

D.R. NO. 2019-10

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-2019-029

GOVERNMENT WORKERS UNION,
Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 331,
Intervenor.

SYNOPSIS

The Director of Representation dismisses a representation petition filed by Government Workers Union (GWU) seeking to represent a unit of blue collar employees of the City of Atlantic City (City). The unit is currently represented by International Brotherhood of Teamsters Local No. 331 (Local 331), its intervention perfected by its certification as majority representative of the petitioned-for unit. The Director found that despite Local 331's efforts to engage in collective negotiations with the City, no negotiations for a successor agreement have been scheduled or conducted since October, 2016, the same month and year Local 331 was certified as majority representative. The Director determined that GWU's petition must be dismissed because Local 331 has not received the full benefit of the certification year. The Director also determined that implementation of the Municipal Stabilization and Recovery Act, N.J.S.A. 52:27BBBB-1 et seq., has preempted the City's authority to engage in unfettered collective negotiations for a successor agreement with Local 331. The Director orders that the certification bar be tolled and shall run for eleven months from the date that there is a change in circumstances.

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Appearances:

For the Public Employer,
Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys
(Gregory J. Franklin, of counsel)

For the Petitioner,
(David Tucker, President)

For the Intervenor,
Willig, Williams & Davidson, attorneys
(James R. Glowacki, of counsel)

DECISION

On November 1, 2018, Government Workers Union (GWU) filed a representation petition, accompanied by an adequate showing of interest, seeking to represent a collective negotiations unit of about 97 blue collar employees of the City of Atlantic City (City). International Brotherhood of Teamsters Local No. 331

(Local 331) is identified on the petition as the current majority representative. It opposes the petition.

On November 2, 2018, we sent correspondence to the parties notifying them of the petition; scheduling an investigatory conference with a Commission staff agent; requesting certain materials from the City; and advising that Local 331 was required to submit a written request to intervene if it had an interest in the petition.

On November 7, 2018, Local 331 filed an unfair practice charge (Dkt. No. CO-2019-119) alleging that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically section 5.4a(1) and (5),^{1/} by refusing to engage in collective negotiations with Local 331.

On November 9, 2018, Local 331 filed a letter seeking to intervene on the petition, based upon its certification as majority representative of the petitioned-for unit. N.J.A.C. 19:11-2.7(b). Local 331 does not consent to an election, maintaining that the City has refused to engage in collective

^{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"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

negotiations, pursuant to the Municipal Stabilization and Recovery Act (MSRA), N.J.S.A. 52:27-BBBB-1 et seq.^{2/}

Also on November 9, 2018, a Commission staff agent sent electronic correspondence to the parties and the DLGS attaching the petition and unfair practice charge, together with Local 331's request to intervene and Certification of Representative. The staff agent noted that Local 331 objected to the petition based upon the City's refusal to engage in collective negotiations, pursuant to the MSRA. The staff agent also noted the authority granted to the Director of DLGS pursuant to the MSRA. In lieu of the investigatory conference, the staff agent requested that the parties and DLGS provide position statements together with any appropriate evidence with respect to the issue(s) raised by Local 331. The staff agent specifically requested that the parties and DLGS address whether there have been negotiations for a collective negotiations agreement between the City and Local 331 since October 5, 2016 and, if not, the applicability of the Commission's certification and/or contract bar. N.J.A.C. 19:11-2.8.

^{2/} On June 6, 2016, pursuant to the MSRA, the New Jersey Department of Community Affairs (DCA) designated the City as a municipality in need of stabilization and recovery. On November 1, 2016, the DCA determined that the City's recovery plan was unlikely to achieve financial stability. On November 9, 2016, the DCA granted the Director of the Division of Local Government Services (DLGS) authority to assume the powers of the City's governing body.

On November 27, 2018, Local 331 filed a letter requesting that its charge block the processing of GWU's petition, together with the certification of its President, Marcus King (King).

Also on November 27, 2018, in response to the petition, the City submitted a letter together with the materials requested by the Director of Representation. The City consents to a secret ballot election. The City also submitted a position statement in response to the unfair practice charge.

