CHIEF ADMINISTRATIVE JUSTICE OF THE TRIAL COURT AND NAGE AND LOCAL 254, SEIU, SCR-2130 (6/25/79).

(40 Selection of Employee Representative)
45.1 contract bar
45.3 prior certification
45.4 timeliness of filing
46.13 validity of authorization cards

Commissioners participating:

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

Appearances:

David Jenkins, Esq. - National Association of Government Employees

Michael J. Muse, Esq. - Local 254, Service Employees International Union, AFL-CIO

Paul T. Edgar, Esq. - Chief Administrative Justice of the Trial Court

DECISION AND ORDER

Statement of the Case

On April 12, 1979, the National Association of Government Employees (NAGE) filed with the Labor Relations Commission (Commission) a petition seeking to represent a bargaining unit of court and probation officers employed by the Chief Administrative Justice of the Trial Court (Employer or Chief Administrative Justice). The unit is described on the petition as follows:

> INCLUDED: All regular full-time probation officers, court officers and deputy sheriffs, duly assigned as court officers, who perform court officer duties on a regular basis for more than 50% of their regular workweek.
> All employees who work less than full-time, but not less than fifteen (15) hours per week, and are either a probation officer, court officer, or deputy sheriff, duly assigned as court officers, who perform court officer duties on a regular basis for more than 50% of their regular workweek.
>
> EXCLUDED: All confidential and managerial employees as defined in the Act, all court officers in Middlesex and Suffolk Superior Courts, and all other employees of the Commonwealth or its counties.

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With the exception of the excluded court officers of Middlesex and Suffolk Superior Courts,[1] the unit sought is the same as that determined in our Decision and Direction of Election issued on November 22, 1977. Commonwealth of Massachusetts (Chief Justice Supreme Judicial Court), 4 MLC 1503. Local 254, Service Employees International Union, AFL-CIO (Local 254 or SEIU) is the currently certified bargaining representative of the unit sought by NAGE.

Pursuant to our authority under Section 4 of G.L. c.150E (Law), the Commission investigated NAGE's petition. In the course of its investigation, the Commission has determined that NAGE's showing of interest is sufficient.[2] On May 18, 1979, a

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[1]The exclusion reflects legislative changes in the Court Reorganization Act passed on July 28, 1978. Acts of 1978, c.478. Among other changes, c.478 amended section 3 of G.L. 150E to read:

> The appropriate bargaining units for judicial employees within the provisions of this chapter shall be a professional unit composed of all probation officers and court officers and a unit composed of all nonmanagerial or nonconfidential staff and clerical personnel employed by the judiciary, provided that court officers in the superior court department for Suffolk and Middlesex counties shall be represented by such other bargaining units as they may select. [Emphasis supplied to indicate changes.]

For a complete history of judicial employee unit determination litigation and relevant legislative action, see Commonwealth of Massachusetts (Chief Justice Supreme Judicial Court), 4 MLC 1503 (1977); Commonwealth of Massachusetts (Chief Administrative Justice), 5 MLC 1296 (1978); and Commonwealth of Massachusetts (Chief Administrative Justice), 5 MLC 1699 (1979).

[2]Local 254 filed a Motion to Dismiss NAGE's petition on the grounds that its showing of interest was insufficient. The showing of interest necessary for a labor organization to obtain an election is administratively determined by the Commission and is not subject to litigation. O.D. Jennings & Co., 68 NLRB 516, 18 LRRM 1133 (1946); Duxbury School Department, 1 MLC 1020 (1974); Local 829, International Brotherhood of Teamsters, 4 MLC 1673 (1978). Local 254's Motion has been treated as a request to investigate NAGE's showing of interest. The Motion to Dismiss is denied.

Under MLRC Rules, 402 CMR 14.05, a representation petition must be accompanied by a thirty percent (30%) showing of interest. The regulation further provides that the Commission may solicit payroll or personnel lists from the employer to assist in determining sufficiency of the showing of interest. If such a list is not made available, the showing of interest will, if otherwise valid, be accepted as bona fide. Finally, the Commission must give a petitioner notice of an insufficient showing of interest and seven (7) days to submit a sufficient showing.

NAGE's petition gave 1200 as the number of employees in the unit sought and was accompanied by an insufficient showing of interest. After notice from the Commission, NAGE secured cards sufficient to fulfill the requirement that it have proof of designation from at least 30% of 1200 employees. SEIU contends that

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hearing was held before Commissioner Joan G. Dolan.[3] Local 254 intervened in the proceedings. All parties were afforded full and fair opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Briefs were timely filed by the Employer, Local 254, and NAGE on May 24, 1979.

Jurisdiction

1. The Chief Administrative Justice of the Trial Court is the Employer of judicial employees within the meaning of Section 1 of the Law.

2. The National Association of Government Employees is an employee organization within the meaning of Section 1 of the Law.

3. Local 254, Service Employees International Union, AFL-CIO is an employee organization within the meaning of Section 1 of the Law.

