

In the Matter of BRISTOL COUNTY SHERIFF'S OFFICE
and
NATIONAL CORRECTIONAL EMPLOYEES UNION
and
MASSACHUSETTS CORRECTION OFFICERS
FEDERATED UNION
Case No. SCR-10-2286

23. *Contract Bar*
45.1 *contract bar*

December 16, 2010
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

*John Connor, Esq. Representing the National
Correctional Employees Union*
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Correction Officers Federated
Union*

RULING ON MOTION TO DISMISS

Overview

The issue before the Board is whether an unfunded three year Memorandum of Agreement (MOA) serves as a contract bar to a representation petition filed by a rival union less than one year after the MOA was signed, ratified and amended by the parties. Under the circumstances of this case, the Board concludes that the Legislature's failure to fund the MOA does not revive or prolong the open period within which rival representation petitions may be processed.

Statement of the Case

On June 14, 2010, the National Correctional Employees Union (NCEU) filed a petition with the Division of Labor Relations (Division) seeking to represent a bargaining unit of correctional officers, sergeants and lieutenants employed by the Bristol County Sheriff's Office (Sheriff). The Massachusetts Correction Officers Federated Union (MCOFU) is the incumbent representative of this bargaining unit. The face of the petition certifies support from at least 50% of the unit employees.

On June 30, 2010, MCOFU filed an unopposed Motion to Intervene in these proceedings, which is granted. MCOFU also filed a Motion to Dismiss on the grounds that: 1) the petition is barred pursuant to the contract bar rule set forth in 456 CMR 14.06(1)(b)

and; 2) the NCEU failed to certify that the petition was supported by 30% of the bargaining unit. The NCEU filed an opposition to the Motion to Dismiss on July 15, 2010. The Sheriff's Office did not file anything with the Division or otherwise enter an appearance in this matter.

For the reasons set forth below, the Commonwealth Employment Relations Board (Board) grants the Motion to Dismiss on the ground that the petition is contract-barred.

Facts

On May 1, 2009, MCOFU and the Sheriff executed two separate memoranda of agreement. The first, effective from July 1, 2008 to June 30, 2009, amended the duration clause of the parties' previous collective bargaining agreement (CBA)¹ but otherwise kept all other articles and sections in full force and effect. The second memorandum was effective by its terms from July 1, 2009 to June 30, 2012 (2009-2012 MOA).² The 2009-2012 MOA consists of twenty-one numbered paragraphs amending the parties' previous CBA, including modifications to the Sick Leave Bonus (Paragraph 2); Job Bids (Paragraph 3); Leave without Pay (Paragraph 5); Grievance and Arbitration filing timelines (Paragraph 6); Clothing replacement allowance (Paragraph 13); Roll Call Pay (Paragraph 14); Salary Rates (Paragraph 15); and Overtime (Paragraphs 16 and 17). Pursuant to Paragraph 20, all other CBA provisions that were not otherwise amended remained in effect.

Paragraph 21, the MOA's final paragraph, states, "All parties stipulate, acknowledge and agree that this Memorandum of Agreement is contingent upon and subject to funding by the Commonwealth of Massachusetts." Bristol County Sheriff Thomas M. Hodgson and three MCOFU representatives signed the 2009-2012 MOA on May 1, 2009.

Approximately one month later, on June 2, 2009, the Sheriff and MCOFU entered into a side agreement (Side Agreement), which, pursuant to its introductory paragraph, "shall modify and/or further define provisions agreed to by the parties in their collective bargaining agreement for Fiscal Years 2009-2012." The Side Agreement, which is one-page long, modifies Paragraphs 2, 3, 5 and 16 of the 2009-2012 MOA. The modifications to Paragraphs 2 (Sick Leave Bonus) and 3 (Job Bids) are identical and state:

The parties agree to hold this paragraph in abeyance until June 30, 2012 or until the previously agreed to pay raise of 5% for FY 2009, 5% FY 2010 and 5% FY 2011 is funded.

Paragraphs 5 and 16 were also modified, but not held in abeyance pending funding.

