BOSTON WATER AND SEWER COMMISSION AND UNITED WATER AND SEWER EMPLOYEES AND AFSCME, COUNCIL 93 AND SEIU, LOCAL 285, MCR-2824 (11/19/79). Decision on Appeal of Hearing Officer's Decision.

(20 Jurisdiction)
23. Contract Bar
(40 Selection of Employee Representative)
45.1 contract bar
42.4 schism
46.3 parties in interest (intervention)
(70 Union Administration and Prohibited Practice)
72.3 agency service fee
(90 Commission Practice and Procedure)
92.47 motion to dismiss
92.51 appeals to full commission

Commissioners participating:

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

Appearances:

Robert E. Holland, Esq.	- Counsel for the Boston Water and Sewer Commission
Joseph G. Sandulli, Esq.	- Counsel for United Water and Sewer Employees
Augustus J. Camelio, Esq.	- Counsel for American Federation of State, County and Municipal employees, Council 93, AFL-CIO
Robert Manning, Esq.	- Counsel for Local 285, Service Employees International Union

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On April 23, 1979, Hearing Officer James M. Litton issued his Decision in the above-captioned matter pursuant to the Expedited Hearing procedure of Section 11 of c.150E (the Law).[1] Hearing Officer Litton dismissed the representation petition filed by the United Water and Sewer Employees (Petitioner). The Petitioner filed a timely appeal of the hearing officer's decision pursuant to MLRC Rules 402 CMR 13.13.[2] The hearing officer filed his

[1] 5 MLC 1870 (H.O. 1979).

[2] Petitioner requested an opportunity to argue orally to the full Commission. This request is denied.

statement of the case with the Commission and the parties.

Opinion

Historically, the water and sewer systems of the City of Boston (City) were run by the water and sewer divisions of the City's Department of Public Works (DPW). DPW employees were employees of the City. In July, 1977, the Massachusetts Legislature enacted the Boston Water and Sewer Reorganization Act of 1977[3] (the Reorganization Act). The Reorganization Act created the Boston Water and Sewer Commission (BWSC), which is independent of the City. The statute further specified that the BWSC would be the employer of BWSC employees for the purpose of collective bargaining; that water and sewer division employees previously working for the City of Boston would become BWSC employees; and that collective bargaining agreements which had covered those individuals as City of Boston employees would remain in full force and effect when they became BWSC employees. The statute did not, however, define bargaining units for the BWSC.

As City of Boston employees, the water and sewer division workers were represented by the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (AFSCME) or by the Service Employees International Union, Local 285 (SEIU). Both AFSCME and SEIU had collective bargaining agreements covering these employees with the City. Those agreements expire on June 30, 1980.

Effective January 1, 1978, the water and sewer divisions in the City DPW were abolished. Employees of those divisions whose work was primarily related to the water works system or the sewerage works were transferred to the BWSC. On November 28, 1978, the United Water and Sewer Employees filed a petition with the Commission seeking certification as the exclusive representative of the BWSC employees. Both AFSCME and SEIU claimed that their agreements expiring June 30, 1980 barred the petition. The hearing officer found a contract bar and dismissed the petition. He also rejected the Petitioner's argument that the AFSCME and SEIU contracts could not bar a petition because they contain an illegal agency service fee.

Under Section 4 of G.L. c.150E, no election may be directed in an appropriate bargaining unit for which a valid collective bargaining agreement is in effect. Section 14.06 of the Commission's Rules and Regulations provides for an "open period" during which a competing labor organization may file a representation petition for a unit covered by a rival's collective bargaining agreement. The regulation states that a petition will be timely if filed no more than one hundred and eighty (180) and no fewer than one hundred and fifty (150) days prior to the termination date of the agreement. If not filed during the thirty-day period specified by 402 CMR 14.06, a petition will be dismissed as untimely. Thus, the contract bar rule has several elements, two of which are timeliness considerations and the requirement that, in order for a contract to be a bar, it must cover an appropriate

[3]Chapter 436 of the Acts of 1977.

unit. It is the latter component which is the focus of litigation here.

The contract bar rule has as its purpose 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). It guarantees that stable bargaining relationships and the contracts which are their result will not be subject to disruption in the form of representation challenges by rival employee organizations, with the exception of the thirty-day period during which such challenges are timely.

In this case, the AFSCME and SEIU contracts covering BWSC employees expire June 30, 1980. Thus, the "open period" is the month of January 1980. In the ordinary course of events, the United Water and Sewer Employees' petition filed November 28, 1978 would be untimely filed and should be dismissed. Petitioners contended before the hearing officer, and argue again on appeal, however, that there is no contract bar since the contracts in issue cover inappropriate units. Under this theory, a representation petition may be filed by a rival organization at any time.

