

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

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| Illinois Council of Police, |) | |
| |) | |
| Petitioner |) | |
| |) | |
| and |) | |
| |) | |
| County of Lake and Sheriff of Lake County, |) | Case No. S-RC-13-031 |
| |) | |
| Employer |) | |
| |) | |
| and |) | |
| |) | |
| Illinois Fraternal Order of Police |) | |
| Labor Council, |) | |
| |) | |
| Incumbent |) | |

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On January 7, 2013, Administrative Law Judge (ALJ) Martin Kehoe issued a Recommended Decision and Order (RDO) in the above-captioned case, recommending that, as a consequence of the filing of a majority interest representation petition filed by the Illinois Council of Police (Petitioner) pursuant to Section 9(a-5) of the Illinois Public Labor Relations Act, 5 ILCS 415 (2010), the Illinois Labor Relations Board, State Panel, order a secret ballot election among the members of a collective bargaining unit of employees of the County of Lake and Sheriff of Lake County (collectively, Employer). In making this recommendation, the ALJ rejected the suggestion of the Illinois Fraternal Order of Police Labor Council (Incumbent) that the “contract bar” rendered the petition for representation invalid.

The Incumbent filed timely exceptions to the Recommended Decision and Order pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code, Parts 1200 through 1240 (Board's Rules), and, while the Employer did not respond, Petitioner filed a timely response. In addition, the Illinois Public Employer Labor Relations Association (IPELRA) has filed a motion for leave to file an amicus brief in support of Incumbent's position, and with that motion tendered for filing the proposed amicus brief. Petitioner has filed a motion to strike IPELRA's motion and brief on the basis that it was untimely. Its response to Incumbent's exceptions includes a response to IPELRA should the Board allow the filing of an amicus brief. In addition, Incumbent has requested an opportunity to present oral argument before the Board.

Issues presented

This case presents the substantive issue whether, after the expiration of a collective bargaining agreement and during negotiations for a successor agreement, the contract bar to the filing of representation petitions by rival unions extends, or should be extended, to include the period of time after the employer and incumbent union have reached agreement on some issues and submitted remaining issues to binding interest arbitration. Amicus states the issue somewhat differently: whether the Board should recognize an "interest arbitration bar."

There are several preliminary procedural issues: Should the Board strike a motion to file a brief of amicus curiae as untimely where it was filed in support of the excepting party, was not filed during the time set for filing exceptions by the Board's rules, but was filed during a lengthier period for filing exceptions erroneously announced by the administrative law judge in his recommended decision and order? If it denies the motion to strike the motion for leave to file

an amicus brief, should the Board allow the filing of the amicus brief? And should the Board grant the excepting party's request for oral argument?

After laying out the context of the dispute, we first address the procedural issues.

Factual context

There is no factual dispute about the timing of the pertinent events. Section 9(h) of the Illinois Public Labor Relations Act prohibits elections “where there is in force a valid collective bargaining agreement,” but expressly allows the Board to process election petitions filed between 90 and 60 days prior to the expiration of an agreement and, for agreements with terms greater than four years, between 90 and 60 days prior to the end of the fifth year of the agreement and prior to the end of each successive year.¹ With respect to a collective bargaining agreement between Respondent, County of Lake and Lake County Sheriff, and Incumbent, Illinois Fraternal Order of Police Labor Council, this “window period” began in September 2009. This contract expired in November 2009. Eighteen months later, in May 2011, Incumbent filed for interest arbitration. Eight months later, in January 2012, Respondent and Incumbent held an interest arbitration hearing. Six months later, in June 2012, Respondent and Incumbent exchanged briefs. Five months later, in November 2012, the arbitrator issued his award. However, in October 2012, one month before the arbitrator issued his award and just short of three years after

¹ The full text of Section 9(h) of the Act reads:

No election shall be directed by the Board in any bargaining unit where there is in force a valid collective bargaining agreement. The Board, however, may process an election petition filed between 90 and 60 days prior to the expiration of the date of an agreement, and may further refine, by rule or decision, the implementation of this provision. Where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement.

the contract expired, Petitioner, Illinois Council of Police, filed the petition for representation at issue.

