the bargaining relationship. See City of Wildwood, D.R. No. 88-22, 14 NJPER 77 (¶19028 1987); accord Appalachian Shale Products Co., 121 NLRB No. 149, 42 LRRM 1506 (1958). The contract must also have a definitive duration and be reduced to writing. See Mercer Cty. Supt. of Elections, D.R. No. 82-40, 8 NJPER 157 (¶13069 1982); New Jersey Transport Information Center, D.R. No. 82-38, 8 NJPER 154 (¶13067 1982); County of Middlesex, D.R. No. 81-1, 6 NJPER 355 (¶11179 1980), rev. den. P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224 1980). The agreement must also be executed by the parties. See City of Egg Harbor, D.R. No. 91-2, 16 NJPER 424 (¶21178 1990); Springfield Bd. of Ed., D.R. No. 89-3, 14 NJPER 583 (¶19248 1988); County of Camden, D.R. No. 88-3, 13 NJPER 663 (¶18251 1987); City of Pleasantville, D.R. No. 86-10, 12 NJPER 70 (¶17027 1985); Bergen Cty. Supt. of Elections, D.R. No. 84-10, 9 NJPER 629 (¶14269 1983); Mercer Cty. Supt. of Elections; Transport. In particular, in every agency case where a memorandum of agreement or a contract has been found to bar a petition, that document has been signed by the parties. See County of Middlesex; accord Vineland Police Department, D.R. No. 82-53, 8 NJPER 323 (¶13147 1982).[4/] The

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4/ In Mercer County Superintendent of Elections, D.R. No. 82-40, 8 NJPER 157 (¶13069 1982), it is not clear whether the memorandum of agreement was bilaterally signed. At one point the decision states that the memorandum was signed by the management negotiating team and the superintendent. Id. at 158. At a different point, the decision indicates that the employer and the incumbent employee organization had executed the memorandum. Id.

requirement that a document be signed by both parties establishes a bright line in an area where predictability is paramount.5/

In this case, the three-year contract covering the period of July 1, 2001 through June 30, 2004 satisfies all these contract bar requirements. That contract contains substantial terms and conditions of employment, has a definite duration, and has been signed by both parties. The contract stabilizes the parties' negotiations relationship for its three-year term.

The Commission is likely to hold that the three-year contract bars the filing of a representation petition until the open period in October 2003 unless CWA can establish that the earlier memorandum of agreement itself established a contract bar and that its memorandum precluded the Judiciary and PANJ from executing a final contract that would change that open period. Two reasons persuade me that it is unlikely that CWA will prevail on its assertions.

First, under agency case law, it does not appear that the memorandum of agreement satisfies the contract bar requirement that a contract be signed. The signature page of the memorandum is blank and no where else in the memorandum is there the signature of any

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5/ It appears that the bilateral execution requirement may go beyond that required by the National Labor Relations Board. The Commission frequently relies on NLRB cases for guidance, Lullo v. Int'l Assn. of Firefighters, Local 1066, 55 N.J. 409 (1970); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1 (1978), but it is not bound by them and has departed from them before. See, e.g., Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983)

authorized representative of PANJ or the Judiciary. See Wildwood; USM Corp., 256 NLRB No. 162, 107 LRRM 1358 (1981). A notation on the top page initialed by PANJ's president does not constitute bilateral execution of the memorandum. While the initials of the Judiciary's lead negotiator appear on various articles with the dates they were agreed to which were appended to the memorandum, his initials do not appear at any place on the memorandum, itself, indicating that the parties had reached an overall agreement. Given the practice of initialing individual articles, one would expect authorized representatives to have executed the memorandum as a whole when and if they intended it to conclude negotiations. Applying the existing case law, I cannot find a substantial likelihood that the memorandum of agreement will be found to constitute a contract bar. The Commission may elect to change the agency's approach in these cases, but I believe a designee should generally apply existing cases rather than predict future changes.

Second, even if the memorandum of agreement satisfied the contract bar requirements, I am not persuaded that it would preclude the Judiciary and PANJ from entering final contracts distinguishing between the two retroactive contract years and the three prospective contract years and thereby establishing a different open period under the three-year contract. The CWA is essentially proposing a new rule of law: parties are precluded from invoking the contract bar based on final separate contracts covering retroactive and prospective periods if the memorandum of agreement leading to those

cases did not call for separate contracts. That proposed rule is unprecedented and, I believe, unlikely to be adopted given the importance of labor relations stability under the contract bar doctrine.

To achieve labor relations stability, the contract bar doctrine allows public employers and majority representatives to enter three-year contracts with the intention of barring rival employee organizations from seeking to displace the majority representative until the last year of the contract. Such a purpose is not illegal. The negotiations leading up to the memorandum of agreement sought to resolve employment conditions for two years retroactively and three years prospectively - - the negotiators' focus was presumably upon settling the differences between them, not on the technicalities of the contract bar doctrine or the exact wording and structure of any final contract. Once the Judiciary and PANJ entered the memorandum of agreement, it made labor relations sense and constituted a legitimate business justification to enter two contracts separately treating the memorandum's retroactive parts, which consisted solely of wage increases, and the memorandum's prospective parts, which consisted of numerous changes in contractual provisions as well as wage increases. Executing a final contract is a proper extension of the negotiations process in which parties can address their mutual interests in stability and specify details such as the structure and format of a contract or contracts. It thus appears to me that the final contract covering

the period of July 1, 2001 through June 30, 2004 was legitimately intended to give the parties to that agreement the long-term labor relations stability they had meant to achieve in concluding their negotiations.

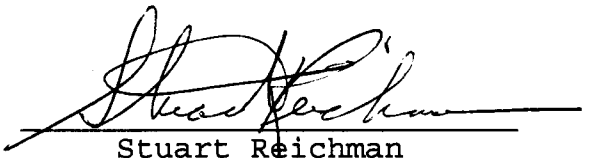
The importance placed by the contract bar doctrine on achieving stability is counterbalanced by the requirement that employees have reasonable opportunities to choose a new or no representative. Ample opportunities were present. An opportunity arose before the predecessor contract expired and another extended opportunity arose after that contract expired. That second opportunity lasted for two years if the memorandum of agreement is considered a contract bar and over two years if it is not. Employees will have a third opportunity during the third year of the 2001-2004 contract.

Given the balance of policy interests under the contract bar doctrine, and absent any authority on point, the CWA has not shown a substantial likelihood that the Commission will disregard the final three-year contract and find instead that the unsigned memorandum of agreement mandated an open period in October 2001.

Consequently, for the reasons expressed above, I find that the CWA has not, at this early stage of dispute, established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Consequently, I decline to grant the CWA's application for interim relief. This case will proceed through the normal unfair practice mechanism.

ORDER

The CWA's application for interim relief is denied.



Stuart Reichman
Commission Designee

DATED: October 17, 2001
Trenton, New Jersey