TOWN OF BURLINGTON AND BURLINGTON POLICE PATROLMEN'S ASSOCIATION AND INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 314, MCR-3742 (4/6/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

45.1 contract bar
92.51 appeals to full commission

Commissioners Participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

William J. Lafferty, Esq.	- Representing Burlington Police Patrolmen's Association
Mark Dalton, Esq.	- Representing Local 314 International Brotherhood of Police Officers
Phillip Collins, Esq.	- Representing the Town of Burlington

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

On April 30, 1987, the Burlington Police Patrolmen's Association (Association) filed a petition with the Labor Relations Commission (Commission) seeking to represent a bargaining unit of police officers employed by the Town of Burlington (Town) who had theretofore been represented by the International Brotherhood of Police Officers, Local 314 (IBPO). On May 28, 1987, the IBPO intervened in the case and argued that a contract existed between it and the Town that should bar the processing of the Association's representative petition. After an expedited hearing, Hearing Officer Amy L. Davidson issued her decision on December 3, 1987,[1] concluding that no written executed agreement was in effect between IBPO and the Town on the date the petition was filed and directing an election in the following bargaining unit:

> All full-time and regular part-time police officers and permanent intermittent police officers employed by the Town of Burlington in its Police Department, excluding the Chief, all civilian employees, all casual and emergency employees of the Town of Burlington.

On December 18, 1987, the IBPO filed a notice of appeal from the hearing officer's decision. Upon our review of the entire record in this case, we affirm the hearing officer's findings of fact, as supplemented below.[2] We also affirm her legal

[1]The full text of the hearing officer's decision is reported at 14 MLC 1359 (1987).

[2]The IBPO has objected to the hearing officer's statement at 14 MLC 1360 n.2 (continued)

conclusions, although we modify her reasoning as set forth in our opinion.

Facts

On June 30, 1986, the collective bargaining agreement between the Town and the IBPO expired and the parties began bargaining for a successor agreement on July 1, 1986. On March 18, 1987, negotiators for the Town and the IBPO reached tentative agreement on a "main contract," subject to ratification by their respective principals.[3] Although the evidence suggests that the parties' negotiators had made written notations on a copy or copies of the predecessor contract incorporating certain agreements to amend that contract, the record contains no evidence that the parties signed, initialed, or otherwise made written notiation of mutual acquiescence in the proposed tentative successor contract.[4] On March 20, 1987, the employees "tentatively" ratified the March 18 agreement; however, prior to the ratification vote, the employees' negotiators informed the membership that they would ask the Town to add one week's vacation for employees with 15 or more years of service. The Town subsequently refused this additional vacation time proposal and on April 6 the Town's Board of Selectmen ratified the March 18 agreement. Shortly after their respective ratifications, the negotiator for each party informed the other that ratification had occurred. On May 18, 1987, a special Town Meeting unanimously passed a warrant article "to fund the collective bargaining agreement." On June 3, 1987, the employees began receiving the negotiated wages, with retroactive payments to July 1, 1986.

At the time they reached agreement on the "main contract," the employees' and the Town's negotiators agreed to continue bargaining on four items to be incorporated into "side letters" to the collective bargaining agreement, viz., light duty on injury leave, retired officers as special police, promotional examinations, and retirement pay. During May and June, 1987, attorney William Lafferty, on behalf of the employees,[5] negotiated with the Town's labor counsel on the "light duty" issue; agreement

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2 (continued)
that "the evidence introduced by the parties concerning events after April 30, 1987, the date on which this petition was filed is immaterial." We agree with the IBPO that evidence of the parties' conduct after April 30 could shed light on whether a complete, final, and executed agreement existed as of that date and we have utilized some of that evidence in our findings of fact, below.

[3]The hearing officer found that the negotiators had reached tentative agreement on the "money items" of a collective bargaining agreement as of March 18, 1987. 14 MLC at 1360. However, the parties' stipulations of fact did not refer to "money items," but rather to a tentative agreement on the contract. The minutes of the employees' "tentative ratification" meeting of March 20 refer to "verification of the 'proposed contract,'" not specifically limited to money items.

[4]The record reveals nothing further about the contents of the parties' agreements comprising the "main contract" negotiated on March 18, 1987, except that it included (but may not have been limited to) "money items."

[5]At the May 20, 1987 union meeting, the employees voted to withdraw from membership in the IBPO. The newly-formed Association then hired Lafferty to represent it.

was reached on that issue by July, and a memorandum of agreement was executed in August, 1987. The parties agreed to begin negotiations on September 15, 1987, on the remaining "side letters." It appears that both parties understood that the "side letter" negotiations would not affect the validity or contents of the "main contract" of March 18, 1987. As of the September 8, 1987 hearing on this case, the process of producing a complete written "main contract" document had not been completed, nor had a contract been executed.