Procedural issues

As an initial matter, we deny Petitioner's motion to strike IPELRA's motion for leave to file the amicus brief because we find IPELRA's motion was timely filed. IPELRA moved for leave to file an amicus brief more than 14, but less than 30 days after issuance of the RDO. Petitioner has moved to strike IPELRA's motion based on Section 1200.135(a) of the Board's Rules which provides that briefs filed "in support of exceptions" must be filed within 14 days of issuance of the RDO. There are two flaws with Petitioner's position. First, the ALJ in this particular instance erroneously advised the parties that they had 30 days to file exceptions (the time period for filing exceptions to RDOs issued concerning unfair labor practice charges under Section 1200.135(b)), rather than 14 days (as specified in Section 1200.135(a) for representation cases). We would be reluctant to find a document untimely where the document was filed consistent with statements made by an agent of the Board. Second, and more importantly, it is Section 1200.140 of the Board's regulations that governs the filing of amicus curiae or "friend of the court" briefs, either upon motion of the entity² seeking leave to file, or at the Board's request.³ It does not provide a specific time frame for filing such briefs, except that it states the

² The regulation actually states that "parties" may file motions with the Board for leave to file amicus briefs, but that word is used imprecisely. Parties such as the Petitioner, Incumbent and Employer already have the right to file briefs, so the regulation here means entities outside the parties already involved in the Board proceeding.

³ Section 1200.140 reads:

Parties may file a motion with the Board to request leave to file an amicus curiae brief or the Board, on its own motion, may solicit such briefs. The Board's standards by which to grant leave to file an amicus brief will include the importance of the issue presented, the general application of the issue presented and the need perceived by the Board for additional briefing on the issue presented. The amicus curiae brief shall conform to any conditions imposed by the Board for briefs in the case in which the brief is filed. Amicus

filing of such briefs shall not serve to delay the proceedings. That the 14-day period in Section 1200.135(a) does not apply is readily evident from the fact that Section 1200.140 allows the Board to solicit the filing of amicus curiae briefs. Such solicitation is unlikely to occur until exceptions have been filed (typically at or near the end of the filing period) or upon the Board's consideration of whether to review the RDO on its own initiative (typically after the lapse of the period for filing exceptions). For each of these reasons, we deny the motion to strike.

Having denied Petitioner's motion to strike, we must consider IPELRA's motion for leave to file the amicus brief. We grant that motion. Section 1200.140 provides: "The Board's standards by which to grant leave to file an amicus brief will include the importance of the issue presented, the general application of the issue presented and the need perceived by the Board for additional briefing on the issue presented." There can be no doubt that the substantive issue in this case will have a broad reach, either exposing or shielding numerous collective bargaining relationships where the prior contract has expired and the parties are still in the process of negotiating a successor agreement, including by means of binding interest arbitration. The "general application" of the issue is broad, and consequently the issue is also important. Where, as is the case here, the employer has failed to file a brief, the third criterion is also present in that there is some need for additional briefing. Finding all three criteria met, we grant IPELRA's motion for leave to file the amicus brief.

While the same reasons that warrant filing an amicus brief tend to support the Incumbent's request for oral argument, we deny that request. Our authority to grant oral argument is contained in Section 1200.135 of the Board's Rules and extends to exceptions filed

curiae parties may be invited to participate in oral arguments heard by the Board. The Board will accept amicus curiae briefs in its proceedings. The filing of such briefs shall not serve to postpone or delay the proceedings.

from ALJ RDOs. See City of Burbank, 2 PERI ¶ 2034 (IL SLRB 1986) n.8. As to the criteria for granting oral argument, the matter is not particularly complex, but certainly is significant given the likely high number of collective bargaining relationships existing in the same or similar contexts. However, with the inclusion of the amicus brief, we believe the issues have been adequately addressed through the briefing process, and whatever additional benefit oral argument might present is outweighed by the delay it would cause in the issuance of a final resolution.⁴

