COMMONWEALTH OF MASSACHUSETTS AND MASSACHUSETTS HEALTH CARE PROFESSIONALS UNION AND MASSACHUSETTS NURSES ASSOCIATION, SCR-2155 (2/4/81).

(40 Selection of Employee Representative)
45.1 contract bar
45.42 open period
46.13 validity of authorization cards

Commissioners Participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Manuel S. Lato, Esq.	- Representing Commonwealth of Massachusetts
Kathryn M. Noonan, Esq.	- Representing Massachusetts Health Care Professionals Union
Alan J. McDonald, Esq.	- Massachusetts Nurses Association

DECISION AND ORDER

Statement of the Case

This case is before us as the result of a petition filed by the Massachusetts Health Care Professionals Union (MHCPU) on November 13, 1980 seeking a representation[1] election among certain employees of the Commonwealth of Massachusetts (Commonwealth). The Massachusetts Nurses ASsociation (MNA), which is the currently certified bargaining representative of Unit 7 employees, intervened in the matter, and the Commission investigated the petition pursuant to its authority under Section 4 of General Laws Chapter 150E (Law).

On November 26, 1980, MNA brought a Motion to Dismiss, stating that the petition was untimely inasmuch as, prior to the date on which it was filed, MNA and the Commonwealth had executed a collective bargaining agreement covering the period from July 1, 1980 through June 30, 1983. In accordance with the Commission's directive, the parties submitted briefs concerning the issue on or prior to December 5, 1980. MHCPU opposed the motion, arguing that the contract should not bar an election because ratification, a prerequisite to the agreement's validity, did not occur before the petition was filed. In support of its argument, MHCPU included with its brief copies of MNA by-laws and correspondence from MNA to unit members regarding a ratification vote. In response, MNA requested an evidentiary hearing on the matter.

On December 12, 1980, the Commission notified the parties that it had denied the Motion to Dismiss but would allow evidence concerning the contract bar issue at a hearing scheduled for December 16, 1980. That hearing, which Commission agent Robert B. McCormack conducted, reconvened on January 14, 1981. All parties to the proceedings

[1]The bargaining unit, known as Unit 7, comprises professional health care employees.

ad full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. MHCPU and MNA submitted supplemental briefs on January 21, 1981, and we have considered them along with the rest of the record. For the reasons set forth below, we hold that the agreement between MNA and the Commonwealth does not constitute a bar to a representation election, and we direct an election accordingly.[2]

Jurisdictional Findings

The Commonwealth, acting through the Commissioner of Administration and Finance, is the employer of health care employees within the meaning of Section 1 of the Law.

MHCPU and MNA are both employee organizations within the meaning of Section 1 of the Law.

Findings of Fact

The facts in this case are relatively straightforward.

On November 12, 1980, MNA and the Commonwealth isgned a collective bargaining agreement for Unit 7 employees which succeeded the contract in effect for the three-year period from July 1, 1977 through June 30, 1980. Article XXXIV of that agreement contains the following duration clause:

> This agreement shall be fore the three-year period from July 1, 1980 to June 30, 1983, and terms contained herein shall become effective on the date of its execution by the parties. Should a successor agreement not be executed by July 1, 1983, this agreement shall remain in full force and effect until a successor agreement is executed or an impasse in negotiations is reached. At the written request of either party, negotiations for subsequent agreement will be commenced on or after April 1, 1983. (emphasis added)

Article IV of the new agreement provides for the payment of an agency service fee by unit employees who are not MNA members, and Section 2 of that Article states the

[2]MNA challenged the petition on two additional grounds.

MNA asserted that MHCPU had engaged in fraudulent conduct while collecting the authorization cards necessary to establish a sufficient showing of interest under Commission Rules 402 CMR 14.05. The Commission's determination that a showing of interest is adequate is an administrative matter not subject to litigation. Commonwealth of Massachusetts (Chief Administrative Justice of the Trial Court), 6 MLC 1195. On the basis of our investigation we are satisfied that there is no cause to invalidate MHCPU's showing of interest.

MNA also raised questions about the precise scope of the bargaining unit. MNA sought to include three titles (Director of Nursing, Court Clinic Director, and Supervisor-Speech and Hearing). Prior to the hearing, the Commission decided that occupants of these titles would be allowed to vote in the election subject to challenge and subsequent determination of the appropriateness of their inclusion in Unit 7. MNA also raised the possibility that persons on 03 contracts with the Commonwealth and persons employed by private providers under contract to the Commonwealth ought to be included in Unit 7. MNA withdrew these issues on the second day of hearing.

following:

> This article shall not become operative as to employees in bargaining Unit 7 certified to the Association until this agreement has been formally executed, pursuant to a vote of a majority of all employees in the bargaining unit voting. (emphasis added)[3]

By letter dated November 11, 1980, Unit 7 President Ruth Lang Fitzgerald stated to unit members in relevant part:

> We urge you most strongly to ratify this contract. In the light of the recent passage of Proposition 2 1/2, and the fiscal uncertainty that will follow, there is no guarantee the Commonwealth will be in a position to offer such a financial package again. This is your contract, negotiated on your behalf and your support is vital. (emphasis added)

