D.R. NO. 85-24

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

In the Matter of:

CITY OF NEWARK,

Public Employer,

-and-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

DOCKET NO. RO-85-48

Petitioner,

-and-

ESSEX COUNCIL NO. 1, NJCSA

Intervenor.

## SYNOPSIS

The Director of Representation directs a representation election for all white collar employees (excluding grant-funded employees) in the City of Newark. In his decision, the Director determined that the representation petition filed October 1, 1984 was timely and was supported by an adequate showing of interest.

In his decision the Director determined that (1) certain grant-funded employees were historically excluded from the unit and therefore is not now included in the unit; (2) certain documents submitted by the incumbent Association did not constitute contracts which would bar an election; and (3) evidence that some of the Petitioner authorization cards were obtained through misrepresentation could not be considered in determining if a question concerning representation existed in the unit for such determinations are not subject to collateral attack.

D.R. NO. 85-24

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

In the Matter of:

CITY OF NEWARK,

Public Employer,

-and-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

DOCKET NO. RO-85-48

Petitioner,

-and-

ESSEX COUNCIL NO. 1, NJCSA

Intervenor.

Appearances:

For the Public Employer
Lucille LaCosta-Davino, Esq.

For the Petitioner
Thomas W. Gleason, Esq.
(Herzl S. Eisenstadt, of counsel)

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

## DECISION AND DIRECTION OF ELECTION

On October 1, 1984, the International Longshoremen's Association, AFL-CIO ("ILA") filed a timely Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission"). The ILA seeks to represent "all white collar workers" employed by the City of Newark ("City"). These employees are currently represented by Essex Council No. 1, New Jersey Civil Service Association ("Council

No. 1") in a city-wide unit of certain white collar employees. Council No. 1 has intervened in this matter pursuant to N.J.A.C. 19:11-2.7,[1/] on the basis of its recently expired contract with the City covering white collar employees for the period January 1, 1979 through December 31, 1982.

I

Both the City and Council No. 1 object to a secret ballot election in this matter and request that the Petition be dismissed.

Council No. 1 argued initially that the number of unit employees listed on the Petition as 625 is not correct, but in fact, the unit contains almost twice as many employees -- 1100. Further, Council No. 1 argued that there is an improper showing of interest because employee signature cards were obtained by fraudulent misrepresentations made by the ILA. Additionally, Council No. 1 contended that there is a contract bar to the processing of the Petition.

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

Based upon the administrative investigation, I find and determine the following:

1. The disposition of this matter is properly based upon the administrative investigation herein, as no substantial and

---

1/ N.J.A.C. 19:11-2.7 provides in part: "No employee organization will be permitted to intervene in any proceeding to resolve a question concerning the representation of employees unless it has submitted ... a current or recently expired agreement with the public employer covering any of the employees involved."

material factual issues have been placed in dispute by the parties which may be more appropriately resolved after an evidentiary hearing. N.J.A.C. 19:11-2.6(b).

2. 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.

3. Essex Council No. 1 and the International Longshoremen's Association, AFL-CIO are employee representatives within the meaning of the Act and are subject to its provisions.

4. Council No. 1 is the exclusive majority representative of the subject employees and is party to a recently expired collective negotiations agreement covering a unit described 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 executives, supervisors within the meaning of the Act, confidential employees, department heads and deputy department heads and policemen covered in the aforementioned Certification and more specifically enumerated by job titles in Appendix A." (Certification of Representative issued April 15, 1971, Docket No. RO-78).

5. By letters from the Commission Designee dated October 2, 1984, the City and Council No. 1 were notified of the ILA's Petition. The City was requested to submit a list of unit employees described in the Petition, i.e., all white collar employees. All parties were notified that absent such a list, the showing of interest is presumed adequate for further processing of the Petition.

6. At an investigatory conference held on October 15, 1984, the City submitted a list of 1500 employees. The City claimed that 1100 of the employees on that list were presently included in the white collar unit and an unspecified 400 of said employees were not included in the unit. Based on this list, the City suggested that the unit could be much larger than the ILA claimed and therefore the Petition should be dismissed due to a deficient showing of interest. At this conference, the City admittted that its list, as then submitted, was not accurate and that it intended to provide the Commission with a list of the employees (and their respective job classifications) who are in the unit represented by Essex Council No. 1 as soon as it was compiled.