Potential applicability of the contract bar

In an effort to stabilize the employer-union relationship, the National Labor Relations Board (NLRB) established the contract bar doctrine under which a current and valid collective bargaining agreement ordinarily prevents the holding of a representation election. The doctrine is not mandated by federal statute, but created under the discretion of the NLRB. ABA Section of Labor and Employment Law, *THE DEVELOPING LABOR LAW* 609 (6th ed. 2012). Illinois has expressly incorporated this doctrine in Section 9(h) of the Illinois Public Labor Relations Act:

No election shall be directed by the Board in any bargaining unit where there is in force a valid collective bargaining agreement. The Board, however, may process an election petition filed between 90 and 60 days prior to the expiration of the date of an agreement, and may further refine, by rule or decision, the implementation of this provision. Where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement.

As expressly permitted by the statute, the Board has, indeed, refined the contract bar by regulation. Section 1210.35(a)⁵ of the Board's Rules largely tracks the statutory language, and

⁴ Our aversion to further delay and our impressions regarding the adequacy of the briefs similarly leads us to reject Petitioner's suggestion that we remand the case to the ALJ to allow fuller briefing at that administrative stage.

⁵ The ALJ erroneously cited 1220.35(a).

restricts it only in situations where an employer recognizes an employee organization through means other than the Board's voluntary recognition and representation processes.⁶

The ALJ looked to Board and NLRB precedent to determine whether the present situation—continued application of a long-expired prior contract, agreement on many terms of a new agreement, and agreement to submit the remaining terms to binding interest arbitration—was sufficient to raise a contract bar. In a number of Board decisions including County of Pulaski, 25 PERI ¶115 (IL LRB-SP 2009), the Board had previously followed the NLRB decision in Appalachian Shale Products Co., 121 NLRB 1160 (1958), which held that, to bar a petition, an agreement must (1) be signed by the parties prior to the filing of the petition and (2) contain terms and conditions substantial enough to stabilize the parties' bargaining relationship. The ALJ referenced these decisions, and noted the need of such a bright line because of the paramount concern for predictability. He found the instant situation met neither requirement in that there had been no signatures and, in fact, no document reflecting the parties' full agreement.

Finding no bright line, he also found there was no contract bar.

⁶ Section 1210.35(a) provides:

When there is in effect a collective bargaining agreement of 3 years or shorter duration covering all or some of the employees in the bargaining unit, representation and decertification petitions may be filed during the window period (between 90 and 60 days prior to the scheduled expiration date of the collective bargaining agreement) or anytime after the expiration of the collective bargaining agreement. However, the collective bargaining agreement shall serve as a bar (contract bar) to filing representation or decertification petitions outside of the window period.

- 1) Where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement. (Section 9(h) of the Act) This bar shall also apply to the filing of majority interest petitions.
- 2) When an employer recognizes an employee organization without using the voluntary recognition or representation procedures as specified by the Act, any collective bargaining agreement reached by the parties shall not serve as a bar to the filing of a representation or decertification petition.

Incumbent argues County of Pulaski did not merely involve lack of a signature by the co-employer sheriff, but also shenanigans in an attempt to obtain some type of signed document before a rival union could get its petition filed with the Board. Indeed, the ALJ's recommendation in County of Pulaski shows an unseemly race to the courthouse door, but both the Board's decision and the ALJ's recommendation was based upon the lack of a signature. 25 PERI ¶115. The ALJ makes clear that the unseemliness of the race was not a consideration, but the need of a bright line to enhance predictability was. Id.

The Incumbent points out that in the public sector in Illinois parties routinely fail to follow the statutory timelines established for interest arbitration and frequently enter into interest arbitration months after a collective bargaining agreement has expired. (It says this is true with respect to every interest arbitration award posted on the Board's website in 2012). It speculates that this is because retroactive wage increases are routinely awarded, eliminating one avenue of pressure for more timely resolution, and because many public sector employees have a right to interest arbitration in place of the employees' right to strike and an employer's right to impose final offers. It claims parties are "hostages" to interest arbitrators, but in doing so overlooks the extent to which the parties themselves control the timing and pace of both the negotiation and interest arbitration processes, including, in the latter regard, with respect to the selection of arbitrators and hearing dates, and the filing of briefs. As evidenced by the Incumbent's own research, parties to interest arbitration proceedings routinely agree to extend the statutory timelines relative to the interest arbitration process.