Findings of Fact

At hearing, the three parties to this litigation signed a thirteen-paragraph Agreed Statement of Facts. That Statement, the hearing testimony and evidence to be detailed below, and Commission records of which we take official notice constitute the basis for the following findings of fact.

Chapter 278 of the Acts of 1977 granted collective bargaining rights to judicial employees. Section 2 of that Act amended G.L. c.150E, Section 1 by

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[2](footnote continued from preceding page)
NAGE's showing of interest is insufficient since a recent count by the Employer indicates that there are some 1490 employees in the unit. A list was solicited from the Employer. Although the best list in existence was made available to the Commission, it is impossible to reach a definitive conclusion on the absolute number of employees in the unit. The current list was compared with the list of employees who were challenged by the Employer in the last election in this unit. Grounds for challenge were that the employees did not belong in the unit. The cross-check resulted in a finding that, in the Employer's view, there are approximately 1200 employees properly in this unit. Since NAGE's tally of the number of employees thus appears to be reasonable and its showing of interest is otherwise valid, the Commission has determined that the showing is sufficient.

[3]On May 24, 1979, the parties jointly filed a "Motion to Change Hearing Designation" seeking to alter the proceeding in this matter from an expedited hearing under MLRC Rules 402 CMR 13.02(3) to a formal hearing pursuant to 402 CMR 13.02(2). The effect of that motion is that an initial decision is made by the full Commission and the appeal step from a single hearing officer to the full Commission is eliminated. The motion is granted, as is Local 254's motion to amend its Motion to Dismiss by deleting paragraphs 2 and 3.

adding a proviso that the employer of judicial employees would be the Chief Justice of the Supreme Judicial Court. On July 11, 1977, Local 254 filed with the Commission a petition seeking to represent the unit of court and probation officers at issue in the instant case. On approximately October 10, 1977, John L. Ritchie was appointed by Supreme Judicial Court Chief Justice Edward F. Hennessey as the Director of Employee Relations for the Judiciary. Mr. Ritchie has continuously held the post of Director of Employee Relations, in which capacity he has served as head of the Employer's bargaining team at all points material to the case sub judice. Mr. Ritchie's current superior is Chief Administrative Justice of the Trial Court Arthur Mason, the Employer in the matter before us.[4]

On November 22, 1977, the Commission issued its Decision and Direction of Election in the bargaining unit sought by Local 254 in its July, 1977 petition. Commonwealth of Massachusetts (Chief Justice Supreme Judicial Court), supra. An election was held among Local 254, NAGE, and the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO. On February 22, 1978, the Commission certifeid Local 254 as the exclusive representative of the unit of court and probation officers.

On or about March 16, 1978, collective bargaining commenced between representatives of then-employer Chief Justice Hennessey and SEIU. Edward Sullivan, business manager for Local 254, testified that the negotiations were unusually difficult because of the ambiguities inherent in court reorganization, which was imminent at the time. Since court and probation officers had traditionally been county employees, Local 254 was faced with bargaining for a large group of employees whose wages, hours, and working conditions differed in accordance with the approximately fourteen entities for which they worked. Because the employer did not have available the information Local 254 considered necessary for bargaining and such material could not be obtained from the county commissioners, Local 254 had to seek bargaining data from its own employee representatives at individual worksites throughout the state.

During the spring of 1978, legislation was filed which would have retained county commissioners as the employers of court and probation officers, thus further beclouding bargaining issues. On April 20, 1978, approximately one month after the commencement of bargaining, Local 254 filed a prohibited practice charge with the Commission. The charge alleged that the Employer had engaged in dilatory tactics, was refusing to respond to proposals, and was bargaining in bad faith by shadow bargaining. On June 2, 1978, Local 254 and the employer were notified that the Commission had voted to dismiss Local 254's charge on the grounds that there was no violation of the Law. Mr. Sullivan testified that ten weeks of bargaining were "lost" during the pendency of the case at the Commission[5] since, apparently,

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[4]See infra for a discussion of the re-designation of judicial employer resulting from court reorganization legislation.

[5]We take administrative notice of the fact that the period April 20-June 2, 1978 is six weeks, not ten. The fact has significance only in that an issue here is frustration of the bargaining process by matters beyond the union's control such that an extension of the certification year is warranted in order to make the union whole for an appropriate period of time. In any case, the factual

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no bargaining occurred during that time. Approximately ten bargaining sessions were held between the commencement of negotiations in March and July 1, 1978.

On or about July 1, 1978, Chapter 478 of the Acts of 1978 became effective. Section 74 of that Act amended G.L. c.150E, Section 1 by designating the Chief Administrative Justice of the Trial Court as the employer of judicial employees. On or about August 11, 1978, the Honorable Arthur M. Mason was appointed to this position.