A summary of the new agreement was enclosed with the letter and described the following change in Article IV:

> Section 2 shall be amended to provide for the mail ratification of a contract by ballot. (emphasis added)

An official ballot which was also enclosed with the letter posed the option of whether "to accept the agreement reached between the Massachusetts Nurses Association and the Commonwealth of Massachusetts." Still another notice provided that "all Unit 7 employees...will be eligible to vote on contract ratification" and referred to a "proposed" agreement. (emphasis supplied throughout)

Article XII, Section 2, C.3 of MNA's by-laws states that:

> A state chapter shall select a collective bargaining committee whose functions will include...the negotiations of collective bargaining agreements on behalf of the Massachusetts Nurses Association and the state chapter with the Commonwealth of Massachusetts, and the administration of collective bargaining agreements after ratification of such agreements by the chapter membership.

Unit 7 by-laws in turn provide the following:

> The duties of the Executive Board shall be...to serve as the bargaining committee in the negotiation of collective bargaining agreements on behalf of the State Chapter subject to ratification by the membership of the State Chapter and in accordance with law. (emphasis again added in each instance.)

[3] In the prior contract, Article IV, Section 2 had required formal execution "pursuant to a vote of a majority of all employees in the bargaining unit present and voting." (emphasis supplied) The modification appears to have removed the requirement of a ratification meeting from the contract and authorized ratification by mail ballot.

Commonwealth of Massachusetts and Massachusetts Health Care Professionals Union and Massachusetts Nurses Association, 7 MLC 1825

As noted above, MHCPU filed its petition for an election with the Commission on November 13, 1980, the day after MNA and the Commonwealth reached a new contract. By letter dated November 25, 1980, Wolf & Company, an independent public accounting firm, certified that unit members had ratified the agreement by a vote of 1,108 to 333.

Positions of the Parties

MNA contends that the Commission should dismiss the representaiton petition in this case on the ground that the agreement which MNA reached with the Commonwealth on November 12, 1980 constitutes a valid bar to an election. In support of this contention, MNA points to the duration clause of the agreement as confirmation that the document came to life on November 12 when the parties signed it. MNA construes the language in Article IV, Section 2 of the new contract to mean merely that, before the payment of an agency service fee can be enforced, a majority of voting employees in the unit must ratify the agreement. Such language, MNA asserts, does not require ratification before the contract as a whole takes effect.

MNA maintains that, in any event, the Commission should adopt the rule enunciated by the National Labor Relations Board (Board) in Appalachian Shale Products, Co., 121 NLRB 1160, 42 LRRM 1506 (1958), and hold that unless a contract expressly calls for ratification, ratification will not be required as a condition precedent for the contract to constitute an election bar. Clearly, MNA argues, there is no such express provision in the agreement at issue.

MNA further contends that, even if the Commission were to consider extrinsic evidence and thereby determine that ratification is a prerequisite to the contract's implementation, the Commission should exercise its discretionary authority and hold the agreement to be a bar. Such a ruling, MNA claims, would clearly promote the policy favoring productive and stable labor relations.

Finally, MNA points to the language of Section 4 of the Law providing that "(e)xcept for good cause no election shall be directed by the Commission in an appropriate bargaining unit within which...a valid collective bargaining agreement is in effect." By such language, MNA argues, the General Court intended that the direction of an election, as opposed to the filing of a petition, be the operative act for determining if a contract bar exists. Thus, MNA reasons, at the time the Commission would otherwise direct an election it must examine whether a valid collective bargaining agreement is in effect. Since, as of November 25, 1980, the contract at issue here was both signed and ratified, the Commission may direct an electiononly for "good cause", and none exists.

In contradistinction, MHCPU contends that the provisions of Article IV, Section 2 of the new agreement expressly require ratification before the contract may become effective. Moreover, MHCPU asserts, the Appalachian Shale rule against looking beyond the four corners of an agreement for determining ratification requirements should not be rigidly applied to the public sector. Citing Merico, Inc., 207 NLRB 101, 84 LRRM 1395 (1973), MHCPU reasons that, whereas in the private sector a presumption exists that "ratification is a gratuitous process which union negotiators have imposed on themselves," the statutory scheme in the Commonwealth, which requires ratification of contracts containing agency fee provisions, warrants no such assumption. Accordingly,

Commonwealth of Massachusetts and Massachusetts Health Care Professionals Union and Massachusetts Nurses Association, 7 MLC 1825

MHCPU urges the Commission to consider the evidence extrinsic to the contract that was introduced at the hearing. On the basis of that evidence, MHCPU argues, the conclusion is inescapable that hte contract reached by MNA and the Commonwealth necessitates ratification before it can take effect. Since ratification did not occur until after MHCPU filed its representation petition, the contract is no bar to an election.