The United Water and Sewer Employees argue in this appeal that the bargaining units covered by the contracts in this case are inappropriate in that they are city-wide units of Boston employees. Additionally, it is contended that the legislature defined a new bargaining unit of BWSC employees by defining the BWSC as the new employer of Boston water and sewer employees. As precedent for its position, Petitioner relies on Commonwealth of Massachusetts, Chief Justice, Supreme Judicial Court, 4 MLC 1503 (1977) (court and probation officers) and Commonwealth of Massachusetts, Commissioner of Administration and Finance, 4 MLC 1830 (1978) (MDC police).

The court and probation officers' case arose out of court reorganization legislation. Middlesex and Suffolk County court officers had been in bargaining units covered by contracts with their respective counties. The court reorganization statute specifically created a new state-wide unit of court employees. It was silent on the status of the old county contracts. We held that the county contracts did not bar an election in the state-wide unit in light of the legislation changing the employer and creating a new appropriate bargaining unit of state-wide judicial employees. Commonwealth of Massachusetts, Chief Justice, Supreme Judicial Court, supra at 1505.

In the MDC police case, the legislature passed a statute which removed the MDC police from state-wide Unit 5 and placed them in a separate bargaining unit. At the time, there was a contract covering all Unit 5 employees which still had several years to run. Governor Dukakis' recommendation that the Unit 5 contract continue to cover the new MDC unit was rejected by the legislature. We held that the Unit 5 contract did not bar an election in the new MDC unit in light of the clear legislative mandate that MDC police be allowed to bargain a new contract. Commonwealth of Massachusetts, Commissioner of Administration and Finance, supra at 1832.

Thus, in the two cases relied on by Petitioner, the legislature defined new appropriate bargaining units by statute, thus rendering the prior bargaining

relationships legally and practically dysfunctional as a matter of law. In the case before us, there is no such legislative mandate. Here, the employer was changed and there was a specific transitional provision continuing the old City of Boston contracts in effect. No BWSC bargaining unit (or units) was created in the law, and none will be implied from the mere statutory re-definition of the employer of these employees.

In the absence of a legislative override of the Commission's usual authority to apply contract bar principles, we are free to exercise our discretion in light of the bar's purposes. The requirement that a contract cover an appropriate unit in order to serve as a bar does not mean that in contract bar cases we will test appropriateness of the unit by community of interest standards used in initial litigation to determine bargaining units. Petitioner's argument that the city-wide Boston unit is inappropriate would have us look at that unit afresh and conduct an examination of whether it is appropriate judged by the standards we would use initially to determine whether it is appropriate under the community of interest test. Theoretically, the presence in the unit of a single inappropriate employee would lead to a finding that the unit is inappropriate, the contract cannot serve as a bar, and a new petition is timely at any point. Under this approach, units would be in a constant state of dispute, bargaining relationships would have no stability, and contracts would always be subject to attack. Such a result is, of course, antithetical to the purposes of the contract bar rule.

In other contexts, both we and the National Labor Relations Board have stated that exceptions to the contract bar rule will rarely be found, and, in general, require evidence of substantial disruption in bargaining relationships and threats to labor stability. City of Worcester, 1 MLC 1069 (1974); City of Salem, 1 MLC 1172 (1974); Hershey Chocolate Corporation, 121 NLRB 901 (1958) (schism and defunctness). In this case there is no evidence or offer of proof indicating that there is a degree of legal or practical dysfunction analogous to the court and probation officer, MDC police, or schism and defunctness cases. Nothing in the existing unit structure precludes the BWSC from honoring its contractual obligations under the Reorganization Act or from fulfilling its bargaining obligations under G.L. c.150E. Under these circumstances we decline to find an exception to the contract bar doctrine.

The Petitioner also alleges that the AFSCME and SEIU contracts should not bar an election because they were improperly ratified and therefore contain illegal agency service fee provisions. In Southeastern Massachusetts University, 5 MLC 1245 (1978), we concluded that "if we are to consider an illegal union security provision good cause for setting aside the contract as a bar, such illegality must be apparent on the face of the contract. 5 MLC at 1247. Petitioner argues that this rule ought not be applied, contending that the BWSC employees have no other means to attack the illegality of the fee. Such is not the case, however. The hearing officer correctly found that the agency fee provisions of

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Section 12 of the Law apply to these employees.[4] There is no reason to depart from the Southeastern rule. Since the agency service fee clause is not invalid on its face, Petitioner's argument fails.

CONCLUSION

In accordance with the foregoing, we hereby AFFIRM the hearing officer's decision and DISMISS the petition.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

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

[4]It must also be noted, however, that AFSCME's contract was executed on July 5, 1977 and SEIU's on September 29, 1977. The present petition was filed on November 28, 1978. Any argument that the agency service fee clause was invalid by virtue of improper ratification may well be time barred. 402 CMR 15.03. The expiration of a statute of limitations is not, however, grounds for altering the rule enunciated in Southeastern Massachusetts University, supra.