In support of its position that the contract bar applies, Incumbent references a non-precedential decision issued by an ALJ in County of Macoupin, 24 PERI ¶96 (IL LRB Gen. Csl. 2008), where an ALJ had relied on Stur-Dee Health Products, 248 NLRB 100 (1980), to find a

contract bar where parties had agreed to refer final issues to binding interest arbitration.⁷ It also cites a decision of Connecticut's public sector labor relations board, City of Prescott, No. 1874 (Conn. SLRB 1981), and an academic source which really does no more than discuss the Connecticut board's decision. Harry T. Edwards, R. Theodore Clark, Jr. & Charles B. Craver, LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS 198 (4th ed. 1991). In County of Macoupin, a Board ALJ found that where a union had given up its right to strike, the parties had already implemented significant contract provisions, and the parties had entered an agreement of understanding to present certain issues to binding interest arbitration, there existed a bar to a representation petition. The fact of that non-precedential holding is of less consequence than whether the NLRB precedent it relied upon, Stur-Dee Health Products, should be found applicable to Section 9(h) of the IPLRA and to this case.

With respect to the NLRB-created contract bar doctrine, the NLRB found in Stur-Dee Health Products, that the parties' signed agreement, which memorialized their determination with respect to all but one issue and also memorialized their agreement to turn that one issue over to binding interest arbitration "contains substantial terms and conditions of employment as well as a definite and readily ascertainable method for determining economic terms" and therefore constituted a bar to a representation petition. Generally speaking, the same situation was present in County of Macoupin. The scenario is different here because the parties did not sign an agreement setting out their agreed-to terms and their agreement to go to binding interest arbitration with respect to the rest. Nevertheless, Incumbent argues the same result should obtain where interest arbitration is statutorily mandated. It suggests that statutory obligation provides

⁷ Incumbent criticizes the ALJ's failure to cite to County of Macoupin, but because that decision had no precedential value it would have been inappropriate for him to have done so.

the “readily ascertainable method for determining” the remaining three issues, but regardless of whether that is true, in this situation there is no document that “contains [the rest of the] substantial terms and conditions of employment.” Even if we were inclined to follow Stur-Dee Health Products, we would find it inapplicable to the present situation.

Incumbent also argues that the ALJ’s holding actually damages stability in that the Board could assume the parties have, since issuance of the arbitration award, retroactively implemented wage increases and could presume that the parties had executed a new collective bargaining agreement. Whether or not that is true in this particular instance where the petition was filed just one month before the arbitrator issued his ruling, as is evident from Incumbent’s research into current arbitration practices, our acceptance of the Incumbent’s position would likely impact a much broader range of cases where interest arbitration remains pending. Moreover, we note that the interest arbitration process here lasted 18 months, and it began 18 months after expiration of the parties’ prior contract, a period during which the parties were presumably negotiating. Removing any threat that a competing petition for representation resolution might provide would mean one less incentive for more timely completion of negotiations. Thus, in the broader range of cases, the ALJ’s holding would enhance stability by encouraging earlier completion of the negotiation process.

Rather than speaking in terms of a “contract bar,” the amicus forthrightly encourages the Board, pursuant to its authority under Section 9(h) to “refine implementation of this provision,” to adopt what it terms an “interest arbitration bar.” In fact, it states the Board already has done so in County of Cook & Sheriff of Cook County, 10 PERI ¶3024 (ILRB 1994), where, it states, we dismissed a petition filed after an interest arbitration award had been issued and before the award was affirmed by the joint employers. Amicus’ representation of our holding is incorrect.

