Independent Laborers Union of New York City,68 OCB 6 (BOC 2001) [Decision No. 6-2201, aff'd, Independent Laborers Union of New York City v. Office of Collective Bargaining, No. 113973/01 (Sup. Ct. N.Y. Co. Apr. 3, 2002).]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of	:	
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INDEPENDENT LABORERS UNION OF NEW YORK CITY	:	
	:	
and	:	Decision No. 6-2001
	:	Docket No. RD-13-99
THE CITY OF NEW YORK	:	
	:	
and	:	
	:	
DISTRICT COUNCIL 37, AFSCME, AFL-CIO	:	

DECISION AND ORDER

On November 24, 1999, the Independent Laborers Union of New York ("Petitioner" or the "Laborers") filed a petition to represent a bargaining unit of Construction Laborers (Title Code 90756) . These employees are now represented by District Council 37, AFSCME, AFL-CIO ("DC 37"), and are part of a certified bargaining unit pursuant to Certificate No. 7-82. On or about December 10, 1999, Petitioner filed an amended petition to include the title Watershed Maintainers (Title Code 91011) in the petitioned-for bargaining unit. Watershed Maintainers are also represented by DC 37 but are part of a certified bargaining unit certified pursuant to Certificate No. 38B-78.[1]

At the time the petition was filed, employees in both titles sought by Petitioner were covered by collective bargaining agreements which were effective from April 1, 1995, through

[1] The title Watershed Maintainer was added to Cert. No. 38B-78 in Decision No.14-84.

March 31, 2000.

BACKGROUND

The sole question considered by the Board in this decision concerns the timeliness of the petition. There is no dispute that the instant petition was filed outside the "window period" limitation set forth in the Rules of the Office of Collective Bargaining, (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") regarding the filing of representation petitions. The petition was not filed between 150 and 180 days prior to the expiration of the collective bargaining agreement [§1-02(g) OCB Rules], but was filed approximately 127 days prior to the contract's expiration. Accordingly, in response to the filing of the petition, the City of New York (the "City") and DC 37 asserted that the Laborers' petition was time-barred. However, the Petitioner asserts that its petition should be held timely under the schism exception to the contract bar rule developed in the private sector. Hershey Chocolate Corp., 121 N.L.R.B. 901, 42 LRRM 1460 (1958)("Hershey").

On December 4, 2000, the Office of Collective Bargaining ("OCB") asked the parties to address a threshold issue -- whether the Hershey exception asserted by the Petitioner can be recognized under the contract bar rule codified in §1-02(g) of the OCB Rules. The parties responded in briefs submitted in January, March and April 2001.

We hold that although this Board has the power pursuant to §1-02(g) of the OCB Rules to find exceptions to the post-expiration contract bar doctrine in "unusual or extraordinary circumstances," and is not precluded from recognizing a schism exception to the contract bar

rule, the Hershey exception is inapplicable in this case. The Laborers' petition was filed outside the window period but prior to the contract's expiration. Moreover, the facts as asserted by Petitioner do not meet the requirements for finding an exception to the contract bar rule under the standards articulated in Hershey, nor do the facts establish any other unusual or extraordinary circumstances which would warrant the Board's processing of this untimely-filed petition.

POSITIONS OF THE PARTIES

The Petitioner

Petitioner asserts that the Board should adopt an exception to the contract bar rule known as the "schism exception" promulgated by the National Labor Relations Board ("NLRB") in Hershey, and apply that exception to find that the instant petition is timely. The Hershey exception permits the processing of an otherwise untimely petition when a petitioner can establish a schism in the bargaining representative that has undermined the stability of the bargaining relationship. Hershey, 42 LRRM at 1464. Petitioner asserts that the facts herein meet the NLRB's definition of a schism and that the Board should apply the Hershey doctrine and find the petition timely.

Petitioner asserts that the Board has the authority to recognize a schism exception and that such recognition would be consistent with its flexible interpretation of the contract bar rule and consistent with the New York State Public Employment Relations Board ("PERB"), which also recognizes this exception. Further, Petitioner asserts that public policy promoting industrial stability warrants the Board's adoption of a schism exception. Petitioner claims that since a

change in bargaining representative would not significantly disrupt labor stability, the employees' right to select their own bargaining representative is paramount. [2]

The City of New York

The City argues that the Board's contract bar rule should be strictly applied and the petition should be dismissed as untimely. The nature of the contract bar rule in the private sector, according to the City, differs significantly from the rule in the public sector, because in the public sector a party is precluded from filing a petition after the expiration of the collective bargaining agreement. The City asserts that the difference in these rules illustrates the public sector's emphasis on preserving established bargaining relationships as a means of ensuring labor stability. Consequently, the Board of Certification, the City asserts, has consistently applied the contract bar rule without exception and should do so here. PERB similarly permits few exceptions to its contract bar rule and has rejected the schism or unusual circumstances exceptions found in the private sector.

Further, the City argues that the Board is bound by its strict enforcement of the contract bar rule in the past; therefore, the Board should not recognize any exceptions based on the equities of this situation, for such recognition would be prejudicial to the City.

District Council 37

DC 37 asserts that the Board should not adopt the schism exception set forth in Hershey

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[2]Petitioner sua sponte expanded its argument to include assertions that its petition should not be time-barred for equity or policy reasons. First, Petitioner asserts that the policy reasons for establishing a contract bar rule are not served in this instance and therefore the rule should not be applied. Second, Petitioner asserts that because of alleged misconduct by DC 37, equity requires that the Board find the petition was timely. As set forth below, we find that the purpose and policy behind the contract bar rule is served by its application herein.

because the codified contract bar rule does not contain a specific schism exception and the Board should not modify the Rules on a case by case basis. Since the contract bar rule is not a creature of case law, but rather one that was formalized in the Board's Rules, a formal revision is required to find another exception. Further, DC 37 asserts that the schism exception is inconsistent with the purposes of the Board's contract bar rule, and adopting that exception would require an examination into internal union matters which are outside the Board's jurisdiction. DC 37 also argues that since PERB has not adopted the schism exception, the Board should likewise decline to recognize any exception.

Moreover, DC 37 asserts that if the Board were to recognize the schism exception, the facts of this case do not support the finding of the exception; therefore, the petition is untimely. Specifically, at the highest level of the union there has been no conflict causing the bargaining unit members to seek a change in their representative. Rather, a group of employees purportedly acting in response to allegations of fraud in DC 37 have sought to change their bargaining representative; such facts are no different from a 'raid' and do not fall within the schism exception defined in Hershey.

DISCUSSION

The Nature of the Petition

This is a representation case, not a decertification case, as it was incorrectly docketed. A decertification petition filed pursuant to Rule §1-02(e) must allege that a union which was previously certified "is no longer the representative of the public employees" in the unit. This

Board has interpreted "unit" in this context to mean the entire existing unit, rather than one title or part of the existing unit.[3] As a result, in a decertification case, the job titles in the petitioned-for unit must be co-extensive with the job titles in the existing bargaining unit which the petitioner is seeking to decertify.

Here, Petitioner merely seeks to represent two titles in a bargaining unit and, in essence, carve out those two titles from two separate pre-existing bargaining units. Since the petitioned-for unit is not coextensive with the existing bargaining units, the petition should have been docketed as a representation petition filed pursuant to §1-02(c) of the OCB Rules.

The Contract Bar Rule and its Exceptions

For all the reasons set forth below, we find that the contract bar rule does provide for exceptions in certain limited circumstances, but those circumstances are not present here and therefore the Laborers' petition is untimely.