In addition to mandating a change in the employer of judicial employees, Chapter 478 brought about significant alterations in the operations of the courts, the biggest of which were in the fiscal and personnel areas. After the appointment of Chief Administrative Justice Mason, a new staff structure was created. In October of 1978, Henry Barr was hired as Administrator of Courts for the Trial Courts with oversight responsibilities for the administrative provisions of Chapter 478. Fiscal and personnel managers were appointed in January and February of 1979. With the appointments of key staff, the prior 417 budgets and all personnel and labor relations functions were centralized in the office of the Chief Administrative Justice.

While the court structure was changing during the summer and fall of 1978, representatives of the Employer and Local 254 continued to hold collective bargaining sessions. During the summer, Local 254 published newsletter information for its members detailing the progress of bargaining. Although it was Mr. Sullivan's opinion that bargaining was not proceeding at a sufficiently rapid or substantial level, the Employer was submitting counter-proposals to Local 254 during July and August. In late August or early September, the parties went to fact-finding. Noting that legislative confusion, rather than the judicial Employer, had affected bargaining in the Spring of 1978, the fact-finder ordered the parties to return to the table for 30 days. Mr. Sullivan testified that, in his view, really serious bargaining began in September of 1978 and the parties were making agreements in December. He also testified that, between August 1978 and April 1979, Local 254 and the Employer had full opportunity to discuss all of the items which ultimately appeared in their collective bargaining agreement, and more which did not.

Between July 1, 1978 and February 2, 1979, twenty-nine bargaining sessions were held. On February 2, 1979, the Employer offered a proposal to Local 254 as a complete and total agreement between the parties. In a letter signed by Mr. Ritchie, the Employer stated in the opening paragraph:

> The following, with enclosures, is offered as a complete and total Agreement between the S.E.I.U., Local 254 (Union), and the Chief Administrative Justice of the Trial Court (Employer), covering applicable probation officers and court officers, as defined therein.

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5 (footnote continued from preceding page)
discrepancy does not affect the result. See Opinion below.

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The rest of the document contained substantive contract provisions. Pursuant to a mail referendum conducted by Local 254 between March 7, 1979 and March 19, the Employer's proposal was rejected by a vote of 431 to 399. Mr. Sullivan so advised Mr. Ritchie by letter on March 21, 1979.

Subsequently, Mr. Sullivan was advised of the two money items which his members felt would remove the stumbling blocks to ratification. During the first week of April 1979, Mr. Sullivan obtained Mr. Ritchie's verbal agreement to certain changes in the proposed contract. Mr. Sullivan informed Mr. Ritchie that if his offers were made in writing they would be accepted.

On April 9, NAGE filed the instant petition, accompanied by a showing of interest which the Commission informed NAGE was insufficient. On April 11, the Employer offered a revised proposal to Local 254. The communication letter from Mr. Ritchie to Mr. Sullivan contained the same total agreement offer language as that in the February 2 letter. Mr. Sullivan testified that, when he received Mr. Ritchie's letter, he signed "Accepted for Local 254--Edward Sullivan--Bus. Mgr." under Mr. Ritchie's signature and placed the letter in his out box, from which, in the ordinary course of business, it would be removed and filed. Mr. Sullivan testified that he signed the document for the sake of being able to answer questions from the legislative body considering the judiciary's budget. He said he did not sign for Mr. Ritchie's purposes, and no written or oral acceptance of any sort was tendered to the Employer until the events of April 25, 1979 to be described below.

On April 12, 1979, NAGE completed the filing of its petition with the Commission. Between April 11 and April 25, a mail ballot vote on the contract was conducted by Local 254. The vote was overwhelmingly for acceptance. After the vote count on April 25, the contract was dated and signed by Messrs. Ritchie and Sullivan in the presence of a witness. The agreement covers the period July 1, 1978 to June 30, 1981. Section 26.01 reads:

> This Agreement, upon ratification, constitutes the complete and entire Agreement between the parties and concludes collective bargaining for its term. No amendment to this Agreement shall be effective unless in writing, ratified, and executed by the parties.

On May 1, Mr. Sullivan wrote the following letter to Mr. Ritchie:

> This will advise you that as a result of a ballot conducted among Court Officers and Probation Officers, the revised proposal of Chief Justice Arthur Mason has been submitted to a mail ballot. The Committee met on Wednesday, April 25, 1979, at 12:00 Noon and has received and tabulated the ballots which indicate as follows:

Total Ballots Cast	875
To Accept the Agreement	530
To Reject the Agreement	250
Challenges	92
Defaced	3

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> Therefore, a majority of the bargaining unit have voted in the affirmative. The contract is accepted.

The only differences between the agreement rejected in March and the one ratified in April are the two improved money items which the employees sought after the initial rejection.

Opinion

Absent a bar, the Commission is directed by the Law to conduct an election in the court and probation officer unit sought by NAGE. G.L. c.150E, sec.4. The Law provides, as do the Commission's Rules and Regulations, that no election shall be directed in a unit during the year after a union's certification or during the life of a valid collective bargaining agreement.[6] G.L. c.150E, sec.4; 402 CMR 14.06. Both the Employer and Local 254 contend that NAGE's petition should be dismissed under both the contract and certification bar doctrines. NAGE disagrees.