7. Council No. 1 agreed with the City's claim that the unit is much larger than the ILA indicated. Council No. 1 further contended that the ILA showing of interest is improper because the designation cards submitted were secured through fraud and misrepresentation. Therefore, Council No. 1 maintained that the Petition should be dismissed.

8. The ILA objected to the City's initial list of employees. In accordance with the Commission's procedures, on October 15, 1984, the ILA was afforded 48 hours to review the City's employee list and advise the Commission whether, and if so how, the ILA wished to proceed in this matter.

9. By letters dated October 16 and 17, 1984, the ILA objected to Council No. 1's and the City's claimed scope of the existing unit; the ILA alleged that said list incorrectly included approximately 450 "grant employees," approximately 141 "seasonal

employees" and an unspecified number of "unrepresented employees." With its correspondence of October 17, 1984, the ILA also submitted a supplemental showing of interest.

10. On October 22, 1984, Council No. 1 submitted various documents in support of its argument that there is a contract bar to the continued processing of the ILA Petition beyond October 2, 1984. These documents include a copy of the original PERC certification in RO-78; a contract between Council No. 1 and the City bearing no date of execution, for the period January 1, 1979 through December 31, 1982; a writing signed April 27, 1982, setting forth salary and certain fringe benefits for the years 1982, 1983 and 1984; a memorandum signed October 1, 1984, setting out salary and fringe benefits for the years 1985 and 1986; and a contract document signed October 18, 1984 by the City and Council No. 1 for the period January 1, 1982 through December 31, 1984.

11. In response to our telephone inquiry on October 29, 1984, the City submitted (on October 30, 1984) three lists of employees and a position statement. The City described the lists as follows: List A, a listing of all white collar employees in titles listed in the Appendix of the 1971 contract between Council No. 1 and the City, List B, a listing of all white collar employees whose titles were either reclassified by the Civil Service Commission to different white collar titles (than those in the Appendix) or who hold white collar titles, which were created since 1971 as the result of the normal accretion to the City's personnel classification plan, (These titles are in addition to those enumerated on List A); List C, a listing of all grant-funded employees who occupy positions

designated as white collar titles by the Civil Service Commission. (List A contains 741 names, List B, 208 names and List C, 506 names).

The City argued initially that all employees on all three lists are included in the white collar unit. List A employees are without question represented by Council No. 1. The employees named on List B are included in Council No. 1's white collar unit and the City has historically treated them accordingly. As to the employees included on List C, prior to July 1984, the City did not acknowledge those positions as white collar Civil Service titles because the City was "embroiled in a dispute with the New Jersey Civil Service Commission as to the propriety of grant-funded titles being considered Civil Service titles." (The City's October 30, 1984 letter). However, the City maintained that its dispute with the Civil Service Commission was resolved in June or July 1984, when the City "acquiesced to Civil Service's position." The City argued that since the grant-funded employees now hold Civil Service white collar titles, they also should be regarded as included in the white collar unit.2/

Regarding this issue, Council No. 1 agrees with the City that all three groups are included in the white collar unit, it submitted affidavits stating that grant-funded employees always received the same economic benefits as those nogeotiated by Council

---

2/ We have also reviewed in this regard a Memorandum of Agreement, excuted by the City and Council No. 1 on July 20, 1984, in settlement of two unfair practice charges (Docket No. CO-84-263 and CE-84-26); and correspondence from those files, dated June 4, 1984, from the City's counsel to Council No. 1's counsel.

No. 1, but it has not submitted any documentation in support of its position that granted-funded employees are included in the unit.

12. In response to our correpondence of October 29, 1984, Council No. 1 submitted affidavits on November 5, 1984, in support of its challenge to the legitimacy of Petitioner's designation cards. In accordance therewith, Council No. 1 requests that the showing of interest be set aside.