Opinion

The issue in this case is whether the contract bar doctrine should preclude a representation petition where no contract has been executed although the principal substantive terms of an agreement have been implemented at the time the petition is filed. In Nashoba Valley Technical High School, 4 MLC 1818 (1978), the Commission affirmed a hearing officer's decision that a contract must be executed, and not merely implemented, before it would constitute a bar to a rival election petition. Since the Commission's Nashoba decision was essentially a summary affirmance, we deem it appropriate to expand upon the applicable principles in the present opinion. We begin with a recitation of the competing policies at stake in interpreting and applying the contract bar doctrine, as the Commission stated them in Commonwealth of Massachusetts (Unit 7), 7 MLC 1825, 1829 (1981):

> [T]he purpose of the contract bar doctrine is the continuation of productive, stable labor relations without the uncertainty and disruption caused by organization rivalries... [H]owever, the postponement of employee freedom of choice concerning the designation of a bargaining representative can be justified only if the statutory purpose of encouraging and protecting stable bargaining relationships will be significantly served... A fundamental premise to the contract bar doctrine's goal of maintaining stability in a bargaining relationship is the existence of stability in the first place... [Although] we share the [NLRB's] concerns about protracted litigation in representation cases, ... we believe that the proper balance to be struck between such concerns and the right of employees to freely select their bargaining representative lies closer to the preservation of the latter... ." (Citations omitted).

Balancing the policies of stability, clarity, and employee free choice, both the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq., and the Commission under Chapter 150E have required that a contract be "executed" before it will constitute a bar to the processing of a representation petition. See Nashoba Valley Technical High School, 4 MLC 1589 (H.O. 1977), aff'd, 4 MLC 1818 (1978); Crothall Hospital Services, Inc., 270 NLRB 1420, 117 LRRM 1072 (1984); Gaylord Broadcasting Co., 250 NLRB 198, 104 LRRM 1360 (1980); Appalachian Shale Products Co., 121 NLRB 1160, 42 LRRM 1506 (1958). In its cornerstone decision in Appalachian Shale Products Co., the NLRB abandoned its previous rule that allowed a contract to bar a petition "where the parties considered the agreement properly concluded and put into effect some of its important provisions." 42 LRRM at 1507 (citations omitted). Instead, emphasizing the importance of

clear and simple rules in contract bar situations, the NLRB inaugurated the requirement that "a contract to constitute a bar must be signed by all the parties before a petition is filed, [otherwise] it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions." Id. We concur with the NLRB's "relatively simple" requirement of a signed writing in order for a contract to constitute a bar to processing a representation petition, because that rule best facilitates expeditious handling of representation cases, while at the same time protecting the stability of continuing bargaining relationships.

Since Appalachian Shale Products, the NLRB has adhered to its requirement of signed writings by both parties prior to the filing of a petition. However, as the NLRB intimated in the Applachian Shale Products decision,[6] informal memoranda[7] or even exchanges of telegrams[8] may suffice to show the contractual terms, so long as the evidence establishes the existence of a complete and final agreement to which all parties have acquiesced by their written signatures or initials.[9] Consonant with the NLRB's view, we do not endorse the hearing officer's suggestion that a comprehensive contract document need be drafted and formally signed in order to evidence a complete agreement had been reached by April 30 despite the subsequent negotiations over the "side letter" issues.[10] Even if we were to find that the March 18, 1987 "main contract" was sufficiently complete and final by April 30 to otherwise constitute a bar, however, we have no evidence that the necessary parties had executed a collective bargaining agreement, since the record does not show any evidence of a signing or initialing of the document. Accordingly, we affirm the hearing officer's conclusion that no contract had been executed as of the date the petition was filed so as to bar the Association's petition.[11]

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[6] See 42 LRRM at 1507.

[7] See, e.g., Bendix Corporation, 210 NLRB 1026, 86 LRRM 1547 (1974).

[8] See, e.g., Georgia Purchasing, Inc., 230 NLRB 1174, 95 LRRM 1469 (1977).

[9] In order to be "final," an agreement that is contingent upon ratification would have to have been ratified prior to the filing of the petition in order to constitute a bar. See Commonwealth of Massachusetts (Unit 7), 7 MLC at 1829-30.

