In the Matter of FRANKLIN COUNTY SHERIFF'S OFFICE

and

NATIONAL CORRECTIONAL EMPLOYEES UNION

Case No. WMAS-09-1001

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March 5, 2010
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

John P. Talbot, Jr., Esq.	*Representing the Franklin County Sheriff's Office*
John Connor, Esq.	*Representing the National Correction Employees Union*

DECISION ON MOTION FOR RECONSIDERATION OF GRANT OF MOTION TO DISMISS PETITION FOR RECONSIDERTION BY WRITTEN MAJORITY AUTHORIZATION

Statement of the Case

The National Correctional Employees Union (NCEU or Union) filed a Petition for Written Majority Authorization with the Division of Labor Relations (Division) on October 2, 2009. The Petition covered ten captains employed in the Franklin County Sheriff's Office (Sheriff). On November 17, 2009, the Division served a notice upon the parties pursuant to 456 CMR 14.19(3), notifying the parties that they had ten days in which to notify the Division whether they had agreed to designate a neutral other than the Division.[1] The notice also required the Sheriff to provide the neutral and the Division with a list containing the full names and titles of the employees in the proposed unit no later than three days from the selection of the neutral.

On November 17, 2009, the Sheriff's Office sent the Division an e-mail listing the full names and titles of the petitioned-for Captains. The e-mail did not indicate whether the parties had designated the Division as the neutral. By letter dated November 25, 2009, counsel for the Sheriff's Office entered his notice of appearance and requested an opportunity to provide additional information concerning two issues: 1) that the individuals listed in the petition are currently recognized and covered by an "employee agreement;" and 2) that the individuals listed in the petition are "managerial employees" excluded from bargaining. The NCEU did not respond to this letter.

On December 4, 2009, the Sheriff sent a Motion to Dismiss to the Division via e-mail and regular mail. The Division received the hard copy of the motion, which was dated December 4, 2009, on December 7, 2009. On January 4, 2010, having received no opposition from the NCEU, the Division stamped "ALLOWED" on the face of the motion and faxed a copy to both parties. That afternoon, the Union faxed the Division a motion titled "Motion to Reconsider the Decision to Grant the Sheriff Office's Motion to Dismiss" (Motion for Reconsideration) along with an opposition to the Motion to Dismiss (Opposition). In the Motion for Reconsideration, the NCEU claims that its earlier failure to respond to the Sheriff's Motion to Dismiss was an oversight—it erroneously assumed that it had already filed an opposition. The Division received hard copies of the Union's Motion for Reconsideration, including a signed affidavit in support of the Opposition, on January 6, 2010. The Sheriff's Office did not file a response to the Motion for Reconsideration or Opposition.

For the reasons set forth below, we affirm the Division's decision to allow the Sheriff's Motion to Dismiss. The information presented in the parties' submissions demonstrates the Sheriff's Office is not required to recognize the captains under the written majority authorization process because another employee organization already represents them for purposes of collective bargaining pursuant to a collective bargaining agreement that is effective by its terms until June 30, 2011.

Timeliness

As a threshold matter, the Board must decide whether the Union's Motion for Reconsideration is untimely. The Union first responded to the Motion to Dismiss on January 4, 2010, approximately one month after it was filed. The Division's regulations are silent as to how long a party has to respond to motions made in the context of an investigation of a Petition for Written Majority Authorization. However, an analogous regulation, 456 CMR 13.07, "Motions," gives parties seven days after service of a motion to file a response to all motions made prior to or subsequent to a hearing. The Union does not claim that it never received a copy of the Sheriff's Motion to Dismiss and thus, its response would be untimely if the Board considered the Motion for Reconsideration under this rule.

However, treating the Sheriff's Motion to Dismiss as a challenge to the inclusion or exclusion of a name on a list pursuant to 456 CMR 14.19 (6) or as a challenge to the validity of the written majority authorization under 456 CMR 14.19 (7), the Sheriff's motion, which has already been allowed, was untimely as well.[2]

1. 456 CMR 14.19(3) states:

> Upon filing and docketing of a petition for certification by written majority authorization, the Division shall prepare and serve a notice upon the parties that shall include information about the Petitioner and the proposed petitioned-for bargaining unit and advise the parties that they may agree upon a neutral to determine the validity of the written majority authorization.

2. Under 456 CMR 14.19(6), the Sheriff's Office had three days from the date of providing the list to the neutral to file challenges to the inclusion of names on the

Therefore, for the sake of consistency and equity, and in the absence of any objection from the Sheriff's Office, we decline to deny the Union's Motion for Reconsideration because it was untimely filed. We therefore turn to the merits of the Union's Motion for Reconsideration and Opposition and summarize the relevant facts from the parties' submissions below.