13. Based upon the parties' submissions, on November 7, 1984, it was concluded that the unit petitioned for by the ILA -- the existing unit of white collar employees represented by Council No. 1 -- was comprised of those employees on two of the City's three lists, Lists A and B. Accordingly, on November 7, 1984, the ILA was afforded 48 hours to submit a showing of interest for a unit consisting of the City's Lists A and B. On November 9, 1984, the ILA submitted a supplemental showing of interest.[3/]

---

3/ Under the rules and regulations of the Commission, representation petitions may be timely filed during any of the following time periods: (a) for employees covered by an existing written collective negotiations agreement, during the "open period" for filing representation petitions (in accordance with N.J.A.C. 19:11-2.8); (b) after the expiration of a collective negotiations agreement and prior to the execution of a successor agreement; (c) if employees are in a unit covered by a certification, election or recognition bar, after the expiration of said bar and prior to the execution of an agreement covering the employees; or (d) at any time concerning a unit of hitherto unrepresented employees.

Where the Commission has become aware, during a timely period for the filing of representation petitions, that a Petitioner's showing of interest is deficient, it has been the Commission's policy to provide the Petitioner 48 hours (or until the end of the timely period, whichever is shorter) in

(Footnote continued on next page)

14. By letter dated February 21, 1985, we notified the parties that there was a proper showing of interest sufficient to support a petition for a unit consisting of all employees included on Lists A and B submitted by the City (949 employees). Also, on February 21, 1985, we advised the parties that following a review of all the submissions to date, I was inclined to order that a secret ballot election be conducted in the existing white collar unit (employees in titles listed in the Appendix to the 1971 white collar unit contract and employees in white collar titles created since 1971, but excluding grant-funded employees -- i.e., employees on the City's Lists A and B) in order to ascertain their representational desires.

15. Additionally, on February 21, 1985, the parties were advised that challenges to the validity of the ILA's showing of interest did not warrant further investigation and that a contract

---

(Footnote continued from previous page)
which to cure the deficient showing of interest.

In the instant matter, although aware that on October 18, 1984, the Employer and the incumbent had executed a collective negotiations agreement covering the petitioned-for unit for calendar 1984 (thus possibly rendering the Petition untimely), we were also aware that the Petitioner had filed Unfair Practice Charges concerning the propriety of the negotiation and execution of said contract. Because the scope of this unit had been and continued to be in dispute (variously, among the parties), under the emergent circumstances presented herein and in order to preserve the potential rights of the Petitioner and the employees, it was determined to continue with the processing of the representation Petition as if the executed agreement were determined not to bar the processing of the instant Petition -- until such time as it was determined whether or not the above-referred agreement was a bar to this Petition.

signed on October 18, 1984, by Council No. 1 and the City did not bar the further processing of the Petition. We requested that the parties submit any additional positional statements and documentation concerning these matters by March 18, 1985.

16. On March 15, 1985, the City responded to our inquiry. It advises that it was "not contesting the Commission's determination that grant-funded employees should not be included in the existing unit,...." However, it did still maintain that the contract with Council No. 1 "which was signed [October 18, 1984] had been in force, through the legislative process, for over two years and was in fact about to expire. The contract's only new provision was the agency shop language which had been finalized prior to the filing of the instant Petition." (Emphasis in original.)

17. On March 18, 1985, Council No. 1 submitted a positional statement and several affidavits in support of its several arguments. First, Council No. 1 argues that the showing of interest should be held to be inadequate and maintains that the affidavits it submitted previously should be considered since the affidavits "clearly demonstrate that the persons solicited [to sign authorization cards] had no idea what they were signing." Second, Council No. 1 states that it has been its position that grant-funded employees have always been included in the white collar unit and Council No. 1 has given those employees full and impartial representation. Third, Council No. 1 maintains these employees "were to pay a representation fee in lieu of dues." Fourth, Council No. 1 contends that it and the City "had reached agreement [on a contract] prior to the filing of the [instant] Petition. Only a

formalization of the existing agreement remained. Accordingly, the contract bar rule should apply." Council No. 1 asks the Commission to dismiss the Petition. 4/

18. On March 20, 1985, I sent a letter to Council No. 1 requesting the following: (1) "documentary evidence demonstrating that Council No. 1 represented grant-funded employees in grievance proceedings with the City brought pursuant to the grievance procedure in the white collar unit's collective negotiations agreement;" and (2) evidence that "grant-funded employees pay agency fees...."