The 2009-2012 MOA was ratified by MCOFU's membership, after which MCOFU submitted it to the Governor with a request for an appropriation necessary to fund the incremental cost items contained therein. The Governor recommended that the Legislature

1. None of the parties submitted a copy of the predecessor CBA.

2. MOA Paragraph 18 states, "This Agreement shall be for the three year period from July 1, 2008 to June 30, 2011." MCOFU claims, without dispute, that the reference to 2011 was a typographical error that should have read June 30, 2012. Based on other references to a three year contract expiring in 2012 in the MOA and Side Letter, discussed below, the Board so finds.

appropriate the monies requested for Fiscal Year 2009. However, on February 23, 2010, the Commonwealth's Undersecretary for Administration and Finance sent a letter to all County Sheriffs informing them it was "extremely unlikely that the legislature would act favorably upon your contracts as currently constructed" and suggesting that the Sheriffs "return to the table to work towards revised agreements" containing certain parameters that included delayed wages and employee furloughs. On May 3, 2010, the Assistant Director of the Commonwealth's Office of Employee Relations sent an e-mail to County Sheriffs updating them on the Commonwealth's efforts to secure revised agreements with its bargaining units and reiterating its suggestion that the Sheriffs delay bargaining for salary increases and provide for furloughs, as other statewide bargaining units had done.

As of the date this petition was filed, the Legislature had not funded the 2009-2012 MOA. There is no evidence that the parties have engaged in further bargaining.

Ruling

Contract Bar

MCOFU contends that the Union's petition is barred pursuant to the contract bar rule set forth in 456 CMR 14.06(1)(b):

Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of an existing valid collective bargaining agreement, unless such petition is filed no more than 180 days and no fewer than 150 days prior to the termination date of said agreement, provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

The purpose of the contract bar rule is the establishment and continuation of stable labor relations and the avoidance of instability of agreements. *Chief Administrative Justice of the Trial Court*, 6 MLC 1195, 1205 (1979). The contract bar doctrine ensures stable bargaining relationships by guaranteeing that the contracts that have been negotiated by the parties are not subject to disruption by representation challenges of rival employee organizations, except for the thirty day period during which such challenges are timely. *Id.*

For a collective bargaining agreement to bar the processing of a petition, the evidence must establish the existence of a complete and final agreement signed by all parties prior to the filing date of

the rival petition. *Town of Saugus*, 28 MLC 80, 82-83 (2001) (citations omitted). To be complete, an agreement must contain substantial terms and conditions of employment and may not be conditioned upon further negotiation. *Town of Westminster*, 23 MLC 153, 155 (1996) (and cases cited therein). If an agreement is contingent upon ratification, it must be ratified before the rival petition is filed for the Board to determine that the agreement is final. *City of Holyoke*, 31 MLC 67, 68 (2004).

Here, MCOFU disputes that the NCEU filed this petition outside of the 2009-2012 MOA's open period or that the MOA was properly executed and ratified, as required by the cases cited above. The NCEU argues that, because the entire 2009-2012 MOA was made contingent upon funding, which has yet to occur, there is no valid CBA between the parties that bars the present petition.

NCEU's argument fails to take into account the Side Letter, however, which, by its terms, was intended to supplement and modify the MOA and which had been executed and was in effect as of the date of the petition. Accordingly, to determine whether the NCEU's petition is contract-barred, we examine the Side Letter's terms as part of the parties' total agreement. *See Town of Ipswich*, 11 MLC 1403, 1410 (1985), *aff'd. sub nom Town of Ipswich v. Labor Relations Commission*, 21 Mass. Ap. Ct. 1113 (1986) (treating side letter agreement as part of parties' total collective bargaining agreement).

There is no question that, pursuant to Paragraph 21, the 2009-2012 MOA was made expressly contingent upon funding. Under the Side Letter, however, only Paragraphs 2 and 3 were held in abeyance pending funding of the agreed-to pay raises or until the June 30, 2012, when the MOA expired. The only reasonable conclusion to be drawn from the fact that the Side Letter singles out only these two paragraphs as contingent on funding is that, with the exception of other cost items, i.e., the referenced pay raises, which must be submitted to the Legislature for funding, the parties intended all remaining terms of the 2009-2012 MOA to remain in effect until June 30, 2012, regardless of whether it was ultimately funded.

