

D.R. NO. 2004-17

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

In the Matter of

CINNAMINSON BOARD OF FIRE
COMMISSIONERS, FIRE DISTRICT NO. 1,

Public Employer,

-and-

Docket No. RO-2004-64

NEW JERSEY FIREMAN'S MUTUAL
BENEVOLENT ASSOCIATION,

Petitioner,

-and-

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 3091,

Intervenor.

SYNOPSIS

The Director of Representation orders an election to determine who will represent firefighters and fire inspectors employed by the Cinnaminson Board of Fire Commissioners Fire District No. 1, who are currently represented by the International Association of Firefighters Local 3091 (IAFF). IAFF asserted that a representation petition filed by the New Jersey Firemen's Benevolent Association (FMBA) was barred by a current collective negotiations agreement between IAFF and the District. The Director found that while the parties executed a memorandum of agreement concerning salaries, the memorandum by its very terms indicated that negotiations between the parties had not concluded; therefore, the parties had not reached sufficient agreement to trigger the application of a contract bar to a representation petition.

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Appearances:

For the Public Employer,
Capehart and Scatchard, attorneys
(Alan Schmoll, of counsel)

For the Petitioner,
Fox and Fox, attorneys
(Craig Gumpel, of counsel)

For the Intervenor,
Keith Kemery, IAFF Business Agent

DECISION AND DIRECTION OF ELECTION

On January 13, and by amendment on January 21, 2004, the New Jersey Fireman's Mutual Benevolent Association (FMBA) filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. The petition was

supported by an adequate showing of interest. FMBA seeks to represent all firefighters and fire inspectors employed by Cinnaminson Board of Fire Commissioners, Fire District No. 1 (District). These employees are currently represented by the International Association of Firefighters Local 3091 (IAFF). Pursuant to N.J.A.C. 19:11-2.7, IAFF intervened in the representation proceeding on the basis of a recently expired collective agreement.

IAFF does not consent to a secret ballot election. It asserts that the petition is untimely due to a current collective negotiations agreement between IAFF and the District. IAFF requests that the petition be dismissed.^{1/}

1/ On February 20, 2004, a Commission staff agent conducted an investigatory conference. The staff agent requested that the parties exchange factually detailed written submissions in response to IAFF's assertion of a contract bar to the representation proceeding, including copies of any contracts or memoranda of agreement asserted to have been executed by the parties prior to the filing of the petition on January 13, 2004, by no later than March 5, 2004. Neither IAFF nor the District made submissions by March 5. On March 16, the staff agent wrote to all parties advising that if position statements had not been received from the District or IAFF by Friday, March 19, the staff agent would make a recommendation to the Director of Representation based upon the information received to date. On March 22, IAFF filed an unfair practice charge (CO-2004-296). The charge alleged that during the pendency of the representation proceeding, the District "engaged in activities designed to interfere with the existence and administration of the IAFF's bargaining agent status", by, inter alia, "unlawfully fail(ing) to forward dues to the IAFF and fail(ing) to produce" the requested copy of the latest draft collective agreement. The IAFF did not specifically request to block

(continued...)

FMBA asserts that there is no contract bar to the petition and requests that an election be directed as soon as possible. The District takes no position concerning which labor organization should represent the firefighters, but states while it authorized implementation of the agreement between the District and IAFF concerning salaries, its review of a draft agreement between the District and IAFF revealed a number of items with which it did not agree, and it has not ratified a collective agreement with any organization.

FMBA presents the certification of Joseph Naprawa, Shop Steward for IAFF Local 3091 and a member of the local negotiating committee. Naprawa asserts that prior to January 21, 2004, the District and the IAFF negotiating committee met numerous times to negotiate a successor to the last collective bargaining agreement, which expired on March 1, 2003. At a meeting on December 3, 2003, IAFF business agent Keith Kemery advised the District that Local 3091 would file for interest arbitration

1/ (...continued)
an election in this matter, nor did it submit any of the documentation required to support a blocking request, including a position statement, together with affidavits or proofs, articulating the nexus between the alleged unfair practice and the preclusion of a free and fair election. See Boro of Berlin, D.R. 93-9, 19 NJPER 74 (¶24033 1993); South Jersey Port Corp., P.E.R.C. No. 90-45, 16 NJPER 3 (¶21001 1990); and Matawan-Aberdeen Reg. Dist. Bd. of Ed., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1989). Therefore, I will not delay the processing of the representation matter as a result of the filing of the unfair practice charge.

since the parties had failed to reach agreement on all outstanding economic and non-economic issues. However, the District and the local membership advised Kemery that they had reached a tentative agreement on salaries which they desired to implement before concluding negotiations on other outstanding economic and non-economic issues. On or about December 9, 2003, Kemery faxed a draft Memorandum of Agreement to the District setting forth the parties' tentative agreement on salaries.

On December 15, 2003, Naprawa, Assistant Shop Steward Chris Hunter, and two fire commissioners met concerning the Memorandum of Agreement. The parties agreed that the implementation of the Memorandum of Agreement would be subject to ratification by the membership and approval by the Board of Fire Commissioners. The tentative agreement as prepared by Kemery specifically stated that the parties reserved "full rights with regard to any and all outstanding subjects of negotiation until such time that same issues are agreed upon and resolved." At the conclusion of this sentence, Harry Smith, Chair of the Board of Fire Commissioners, added the words "***See Note" and, at the bottom of the page, below the lines provided for signatures, the following language:

**Be it known that any and all outstanding subjects and issues are hereby limited to the following list and that no other is subject to all (sic) any part of continuing negotiations.