19. On March 30, 1985, Council No. 1 responded to my March 20, 1985 letter. First, Council No. 1 maintains that because there was a dispute with the City concerning the production of a list of names of employees for agency fee deductions, no deductions were made. Second, Council No. 1 maintains that since many employee grievances were not written, it is not able to provide documentation concerning grievances filed on behalf of grant-funded employees. However, one employee while holding regular Civil Service status, but who was originally a CETA program employee, received Council No. 1's assistance in 1983 and 1984 on a Civil Service matter.

20. On April 8, 1985, in response to our February 21, 1985, letter to the parties, the ILA submitted a positional statement agreeing with the Administrator's preliminary decision and urging the Director to order an election in this matter.

---

4/ Additionally, Council No. 1 urges the Director to consider only those authorization cards submitted by employees on Lists A and B as part of the showing of interest in support of the ILA Petition.

II

The issues raised in this matter shall be addressed seriatim.

A. Council No. 1 objects to a secret ballot election in this matter alleging that fraudulent misrepresentations were made to individuals who signed authorization cards for the ILA. In support of this allegation, Council No. 1 submitted numerous affidavits.[5/]

Pursuant to N.J.A.C. 19:11-1.2(a)(8), "petitions for certification of public employee representative shall be accompanied by a showing of interest as defined in N.J.A.C. 19:10-1.1 of not less than 30 per cent [sic] of the employees in the unit alleged to be appropriate..."

> N.J.A.C. 19:10-1.1 defines a showing of interest as: ... a designated percentage of public employees in an allegedly appropriate negotiations unit, or a negotiations unit determined to be appropriate, who are members of an employee organization or have designated it as their exclusive negotiations representative.... When requesting certification, such designations shall consist of written authorization cards or petitions, signed and dated by

---

5/ The unit we found appropriate consists of 949 employees. The unit urged by Council No. 1 consists of employees on Lists A, B and C inclusive-1455 employees. Council No. 1 submitted a total of 114 affidavits. One affidavit was from the person who allegedly secured an undesignated number of ILA designations cards. The other 113 affidavits were from City employees, holding white collar titles, who each said that "It was never my intention to sign a pledge card for representation by the ILA". Even assuming all 113 employees signed ILA designations cards, these 113 affidavits represent only 12% of the unit we have found appropriate and only 8% of the unit urged by Council No. 1.

> employees, normally within six months of the filing of the petition, authorizing the employee organization to represent such employees for the purpose of collective negotiations....

In In re Jersey City Medical Center, D.R. NO. 83-19, 8 NJPER 642 (Para 13308 1982), the Director of Representation stated:

> The submission of a showing of interest by a Petitioner is an administrative requirement for the purpose of ensuring that sufficient interest exists among employees on behalf of the petitioner to warrant the expenditure of Commission resources in processing the petition. It is uniquely an administrative concern, and questions relating to its validity must be raised in a prompt manner. Unless good cause exists to the contrary, challenges questioning the validity of a showing of interest are to be raised prior [to] the informal conference and should be embodied in the challenging party's response to the Commission's initial request for positional statements.
>
> * * *
>
> Consistent with N.J.A.C. 19:11-2.1 the undersigned engages in a separate review of claims regarding the propriety of the showing of interest. Documentary and other evidence in support of such claims shall be filed within 72 hours of the raising of the challenge. (citations omitted) 6/

In the instant matter, the ILA submitted a sufficient number of authorization and designation cards containing clear and unambiguous language that the signer "authorize[s] International

---

6/ See, In re Woodbridge Tp. Bd. of Ed., D.R. NO. 77-9, 3 NJPER 26 (1977); In re City of Jersey City, E.D. No. 76-19, 2 NJPER 30 (1976) ("Jersey City"). N.J.A.C. 19:11-2.1 provides: "the showing of interest shall not be furnished to any of the parties. The director of representation shall determine the adequacy of the showing of interest and such decision shall not be subject to collateral attack." See also, Pacific Gas & Electric Co., 97 NLRB 1397 n.3, 29 LRRM 1256 (1956), in which the Board makes clear that the manner, method and procedure in determining the showing of interest is not for disclosure.

Longshoremen's Association, AFL-CIO, to represent me for the purpose of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law."