On the same date, GWU filed a letter asserting that unit members should be given the opportunity to vote in a secret ballot election. On November 29, 2018, GWU submitted a newspaper article reporting that City employees "will receive annual stipends over the next three years and the starting salary for all workers will be raised." David Danzis, Atlantic City Public Employees to Receive Pay Increases, Press of Atlantic City, November 29, 2018.^{3/}

On December 10, 2018, we issued a letter to the parties, with a copy to DLGS, advising of our tentative determination to extend the certification bar, dismiss GWU's representation petition, and process Local 331's unfair practice charge in the normal course. We also advised that a decision consistent with this determination would issue in the absence of a substantial

^{3/} https://www.pressofatlanticcity.com/news/press/atlantic_city/atlantic-city-public-employees-to-receive-pay-increases/article_93f72333-0387-5455-9099-b7e573055b7f.html

and material factual dispute. We asked the parties to submit documents or other evidentiary materials by December 19, 2018 if they believed our determination was incorrect or wished to bring additional material facts to our attention. No party filed a response.

On December 19, 2018, DLGS filed a letter, advising that it did not take a position regarding a secret ballot election or our tentative decision to continue a bar to the processing of the petition.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2(a). The disposition of the petition is properly based upon our administrative investigation. No disputed substantial material factual issues warrant our convening an evidentiary hearing. N.J.A.C. 19:11-2.2, -2.6. I find the following facts.

On October 5, 2016, the Director of Representation issued a Certification of Representative identifying Local 331 as the exclusive representative of a collective negotiations unit of "all regularly employed blue collar employees employed by the City." (Dkt. No. RO-2017-001). AFSCME Council 71, Local 2303 (AFSCME) and the City were parties to a collective negotiations agreement (CNA) covering the petitioned-for unit that extended from January 1, 2010 through December 31, 2014.

Local 331's President King certifies that since October, 2016, Local 331 has communicated with the City regarding collective negotiations for a successor agreement and that the parties have met numerous times (i.e., 10/13/2016, 12/16/2016, 1/18/2017, 1/26-27/2017, 1/30/2017, 2/15/2017, 7/18/2017, 7/20/2017, 9/8/2017, 10/16-17/2017) concerning disciplinary matters and the status of negotiations. He certifies that on November 8, 2017, a meeting was held between Local 331, the City, and the State of New Jersey (State) and the parties ". . . discussed the elimination of Civil Service following the State's takeover of the City, and the status of negotiations over a collective negotiations agreement." On April 24, 2018, Local 331 sent correspondence to Cameron Jones, Executive Assistant to Lt. Governor Sheila Oliver (Oliver), regarding the status of collective negotiations with the City. On August 6, 2018, Local 331 received an invitation from Laurel Brennan, Secretary-Treasurer of the New Jersey State AFL-CIO, to attend a meeting with Lt. Governor Oliver to discuss issues related to the City. The meeting was apparently cancelled due to changes in Lt. Governor Oliver's schedule. King certifies that on August 30, 2018, he asked Jason Holt, who previously served as the City's Business Administrator and was working for DCA at that time, about contract negotiations and demanded that the City negotiate with Local 331. King certifies that on August 30, Local 331 met

with James Johnson (Johnson), the Special Counsel appointed by Governor Phil Murphy (Murphy) to complete fact-finding and render a report regarding the City's economic condition, and requested that he assist Local 331 in obtaining a successor agreement. On August 31, 2018, Local 331 sent a copy of the 2010-2014 CNA to Johnson. King certifies that to date, Local 331 has not received any response from Johnson. On September 20, 2018, Johnson submitted a report to Governor Murphy regarding the City's economic condition entitled, "Atlantic City: Building a Foundation for a Shared Prosperity." Johnson recommended that the City remain under State control until 2021. King certifies that the City has not stated that it does not have an obligation to engage in collective negotiations with Local 331 at any time since the certification was issued in October 2016; however, the City "has not provided dates to negotiate with Local 331" despite "repeated requests from the Local." King certifies that over the last six months, he has "heard on an almost daily basis from many . . . unit members that are frustrated with the inability of Local 331 to secure a contract with the City and are therefore dissatisfied with Local 331."