The Executive Director's dismissal in that case, sustained by this Board, specifically rejects establishment of an interest arbitration bar, stating that "it is not necessary to establish such a contract bar rule now." Moreover, Amicus' articulation of the factual context in County of Cook is incorrect. It states: "a rival union filed a representation petition *after* the issuance of an interest arbitration award for a group of correctional officers; the award was later affirmed by the joint employers in question." In fact, the employer had "accepted and adopted the entire Award on December 7, six days *before* the petition was filed." Id. (emphasis added). The issues were whether the employees also needed to ratify the award (the Board found they did not) and whether by reference to the parties' agreement on the other terms not submitted to arbitration "*the Award* constituted a contract that sufficiently contained substantial terms and conditions of employment and was adequately memorialized establishing it as the controlling document," id. (emphasis added), (the Board found it did). We did not in County of Cook adopt the type of interest arbitration bar the amicus here suggests.

Amicus also quotes from County of Cook the Executive Director's discussion of several factors that would weigh in favor of establishing an interest arbitration bar:

There are several reasons for holding that a contract bar applies once the parties request interest arbitration as provided in Section 14 of the Act. Providing such a rule would increase bargaining stability between the parties. Also, it appears unfair to negotiating parties who may have expended much time and money in the arbitration process just to have it wasted when a representation petition is filed at the last minute. Additionally, as the present facts demonstrate, once the parties turn resolution of the contract over to a third party, they no longer have full control over when the arbitration panel will issue its award.

We note the Executive Director also discussed factors that weigh against such action:

[S]everal unknown exceptions may be needed that renders such a hard and fast contract bar rule undesirable. Additionally, parties may abuse such a rule by prematurely demanding interest arbitration just to bar future petitions from being processed. Also, the rights of employees to freely choose their bargaining

representative, which necessarily entails changing representatives from time to time, would be hampered by establishing a contract bar whenever interest arbitration is requested. These are matters to be considered in a case where the Board is directly faced with this issue.

Amicus also cites the same Connecticut labor relations board's decision referenced by Incumbent where, as in County of Cook and in contrast to the situation here, a petition for representation had been filed *after* an interest arbitration award had been issued. And amicus cites to a decision of the Wisconsin public sector labor relations board in which it recognized an arbitration bar, but does not mention that in County of Cook, the Board's Executive Director had also explained that the Wisconsin board later found need to craft numerous exceptions to that doctrine:

The Wisconsin Employment Relations Commission (WERC), in fact, has established a mediation-arbitration bar in which a representation petition will be deemed untimely if the contracting parties had previously invoked WERC's statutory interest arbitration procedures. *See Dunn County*, Dec. No. 17861 (WERC 1980); *City of Prescott (Police Department)*, Dec. No. 18741 (WERC 1981). Since those early decisions, however, WERC has provided several exceptions to its mediation-arbitration bar rule. *See Marinette County*, Dec. No. 26675 (WERC 1990) (bar not applicable in multiple units with differing expiration dates); *Oconto County*, Dec. No. 21847 (WERC 1984) (bar not applicable if contract expires on own terms even though interest arbitration still pending). No other public sector cases were found establishing a contract bar at this early stage.

Wisconsin would not have applied its interest arbitration bar under the set of facts presently before us.

Our close review of the relevant authority reveals that the ALJ's recommended decision is consistent with applicable authority and that all contrary valid authority cited to us is distinguishable in significant ways. Moreover, our consideration of the policy concerns cited to us reinforces the essential principal at the core of the NLRB's decision in Appalachian Shale Products Co., 121 NLRB 1160 (1958), in our own decision in County of Pulaski, 25 PERI ¶115

(IL LRB-SP 2009), and in the ALJ's recommended decision in this case: that stability in bargaining relationships requires predictability and a bright line. Where, as here, a collective bargaining agreement has expired and there was no signed single document incorporating all bargaining subjects agreed upon and the precise means by which a few remaining issues might be resolved such that the document could be considered to contain sufficient terms and conditions to stabilize the parties' bargaining relationship, there is no bar to the petition for representation. We adopt the ALJ's recommended decision to proceed to an election.