Council No. 1 submitted 114 affidavits in support of its claim that the showing of interest was collected by fraudulent misrepresentation of the authorization cards's purpose. Generally, in arriving at its decisions, the Commission may look to the decisions of the National Labor Relations Board for guidance, where appropriate (Lullo v. International Assn. of Firefighters, 55 N.J. 409 (1970). On the issue of alleged misrepresentation, the Board's long standing policy is clear:

> In general, the Board determines the validity of a union's showing of representative interest only by means of an administrative investigation. Thus, the Board refuses to permit in the representation proceeding, the litigation of allegations that authorization cards have been procured by fraud, misrepresentation, or coercion or that they have been revoked or that they are stale. (Footnotes omitted) Georgia Kraft Co., 120 NLRB 806, 42 LRRM 1066 (1958).7/

Additionally, the Board finds that "it is well settled that an employee's subjective state of mind in signing a union card cannot negate the clear statement on the card that the signer is designating the union as his bargaining agent," Gary Steel Products

---

7/ Globe Iron Foundry, 112 NLRB 1200, 36 LRRM 1170; Standard Cigar Company, 117 NLRB 852, 39 LRRM 1332; The Babock & Wilcox Company, 116 NLRB 1542, 39 LRRM 1032; Reliable Mailing Service Company, 113 NLRB 1263, 36 LRRM 1459; and The Cleveland Cliffs Iron Company, 117 NLRB 668, 39 LRRM 1319.

Corp., 144 NLRB 1160, 54 LRRM 1211 (1963), citing, Dan River Mills, Inc., 121 NLRB 645, 42 LRRM 1411). 8/

Clearly, any doubts as to the desires of employees on representational matters can best be answered by the conduct of a secret ballot election by the Commission. Therefore, I am satisfied that the showing of interest is proper and valid on its face. See In re City of Orange Tp., D.R. NO. 85-10, 10 NJPER ___ (Para _____ 1984), Jersey City, supra, and Woodbridge Tp. Bd. of Ed., supra. 9/

B. The City and Council No. 1 raised objections to the continued processing of the Petition beyond October 15, 1984, alleging that the showing of interest was inadequate for the requested unit.

Pursuant to its policy, upon initial receipt of a Petition, the Commission presumes that the showing of interest

---

8/ In an exceptional case, where the Board investigated the adequacy of a petitioner's showing by reviewing affidavits and determined that the evidence submitted created a reasonable cause for believing that the showing may have been tainted by fraud, there was a submission of affidavits stating that the affiant had not authorized the petitioner to represent them from more than 70% of the unit members. Globe Iron Foundry, supra. However, where such denials were from less than 70% of the unit, the Board found that the showing of interest was valid and otherwise adequate. General Shoe Corp. 114 NLRB 381, 36 LRRM 1578 (1955).

In the instant matter, Council No. 1 submitted, at best, affidavits from 12% of the unit I found appropriate. All the affiants said: "It was never my intention to sign a pledge card for representation by the ILA." Such language raises a question as to the true desires of the affiants but does not question the authenticity of the clearly worded authorization cards.

9/ In the processing of a representation petition, only authorization cards from employees eligible for inclusion in the unit determined appropriate are counted to ensure the requisite showing of interest.

accompanying the Petition is adequate if the showing is facially proper and sufficient, unless an administrative investigation leads to a different result. Once the petition has been filed with the Commission, a notice of the filing is sent to the employer and other interested employee organizations, if known.[10/] In that letter, the employer is requested to post notices and to furnish the names, addresses and telephone numbers of all employee organizations which have claimed to represent any of the employees in the requested unit.[11/] Notably, the employer was further requested to submit, within five days of receipt of said letter, the following information:

> (b) An alphabetized list of employees described in the Petition, together with their job classifications, for the payroll period immediately preceding the date of this letter. Upon timely receipt of such list, a further administrative determination will be made to assure that a sufficient showing of interest exists to warrant further processing of the matter by the Commision. The showing of interest accompanying the Petition, if facially proper and adequate, will be presumed adequate if the employer has not provided a list of employees. Should this matter proceed to a secret ballot election, the employer will be required to submit an eligibility list containing the employees' home addresses and job titles. (Emphasis added)[12/]

---

10/ In this case, proper notices were sent on October 2, 1984, to the City of Newark and to Council No. 1.

