

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

International Brotherhood of
Police Officers,

Petitioner,

and

The University of the District of
Columbia,

Agency,

and

American Federation of State, County
and Municipal Employees, District
Council 20, Local 2087,

Intervenor.

PERB Case No. 82-R-08
Opinion 51

DECISION AND ORDER

The parties to this proceeding are the International Brotherhood of Police Officers (IBPO), the University of the District of Columbia (UDC) and the American Federation of State, County and Municipal Employees, Council 20, Local 2087 (AFSCME). The proceeding arises out of a recognition petition filed by the IBPO in which it seeks the exclusive right to represent a unit of security officers currently represented by AFSCME and described as follows:

"All special police officers of the University of the District of Columbia, excluding any management officials, confidential employees, supervisors or employees engaged in personnel work in other than purely clerical capacities and any employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978."

This is another "contract bar" case resembling, in some respects, those covered by the Board in a series of recent decisions. It is largely controlled, however, by a procedural point.

The IBPO petition for recognition was filed with the Board on April 14, 1982. As the facts of the case were developed before the Hearing Examiner, the timeliness of the IBPO petition depends,

principally, on the effect to be given a terms-and-conditions agreement which had been entered into between UDC and AFSCME on November 30, 1980. This contract was to run for one year, to November 30, 1981, but contained a provision (Duration Clause, Article XXIX) for its automatic extension in the event of notice being received not more than ninety (90) nor less than sixty (60) days prior to the expiration date. The contract provided that, if such notice was given, the agreement would continue in effect until "(1) November 30, 1982 or (2) until a new agreement is executed, whichever occurs first."

It is agreed that the extension notice provided for in the contract was given during the specified 60 to 90 day period. AFSCME relies on the automatic extension of the November 30, 1980 agreement as constituting a contract bar to IBPO's April 14, 1982 petition for recognition under Board Rule 101.8(b):

"A petition for exclusive recognition shall be barred if:

- (b) there is an existing labor-management agreement covering the employees in the proposed unit, Provided That a petition may be filed during the period between the 120th day and the 60th day before the expiration of an agreement having a duration of less than three years or after 975 days for an agreement having a duration of three years or more;"

IBPO, contending that the "Duration Clause" (Article XXIX) allows for an indefinite extension of the existing agreement, urges the Board to adopt the rule established by the National Labor Relations Board (NLRB) in Metropolitan Life Insurance Company, 172 NLRB 137, 68 LRRM 1438 (1968). The NLRB held in that case that:

"The time guide has always been computed from the expiration (or automatic renewal) date on the face of the contract.... [A]n interim agreement pending the negotiation and execution of a new agreement cannot change the expiration date for purposes of the timely filing of the petition."

The Hearing Examiner concluded that the extended 1980 Agreement should not be allowed to bar this petition because there was no definite expiration date. She reasons that this effectively prevents challenging unions from knowing when a challenge is permissible. The Hearing Examiner recommended, therefore, "...that where the parties execute an extension agreement which serves merely as an interim agreement during a period of further negotiations, such an agreement may not operate as a bar to an otherwise proper recognition petition."

The Board affirms the Hearing Examiner's conclusion on this point. Article XXIX of the UDC/AFSCME agreement represented an understandable effort by the parties to cope with the uncertainties which existed at that time regarding the application of the new statutory provisions governing this situation. The reasoning behind the NLRB's Metropolitan Life Insurance Company rule is nevertheless sound. To give the indefinite extension provision the effect AFSCME claims for it would be to rule in effect that there was no point during this transition period at which the recognition issue could be raised by an outside union.

AFSCME contends further that the Compensation Agreement between AFSCME and UDC for Compensation Bargaining Unit 11, approved by UDC's Board of Trustees on May 5, 1982 and forwarded to the Council of the District of Columbia on May 25, 1982, should also operate as a bar to the petition. IBPO argues that the Compensation Agreement should not bar the petition because it concerns wages and fringe benefits only and does not cover substantial terms and conditions of employment.

The Hearing Examiner reasoned that, "[c]ompensation and non-compensation agreements may not necessarily coincide, and it is all the more important to uphold the totality concept when interpreting the Comprehensive Merit Personnel Act (CMPA) in order to preserve the stability of labor management relations;" and further that "a contract is only deemed to be fully in place when substantial terms and conditions sufficient to stabilize a labor-management relationship have been negotiated and ratified." She concluded, accordingly, that the May, 1982 Compensation Agreement could not be considered a bar to the IBPO petition filed on April 14, 1982.

The Board also affirms this conclusion. On the facts developed before the Hearing Examiner, the situation was simply that the Compensation Agreement was not in effect when the IBPO petition was filed.

A sense of uncertainty about the situation in this case prompted the Board to grant the request by AFSCME for an opportunity to argue orally before the Board. A hearing was held for this purpose on October 6, 1982.

In the course of this hearing, counsel for AFSCME referred to additional negotiations between UDC and AFSCME in March and April, 1982 which might arguably effect this case. The references were to matters which had not been developed before the Hearing Examiner and on which no evidence had been introduced. Counsel for IBPO properly objected to their being brought into the proceeding at so late a date and solely on the basis of representation by counsel for AFSCME.

The Board is not inclined to adopt too strict a rule regarding the time at which a record will be considered finally closed. There may well be situations in which evidence develops under circumstances which explain its not having been introduced earlier. It is at the same time essential to preserve the effectiveness of the hearing examiner procedure.

Nothing in the nature of the facts referred to by counsel for AFSCME at the Board's October 6 hearing would explain their not having been introduced at the July 13 hearing before the Examiner. The parties also had an opportunity to file post-hearing briefs. IBPO did so. AFSCME, in a letter to the Board on July 16, stated that it would not be filing a brief and would "rely on the record made at the July 13, 1982 hearing." Following the issuance of the Hearing Examiner's recommendation on August 25, 1982, AFSCME filed written exceptions, but made no reference to any additional evidence.

Under these circumstances the Board declines to reopen the record in this case. AFSCME stated specifically its desire and intention to rely on the record as it was developed before the Hearing Examiner. All of the matters referred to by counsel at the October hearing before the Board involved developments known to all parties at the time of the July hearing before the Examiner. While the Board expressly reserves its discretion to reopen a record under different circumstances, the effect of doing so here would be to undermine seriously the hearing examiner procedure.

ORDER

It is ordered that:

1. The Motion to Dismiss based upon a contract bar is denied.
2. The request to reopen the record is denied.
3. The IBPO's Recognition Petition filed herein for the election of a terms-and-conditions representative is sustained and an election is authorized to determine whether these employees wish to be represented by IBPO, AFSCME or no representative for bargaining their terms-and-conditions of employment.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

November 2, 1982