1. Uniform authorization and issue.
2. Recognition of officers.

3. Minimum station manning, four FF assigned in station, minimum of three to respond with apparatus meeting fourth at response location.

The parties initialed the additions made by Smith and signed the agreement.

The issue for determination is whether the petition is timely filed pursuant to N.J.A.C. 19:11-2.8. This rule provides:

(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 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.

For an agreement to act as a bar to the filing of a petition, the agreement must be in writing and executed by the parties prior to the filing of the petition. See City of Egg Harbor, D.R. No 91-2, 16 NJPER 424 (¶21178 1991) (letter memorializing parties' tentative agreement, but requiring formal ratification by both parties, did not constitute final "written agreement" barring representation petition); City of Pleasantville, D.R. 86-10, 12 NJPER 70 (¶17027 1986) (no contract bar where both parties did not formally ratify and sign tentative agreement prior to filing of representation petition by rival union); Bergen County Supt. of Elections, D.R. 84-10, 9 NJPER 629

(¶14269 1984) (written memorandum of agreement did not constitute contract bar where such memorandum had not been executed by both union and employer, and where evidence failed to demonstrate that parties had concluded negotiations over terms of alleged contract); compare Mercer Cty. Supt. of Elections, D.R. No. 82-40, 8 NJPER 157 (¶13069 1982) (contract bar attached where parties executed successor agreement containing new salary provisions, grievance procedure, provision for dues deductions and a duration clause, and providing for continuation of all other terms of expired agreement); see also Appalachian Shale Products, 121 NLRB 1160, 42 LRRM 1506 (1958).

When the parties reserve the right to ratify an agreement, ratification of the agreement must occur prior to the filing of a petition for the agreement to act as a bar. Egg Harbor; See also City of Wildwood, D.R. No. 88-22, 14 NJPER 77 (¶19028 1988) (contract bar attached where parties both ratified successor agreement despite dispute over appropriate calculation of top salary step); County of Middlesex, D.R. No. 81-1, 6 NJPER 355 (¶11179 1981), req. for rev. denied, P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224 1981) (letter of agreement containing "recommendations" requiring ratification by both parties did not operate as bar to representation petition). Further, an agreement which does not state substantial terms and conditions of employment to the degree necessary to stabilize the parties'

bargaining relationship cannot act as a bar to the filing of a petition. Egg Harbor; See also City of Newark, D.R. No. 84-23, 10 NJPER 369 (¶15172 1984), req. for rev. denied, P.E.R.C. 85-1, 10 NJPER 456 (¶15206 1985) (memorandum containing no agreement concerning noneconomic items lacked sufficient substantial terms and conditions of employment to provide stable labor relationship between parties did not constitute contract bar); Mount Olive Tp. Bd. of Ed., D.R. 83-29, 9 NJPER 633 (¶14271 1983) (memorandum of understanding containing percentage salary increases but indicating "all language must still be resolved" was insufficient written agreement to trigger contract bar rule); Appalachian Shale.

Here, it appears that while the parties executed a memorandum of agreement concerning salaries, the memorandum by its very terms indicated that negotiations between the parties had not concluded. The memorandum as drafted by Kemery, the IAFF representative, expressly stated that issues remained to be negotiated and resolved. Further, one of the District's Commissioners memorialized the outstanding subjects on the body of the agreement, which all parties initialed, signaling their agreement that these issues remained unresolved between them. These facts make clear that the parties had not reached sufficient agreement to trigger the application of a contract bar

to a representation petition. City of Newark; Egg Harbor; Mount Olive.

Accordingly, I find that the petition is timely and I direct that an election be conducted among the employees in the unit as follows:

Included: All regularly employed firefighters and fire officers employed by the Cinnaminson Board of Fire Commissioners, Fire District No. 1.

Excluded: All managerial executives, confidential employees, supervisors within the meaning of the Act, professional employees, craft employees, police employees, casual employees, and all other employees.

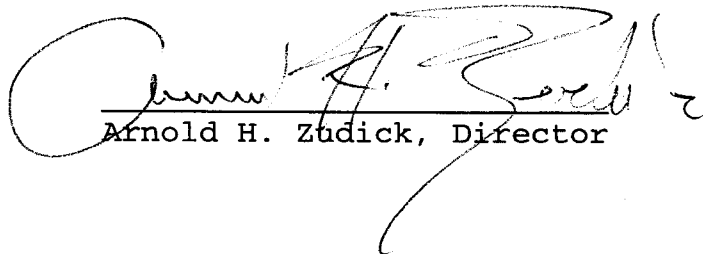
Employees shall vote on whether they wish to be represented for purposes of collective negotiations by the New Jersey Firemen's Benevolent Association, the International Association of Firefighters Local 3091, or no representative. The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the

designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible employees, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us not later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the FMBA and the IAFF with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: April 20, 2004
Trenton, New Jersey