11/ By letter dated October 15, 1984, the City responded with a list of employee organizations claiming to represent the petitioned-for employees within the previous 12 months. It identified the ILA, Local No. 6, Petitioner in a companion case, RO-85-14, and the FOP, Local No. 12, Petitioner in a companion case, RO-85-55.

12/ In the instant matter, by correpondence dated October 2, 1984, the employer was requested to submit the above-referenced alphabetized list of employees described in the Petition.

After initially determining that the showing of interest accompanying the Petition was facially proper and adequate, the Commission Designee sent correpondence, dated October 2, 1984, (referenced above) to the parties herein and scheduled an investigatory conference for October 15, 1984, for the purpose of executing an Agreement for Consent Election or to permit the parties to assert disputed issues of fact or law.

On October 15, 1984, because the City was not able to provide an adequate list of employees in the white collar unit, the showing of interest accompanying the original ILA petition was presumed adequate and the processing of the petition continued. However, the parties were offered the opportunity to raise issues of fact or law. See, In re Cty. of Middlesex, (Roosevelt Hosp.), P.E.R.C. No. 81-129, 7 NJPER 266 (Para 12118 1981) ("Middlesex"); In re Cty. of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (Para 14196 1983) ("Bergen"). The City and Council No. 1 refused to execute an Agreement for Consent Election for the reasons enumerated hereinabove. It was not until October 30, 1984, that the City submitted an adequate list of employees (and titles) whom the City considered included in the petitioned-for white collar unit.

The ILA, on October 15, 1984, specifically objected to inclusion of grant-funded employees in the white collar unit.

For the purposes of determining the adequacy of the ILA showing of interest herein, the continued processing of the instant Petition and its ultimate perfection on November 9, we have considered as part of the petitioned-for white collar unit those

employees in titles listed in the Appendix of Council No. 1's contract (List A) and those employees whose titles were created as part of the normal changes and accretions to the City's classification plan (List B). We have declined to consider List C as part of the existing white collar unit at this time. It is not sufficient for the City to presently assert, without further supportive documentation or evidence, [13/] that grant-funded employees (those enumerated on List C) are included in the city-wide white collar unit. The City acknowledges that as of July 1984, it considered these grant-funded employees in Civil Service titles. It is not contesting the Commission's determination that grant-funded employees are not presently included in the unit, and the City does not contend that these employees have historically been considered and treated as included in the white collar unit -- in fact, quite the contrary would appear to be true (see paragraph #11, supra).[14/]

In correspondence dated March 20, 1985, I requested that Council No. 1 submit documentary evidence supporting its claims that it had always represented grant-funded employees in its white collar unit. By letter dated March 29, 1985, Council No. 1 responded that it has always treated all City employees with white collar titles

---

13/ See, In re Hoboken, D.R. No. 85-4, 10 NJPER 597 (Para 15276 1984).

14/ In this regard, it is noted that although the City, Council No. 1 and the Civil Service Commission were involved in disputes concerning the status of grant-funded employees, neither the City nor Council No. 1 ever filed a representation petition or a clarification of unit petition with the Commission to resolve the status of those employees.

equally -- neither distinguishing nor identifying grant-funded employees from any others. However, it was unable to provide evidence which indicates that it had in fact represented grant-funded employees over the years through any of the myriad processes of labor relations. In sum, no documentary evidence was submitted by Council No. 1 to buttress its contentin that grant-funded employees were part of its extant white collar unit and its unsupported claims do not constitute substantial and material factual issues.[15/] Further, Council No. 1 failed to submit any evidence to support its claim that its negotiated agency shop fee with the City in fact covers grant-funded employees.

Based upon a review of the parties' submissions and the foregoing analysis, I find that the existing white collar unit consists of all white collar employees but excludes grant-funded employees, seasonal employees, all employees in other collective negotiations units, managerial executives, confidential employees, professional employees, craft employees, supervisors within the meaning of the Act and police employees. Accordingly, I find that the showing of interest, submitted by ILA for the above-described unit is adequate

C. I have reviewed all the documentary evidence submitted by Council No. 1 in support of its claim that an existing contract bars the further processing of the instant Petition.