Relevant dates in terms of a structure for the facts and the parties' arguments are as follows:

February 22, 1978	:	Certification of SEIU
March 16	:	Bargaining begins
April 20-June 2	:	Processing of unfair labor practice charge
July 1	:	Employer changes
August 11	:	Chief Justice Mason assumes office
February 2, 1979	:	First complete offer package
February 22	:	Certification year expires
March 21	:	Offer rejected
April 11	:	Second offer, action by Mr. Sullivan
April 12	:	NAGE's petition filed
April 25	:	Contract executed after ratification vote

The parties raise two types of arguments. The first relates to the technical application of the bar rules; the second goes to the proper exercise of our discretion in applying the rules even if they would not otherwise be appropriate.

Technical Application of the Rules[7]

Certification Bar

During the twelve-month period following its certification, a union is insulated from challenges by rival organizations. Local 254's certification year

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[6] No contract may, however, bar an election for more than three years. MLRC Rules and Regulations, 402 CMR 14.06(1).

[7] The Employer concedes that a technical application of the bar rules leads to the conclusion that neither bar applies on these facts. Its arguments focus on discretionary application and will be discussed below.

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began February 22, 1978 and ended a year later. On April 12, 1979, approximately seven weeks after the end of SEIU's certification year, NAGE filed its petition with the Commission.[8] Under a strict application of the certification bar rule, NAGE's petition is not barred since Local 254's insulated period was over.

Contract Bar

Local 254 contends that it had a valid collective bargaining agreement with the Employer on April 11, 1979 which barred NAGE's April 12 petition. It argues that Messrs. Sullivan and Ritchie had an oral agreement as to terms during the first week of April, and simply reduced their oral contract to writing on April 11 when Mr. Sullivan signed his name on the bottom of the Employer's offer letter. SEIU argues that no formal document is necessary, and that the only requirement for a valid contract is that it be in writing and signed. NAGE's position is that there was no contract on April 11 since Mr. Sullivan did not communicate acceptance of the Employer's offer until April 25, thirteen days after NAGE's petition was filed. NAGE further argues that there can be no bar without a formal agreement signed by both parties, and that ratification by Local 254's membership was a condition precedent to the formation of a contract legally adequate to act as a bar.

While the technical rules of contract do not always govern labor agreements, certain black letter law principles are applicable to this case. First is that without acceptance of an offer there can be no contract. A private act of assent which is not communicated to the offeror is not a legally sufficient acceptance. Williston on Contracts, Third Edition, section 70. In this case, there was an

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[8] There appears to be some dispute in this case as to the operative date of NAGE's petition. Section 14.05 of our Rules and Regulations states that no petition shall be "entertained" unless accompanied by a 30% showing of interest in the unit sought. The rule further provides that a petitioner shall have seven days to complete an otherwise inadequate showing of interest. Failure to do so results in dismissal of the petition absent extraordinary circumstances. The allowance of the seven-day period does not increase the time period for timely filing under contract bar rules. 402 CMR 14.05 and 14.06(1).

Applying these principles to the facts here, we find that NAGE's April 9, 1979 petition was accompanied by an inadequate showing of interest. The deficiency was corrected on April 12. On April 11, there occurred a series of events which Local 254 alleges barred the April 12 petition. NAGE contends that the operative filing date is April 9 and that its later-completed showing of interest relates back to the date the petition was submitted on April 9.

The operative date of filing of the petition is clearly April 12, 1979. Date of filing becomes significant only when questions of contract and certification bars arise, as they do in this case. Where timeliness of filing is an issue, there can be no concept of a showing of interest "relating back" to date of submission of a piece of paper making a bare claim of representation. A petition will not be deemed "filed" until it is accompanied by the showing of interest required under our rules as adequate proof that the petition raises a substantial question of representation.

offer letter signed by Mr. Ritchie on April 11. Mr. Sullivan testified that he wrote "Accepted for Local 254--Edward P. Sullivan--Bus. Mgr." underneath Mr. Ritchie's signature on the offer letter. Mr. Sullivan's notation was not dated and the letter was placed in his out box for filing or use in the legislature. No acceptance was communicated to Mr. Ritchie or the Employer until April 25 when, after tabulation of the ratification vote, Messrs. Ritchie and Sullivan dated and signed the contract in the presence of a witness. We find that Mr. Sullivan's private "acceptance" was insufficient to form a legally adequate contract as of April 11.