ORDER

IT IS HEREBY ORDERED that a secret ballot election shall be conducted among employees previously formally included by this Board in the election unit described in the first footnote of the Administrative Law Judge's Recommended Decision and Order at a time and place set forth in the Board-issued Notice of Election. In accordance with the Act and the Board's Rules, eligible employees shall be given an opportunity to vote between representation by the Illinois Fraternal Order of Police Labor Council, representation by the Illinois Council of Police, or "No Representation."

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



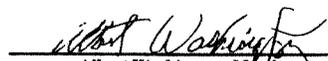
Paul S. Besson, Member



James Q. Brennwald, Member



Michael G. Coli, Member



Albert Washington, Member

Chairman Hartnett, concurring:

I join in the opinion of my colleagues and write separately only to explain that I feel the importance and complexity of the issue presented in this case would have made oral argument particularly appropriate. I would have granted the Incumbent's request for oral argument.



John Hartnett, Chairman

Decision made at the State Panel's public meeting held in Chicago, Illinois and, by means of video conference, Springfield, Illinois, on March 12, 2013; written decision issued in Chicago, Illinois on April 8, 2013.

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ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On October 30, 2012, the Petitioner, Illinois Council of Police, filed a majority interest petition in Case No. S-RC-13-031 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). The petitioned-for unit is currently represented for purposes of collective bargaining by the Incumbent, Illinois Fraternal Order of Police Labor Council.¹

¹ The instant representation petition specifically seeks a unit that includes certain job classifications in the peace officer unit of the Employer, County of Lake and Sheriff of Lake County, including a number of positions characterized as law enforcement (deputy sheriff, highway patrol, detective, warrant process server, process supervisor, and court security) and law enforcement support (radio dispatcher, assistant dispatch supervisor, lead dispatch supervisor, senior utility worker, and magnetometer operator). According to the petition, this petitioned-for unit excludes the communications director; all sworn deputy sheriffs in the classification of sergeants and above; all professional, confidential, supervisory, and managerial employees as defined by the Act; and all other employees of the County of Lake. To avoid any potential ambiguities, I note that the unit at issue appears to have been originally certified by the Board on June 20, 1986 in Case No. S-VR-43. Later, on August 2, 1990, in Case No. S-RC-90-19, the Incumbent was recertified as the exclusive representative of the bargaining unit after an election. This Case No. S-RC-90-19 unit was later amended or clarified to include some positions and exclude others on January 19, 1995 in

On November 9, 2012, the Incumbent filed a position statement with the Board which objects to and seeks dismissal of the instant representation petition. The Employer, County of Lake and Sheriff of Lake County, later filed its own position statement on November 21, 2012. Subsequently, on December 12, 2012, the Petitioner filed a position statement responding to the other two parties' position statements. After full consideration of all aspects of the controversy, I recommend the following.

I. ISSUES AND CONTENTIONS

In an effort to establish a new collective bargaining agreement, the Incumbent and the Employer held an interest arbitration hearing on January 27, 2012 and subsequently filed post-hearing briefs. As of November 9, 2012, the date the Incumbent filed its position statement with the Board, the arbitrator had not issued an arbitration award.² In this context, the Incumbent's November 9, 2012 position statement objects to the instant petition on the grounds that, according to the Incumbent, there is a "de facto contract bar" and on grounds the Incumbent alleges are rooted in the public policy of the Act and demand "an expeditious, equitable and effective procedure for the resolution of contract disputes or employees who perform essential services." As noted above, the Incumbent ultimately concludes that the Board should dismiss the instant representation petition.

The Employer's November 21, 2012 position statement does not explicitly address the arguments provided by the Incumbent's position statement and does not object to the instant

Case No. S-UC-(S)-95-15. On March 6, 1995, in Case No. S-RC-95-31, the Incumbent was once again certified as the exclusive representative after another election. Although not overtly acknowledged by the instant representation petition, the Incumbent's unit was subsequently formally clarified on July 7, 2000 in Case No. S-UC-99-017 to include a new radio communications shift manager position. Presumably, a future election would include this new position and only those positions that have been formally included by the Board.