Analysis

As we have previously recognized, the purpose of the contract bar doctrine is the continuation of productive, stable labor relations without the uncertainty and disruption caused by organizational rivalries. As we also stated, at that time, however, the postponement of employee freedom of choice concerning the designation of a bargaining representative can be justified only if the statutory purpose of encouraging and protecting stable bargaining relationships will be significantly served. Commonwealth of Massachusetts (Chief Administrative Justice of the Trial Court), supra. In that case, we specifically reserved the question of whether to adopt the Board's approach in Appalachian Shale that prior ratification is -nnecessary to establish a contract bar in the absence of an express contractual provision so requiring. Because of the following considerations, we decline to apply the rule.

As justification for its approach, the Board states that looking beyond the express terms of a contract in order to determine if ratification is a prerequisite tends to result in protracted hearings involving conflicting testimony which must be resolved. Every effort should be made, the Board maintains, to eliminate litigation of actual issues in representation cases and to give greater weight to the language of the contract itself. Appalachian Shale Co., supra.

However, a fundamental premise to the contract bar doctrine's goal of maintaining stability in a bargaining relationship is the existence of stability in the first place. Where parties to a contract contemplate ratification as the final step in the bargaining process, such stability is necessarily absent until ratification has occurred. Westinghouse Electric Corp., 111 NLRB 497, 35 LRRM 1498 (1955).

We share the Board's concerns about protracted litigation in representation cases. Nonetheless, we believe that the proper balance to be struck between such concerns and the right of employees to freely select their bargaining representative lies closer to the preservation of the latter. Accordingly, if the agreement at issue is ambiguous regarding the precondition of ratification, we will examine certain extrinsic evidence in an attempt to resolve the ambiguity. This, we believe, will best serve to effectuate the fundamental policies of the Law.[4]

Turning to the terms of the agreement in question, we are unable to conclude that either Article XXXIV or Article IV unequivocally establishes whether ratification is a condition which must be satisfied before the contract can take effect. One reasonable construction of Article XXXIV is that the agreement took effect as soon as the parties affixed their signatures to it. An equally compelling construction of the language,

[4]We neednot now decide whether to reveiw extrinsic evidence where a contract is totally silent regarding the necessity of ratification.

however, is that the "execution" set forth in Article XXXIV is the same as the "formal execution" mentioned in Article IV, Section 2, which in turn requires "a vote of a majority of all employees in the bargaining unit voting." The latter approach conforms to the well-established principle t-at a writing is interpreted as a whole, and that all writings forming a part of the same transaction are interpreted together. Restatement, Contracts §235. Since neither interpretation of the contract advanced by MNA and MHCPU convinces us whether ratification is necessary before the document is effective, we will examine MNA's course of conduct as it bears on the question.

Our examination of that conduct, moreover, leaves absolutely no doubt that, before the agreement reached by MNA and the Commonwealth can take effect, ratification of the contract is essential. The correspondence from Unit 7 President Fitzgerald dictates such a conclusion. We are particularly mindful of the reference to a "proposed" agreement in MNA's notice describing the forthcoming ratification. Most significantly, neither MNA nor the Commonwealth called any witnesses to testify with respect to the conduct of those parties after they had signed the agreement. Had the contract actually taken effect on November 12, 1980, then presumably that fact would have been a simple matter to establish.[5]

The sole remaining matter for our consideration is whether, as MNA asserts, Section 4 of the Law precludes us from directing an election because the contract has now been signed and ratified, and no good cause exists to direct an election notwithstanding the existence of a "valid contract." Although the argument may have surface appeal, the statutory construction advanced by MNA dictates illogical and impractical results which militate against its adoption. Were we to so read Section 4, then in a situation where a competing union files a representation petition during the "open" period prior to the expiration of a valid contract between the incumbent and the employer, we would be precluded from directing an election except upon a showing of "good cause" until after the expiration of the contract. The additional language in Section 4 requiring the Commission by its rules to "provide an appropriate period prior to the expiration of such agreements when certification or decertification petitions may be filed" demonstrates that the General Court had no intent to limit us.

For all the above reasons, we hold that the agreement reached by MNA and the Commonwealth does not bar an election in this case, because ratification of that agreement is a condition precedent to its implementation, and such ratification occurred after MHCPU had filed a representation petition with the Commission.

Direction of Election

WHEREFORE, we conclude that a question has arisen concerning the representation of certain employees of the Commonwealth within the meaning of Section 4 of the Law.

The unit appropriate for the purposes of collective bargaining is Unit 7, Health Care and includes all employees in the classifications listed in Apprndix A.

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[5]Because these factors convince us that ratification is a precondition, it is unnecessary for us to decide whether we may properly take into account the substance of union by-laws.

Commonwealth of Massachusetts and Massachusetts Health Care Professionals Union and Massachusetts Nurses Association, 7 MLC 1825

IT IS HEREBY ORDERED that an election shall be held for the purposes of determining whether a majority of employees in the above-described unit desire to be represented by the Massachusetts Nurses Association, by the Massachusetts Health Care Professionals Union, or by no employee organization.

The eligible voters shall include all those persons within the above-described unit whose names appear on the payroll of the employer on January 30,1981 and who have not since quit or been discharged for cause.

In order to ensure that all eligible voters shall have the opportunity to be informed of the issues and 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 three (3) 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, not later than fourteen (14) days from the date of this decision.

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 the 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

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner