

severance petition was filed, which constitutes a contract bar to the filing of a severance petition under PERB Regulation 40260(b).¹ Having reviewed the entire record, we affirm the Board agent's determination and adopt his findings of fact. We affirm his conclusions of law only insofar as they are consistent with the following discussion.

FACTUAL SUMMARY

DPA and CAUSE executed an MOU which went into effect on August 16, 1987, and remained in effect through and including June 30, 1988. On June 30, 1988, the parties entered into a written extension of that MOU to August 31, 1988. On August 30, 1988, CAUSE and DPA agreed to the terms of a new MOU. At that time, CAUSE and DPA agreed to an oral extension of the prior MOU until a ratification vote of CAUSE membership could be taken. The successor MOU was ratified by the Legislature on September 1,

¹PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq., and those regarding severance petitions begin at section 40200. Section 40260(b)(2) provides:

(b) A petition shall be dismissed in part or in whole whenever the Board determines that:

.....

(2) There is currently in effect a memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees covered by the severance petition, unless the petition is filed less than 120 days but more than 90 days prior to the expiration date of such memorandum . . .

1988. On that date, CSPOA filed a petition to sever a number of positions from Unit 7, the unit represented by CAUSE. The new MOU was eventually ratified by CAUSE membership in mid-October, 1988.

Section 20.2 of the successor MOU reads, in pertinent part:

a. Duration. The terms of the agreement shall go into effect on the date the Legislature and CAUSE ratifies the entire contract and remain in full force and effect through and including June 30, 1991.

PROCEDURAL BACKGROUND

The Board agent found that there was no contract bar in effect on September 1, 1988 (the date the severance petition was filed), and therefore the petition was timely filed. With regard to the prior MOU, the Board agent found the oral extension was not a contract bar because it was for an indefinite duration and the evidence proffered to show a valid and binding extension was not persuasive. The administrative determination, citing Bassett Unified School District (1979) PERB Order No. Ad-77 and Appalachian Shale Products Company (1958) 121 NLRB 1160 [42 LRRM 1506], states specifically that under PERB law an extension of an agreement must be written and signed, must be of a definite duration, and must contain substantial terms and conditions of employment.² The Board agent also found, citing Appalachian Shale Products Company, that the successor agreement did not

²As more fully explained below, we do not agree that PERB has expressly adopted the National Labor Relations Board's (NLRB) position on contract bar. Neither do we agree that Bassett stands for the proposition for which it was cited.

constitute a valid contract bar because it contained a requirement of ratification by CAUSE membership as an express written condition precedent to its validity.

CAUSE appealed the administrative determination on the grounds that: (1) NLRB case law should not be followed, particularly regarding the requirement that an extension of an agreement be in writing; (2) there was evidence of the oral agreement in documents which continued benefits for unit members, amongst others, during the period of time for which the extension is alleged to have been in effect;³ and (3) the policy of effectuating stability of contractual relations would best be served by recognizing the oral extension as a contract bar.

DPA appealed the administrative determination on the ground that the oral extension of the prior MOU is a valid contract bar. There is no PERB law parallel to the NLRB rule requiring an extension to be in writing in order to constitute a contract bar, and DPA urges PERB not to adopt such a rule. In addition, DPA argues that an after-the-fact determination of the length of duration of the oral extension reveals that the duration was reasonable and, therefore, the period is not indefinite.

CSPOA's response to the appeals is that the extension was not a valid contract bar because it was of an indefinite duration which, under PERB law, does not rise to the level of a contract bar. CSPOA also argues that, under NLRB law, a definite duration

³Because we find that the contract extension fails on the basis of indefinite duration and lack of a writing, we need not reach the issue of the effect of the proffered documents.

and a writing are required, and in this case neither requirement was met. Further, CSPOA disputes the contention that the successor contract was in effect on the date the petition was filed because, by its terms, the contract required ratification prior to becoming effective.

DISCUSSION

Under PERB Regulation 40260(b), there must be a valid and binding MOU currently in effect between the employer and the union representing the unit in question at the time the petition is filed in order to effectively bar the filing of such petition. In the present case, therefore, if either the oral extension of the prior MOU for an indefinite duration or the unratified successor MOU is found to constitute a valid and effective MOU at the time the severance petition was filed, the contract bar doctrine would preclude the filing of such petition.

There are, therefore, two issues in this case: (1) whether the oral extension of the prior MOU for an indefinite duration constituted a valid and effective contract on September 1, 1988; and (2) whether the successor MOU, which had been ratified by the Legislature but not by the CAUSE membership on September 1, 1988, constituted a valid and binding contract on that date.

EFFECT OF THE EXTENSION OF THE PRIOR MOU

Regarding the oral extension of the prior MOU, the Board agent stated that PERB precedent required a contract be in writing in order to act as a bar. In fact, the PERB cases that mention the requirement of a written contract arise under

section 3544.7(b)(1) of the Educational Employment Relations Act (EERA), which concerns petitions for representation elections and petitions for investigations, and reads, in pertinent part, as follows:

(b) No election shall be held and the petition shall be dismissed whenever:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition . . .

(Emphasis added)

(See Downey Unified School District (1980) PERB Order Ad-97.)