Facts

On April 15, 2009, the Sheriff's Office and "The Non-Unit Employees Association" (Association) entered into an Agreement that is effective by its terms from July 1, 2009 through June 30, 2011. The Agreement contains 46 articles and two appendices.[3] Sheriff Frederick B. Macdonald signed the Agreement on behalf of the Sheriff's Office. Carrie Task, the Personnel Director's Administrative Assistant, signed on behalf of the Association. The Agreement's Preamble states that its purpose is "the promotion of harmonious relations between the Employer and the Association" and further states:

> The Association recognizes the importance of a unified effort to continue to promote the highest levels of professionalism and quality of work. To that end, the Association will make every effort to rally its members toward this common goal and for the common good.

Article I of the Agreement contains the following definitions:

> **Non-Unit Employee:** An employee of the Franklin County Sheriff's Office to whom this agreement applies. Each employee is classified as belonging to one of the following categories:
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> Managerial Employee - An employee holding the pay grade of 22 or above.
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> Professional, Clerical, Technical and Maintenance Employee - an employee holding the pay grade of 21 or below who is not represented by a labor union.
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> Regular Part Time Employee: An employee, excluding contract employees, who is expected to work 50% or more of the hours in a work week of a regular full-time employee in the same title, and who is employed for at least 50% of a work year. Regular Part-Time employees are eligible for some employee benefits as described in this Agreement. [4]

Article 2 of the Agreement, "*Introduction*," states:

> Effective July 1, 2007, this Agreement between the Franklin Sheriff's Office Non-Unit Employees Association and the Franklin Sheriff's Office (FSO) are adopted for all non-unit personnel, excluding however, the titles of Superintendent, Special Sheriff, Chief of Staff, Assistant Superintendent and any other title created which holds the salary grade of 26 or higher. In addition, all per diem, casual, seasonal or temporary employees are excluded. Grant funded employees shall be covered under these terms to the extent permissible under the respective grant.

Article 3 of the Agreement, "Recognition/Association Representation" states:

> The Employer recognizes the Association as the sole and exclusive negotiating unit for the purpose of negotiating as to hours, wages, and other conditions of employment as set forth in the Agreement.
>
> The Association agrees that it shall act as the exclusive bargaining agent for all employees covered by this Agreement and shall act, represent and negotiate agreements and bargain collectively for all employees within the association, and shall be responsible for representing the interests of such employees, as provided for within this Agreement, without discrimination, and without regard to whether or not said employees are Association members.

Article 16 of the Agreement describes a three-part grievance procedure that culminates in the grievant presenting his grievance to the Sheriff. The Agreement does not provide for final and binding arbitration. The Agreement also obligates the Sheriff's Office to discipline and discharge bargaining unit members for just cause only and contains other provisions typically found in collective bargaining agreements, such as Shift Differentials, Longevity Pay, Holiday and Vacation Leave, Management Rights and a zipper clause.

The Union provided additional information regarding the formation and existence of the Association in an affidavit from Captain Paul Hill, which states in pertinent part:

> I am aware that the "Non-Unit Employees Association" was formed by the Sheriff and his management team for the sole purpose of submitting to the legislature for raises for non-bargaining unit personnel employed within the Franklin County Sheriff's Department. At no time to my knowledge has the Non-Unit Employees Association ever met. At no time did I or any other employee pay Union dues to this Association and at no time did I or any other employee ever ratify or participate in the ratification of any collective bargaining agreement…. The Association also does not represent any members nor has the Association ever filed a grievance or represented any individuals during a disciplinary proceeding.
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> * * *
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> At no time to my knowledge did the employer ever post on a bulletin board or otherwise advise all persons that the employer intended to grant exclusive recognition to the Non-Unit Employees Association.

Opinion

Under Section 4 of the Law, as amended, an employer is required to recognize employees under the written majority authorization

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list. The Sheriff provided the Division with the list on November 17, 2009. Allowing three days for mail service, the Sheriff's challenges were therefore due on November 23, 2009. Under 456 CMR 14.19(7), the Sheriff's Office had three days from the designation of the neutral to file challenges to the validity of the written majority petition. In this case, because neither party designated a neutral within the ten-day period, the Division was designated by default ten days after the Division sent the November 17 notice. *See* 456 CMR 14.19(4). Thus, the Sheriff's challenges were due on or before December 3, 2009, allowing three days for mail service. The Sheriff sent the Motion to Dismiss by e-mail on December 4, 2009. Even assuming that the Division would accept the motion by e-mail, the Motion to Dismiss was at least one day late under 456 CMR 14.19(7) and over ten days late under 456 CMR 14.19(6).