The events of April 11 also fail to meet the requirement that a contract will not be found to be a bar unless it has been signed and executed by all the parties before a petition is filed. Appalachian Shale Products Co., 121 NLRB 1160, 42 LRRM 1506 (1958); Nashoba Valley Technical High School District, 4 MLC 1589 (H.O., 1977). SEIU argues that a formal document is unnecessary for a valid contract. As a general proposition, that statement may be correct, and there are many cases where the National Labor Relations Board (Board or NLRB) has found the existence of a valid contract in documents other than the conventional bound collective bargaining agreement. See, e.g., Bemis Bros. Bag Co., 97 NLRB No.1, 29 LRRM 1049 (1951) (initialed marginal modifications to expired contract); Bendix Corp., 210 NLRB 1026, 86 LRRM 1547 (1974) (serial memoranda); Georgia Purchasing, 230 NLRB No.183, 95 LRRM 1469 (1977) (telegrams). Since the essence of contract is bilateral agreement, however, the finding of a legally adequate contract in all cases rests on an exchange of signed offers and acceptance. Without belaboring arcane points of contract law, it is clear that there can be no finding of a legally adequate signing or execution of a contract in Mr. Sullivan's actions of April 11. A unilateral signing conducted in private with no communication of acceptance to the other side is not a legally adequate signing or execution within the meaning of the Appalachian Shale rule. As Mr. Sullivan frankly testified, his signature on April 11 was for purposes other than the Employer's concern of concluding a collective bargaining agreement. No legally adequate signing or execution occurred until April 25.

Finally, NAGE must also prevail on the argument that ratification was a condition precedent to the formation of a contract adequate to act as a bar. Since the ratification process did not conclude until April 25, the argument goes, there could be no contract before the April 25 document. The general rule is that where an express contractual provision requires ratification as a condition precedent to contractual validity, a contract cannot be a bar unless it is ratified prior to the filing of a petition. Appalachian Shale Products, supra; City of Somerville, 2 MLC 1335 (1976). In this case, the parties' agreement in section 26.01 states that the agreement "upon ratification" constitutes the complete and entire agreement between the parties and concludes collective bargaining for its term. (Emphasis supplied). We find that prior ratification was required by an express contractual provision.[9] No ratification having occurred

[9]We need not decide in this case whether we would adopt the Board's approach that prior ratification is unnecessary in the absence of an express contractual provision. Appalachian Shale, supra. Were we to adopt, for instance, a "course of dealings or conduct" approach here, however, the facts would lead us to the same

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until April 25, the April 11 document cannot serve as a contract bar.

Thus, technical application of the bar rules to the facts of this case leads to the conclusion that there is no impediment to NAGE's petition. Both SEIU and the Employer urge us, however, to use our discretion to find that unique circumstances justify the application of the bar rules.

Discretionary Application of the Bar Doctrine

NAGE's position is that no bar exists, and there are no special circumstances which should lead us to create one. Local 254 and the Employer contend that the unique facts of this case mandate an extension of the certification year. The Employer would have us begin the year with the appointment of Chief Justice Mason on August 11, 1978 and end it on August 11, 1979. Under that approach, NAGE's April 12, 1979 petition is barred. Both SEIU and the Chief Administrative Justice would also have us find that the April 25, 1979 agreement should be found to be a contract bar.

We have previously held, and now affirm, that execution of a contract within the certification year precludes reliance by the parties on the certification to bar petitions whose timeliness would otherwise be tested by contract bar rules. City of Gardner, 1 MLC 1115 (1974). On April 25, 1979, the Employer and Local 254 executed a valid collective bargaining agreement. Thus, any extension of the certification year would not go beyond the fruition of the parties' bargaining on April 25. Regardless of whether April 25 or August 11 is the relevant date, however, SEIU and the Employer's arguments for discretionary application of the bar rules apply equally, since their focus is to find a bar to the April 12 petition. Since the justifications offered for the application of both bars are substantially the same, they will be discussed together.

In the view of Local 254 and the Employer, the comprehensive revamping of the court system mandated by reorganization legislation had a significant impact on matters germane to collective bargaining. Relevant budget, personnel, and policy-

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[9] (footnote continued from preceding page)
conclusion we reach above. There was a prior ratification vote which led to rejection of the Employer's first complete offer. After that time, the parties conducted further negotiations, and Local 254 bargained the two money concessions its business manager had been told were necessary to obtain ratification. The contract was put to a vote again, some two weeks after NAGE's petition was filed. It defies common sense and labor relations experience to believe that ratification was gratuitous at a time when Local 254's representative status had been called into question.

Local 254 argues that ratification was not really required but was done merely because it was necessary to obtain an agency fee under G.L. c.150E, sec.12. The argument supports the conclusion that prior ratification was required since, on its face, it concedes the necessity of ratification. Additionally, the motivation behind a ratification requirement is immaterial to the issue of wether ratification was necessary.

making functions were centralized in the Chief Administrative Justice. Information necessary for bargaining was difficult, if not impossible, to obtain from the counties in the spring of 1978. The Employer changed, and new staff appointments had to be made. Policies had to be examined and modified where necessary, a process which continues today. Local 254 further contends that we should infer that it was unlikely Chief Justice Hennessey would make collective bargaining decisions which would bind his successor, Chief Justice Mason. Meaningful bargaining could not be conducted between July 1 and August 11 when there was no employer and no bargaining occurred between April 20 and June 2 when Local 254's charge was being processed by the Commission. Both parties argue that mechanical application of the bar rules would lead to an unfair and inequitable result since circumstances beyond the parties' control deprived them of a significant period of bargaining. Local 254 also alleges that the overwhelming ratification vote of April 25 clearly indicates that there is no employee dissatisfaction and expresses employee wishes that the April 25 contract be enforced. Finally, SEIU argues thatthe financial realities of the state budgetary process will lead to the employees' loss of their retroactive pay if NAGE's petition is not dismissed since it is impossible to hold an election within the current fiscal year; such a situation would not be equitable.

