

D.R. NO. 2017-14

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

In the Matter of

CITY OF ATLANTIC CITY,

Public Employer,

-and-

Docket No. RO-2017-044

GOVERNMENT WORKERS UNION,

Petitioner,

-and-

AFSCME New Jersey, Local 2303C

Intervenor.

SYNOPSIS

The Director of Representation dismisses a representation petition for an election filed by the Government Workers Union (GWU) seeking to represent a unit of lifeguards employed by the City of Atlantic City (City). AFSCME NJ Local 2303C (AFSCME), the incumbent representative of City lifeguards, opposed the petition and argued the petition was barred by a contract imposed on the City and AFSCME by the Director of the Division of Local Government Services (DLGS) pursuant to the Municipal Stabilization and Recovery Act, N.J.S.A. 52:27BBBB-1 et seq. The Director of Representation agreed with AFSCME and found that GWU's petition was untimely pursuant to N.J.A.C. 19:11-2.8 based on the contract imposed upon the City and AFSCME by the DLGS.

D.R. NO. 2017-14

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

In the Matter of

CITY OF ATLANTIC CITY,

Public Employer,

-and-

Docket No. RO-2017-044

GOVERNMENT WORKERS UNION,

Petitioner,

-and-

AFSCME New Jersey, Local 2303C

Intervenor.

Appearances:

For the Public Employer,
Cleary Jacobbe Alfieri Jacobs, LLC
(Gregory Franklin, of counsel)

For the Petitioner,
(David Tucker, President)

For the Intervenor,
Law Office of David Beckett
(David Beckett, of counsel)

DECISION

On June 1, 2017, the Government Workers Union (GWU) filed a Petition for Certification of Public Employee Representative by election seeking to represent a unit of lifeguards employed by the City of Atlantic City (City). The petition was supported by

an adequate showing of interest. N.J.A.C. 19:11-1.2(a)(9).^{1/}

We granted the American Federation of State, County and Municipal Employees, New Jersey, Local 2303C's (AFSCME) request to intervene based upon a collective negotiations agreement extending from January 1, 2013 through December 31, 2014 for a unit of City lifeguards. The 2013-2014 agreement is the most recent CNA between the City and AFSCME. AFSCME opposes GWU's petition and argues the petition is barred by a contract imposed upon the City and AFSCME by the Director of the Division of Local Government Services (DLGS) pursuant to the Municipal Stabilization and Recovery Act (MSRA), N.J.S.A. 52:27BBBB-1 et seq. The City concurs with AFSCME.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2(a). On June 2, 2017, the assigned Commission staff agent requested the parties file briefs and/or certifications addressing AFSCME's objections. AFSCME and the City filed briefs with exhibits and GWU filed a letter in response. GWU contends its petition is timely, that AFSCME does not enjoy majority support from its unit members, and

^{1/} GWU submitted a petition on May 5, 2017 that was not supported by an adequate showing of interest. A petition is deemed "filed" when it is accompanied by an adequate showing of interest. Jersey City Medical Center, D.R. No. 80-11, 5 NJPER 504 (¶10260 1979); N.J.A.C. 19:11-1.2(a)(9). GWU submitted an adequate showing of interest on June 1, 2017.

that the intent of unit employees to choose a majority representative is "primary."

The disposition of GWU's petition is properly based upon our administrative investigation. No disputed, substantial material facts justify an evidentiary hearing. N.J.A.C. 19:11-2.2. Based upon our administrative investigation, I make the following:

FINDINGS OF FACT

AFSCME is the exclusive majority representative of a unit of lifeguards, lead lifeguards, lieutenant and senior lieutenant lifeguards. AFSCME and the City are parties to a collective negotiations agreement extending from January 1, 2013 through December 31, 2014. The parties have not negotiated a successor agreement.

On May 27, 2016, the New Jersey Legislature enacted the MSRA, which authorizes the State to "take action to assist local governments experiencing severe budget imbalances and other conditions of severe fiscal distress or emergency by requiring prudent fiscal management and operational efficiencies in the provision of public services." N.J.S.A. 52:27BBBB-2(c). The MSRA also empowers the Local Finance Board to "develop a comprehensive rehabilitation plan for local governments that are experiencing severe fiscal distress, and to act on behalf of a local government unit to remedy the distress."

N.J.S.A. 52:27BBBB-2(d). The State subsequently determined that

Atlantic City was a "municipality in need of stabilization and recovery" due to its dire fiscal situation, N.J.S.A. 52:27BBBB-3, thereby making Atlantic City government subject to the MSRA.

With respect to collective negotiations, the MSRA empowers the Director of the Division of Local Government Services (Director) in the Department of Community Services to unilaterally alter or terminate any CNA governing City employees and, with respect to any expired CNA, "unilaterally modify wages, hours or any other terms and conditions of employment." N.J.S.A. 52:27BBBB-5(g) and (i). The Director also "acts as the sole agent in collective negotiations" on behalf of the City. N.J.S.A. 52:27BBBB-5(h). The Director has the exclusive power to impose a collective negotiations agreement on a City negotiations unit provided the action is "reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery" of the City. N.J.S.A. 52:27BBBB-5(g).