---

15/ One instance was cited where, in 1983 and 1984, counsel for Council No. 1 represented a regular salaried employee, who had originally been hired pursuant to a CETA grant, in his appeal to Civil Service of a lay-off.

N.J.A.C. 19:11-2.8 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." The rule 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...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;

In In re East Brunswick Bd. of Ed., D.R. No. 80-39, 6 NJPER 308 (Para 11148 1980), citing a National Labor Relations Board decision, the Director noted the policy considerations underlying the contract bar rule:

> 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).

The single page document signed April 27, 1982, submitted by Council No. 1 does not state a specific term, nor does it make reference to a prior written agreement containing a recognition clause. Further, by its own terms, the April 27, 1982 writing is described as an "offer" by the City; it is best described as a list of economic items. Although it lists certain changes in salary and fringe benefit items for certain years, 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 Tp., D.R. No. 83-29, 9 NJPER 633 (Para 14271 1983). Therefore, I conclude that the April 27, 1982, writing does not constitute a contract within the meaning of subsection 2.8 sufficient to bar the processing of the instant Petition.

The October 1, 1984, writing submitted by Council No. 1, is a single page document which on its face purports to cover the years 1985 and 1986, not 1984. Accordingly, the October 1, 1984, writing (covering a period subsequent to December 31, 1984) cannot constitute a bar to the representation petition herein, which was filed October 1, 1984. 16/

The last document submitted by Council No. 1 for our consideration is an agreement between Council No. 1 and the City,

---

16/ We have also reviewed the July 1984 Memorandum of Agreement executed by the City and Council No. 1 in settlement of two

(Footnote continued on next page)

executed on October 18, 1984, covering the period January 1, 1982 through December 31, 1984.

On March 15, 1985, the City filed a response to our February 21, 1985 letter to the parties. In its response, concerning the contract bar effect of its current agreement with Council No. 1, it argues that the contract signed on October 18, 1984 had been in effect for some time. Specifically, the City contends that "The contract which was signed had been in force, through the legislative process, for over two years and was in fact, about to expire. The contract's only new provision was the agency shop language which had been finalized prior to the filing of the instant petition." (Emphasis in original). However, Council No. 1 disagrees with the City on this point and thus substantially undermines the contention that a de facto agreement existed between the parties. Council No. 1 states that, "Although the City of Newark and Essex Council No. 1 negotiated an agreement covering 1984, including an agency shop provision, there was a dispute and unfair practice charge concerning the production of a list of employees' names by the City of Newark to Essex Council No. 1. Because the City did not produce the list of names and because of the City's extensive review of the Demand and Return System of Essex Council No. 1, agency shop fees were never deducted from any employees' salaries." (Emphasis added. Council No. 1's letter of March 29, 1985). From all of the parties' submissions on this issue

---

(Footnote continued from previous page)
unfair practice charges (Docket Nos. CO-84-263 & CE-84-26). In this regard, the Memorandum indicates that as of the date of its execution (July 20, 1984), no final contract draft had yet been agreed upon by the parties.

it is clear to me that the "agreement" was not reduced to writing and signed by the parties prior to the filing of the instant Petition, on October 1, 1984. The Commission's rule in N.J.A.C. 19:11-2.8 requires that in order for an agreement to operate as a contract bar, it must be in writing. Additionally, we require that the written agreement be signed. See, In re Cty. of Middlesex, P.E.R.C. No. 81-124, 7 NJPER 266 (Para 12118 1981). See also, In re Transport of New Jersey, D.R. No. 82-38, 8 NJPER 154 (Para 13067 1982 ).

It is the Commission's view that the proper action to be taken by any employer faced with knowledge of pending questions concerning representation of employees is to remain neutral in its position as between rival employee organizations. In In re Middlesex Cty., supra, the Commission held that an employer with knowledge of a pending petition and question concerning representation violates N.J.S.A. 34:13A-5.4(a)(1) and (2) if it negotiates with the incumbent union before the Commission resolves the representation issue. In Middlesex, the Commission stated unequivocally:

> We believe that the proper action to be taken by an employer who is faced with and has knowledge of a pending question concerning representation to avoid the committing of an unfair practice...is not to begin or if begun, to cease negotiations with the incumbent union until the representation issue has been properly determined. (footnotes omitted). 7 NJPER 267.