The certification and contract bars have as their purpose the establishment and continuation of productive, stable labor relations without the uncertainty and disruption caused by organizational rivalries, employer attempts to evade duly elected employee representatives, and instability of agreements. Superior Electric Products Co., 6 NLRB 19, 2 LRRM 105 (1938); City of Worcester, 1 MLC 1069 (1974); Essex County, 4 MLC 1147, 1150 (H.O., 1977). The certification bar allows a union one year in which neither an employer nor a rival union may attack its representative status. NLRB v. Brooks, 32 LRRM 2119 (9th Cir. 1953). For the sake of giving the bargaining relationship a chance to succeed, the statutory right of employees to select their representatives is restricted. A similar rationale favoring labor stability justifies the loss of otherwise scrupulously guarded employee freedom of choice when a valid contract bars an election. Both we and the Board believe that bar policies should rest on the fundamental premise that the postponement of employee free choice can be justified only if the statutory purpose of encouraging and protecting stable bargaining relationships will be significantly served. Ludlow Typograph Co., 108 NLRB No.209, 34 LRRM 1249 (1954); City of Gardner, supra. We are very reluctant to extend the bar doctrine beyond what is essential in those rare cases where extension is warranted. The parties' arguments for discretionary application of a bar in this case fall into essentially three categories: impossibility or frustration of bargaining by events outside the parties' control; equity; and reasonableness of the bargaining period.

There have been two lines of cases relating to frustration of the bargaining process of a magnitude sufficient to justify an extension of the certification year or waiver of normal contract bar rules. First is the situation in which national emergencies beyond the parties' control led to government policies antithetical to free collective bargaining. During World War II, the government established the War Labor Board to adjudicate contract disputes in lieu of strikes. During this period, the NLRB held that, where contractual issues were submitted to the War Labor Board and unavoidable delays occurred before a decision issued, the certified union should be given a reasonable period of time in which to consummate a contract, despite expiration of the certification year and the

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filing of a rival petition. The Board's rationale was that unions should not be penalized for voluntarily surrendering their right to strike and letting government set the terms of their contracts. Allis-Chalmers Manufacturing Co., 50 NLRB No.44, 12 LRRM 347 (1943). In 1971, President Nixon announced a wage and price freeze for 90 days. In recognition of the effect of this so-called Phase I program on collective bargaining, the NLRB suspended its ordinary contract bar rules. Thus, where a 60-day "insulated period"[10] fell within Phase I, the Board dismissed otherwise timely petitions even though a prior contract had ended and no new agreement had been reached. Its theory was that the absence of wage and price guidelines during this period created an uncertainty which precluded parties from bargaining intelligently. All parties could know was that a freeze would be in effect and future government rules would supercede whatever agreements they might reach. See, e.g., West India Manufacturing and Service Co., Inc., 195 NLRB No.203, 79 LRRM 1619 (1972).

The second line of cases justifying otherwise inapplicable bar rules are those situations in which employer misconduct causes a frustration of the bargaining process. The Board has founded these cases on a continuum of employer misconduct which ranges from violation of an agreement settling an unfair labor practice to unitary refusals to bargain to massive and diverse violations of the collective bargaining obligation. Gebhardt-Vogel Tanning Co., 154 NLRB No.68, 60 LRRM 1037 (1965); Mar-Jac Poultry Co., 136 NLRB No.73, 49 LRRM 1854 (1962); J.P. Stevens Co., Inc., 239 NLRB No.95, 100 LRRM 1052 (1978). In these cases, the Board has extended the certification year, held that a rival petition was barred, and given the union a sufficient amount of time to compensate it for the loss of bargaining time caused by the employer.

Although they do not say so in exactly these terms, Local 254 and the Employer are raising frustration of the bargaining process along the two lines noted above. Their position would appear to be that court reorganization was, on the facts of this case, analogous to situations where bargaining became impossible. The Employer contends that it was blameless in whatever frustration of the process occurred; SEIU agrees but advances the employer fault line of cases by extension. Its position is that it should receive "compensatory time" along the lines of a Mar-Jac Poultry remedy for the period it "lost" while its unfair labor practice was being processed and dismissed by the Commission.