[10] For a contract to satisfy the "complete agreement" prerequisite for applying the contract bar doctrine, it would normally embody "substantial terms and conditions of employment," Appalachian Shale Products Co., 42 LRRM at 1507, not deemed by the parties to be contingent upon further negotiations. This record tends to portray the "side letter" negotiations as tangential to the "main contract." Although we do not know the contents of the March 18, 1987 agreement, it appears that both parties viewed it as a full contract, not dependent upon further negotiations, when it was ratified and funded. The testimony indicated that the "main contract" would be unaffected by the "side letter" bargaining. In determining whether parties have reached a "complete agreement," however, the absence of evidence about the substantive provisions of the agreement or that the parties have reduced the agreement to writing could suggest that the parties viewed "side letter" issues, still under negotiation, as

(continued; 11, see page 1636)

Direction of Election

We therefore conclude that a question has arisen concerning the representation of certain employees of the Town of Burlington within the meaning of Section 4 of G.L. c.150E.

The unit appropriate for the purpose of collective bargaining consists of:

> All full-time and regular part-time police officers and permanent intermittent[12] police officers employed by the Town of Burlington in its Police Department, excluding the Chief, all civilian employees, all casual and emergency employees of the Town of Burlington.

IT IS HEREBY ORDERED that an election shall be held for the purpose of determining whether a majority of those employees in the above-described unit wish to be represented by the International Brotherhood of Police Officers, Local 314 or by the Burlington Police Patrolmen's Association or by no employee organization.

The eligible voters shall include all those persons in the above-described unit whose names appear on the payroll of the Town of Burlington on April 2, 1988 and who have not since quit or been discharged for cause.

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10 (continued)
substantial and integral, rather than tangential, to their agreement. Although we need not decide whether the parties in this case had reached a "complete agreement," because our ruling on the execution issue is dispositive, we note our reluctance to prolong the open period to accommodate negotiations over "side" or tangential issues, after the parties have concluded the essence and substance of their contract negotiations.

11 (from page 1635)
The hearing officer rested her decision in part upon the fact that funding pursuant to Section 7(b) of the Law had not occurred prior to the April 30 filing of the petition. See 14 MLC at 1361-62. We expressly disavow this prong of the hearing officer's reasoning. To require a contract to have been funded by the legislative body before it would be sufficiently "final" to bar a rival representation petition would unnecessarily entangle the employees' free choice of representatives with the vagaries and delays that may attend a legislative process over which neither they nor their employer has control. However, we need not reach the question whether a legislative body's refusal to fund an agreement would revive or prolong the "open period" within which rival representation petitions may be processed; the various competing policies at stake in resolving that issue are best evaluated in light of an actual fact situation.

12 In approving the parties' stipulated unit, we note that the term "permanent intermittent" police officers is not intended to restrict unit inclusion only to employees classified as "permanent" under Civil Service Commission rules.

In order to ensure that all eligible voters shall have the opportunity to be informed of the issues and of their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER ORDERED that three (3) copies of an election eligibility list be filed by the Town of Burlington with the Executive Secretary of the Commission, Leverett Saltonstall Buildin, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, no later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the list available to all parties to the election. Since failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this directive may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER

ELIZABETH K. BOYER, COMMISSIONER

BOARD OF REGENTS OF HIGHER EDUCATION, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER AND MASSACHUSETTS ASSOCIATION OF SERVICE AND HEALTH CARE, SUP-2892 (4/7/88).

63.7 discrimination -- union activity
65.2 concerted activities
65.7 surveillance
91.11 statute of limitations

Hearing Officer:

Diane M. Drapeau, Esq.

Appearances:

Richard Ong, Esq. - Representing the Board of Regents

Preston Ripley - Representing the Massachusetts Association of Service and Health Care

HEARING OFFICER'S DECISION

Statement of the Case

This case involves a charge by the Massachusetts Association of Service and Healthcare (M.A.S.H.) that the Board of Regents of Higher Education, University of Massachusetts Medical Center (Medical Center) violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it 1) transferred Jane Dube to another worksite; 2) conducted a surveillance of Dube; 3) required Dube to work a more restrictive schedule than co-workers; and 4) stopped Dube from distributing MASH leaflets.

On the basis of the entire record, I find that the Medical Center violated Section 10(a)(1) of the Law.

Findings of Fact

Jane Dube has been employed at the Medical Center's Department of Risk and Safety Assurance for approximately four and a half years. Up through the fall of 1984, she was the head clerk for Guy Fragola. She routinely performed clerical duties and handled budgetary matters.

Sometime in 1982 Sheryll Sneade and Dube objected to certain Medical Center policies dealing with classified employees. In March 1982 Sneade and Dube raised issues with regard to hiring procedures, such as, the posting of vacancies and nepotism within the administration. Dube met personally with several managerial personnel including Dr. Robert Tranquada, the Chancellor of the Medical Center, to discuss these issues, but was not satisfied with their responses. At some point she also objected to the Medical Center's prohibition on employees talking to the media.

In August 1983 a group of employees, including Dube and Sneade, spoke to the Worcester Magazine about working conditions at the Medical Center. Sneade and Dube were quoted in the Magazine criticizing Fragola. On August 10, 1983, the editor of