See also, In re County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (Para 14196 1983).

During the pendency of a representation question, the rights of all parties must be protected. No single party or combination of parties should be able to frustrate this process or the rights of employees. An employer's neutrality, vis-a-vis rival organizations, is paramount if its employees are to be accorded the opportunity to make a considered choice for a majority representative.

In Bergen, the Commission further elaborated upon Middlesex:

> Middlesex County also provides a bright-line and simple standard by which the parties can guide their conduct during pending representation proceedings and by which unit employees can understand the parties' positions. Under Middlesex County, the parties know, and can so inform concerned employees, that contract administration and grievance processing will continue, but negotiations over a successor contract must stop until the pending question concerning representation is resolved either through an administrative investigation (if the petition is defective or improperly supported) or through an election.... Under RCA Del Caribe, [262 NLRB No. 116, 110 LRRM 1369 (1982)] by contrast, an employer will still be required to stop negotiating with the incumbent if a good faith doubt of its majority status is raised through objective consideration; this standard can only be assessed on a case-by-case basis and may place the employer in a position of uncertainty concerning its obligations and its employees in a position of uncertainty concerning the employer's motivation -- objective doubt of majority status or subjective preference for another organization -- for refusing to negotiate with the incumbent.
>
> On balance, then, our experience in administering the Act does not make it evident to us, as it was to the Board, that our effort to promote employee free choice has been at a price to the stability of labor-management relationships. Rather, we believe Middlesex County serves both freedom of choice and labor stability and prevents needless confusion. Bergen, slip op., p.34.

In the instant matter, the employer and the incumbent both proffer an agreement signed on October 18, 1984, as a contract bar to the instant Petition.

It is clear however that, at least as of October 15, 1984, the date of the investigatory conference, both the City and Council No. 1 had notice of the Petition and were thus aware of a pending question concerning the representation of white collar employees which had not been resolved by this Commission. 17/

Accordingly, the City and Council No. 1's execution of the agreement on October 18, during the pendency of a question concerning representation raised by the filing of the instant Petition (which petition was presumptively valid on that date), cannot be allowed to bar the continued processing of the Petition. In light of all the circumstances of this case and the applicable law, I hold that the Petition filed on October 1 is timely.

---

17/ While there was a considerable amount of uncertainty surrounding the issue of which employees were included in the petitioned-for unit -- the unit then represented by Council No. 1 -- and how many employees were included in that unit, it seems clear that the City and Council No. 1 were aware that the nonsupervisory white collar employees of the City were the subject of a Petition filed by the ILA. In Bergen, the Commission rejected the County's exceptions to the Hearing Examiner's Report concerning its (the County's) negotiations with the Incumbent during the pendency of representation proceedings involving the unit of certain nonsupervisory blue collar employees. The Commission stated: "We specifically find that the negotiations unit petitioned for was not so substantially different from the one Local 1 represented that Local 29's representation petition did not raise a valid question concerning representation in that unit." Bergen, slip op., p.35.

III

Pursuant to N.J.A.C. 19:11-2.6(b)(3), I direct that an election be conducted in a unit of all white collar employees employed by the City of Newark (employees on City List A and List B) excluding grant-funded employees (City's List C) of the City of Newark, managerial executives, supervisors, confidential employees, professional employees, craft employees, police within the meaning of the Act, and all other employees in other collective negotiations units. N.J.S.A. 34:13A-6(d). The election shall be conducted no later than thirty (30) days from the date of this decision.

Those eligible to vote are the employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person in order to be eligible to vote. Ineligible to vote are employees wo 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. 19:11-9.6, the Public Employer is directed to file with me and with the employee organizations, an eligibility list consisting of an alphabetical listing of the names of all eligible voters, including employees voting subject to challenge, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by me no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously

filed with the employee organizations with statement of service to me. I shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the International Longshoremen's Association, AFL-CIO, or by Essex Council No. 1, New Jersey Civil Service Association or neither.

The exclusive representative, if any shall be determined by the majority of ballots cast by the employees voting in the election. The election shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR

Edmund G. Gerber

DATED: April 26, 1985
Trenton, New Jersey