The parties' arguments cannot succeed here. As to the Mar-Jac contention, both we and the fact-finder found that the Employer was blameless for whatever frustration of the bargaining process occurred in this case. Given the absence of other charges against the Employer during the period in question, we can only assume that it fulfilled its bargaining and other obligations throughout. Such a situation removes the underpinnings of the Mar-Jac rationale, which is that an employer will not be allowed to profit from its failure to carry out its statutory

[10]The term refers to that period toward the end of the life of a contract when the parties are "insulated" from representation challenges so that they will have the fullest possible opportunity to arrive at a new agreement. Under Commission Rules and Regulations, the period is 150 days. 402 CMR 14.06.

obligations. We will not stretch Mar-Jac to find that a union may extend its certification year insulation by filing an insubstantial bad faith bargaining charge with the Commission and then not bargaining while the charge is pending. It also cannot be seriously advanced that an impossibility analogous to the War Labor Board or Phase I cases exists when a refusal to bargain charge is filed with the Commission. Nothing in our processes prevents a union from continuing its attempts to reach agreement.

The far more difficult issue is the one which is the crux of this case, i.e., on this record, did court reorganization so severely frustrate the bargaining process that we should not apply the contract or certification bars to preclude NAGE's petition? With recognition of the fact that we cannot permit hard cases to make bad bar law, we find that no extension of technical bar doctrines is warranted.

This was a first contract for a large and diverse employee group. Between March 16 and July 1, 1978, the parties held ten bargaining sessions. During July and August of 1978, Local 254 reported to its membership that negotiations were progressing. Although Mr. Sullivan did not feel that negotiations were sufficiently substantive, even he does not contest that proposals and counter-proposals were being exchanged throughout the summer. An examination of the long and complex April 25, 1979 collective bargaining agreement introduced into evidence reveals a large number of articles which would require extensive discussions on language. By even Local 254's standards, serious negotiations were in progress in September of 1978, and agreements were being arrived at in December, despite the fact that key staff appointments were not made until January and February of 1979. Between July 1, 1978 and February 2, 1979, twenty-nine bargaining sessions were held, bringing the total number of sessions to thirty-nine over approximately an eleven-month period. During a ratification vote in March 1979, the Employer's offer of February 2, 1979 was rejected 52-48% because two money items the employees wanted had not been obtained. When those concessions materialized in April, the contract was ratified. Throughout the entire period, Mr. Ritchie headed the management bargaining team as the representative of whatever official was the statutory judicial employer. Local 254 had full opportunity to negotiate all matters it wished to discuss.

On these facts, we cannot find that court reorganization led to a massive frustration of the bargaining process. While we have no hesitation in finding that the reorganization made bargaining more difficult during the Spring of 1978, we cannot paint the difficulty with the broad brush the parties would have us use. Thirty-nine bargaining sessions were held within the certification year, and it was not proved that the ten which occurred during the stewardship of Chief Justice Hennessey were wasted. Meeting Local 254's arguments directly, we are also unwilling, absent proof, to infer that the change in employers produced a critical disruption in bargaining philosophy or policy, particularly where the head of the management bargaining team, Mr. Ritchie, remained the same throughout the entire course of bargaining. It might be more reasonable, absent proof, for us to infer that Justice Mason and Supreme Judicial Court Chief Justice Hennessey shared a uniform bargaining philosophy since Chief Justice Mason was appointed by the

Chief Administrative Justice of the Trial Court and NAGE and Local 254, SEIU, 6 MLC 1195

Supreme Judicial Court.[11] Further, the absence of key employees cannot have been critical since agreements were being reached several months before their appointment. Most compelling is the fact that the parties ultimately achieved an agreement on the Employer's February 2, 1979 offer, plus two items. Had a small percentage of the employees not voted to reject the Employer's February 2 original offer, the contract would have been ratified weeks before NAGE's petition was filed. Finally, we do not know why there was no vote on the original offer until more than a month after it was made. Whatever the grounds for that lapsed period of time, the parties have not indicated that they related to frustration of the bargaining process.

Several other principles must also be noted in connection with the frustration argument. First is that it is two-part. As a threshold matter, it must be found that there was frustration or impossibility sufficient to warrant consideration of otherwise inapplicable bar rules. Bowling Green Foods, 196 NLRB No.111, 80 LRRM 1101 (1962) (petition filed six weeks after the end of Phase I when only the union had signed a new contract; Phase I impossibility argument rejected). Additionally, the facts cannot indicate that the parties were unharmed by time lost since they had an otherwise adequate opportunity to bargain. City of Gardner, supra; Southern Manufacturing Co., 144 NLRB No.73, 54 LRRM 1118 (1963); Jack L. Williams, D.D.S., 231 NLRB No.144, 97 LRRM 1532 (1977). Finally, exceptions to otherwise applicable bar rules will be very strictly applied and parties will receive only the amount of time absolutely necessary to make them whole for time lost. See, West India, supra (60-day insulated period lost; 60 days given); J.P. Stevens, supra (an extra year awarded only after a finding that the company's illegal conduct had prevented bargaining for the entire certification year).

Applying the principles above to this case, we find that, although bargaining in the early stages of Local 254 and the Employer's relationship was certainly beclouded by court reorganization, it did not suffer impediments fatal to or overwhelmingly disruptive of the bargaining process. It is clear on this record that whatever disruption existed was cured by a later course of protracted and successful bargaining. Additionally, NAGE's petition was not filed until seven weeks after the end of SEIU's certification year. Thus, the parties to the contract have already received an extra seven weeks to compensate them for whatever disruption occurred during the early stages of bargaining.