² The arbitrator, Steven M. Bierig, later issued an arbitration award on November 29, 2012.

petition.³ In sum, the Petitioner's December 12, 2012 position statement requests that the undersigned hold that the instant petition is not contract barred within the meaning of Section 9(h) of the Act and, accordingly, proceed to an election. Thus, the sole issue or question to be determined is whether or not, under the circumstances, the instant petition should be dismissed.

II. DISCUSSION AND ANALYSIS

The instant matter ostensibly involves the Board's "contract bar" doctrine. Broadly speaking, a contract bar prevents the Board from conducting an election in any bargaining unit where there is a valid collective bargaining agreement. In other words, once a new agreement is reached, it bars the filing of a representation petition. Chicago Housing Authority, 14 PERI ¶3013 (IL LLRB 1998). This doctrine is generally derived from Section 9(h) of the Act, which specifically states,

No election shall be directed by the Board in any bargaining unit where there is in force a valid collective bargaining agreement. The Board, however, may process an election petition filed between 90 and 60 days prior to the expiration of the date of an agreement, and may further refine, by rule or decision, the implementation of this provision. Where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement.

Correspondingly, Section 1220.35(a) of the Rules states, in pertinent part,

³ Before noting that it considers the County of Lake and the Lake County Sheriff to be joint employers for purposes of this petition, the Employer's November 21, 2012 position statement indicates that the Employer does not intend to raise any issues concerning the appropriateness of the bargaining unit or, to the extent known, whether any employees sought by the Petitioner to be included in the petitioned-for unit should be excluded from the same. The Employer's position statement also notes that it takes this position based upon an alleged representation from the Petitioner's counsel that the composition of the bargaining unit which the Petitioner seeks to represent will remain the same in terms of the current description of the unit. Furthermore, the Employer asserts that, in the event the Petitioner should attempt to change this alleged position and seek to add or include any positions from the unit not currently represented by the Incumbent, the Employer reserves the right to raise any issues concerning the appropriateness of the bargaining unit and, to the extent known, whether any employees sought by the Petitioner to be included in the unit should be excluded.

- 1) When there is in effect a collective bargaining agreement of 3 years or shorter duration covering all or some of the employees in the bargaining unit, representation and decertification petitions may be filed during the window period (between 90 and 60 days prior to the scheduled expiration date of the collective bargaining agreement) or anytime after the expiration of the collective bargaining agreement. However, the collective bargaining agreement shall serve as a bar (contract bar) to filing representation or decertification petitions outside of the window period.
- 2) Where more than four years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such agreement. (Section 9(h) of the Act) This bar shall also apply to the filing of majority interest petitions.

Here, it is fairly plain that, at the time the instant petition was filed with the Board on October 30, 2012, the Incumbent and the Employer were operating according to a collective bargaining agreement which had been in effect since December 1, 2006 and expired on November 30, 2010. To this extent, it appears that the Petitioner was not contract barred or untimely when it filed its petition on October 30, 2012. However, in this instance, the Incumbent asserts that the Incumbent and the Employer have a de facto collective bargaining agreement through November 30, 2013. At the outset, I note that neither the Act nor the Rules expressly recognize the Incumbent's proffered policy. Moreover, the Incumbent has presented no prior Board decision to support its position. Nevertheless, to the extent possible, it will be considered.

To determine whether an "agreement" is sufficient to bar an otherwise timely-filed petition, the Board follows the National Labor Relations Board's rules set forth in the case of Appalachian Shale Products Co., 121 NLRB 1160 (1958), and followed thereafter. As set forth in that case, to bar such a petition, the agreement (1) must be signed by the parties prior to the filing of the rival petition and (2) must contain terms and conditions substantial enough to stabilize the parties' bargaining relationship. County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115 (IL LRB-SP 2009); City of Calumet City, 21 PERI ¶98 (IL LRB-SP 2005); Chicago

Housing Authority, 14 PERI ¶3013; City of Chicago, 2 PERI ¶3015 (IL LLRB 1986). The minimal requirement that a document be signed by both parties establishes a “bright line” in an area where predictability is paramount. County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115; City of Calumet City, 21 PERI ¶98 (IL LRB-SP 2005); see Seton Medical Center, 317 NLRB 87, 88 (1995).