Local 331 argues that it has been unable to negotiate a collective negotiations agreement due to the City's failure to schedule and participate in negotiations. Local 331 reports a causal connection between the City's refusal to recognize/

negotiate with Local 331 and unit employee dissatisfaction with Local 331; and that as a result, no "free and fair" representation election can be conducted now. Local 331 asserts that although the MSRA gives the State comprehensive authority over the City's labor relations, it does not relieve the City or State of their obligation to engage in collective negotiations. However, in this case, the City has not met to meaningfully participate in negotiations with Local 331 in violation of the Act. It seeks resolution of its charge before the representation petition is processed.

The City asserts that negotiations for a successor agreement between it and Local 331 commenced in early October, 2016. On October 13, 2016, Local 331 executed a memorandum of agreement (MOA) extending from January 1, 2015 through December 31, 2017. (It does not appear that the City signed the MOA). According to the City:

The Director [of DLGS] ultimately rejected the terms and conditions contained with[in] the [2015-2017] MOA agreed to between the parties, and did not implement its terms as part of the entire recovery plan for the City. To date, there have not been any subsequent negotiations between the City and [Local 331] for a successor agreement. Of note however, there have been no changes to the terms and conditions of employment for [Local 331] members; rather, the expired collective negotiations agreement has remained the status quo during the State's takeover of the City under the MSRA.

The City claims that the Director of DLGS is reviewing Local 331's unfair practice charge and argues that it is not subject to the Commission's unfair practice jurisdiction, pursuant to the MSRA.^{4/} The City maintains that the charge fails to comply with specificity requirements set forth in N.J.A.C. 19:14-1.3(a)(3) and that even if it does, it fails to set forth any allegations that constitute a violation of the Act. The City contends that while it remains subject to the MSRA, the City was/is under no obligation to negotiate with respect to the terms and conditions of employment for unit members.

DLGS acknowledges that it is granted broad authority under the MSRA and notes that while it remains in effect, the City is

^{4/} The MSRA grants the Director of the Division of Local Government Services (DLGS) or his/her designee broad authority to take "any and all actions that . . . may help stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality" including, but not limited to, implementing governmental, administrative, and operational efficiency and oversight measures; controlling litigation and the municipality's legal affairs; unilaterally modifying, amending, or terminating any collective negotiations agreements and the terms and conditions of employment; acting as the sole agent in collective negotiations; unilaterally modifying wages, hours, or any other terms and conditions of employment with respect to any expired collective negotiations agreement; unilaterally abolishing any non-elected positions; and unilaterally appointing, transferring, or removing employees. N.J.S.A. 52:27BBBB-5; see also N.J.S.A. 52:27BBBB-2, -7; City of Atlantic City, D.R. No. 2017-14, 44 NJPER 9 (¶4 2017). Moreover, the MSRA is to be "construed liberally to give effect to its intent" and any provision or its application held to be invalid is severable and shall not affect the others. N.J.S.A. 52:27BBBB-13; see also N.J.S.A. 52:27BBBB-10.

not subject to Civil Service jurisdiction. DLGS asserts that, "[a]lthough these operating conditions alter the terms of negotiation, they do not preclude negotiation" and "DLGS, the City, and various union representatives from across the City's public-sector unions have engaged in contract negotiations nearly from the MSRA's inception in the City." DLGS maintains that, "[b]y correspondence dated March 22, 2018, Local 331 was acknowledged as the majority representative for rank and file blue collar workers" and "[t]he most recent discussion with Local 331 took place on or about October 16, 2018." DLGS "anticipate[s] that these discussions will lead to formal negotiations." DLGS "remains open to continuing productive dialogue with union representatives, subject to the MSRA's legislatively imposed constraints."

GWU argues that Local 331 ". . .has had adequate time to demonstrate their services (or lack thereof) to [unit members]" and "should not be permitted a contract bar for an unlimited time." GWU maintains that a blocking charge "requires a connection between unfair conduct and employee dissatisfaction." GWU asserts that the City, ". . .cannot be guilty of an unfair practice when the underlying conduct (no labor agreement) may be a by-product of State oversight outside the City's control" and that there is "no . . . evidence that employee dissatisfaction is founded solely on a lack of a contract."

ANALYSIS

N.J.A.C. 19:11-2.8, "Timeliness of petitions," provides in a pertinent part:

(b) Where there is a certified or recognized representative, a petition for certification or decertification will not be considered timely filed if during the preceding 12 months an employee organization has been certified by the Commission as the exclusive representative of employees in an appropriate unit, or an employee organization has been granted recognition by a public employer pursuant to N.J.A.C. 19:11-3.1 (Recognition as exclusive representative).

It is undisputed that despite Local 331's continued/sustained efforts to engage in collective negotiations with the City, no negotiations for a successor agreement have been scheduled or conducted since October, 2016, the same month and year Local 331 was certified as majority representative. The terms and conditions of employment established in the expired 2010-2014 CNA remain in place. Although DLGS acknowledged Local 331 as the majority representative for blue collar workers in March, 2018, DLGS concedes that as of December 19, 2018, unspecified "discussions" have occurred and formal negotiations are merely, "anticipated." Under the circumstances of this case, GWU's representation petition must be dismissed because Local 331 has not received the full benefit of the certification year - a reasonable period to engage in meaningful collective negotiations with the public employer.

The Commission has found that "in a situation where an employer has failed to bargain in good faith during the certification bar year[,], the appropriate remedy is an affirmative order to bargain and the extension of the certification bar year for a period equivalent to the period of the refusal to bargain" - "even where the union may have lost majority adherence during the interim." Jersey City Bd. of Ed., P.E.R.C. No. 79-15, 4 NJPER 455, 456 (¶4206 1978).

In this case, implementation of the MSRA has preempted the City's authority to engage in unfettered collective negotiations for a successor agreement with Local 331. See N.J.S.A. 52:27BBBB-2, -5, -7, -10, -13 (granting the Director of DLGS broad, liberally-construed authority to act as the sole agent in collective negotiations and to unilaterally modify, amend, or terminate any collective negotiations agreement and/or the terms and conditions of employment including wages, hours, or any other terms and conditions of employment with respect to any expired collective negotiations agreement). It is undisputed that the then-Director of DLGS ultimately rejected a partially executed memorandum of agreement with Local 331 that would have memorialized terms and conditions of employment of the petitioned-for unit from 2015 through 2017. "Under these circumstances and in order to give effect to [N.J.A.C. 19:11-2.8(b)], . . . good cause exists and . . . fairness

requires a liberal construction of the rule." Hudson Cty. Bd. of Chosen Freeholders, D.R. No. 86-16, 12 NJPER 234 (¶17096 1986).

Accordingly, I direct that the certification bar be tolled and shall run for eleven months from the date that a change in circumstances permit the DLGS or the City (with DLGS authorization and for as long as such authorization is required or administered under the MSRA) to collectively negotiate in good faith in order to reach and sign a successor collective negotiations agreement with Local 331.

ORDER

The certification bar is tolled and extended to provide that the certified representative, International Brotherhood of Teamsters Local No. 331 (Local 331), receives the full benefit of the certification year. The certification bar shall run for eleven months from the date that:

- (a) uninterrupted good faith negotiations between Local 331 and the Division of Local Government Services (DLGS) in conjunction with the City of Atlantic City (City), while it remains a municipality in need of stabilization and recovery under the Municipal Stabilization and Recovery Act (MSRA), N.J.S.A. 52:27BBBB-1 et seq., commence; or

- (b) DLGS relinquishes the powers of the City's governing body and the City is declared to no longer be a municipality in need of stabilization and recovery under the MSRA.

The representation petition filed by Government Workers Union is dismissed. The unfair practice charge filed by Local 331 will be processed in the normal course, with added service upon DLGS.

/s/ Jonathan Roth
Jonathan Roth
Director of Representation

DATED: December 21, 2018
Trenton, New Jersey

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 January 8, 2019.