The other two categories of arguments raised by Local 254 and the Employer go to equity and reasonableness in this case. First is SEIU's contention that there was an overwhelmingly favorable ratification vote in April, thus indicating a lack of employee dissatisfaction and an equitable interest in enforcement of the contract. Local 254 contends that if we do not find a contract bar or extend the certification year until the date of contract execution the employees will lose their contractual retroactive pay. The rationale is that NAGE's petition must be dismissed because it is impossible to hold an election prior to the end of the current fiscal year, at which time the retroactive pay money will revert to the General Fund. Both the Employer and Local 254 argue further that parties should be allowed a "reasonable" time to achieve a stable relationship, and the circum-

[11] See Section 110 of Chapter 478 of the Acts of 1978.

stances of this case deprived them of that reasonable period. The argument is essentially that raised in the early period under the Wagner Act before the one-year certification bar rule was solidified. See Brooks v. NLRB, supra.

We will be blunt in dealing with these arguments. The Law guarantees that collective bargaining relationships in the public sector will be established and protected within limits. These protections were never meant to guarantee unions or employers a legal right to achieve with ease exactly what they want on their own terms and at their own time, but such is the result which would obtain under the Employer's and SEIU's argument for a "reasonable" time to achieve an agreement. Under their interpretation, every case would have to be examined in its unique facts, and the certainty and predictability achieved by the contract and certification bar rules would be lost, as would employee freedom of choice to select new bargaining representatives. This is a hard case, but not because of the equity and reasonableness arguments offered. Every teacher, firefighter, and tree trimmer in this Commonwealth who pays even minimal attention to the bargaining which controls her/his working life knows that there are budgetary deadlines which are a, if not the, central fact of public sector bargaining. When employees choose to reject a contract because they want more money they do so in light of existing circumstances and those which are foreseeable. The same choice is made when a legally sufficient number of employees petition the Commission to conduct an election for a new union.

Thus, we find nothing in the facts of this case or in the arguments which compel us to apply otherwise inapplicable contract or certification bars and dismiss NAGE's petition. We feel constrained to state, however, that it is crystal clear on this record that a massive amount of time, energy, work, and money have been expended by both this Employer and Local 254 in attempting to achieve and protect their agreement under difficult circumstances. It is this fact which makes this case hard--but not unique in the public sector. However, a substantial question of representation has been raised in a unit which will have no election between February, 1978 and summer of 1981 if bar rules are applied. Despite the harsh realities of public sector collective bargaining, it is the statutory election procedures and not a twisting of the contract and certification bars which must be the avenue for resolving the issues raised by NAGE's petition.

WHEREFORE, upon all of the evidence and the record as a whole, the Commission finds:

1. That a question has arisen concerning the representation of certain employees of the Commonwealth.

2. That the unit appropriate for collective bargaining shall INCLUDE:

   All regular full-time probation officers, court officers and deputy sheriffs, duly assigned as court officers, who perform court officer duties on a regular basis for more than 50% of their regular workweek. Also included are all employees who work less than full-time, but not less than fifteen (15) hours per week, and are either a probation officer, court

officer, or deputy sheriff, duly assigned as court officers, who perform court officer duties on a regular basis for more than 50% of their regular workweek.

EXCLUDED are all confidential and managerial employees as defined in the Act, all court officers in Middlesex and Suffolk Superior Courts, and all other employees of the Commonwealth or its counties.

3. That an election by secret ballot shall be conducted by the Commission to determine whether a majority of the employees in the unit described above desire to be represented for purposes of collective bargaining by Local 254, Service Employees International Union, AFL-CIO, or by the National Association of Government Employees, or by no employee organization. The election shall be conducted at such times and places and under such conditions as shall be specified in a Notice of Election to issue following this Decision and Direction of Election.

4. The eligible voters shall include all those persons within the above-described unit whose names appear on the payroll of the Employer on June 15, 1979, and who have not since quit or been discharged for cause.

Direction of Election

By virtue of and pursuant to the power vested in the Commission by Chapter 150E of the General Laws, IT IS HEREBY DIRECTED, as part of the investigation authorized by the Commission, that an election by secret ballot shall be conducted under the direction and supervision of representatives of the Commission among the employees in the aforesaid bargaining unit at such time and place and under such conditions as shall be contained in the notice of election issued by the Commission, served on all parties, and posted on the premises of the Employer, together with copies of the specimen ballot.

In order to assure that all eligible voters shall have the opportunity to be informed of the issues and the exercise 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 DIRECTED that five (5) copies of an election eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, on Monday, July 9, 1979.

The Executive Secretary shall make the list available to all the 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 filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting

aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JAMES S. COOPER, Chairman
GARRY J. WOOTERS, Commissioner
JOAN G. DOLAN, Commissioner