Concerning the first element, I readily find that, at the time the instant petition was filed, the relevant collective bargaining agreement had plainly not yet been “signed” by the parties. Rather, at the time, the parties were clearly still waiting for an award from the January 27, 2012 interest arbitration. As it is well-established that contracts not signed before the filing of a petition cannot serve as a bar, it is clear that the instant circumstances are simply insufficient to constitute a contract bar. See Crothall Hospital Services, Inc., 270 NLRB 1420, 1422 (1984), citing Appalachian Shale Products Co., 121 NLRB at 1161.

Separately, I must also note that even the issuance of an award does not necessarily signify that contract negotiations have concluded. Putting aside the fact that no final signature could have been presented when the petition was filed, it can hardly be argued that the new collective bargaining agreement had been “fully executed,” reduced to writing, or ratified by that date. Indeed, here, there is no document, formal or informal, reflecting the parties’ full agreement. See County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115; Seton Medical Center, 317 NLRB at 87. Likewise, it generally follows that it cannot be found that there was “no doubt” in the minds of the employees about whether the new contract was in place (as prescribed by the Board’s contract bar doctrine) when certain aspects were, quite literally, still in dispute. See County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115. In addition, I presume that, at the time the petition was filed with the Board, the parties were in fact operating solely in

accordance with the terms of the expired contract rather than those of a future, unknowable agreement. As the parties intuitively cannot simultaneously operate according to two dissimilar collective bargaining agreements, it would be inconsistent to find that the new agreement was also in place at the time of filing.

Granted, it is not strictly required that the parties execute a formal document. County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115; City of Calumet City, 21 PERI ¶98; see Appalachian Shale Products Co., 121 NLRB at 1162. Yet, I nevertheless find that the instant circumstances are not easily characterized as the requisite signature and are largely the kind of circumstances Appalachian Shale Products Co. was directed at avoiding. Because this first element has thus not been satisfied, I will not address the second in detail. Moreover, experience has indicated that true stability of labor relations is not obtained until collective bargaining agreements have been reduced to writing and signed. See B.C. Acquisitions, Inc., 307 NLRB 239, 240 (1992); Eicor, Inc., 46 NLRB 1035, 1037 (1943). Based on the foregoing, I must ultimately conclude that the instant circumstances do not meet the Board's bright line standard.⁴ Accordingly, I also conclude and hold that the instant petition is not contract barred within the meaning of Section 9(h) and should proceed, as in the normal course, to election.

Inter alia, the Incumbent asserts that the Board should recognize the good faith efforts of the Incumbent and the Employer. According to the Incumbent, this would allow the Employer to avoid suffering "the expense of starting all over again at the bargaining table." While this particular consideration is admittedly valid to a degree, I find that it nevertheless does not outweigh the variety of decidedly valid policy considerations behind the Board's established contract bar rules. See County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115. The

⁴ To clarify, in reaching this conclusion, I have not strictly viewed the matter as one in which any party bears a burden of proof, since no party is presently attempting to assert a statutory exclusion or inclusion. See County of Pulaski/Sheriff of Pulaski County, 25 PERI ¶115.

contract bar doctrine was in fact developed to achieve a balance between the conflicting goals of insuring stability in labor relations and permitting employee freedom of choice. See City of Calumet City, 21 PERI ¶98; City of Chicago, 2 PERI ¶3026 (1986).

III. RECOMMENDED ORDER

IT IS HEREBY ORDERED that a secret ballot election shall be conducted among employees in the election unit defined above at a time and place set forth in the Board-issued Notice of Election. In accordance with the Act and the Board's Rules, eligible employees shall be given an opportunity to vote between representation by the Illinois Fraternal Order of Police Labor Council, the Illinois Council of Police, or "No Representation."

IV. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The

exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 7th day of January, 2013.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



**Martin Kehoe
Administrative Law Judge**