The present case does not fall under EERA, however, but rather falls under the Ralph C. Dills Act (Dills Act) (codified at Gov. Code, sec. 3512 et seq.), which contains no statutory language requiring a writing similar to the above-quoted EERA section. Nor does Regulation 40260(b) expressly require a writing.

Similarly, neither the National Labor Relations Act (NLRA) nor the regulations promulgated thereunder expressly address the issue of contract bar. Rather, the NLRB has created and defined the contract bar doctrine through case law.

PERB has held it is appropriate to look to NLRB precedent for guidance where the federal rule has been the prototype for California labor legislation, and particularly regarding the contract bar rule under the Dills Act. (State of California

(State Employees Trades Council) (1983) PERB Decision No. 348-S, at pp. 7-8 and footnote 2.⁴)

Under NLRB law, an agreement must be in writing and signed, and contain substantial terms and conditions of employment in order to constitute a contract bar. (Appalachian Shale Products Co., supra, 121 NLRB 1160 [42 LRRM 1506]; Local 1199, Drug and Hospital Employees, et al. (1962) 136 NLRB 1564, at 1575 [50 LRRM 1033]; J. Sullivan & Sons Manufacturing Corp. (1953) 105 NLRB 549, at 551 [32 LRRM 1309]; and Morris, The Developing Labor Law, 2nd Ed. at 361.) The contract bar doctrine balances the statutory policy of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives. (Appalachian Shale, supra, at 1161.) We find the policy of promoting industrial stability is furthered, in part, by requiring the formality of a writing for a contract to constitute a contract bar. Because the considerations underlying the requirement of a formal writing are the same for cases arising under the Dills Act as those arising under EERA and the NLRA, we hold that contracts must be evinced by a writing, signed and contain substantial terms and conditions of employment in order to constitute a contract bar.

The oral extension was also for an indefinite duration, as the parties agreed to continue the prior MOU in effect until

⁴PERB has followed much of the NLRB's contract bar doctrine but has declined to follow it in toto. (See Alum Rock Unified Elementary School District, supra, PERB Order Ad-158 and Downey Unified School District, supra, PERB Order Ad-97.)

ratification. Contrary to the implications in the administrative determination, PERB has never directly addressed the issue of whether an indefinite extension of an existing contract can constitute a contract bar.⁵ NLRB precedent, which holds that contracts having no fixed duration shall not be considered a bar for any period, is instructive for the reasons stated above. (Pacific Coast Association of Pulp and Paper Manufacturing, et al. (1958) 121 NLRB 990 [42 LRRM 1477]; Cind-R-Lite Co. (1979) 239 NLRB 1255 [100 LRRM 1138].)

The NLRB has explained the policy behind this requirement as follows:

We believe that our contract-bar policy should rest on the fundamental premise that the postponement of employees' opportunity to select representatives can be justified only if the statutory objective of encouraging and protecting industrial stability is effectuated thereby. That objective is served where contracting parties have entered into mutual and binding commitments thereby reasonably insuring that for the duration of the agreement neither party will disrupt the bargaining relationship by unilaterally attempting to force changes in the conditions of employment upon the other. But to grant the protection of our contract bar policy to parties which have not so committed themselves--either party being free at all times to dissolve the contract and exert economic pressure upon the other in support

⁵The case cited therein involved a contract of short, as opposed to indefinite, duration. (See Alum Rock, supra.)

of bargaining demands--would be to abridge the statutory right of employees to select representatives without concomitant statutory justification.

(Pacific Coast Association of Pulp and Paper, et al., supra, at 994.)

Because the policy considerations enunciated by the NLRB in Pacific Coast, supra, apply equally to the contract bar doctrine under the Dills Act, we hold that a contract must be for a definite duration to act as a contract bar under the Dills Act. In this case, although ratification in fact occurred approximately six weeks after the oral agreement was made, the contract term was nevertheless for an indefinite duration, and therefore on this ground must fail as a contract bar.

EFFECT OF THE SUCCESSOR CONTRACT

The second issue is whether the successor contract was binding and effective, although it had not yet been ratified by CAUSE membership. In Downey Unified School District, supra, PERB Order No. Ad-97, PERB held that a contract which was not yet ratified by the parties was not a valid contract bar, even where the requirement of ratification was not found in the agreement itself, but rather was found in the ground rules regarding contract negotiation. Therefore, PERB has held that unlike the NLRB,⁶ it will recognize a requirement of ratification as a

⁶The NLRB held in Appalachian Shale, supra, that where a new collective bargaining agreement which terms explicitly require ratification as a condition precedent to effectiveness has not been ratified by the parties, it would not operate as a contract bar.

condition precedent to finding a contract bar even where the parties have executed a written agreement to that effect outside of the collective bargaining agreement itself.

In the present case, the MOU itself required ratification by the parties as a condition precedent to effectiveness of the contract. It had not yet been ratified when CSPOA filed its severance petition, and therefore did not constitute a contract bar at that time.

Because neither the oral extension of the prior MOU for an indefinite duration, nor the unratified MOU, constituted a contract bar on the date of filing of the severance petition herein, we find the filing of such petition was timely.

ORDER

The administrative determination is AFFIRMED. CAUSE and DPA's appeals are DENIED.

Members Porter and Shank joined in this Decision.