This finding is fully consistent with the statutory scheme set out in Section 7(c) of M.G.L. c. 150E (the Law), which, like Section 7(b), its counterpart for certain other public employers,³ "anticipates the possibility that funds may not be available to pay the costs of a collective bargaining agreement." *City of Lawrence*, 16 MLC 1760, 1763 (1990). Specifically, Section 7(c) obliges county sheriffs and certain other public employers named therein⁴ to submit to both the Governor and the Legislature a request for an ap-

3. Section 7(b) of M.G.L. c. 150E states:

(b) The employer, other than the board of higher education or the board of trustees of the University of Massachusetts, a county sheriff, the PCA quality home care workforce council, the alcoholic beverage control commission, or the state lottery commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences

shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

The Board looks to Section 7(b) of the Law for guidance when construing Section 7(c). *Board of Trustees of University of Massachusetts (Amherst)*, 30 MLC 106, 108 (2004).

4. Board of Higher Education, Board of Trustees of the University of Massachusetts, the PCA Quality Home Care Workforce Council, the Alcoholic Beverage Control Committee, the Massachusetts Department of Transportation and the State Lottery Commission.

appropriation necessary to fund the incremental costs items in a CBA within thirty days after the CBA is executed by the parties. If within 45 days, the Governor fails to recommend that the Legislature appropriate the necessary funding, then the appropriation requests “shall be referred back to the parties for further bargaining.” M.G.L. c. 150E, §7(c). In this case, the Governor approved the 2009-2012 MOA in its first year and forwarded it to the Legislature, which has yet to fund it.

The NCEU would have the Board deny MCOFU’s Motion to Dismiss on the grounds that the Legislature has yet to act on the Governor’s recommendation to fund the agreement. Based on the scope of the express terms of the 2009-2012 MOA and Side Agreement signed by both parties and currently in effect, we reject NCEU’s argument. On these facts, we do not find that the Legislature’s failure to fund the 2009-2012 MOA means that the parties have not otherwise executed a binding contract that serves as legitimate contract bar. *Town of Burlington*, which the NCEU relies on for its argument, actually contains strong dicta indicating the Board’s longstanding reluctance to ignore a contract bar merely because an otherwise valid contract has not yet been funded. 14 MLC 1632, 1636, n. 11 (1988). In that case, the Board disavowed the reasoning of a hearing officer’s ruling that a contract bar did not exist based in part on the fact that the contract at issue was not funded. *Id.* The Board explained that

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 employee’s free choice of representatives with the vagaries and delays that may attend a legislative process over which neither they nor their employer have control.

Id. Nevertheless, NCEU would have us ignore our prior admonition in *Burlington* regarding the conundrums inherent in the legislative funding of labor agreements because the CBA in that case was not made expressly contingent on funding. *See id.* NCEU further notes that, because the case was decided on different grounds, i.e., the *Burlington* CBA was not executed by the parties, the Board in *Burlington* left open the question of 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” and leaving resolution of the issue to an “actual fact situation.” *Id.*

In this case, the facts cause us to reject the NCEU’s claim that the failure to fund the 2009-2012 MOA creates an open period. The 2009-2012 MOA, which must be read in conjunction with the Side Agreement, establishes a binding three-year agreement that, with the exception of two provisions, is no more contingent upon funding than any other CBA for which appropriation requests must be made. Accordingly, the factual distinction urged by the NCEU does not apply.

Our holding is further guided by the fundamental premise of the contract bar doctrine - encouraging and maintaining stability in the bargaining relationship. This requires, of course, “stability in the first place.” *Id.* at 1634 (quoting *Commonwealth of Massachusetts (Unit 7)*, 7 MLC 1825, 1829 (1981)). Under the specific circumstances of this case, the economic uncertainties inherent in the Commonwealth’s public sector funding scheme are not grounds that would cause us to ignore the contract bar doctrine. *Id.* By executing a three-year CBA containing both non-economic terms and economic terms and ratified by the Union’s membership, MCOFU and the Sheriff have demonstrated a sufficient, ongoing level of stability in their bargaining relationship. It would not serve the public interest in labor stability through collective bargaining to allow the uncertainties of legislative action on funding to revive or prolong the open period.⁵

Conclusion

For the reasons described above and in the absence of good cause shown, the Union’s petition is contract-barred. The Board therefore grants MCOFU’s Motion to Dismiss.

SO ORDERED.

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5. Because we have concluded that the petition is contract-barred, we do not address MCOFU’s argument regarding the sufficiency of the showing of interest, ex-

cept to note that the face of the petition reflects support from 50% of the employees in the unit as required by Division Rule 14.05 (2), 456 CMR 14.05 (2).