On May 16 and 19, 2017, the Director imposed a collective negotiations agreement on AFSCME's unit of lifeguards. Pursuant to the MSRA, the Director notified AFSCME and the City by memoranda that several dozen modifications to the 2013-2014 CNA were being imposed effective on May 19, 2017. The term of the modified CNA extends from May 19, 2017 through December 31, 2021. The memoranda imposed modified terms and conditions of employment

for lifeguards during this period, and covers a range of subjects, including:

- (1) The elimination of longevity pay;
- (2) Differentiated salary amounts and manner of payment for lifeguards of different ranks;
- (3) Elimination of interest arbitration;
- (4) Elimination of paid leave for attendance at United States Lifeguards Association meetings;
- (5) Modification of seniority rights;
- (6) Redefining the lifeguard "season";
- (7) Elimination of salary increments during the interim period between this agreement and a successor agreement; and
- (8) Modification of overtime eligibility.

Terms and conditions of employment set forth in the 2013-2014 CNA that were not modified or eliminated were continued in effect.

The memoranda which imposed the contract noted that the modified terms and conditions were designed to "rehabilitate the financial condition of the City."

On June 1, 2017, the GWU filed a Petition for Certification of Public Employee Representative by election that was accompanied by an adequate showing of interest. GWU does not dispute that the Director's May 16 and 19 memoranda operate as a binding contract on the City and AFSCME, but contends it should

not bar the processing of its representation petition.

ANALYSIS

N.J.A.C. 19:11-2.8(c) provides, in pertinent part:

During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative normally will not be considered timely filed unless:

2. In a case involving employees of a county or a municipality, any agency of a county or municipality 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 a renewal date of such agreement.

An agreement "in excess of three years will be treated as a three-year agreement and will not bar a petition filed at any time after the end of the third year of the agreement." N.J.A.C. 19:11-2.8(d). In interpreting this regulation, the Commission has relied upon Commission and National Labor Relations Board (NLRB) precedent. Manalapan-Englishtown Regional Bd. of Ed., D.R. No. 81-13, 6 NJPER 530 (¶11270 1980); City of Vineland, D.R. No. 82-53, 8 NJPER 323 (¶13147 1982).

The Commission and NLRB have held that, when an interest arbitrator or court exercises the statutory authority to impose a contract on parties with substantive terms and conditions of employment, that contract is a "written agreement" sufficient to bar the filing of a representation petition. City of Vineland

Police Department; D.R. No. 82-53, 8 NJPER 323 (¶13147 1982) (arbitration award barred the filing of a representation petition given "the statutory mandate of N.J.S.A. 34:13A-16 et seq. that the arbitrator's award resolve all outstanding disputed negotiations issues"); County of Essex, D.R. No. 90-33, 16 NJPER 402 (¶21168 1990); Direct Press Modern Litho, Inc. v. IBT Local 198, 328 NLRB 860, 161 LRRM 1193 (1999).

In Direct Press, the NLRB held that a bankruptcy court order extending the duration of a collective bargaining agreement (CBA) by six and a half months operated as a bar to a representation petition. 328 NLRB at 860. While noting that the petition was timely filed during the open period of the original CBA, the NLRB noted that the bankruptcy court had the statutory authority under the federal bankruptcy code to modify the CBA. Id. In order to harmonize the NLRB's contract bar doctrine with the policy of rehabilitating the financial condition of a debtor under the bankruptcy code, the NLRB found it was appropriate to treat the court-ordered extension of the CBA as a contract bar to a representation petition. 328 NLRB at 861.

Similar to the interest arbitrator in Vineland and the court in Direct Press, the Director exercised his statutory authority under the MSRA to impose a collective negotiations agreement of a definite duration on the City's lifeguards. That agreement, memorialized in memoranda dated May 16 and May 19, 2017, sets

forth substantive terms and conditions of employment for lifeguards. The memoranda sets the term of the agreement from May 19, 2017 through December 31, 2021. Pursuant to N.J.A.C. 19:11-2.8, the memoranda issued by the Director is a "written agreement" that bars the filing of representation petition.^{2/} Since GWU's petition was filed on June 1, 2017, it is untimely and must be dismissed pursuant to N.J.A.C. 19:11-2.8.

GWU also contends that AFSCME has "not demonstrated majority support by a contract negotiations or ratification." `In contract bar cases, we presume the contract is legally valid and do not address questions concerning majority support for the incumbent. Manalapan, 6 NJPER 530; Electro Metallurgical Co., 72 NLRB No. 253, 19 LRRM 1291 (1947); NLRB v. Pepsi Cola Co., 454 F.2d 5 (6th Cir. 1972).

ORDER

The petition is dismissed.

/s/Gayl R. Mazuco, Esq.
Director of Representation

DATED: June 23, 2017
Trenton, New Jersey

^{2/} While the agreement imposed by the Director does not expire until 2021, we note that our regulations state that an agreement in excess of three years "will be treated as a three-year agreement..." for purposes of determining the open period. N.J.A.C. 19:11-2.8.

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by July 10, 2017.