3. Appendix A is a grievance form. Appendix B is a salary chart containing salary and step increases for FY 2002-2011.

4. The Board takes administrative notice that it has not certified the Non-Unit Employees Association as the exclusive representative of this or any other bargaining unit of employees employed by the Sheriff's Department.

process "only when no other employee organization has been and currently is lawfully recognized as the exclusive representative of the employees in the appropriate bargaining unit." The Sheriff's Office urges the Division to dismiss the Union's petition because the employees are already represented for purposes of collective bargaining and covered by a collective bargaining agreement that does not expire until June 30, 2011. The Union opposes the motion to dismiss, claiming that the contract bar is invalid because the Sheriff's Office did not lawfully recognize the Association and because the petitioned-for captains are not included in the Association's unit, as defined in the Agreement. We treat each of these arguments in turn.

Employee Organization Status

The Union argues that because the Association was created solely to petition the state legislature for wage increases for non-bargaining employees, does not collect dues or have elected officers, and entered into an Agreement that was signed on its behalf by the Administrative Assistant to the Personnel Director, its purpose is not to engage in concerted activity. In essence, the Union argues that the Association is not an employee organization under the Law. We disagree.

Section 1 of the Law defines an "employee organization" as "any lawful association, organization, federation, council, or labor union, the membership of which includes public employees, and assists its members to improve their wages, hours, and conditions of employment." The Board has long held that the definition of "employee organization" is broad and does not require any specific form of organization structure. *Commonwealth of Massachusetts*, 10 MLC 1557, 1561 (1984). In determining whether an organization is an employee organization within the meaning of Section 1, the Board analyzes whether the organization: 1) has as one of its purposes the assistance of public employees in improving their wages, hours and conditions of employment; 2) is able to adequately and independently represent employees in those concerns; and 3) is not the product of employer domination or control. *Commonwealth of Massachusetts*, 6 MLC 2123, 2125 (citing *IBPO and Massachusetts Motor Vehicle Inspectors Association*, 1 MLC 1225, 1226 (1974)).

With respect to the first element, the Union has presented no evidence that the Association does not represent employees for the purpose of improving their terms and conditions of employment. Indeed, Article 3 of the Agreement reflects that the Association exists for this very purpose and the Agreement appears to be a comprehensive collective bargaining agreement covering the full range of topics typically addressed in such agreements. Moreover, even if the Association were formed merely to obtain wage increases from the state legislature, this would seem to fall squarely within the purpose of "assisting employees to improve their wages, hours and conditions of employment." Although Captain Hill asserts that the Agreement does not collect dues, the Board has deemed organizations to meet the statutory definition even though they had no by-laws, constitution, officers, dues or any prior history of bargaining. *Commonwealth of Massachusetts*, 10 MLC at 1561. Finally, although there may be a number of confidential or managerial employees in the unit described in the recognition clause, the unit also describes other employees who fall within the definition of public employee, such as "all professional, clerical, technical and maintenance employees" and at least six of the captains at issue here.[5] Accordingly, the Association satisfies the first element of the analysis.

The Union has also failed to provide evidence that the Association cannot adequately and independently represent employees in their concerns. The fact that the Administrative Assistant to the Director of Personnel signed the collective bargaining agreement does not provide a sufficient basis to determine that the Association cannot adequately and independently represent employees.

The final step of the analysis requires the Board to consider whether the Association is the product of employer domination and control. This issue typically arises under Section 10(a)(2) of the Law, which makes it unlawful for an employer to dominate, interfere or assist in the formation, existence, or administration of any employee organization. In *Blue Hills Regional Technical School District*, 9 MLC 1271, 1277-1278 (1982), the former Commission concluded that there was sufficient evidence of employer domination and control over an employee organization where the employer initiated the idea of forming the organization, and handpicked all of the organization's representatives. The information submitted by the parties in this case contains no comparable information regarding the formation of the Association or selection of its officers, except that the Administrative Assistant to the Personnel Director signed the Agreement on the Association's behalf. Without further facts as to how or by whom Ms. Task was selected, we are unable to conclude from the information before us that the Association is the product of employer domination or control. Accordingly, we conclude that the Association is an employee organization under the Law and address the Union's remaining arguments as to why the Board should allow it to proceed with its petition

Lawful Recognition/Contract Bar

Under the contract bar rule set forth in 456 CMR 14.06(1), the Division will not entertain any petition filed under Section 4 of the Law during the term of an existing valid collective bargaining agreement unless the petition was filed "no more than 180 days and no few than 150 days prior to the termination date of the agreement." The Union filed this petition on October 2, 2009 well before this open period, which begins in January 2011. The Union nevertheless argues that because the Sheriff's Department did not comply with the procedures set forth in 456 CMR 14.06(5), "Recognition Bar,"[6] the Association is not the exclusive representative of the bargaining unit and there is no contract bar. Phrased more broadly, the Union claims that collective bargaining agreements entered into by parties who have not complied with the voluntary

5. The Sheriff's Office seeks to exclude only four of the ten petitioned-for captains on the grounds that they are confidential employees.