The doctrine of contract bar exists in both the public and private sector for substantially the same reason -- to promote labor stability by providing bargaining representatives and employers with an adequate opportunity to negotiate contracts. This purpose, however, is weighed against the statutory rights of employees to freely elect and change their bargaining representatives.[4] Accordingly, the contract bar doctrine is a means of establishing a balance between these two competing interests.

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[3] Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, Decision No. 6-95, at 13-14; Municipal Police Benevolent Ass'n., Decision No. 4-95, at 3.

[4] Terminal Employees Local 832, IBT, Decision No. 27-72 , at 5; Hershey, 42 LRRM at 1462.

Section §1-02(g) of the Board's Rules limits the period for filing a petition to the thirty days between the fifth and sixth months prior to the expiration date of a contract, and also prohibits the filing of petitions after the contract has expired. Specifically, 61 RCNY §1-02(g), provides:

> [a] valid contract between a public employer and a public employee organization shall bar the filing of a petition for certification, designation, decertification or revocation of designation during a contract term not exceeding three (3) years. Any such petition shall be filed not less than 150 or more than 180 days before the expiration date of the contract, or, if the contract is for a term of more than three (3) years, before the third anniversary date thereof. *Subject to the provisions of §1-02(r)*[5] *of these rules, no petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract.* [Emphasis added.]

The Board's certification bar rule is set forth in §1-02(t) as follows:

> **Certification; designation - life; modification.** When a representative has been certified by the board, such certification shall remain in effect for one year from the date thereof and until such time thereafter as it shall be made to appear to the board, through a secret ballot election conducted in a proceeding under §§1-02(c), (d) or (e) of these rules, that the certified employee organization no longer represents a majority of the employees in the appropriate unit. When a representative has been designated by the board to represent a unit for the purposes specified in paragraphs two, three or five of §12-307(a) of the statute, such designation shall remain in effect for one year from the date thereof and until such time as it shall be made to appear to the board that the designated employee organization no longer represents a majority of the employees in the appropriate unit. *Notwithstanding the above bar on challenging a certification within one year of its issuance, in any case when unusual or extraordinary circumstances require, such as where there is reason to believe that a recognized or certified employee organization is defunct or has abandoned representation of the employees in the unit for which it was recognized or certified, the board may modify or suspend, or may shorten or extend the life of the certification or designation.* The provisions of this section shall apply to certifications issued by

[5] When revisions to the Rules were adopted in September 1997, inadvertently the cross-reference contained in this subsection was not changed to reflect the addition of two intervening subsections. The cross-reference should be to §1-02(t).

> the New York City Department of Labor prior to the effective date of the statute, or issued in a case or matter which was pending on such effective date and in which an election had been held. [Emphasis added.]

The Board's contract bar rule is unique because it not only creates a window period during the contract term for filing of petitions, but also precludes the filing of petitions after the contract expires. We previously noted that this limitation was needed to further preserve the stability of bargaining relationships ". . . because all parties concerned recognized and were aware of lengthy delays in the negotiation and execution of collective bargaining agreements with the City."[6]

We reject DC 37's and the City's contention that there are no exceptions to the contract bar doctrine set forth in §1-02(g) of the Rules. Section 1-02(g) – the contract bar rule – specifically cross references §1-02(t) regarding certification bar, and thereby incorporates the "unusual or extraordinary circumstances" exception described therein. The last sentence of this section provides that a petition may not be filed after a contract expires unless "unusual or extraordinary circumstances" can be shown. We are persuaded that the sentence in §1-02(g) beginning with "Subject to the provisions of . . ." would be devoid of meaning if it were not intended to incorporate the "unusual or extraordinary circumstances" provisions of §1-02(t). We find there is no other way meaningfully to read the cross- reference to §1-02(t) other than to incorporate the "unusual or extraordinary circumstances" exception to the certification bar rule and apply it to the post-expiration contract bar.

The City asserts that we are bound by our statement in Civil Serv. Technical Guild, Local

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[6] New York State Nurses Ass'n., