P.E.R.C. NO. 94-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF PUBLIC ADVOCATE),

Respondent,

-and- Docket No. RO-93-157

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

STATE OF NEW JERSEY (DEPARTMENT OF TRANSPORTATION),

Respondent,

-and- Docket No. RO-93-171

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

STATE OF NEW JERSEY (DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. RO-93-189

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a request for review of D.R. No. 94-7. In that decision the Director of Representation dismissed three representation petitions by which CWA sought to add approximately 107 unrepresented employees to its negotiations unit of higher level supervisors employed by the State of New Jersey. The contract bar rule applied in this case is well-established and well-known and should not be abandoned in favor of either a contrary rule allowing all mid-contract petitions seeking to add unrepresented employees or a case-by-case assessment permitting some petitions, but not others.

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Charging Party.

Appearances:

For the Respondent, Melvin L. Gelade, Director, Office of Employee Relations

For the Charging Party, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION AND ORDER

The Communications Workers of America, AFL-CIO has requested review of D.R. No. 94-7, 19 NJPER 530 (¶24247 1993). In that decision our Director of Representation dismissed three representation petitions by which CWA sought to add approximately 107 unrepresented employees -- assistant chief and chief investigators in the Department of Public Advocate (RO-93-157), supervisory engineers in the Department of Transportation (RO-93-171), and supervisory medical review analysts in the Department of Human Services (RO-93-189) -- to its negotiations unit of higher level supervisors employed by the State of New Jersey. Relying on N.J.A.C. 19:11-2.8 and Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the Director applied the contract bar rule and dismissed these petitions since the current contract covering higher level supervisors does not expire until June 30, 1995.

CWA asserts that Clearview was wrongly decided since it wrongly assumed that private sector precedent precluded mid-contract petitions. The employer responds that N.J.A.C. 19:11-2.8 controls this case and that any change in that regulation must be accomplished through rulemaking proceedings.

N.J.A.C. 19:11-8.2 sets forth the grounds for granting a request for review. That rule permits review if a "substantial question of law is raised concerning the interpretation or administration of the act or these rules" or "there are compelling

reasons for reconsideration of an important commission rule or policy."

Our contract bar rule is an important aspect of our administration of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., because it seeks to balance and accommodate two policies at the heart of the Act: the opportunity of employees to select negotiations representatives and the need for labor relations stability. N.J.A.C. 19:11-2.8 codifies that rule by telling employees, employee organizations, and employers when representation petitions may or may not be filed. Subsection (a) provides that if there is no majority representative and if no valid election has been held within twelve months, a petition for certification may be filed at any time. Subsection (c) provides:

> 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:
>
> 1. In a case involving employees of the State of New Jersey, any agency thereof, or any State authority, commission or board, the petition is filled not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement.

CWA argues that its petition is timely under subsection (a) since the employees in question are unrepresented and there has been no election within the last twelve months. The employer argues that the petition is untimely under subsection (c) since there is a contract covering the unit in question and the open period does not

commence until October 1994. On its face, the regulation is unclear. Either reading is plausible.

Clearview was decided in 1977. The then Director of Representation broadly reviewed the nature of different representation proceedings -- see N.J.A.C. 19:11-1 -- and the purposes and application of the contract bar rule. He noted, correctly, that by restricting the filing of represention petitions to certain times, we had followed "the universal approach of other labor relations agencies." Id. at 251. Applying N.J.A.C. 19:11-2.8 to the case before him, the Director dismissed a petition seeking to add unrepresented non-professional employees to a negotiations unit of professional employees in the middle of a contract.

Clearview's interpretation of N.J.A.C. 19:11-2.8 has been the law for 16 years. This precedent requires dismissing these petitions unless compelling reasons exist for reconsidering it.

CWA asserts that applying Clearview in this case is inconsistent with private sector precedent. That is so. The National Labor Relations Board has contract bar rules, see Gorman, Basic Text on Labor Law, at 54-59 (1976), but it will not dismiss representation petitions filed on behalf of unrepresented employees based upon a contract that does not cover them. See, e.g., NLRB v. Mississippi Power and Light Co., 769 F.2d 276, 120 LRRM 2302 (5th Cir. 1985). It is not clear to us that Clearview was based on a mistaken assumption that private sector precedent supported dismissing the petition; it appears to us that the Director cited the "universal approach of other labor relations agencies" for the

general proposition that the concept of temporal restrictions is accepted everywhere, not for the specific proposition that a contract bar rule must be applied a particular way. In any event, whether or not Clearview was based on a mistaken assumption is not material at this point.

We need not follow NLRB precedents and have not done so when our assessment of the policies behind the New Jersey Employer-Employee Relations Act differs from the NLRB's assessment of the purposes behind the Labor-Management Relations Act, 29 U.S.C. §141 et seq. See Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 457-458 (¶14196 1983). Our assessment differs here.

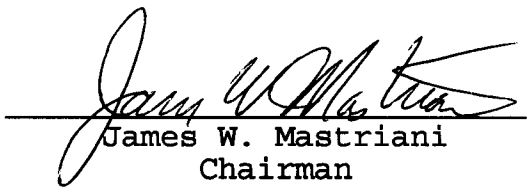
We recognize that applying the contract bar rule means that these unrepresented employees will have to defer seeking inclusion in the negotiations unit until a timely petition can be filed. However, their opportunity to seek representation has only been delayed, not denied, and that delay could have been avoided altogether had the employees or CWA taken advantage of their earlier opportunity to file a petition during the open period. Since that earlier opportunity was not seized, the parties have negotiated a collective negotiations contract that does not cover these positions. To permit a representation election now raises the possibility of repeated and unceasing litigation and negotiations during the contract period -- the period of supposed stability -- as group after group of unrepresented employees throughout the State comes forward.

The rule applied in this case is well-established and well-known. This clear rule should not be abandoned in favor of either a contrary rule allowing all mid-contract petitions seeking to add unrepresented employees or a case-by-case assessment permitting some petitions, but not others. We thus decline to revisit our agency's longstanding caselaw and we deny CWA's request for review.

ORDER

CWA's request for review is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino was not present.

DATED: March 29, 1994
Trenton, New Jersey
ISSUED: March 30, 1994