6. [See next page.]

recognition procedures set forth in Division Rule 14.06(5) are not "valid collective bargaining agreements" for the purpose of the contract bar rule. We reject this argument as it is without support under Chapter 150E or the Division's rules and contrary to the policy underlying the contract and recognition bar rules.

Both the contract bar rule and the recognition year bar rule reflect a balancing of two important policies - the right of employees under Section 2 of the Law to freely choose their employee representative, against the policy of continuing productive, stable labor relations without the uncertainty and disruption caused by organization rivalries. *Commonwealth of Massachusetts*, 7 MLC 1725, 1729 (1981); *Springfield School Committee*, 27 MLC 20, 21 (2000).

The recognition year bar rule insulates parties who comply with the procedures set forth therein from rival organizing efforts for a period of 12 months. *See* 456 CMR 14.06 (5)("*For purposes of 456 CMR 14.06* [Bar to petitions; elections], recognition shall not be extended to an employee organization unless…") (Emphasis added). Because this rule places some limitations on employee free choice, it reasonably requires some evidence that the employer has, in fact, recognized the employee organization as the exclusive representative of an appropriate bargaining unit of employees. However, once the employer and voluntarily recognized union have negotiated and executed a contract, this evidence is no longer needed, as the very existence of a signed contract demonstrates that the employer has recognized the employee organization as the bargaining unit's exclusive representative for purposes of assisting members with improving terms and conditions of employment. At that point, the contract rule serves to bar rival union petitions for the life of the agreement, regardless of whether the parties complied with the recognition year bar procedures.

Nothing in the 456 CMR 14.06 mandates or suggests otherwise, and this is so for good reason. Declaring a contract invalid simply because the union was not recognized pursuant to 456 CMR 14.06(5) would have a significant destabilizing effect on all units in the Commonwealth that were not voluntarily recognized pursuant to this rule.

In this case, in the absence of persuasive evidence that the Agreement is not a valid collective bargaining agreement, we conclude that the Union's petition, which was filed more than 180 days prior to the expiration date of the Agreement, is untimely under the contract bar doctrine and should be dismissed for that reason.

The Union finally argues that, even assuming that the Association were an exclusive bargaining representative, the Division should process its petition because the captains it seeks to represent do not fall within any of the three categories of employees set forth in the recognition clause of the Agreement: Managerial; professional, clerical and technical employees; and regular part-time.

This argument is without merit. The Agreement defines a managerial employee as one holding the pay grade of 22 or above. The Union argues that because the Sheriff's Office does not claim that the captains are managerial employees, they do not qualify as managerial employees under the Agreement.[7] The Union does not, however, dispute that the petitioned-for captains hold the pay grade of 22 or above. Therefore, whether or not the Sheriff's Office claims that the Captains are managerial employees, the Captains are covered under the plain language of Article I of the Agreement.

The Union lastly contends that its petitioned-for bargaining unit of captains is appropriate because it mirrors bargaining units in other Sheriff's Departments in the state. The issue here is not whether the petitioned-for unit is appropriate, but whether the petition should go forward because the captains are already represented for purposes of collective bargaining. Because we have concluded that they are, there is no need for further inquiry.

Conclusion

For the foregoing reasons, the Board affirms its prior dismissal of the Union's petition for written majority authorization.

SO ORDERED.

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6. 456 CMR 14.06(5), *Recognition Year Bar*, states:

> Except for good cause shown, no petition for an election will be processed by the Commission pursuant to MGL c. 150E, §4, in any represented bargaining unit or any subdivision thereof with respect to which a recognition agreement has been executed in accordance with the provisions of this subsection in the preceding 12-month period. For purposes of 456 CMR 14.06 [Bars to Petitions; Elections], recognition shall not be extended to an employee organization unless:
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> a) The employer in good faith believes that the employee organization has been designated as the freely chosen representative of a majority of the employees in an appropriate bargaining unit;
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> b) The employer has conspicuously posted a notice on bulletin boards where notices to employees are normally posted for a period of at least 20 consecutive days advising all persons that it intends to grant such exclusive recognition without an election to a named employee organization in a specified bargaining unit;
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> c) The employer shall not extend recognition to an employee organization if another employee organization has within the 20 day period notified the employer of a claim to represent any of the employees involved in said bargaining unit and has prior to or within such period filed a valid petition for certification which is pending before the Commission; and,
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> d) Such recognition shall be in writing and shall describe specifically the bargaining unit involved.
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> e) The employee organization is in compliance with the applicable filing requirements set forth in MGL c. 150E, §§13 and 14.

7. Although the Sheriff's Office originally claimed that the captains were managerial in its November 23, 2009 letter, it does not reassert this claim in its Motion to Dismiss, arguing instead that at least some of them are confidential employees.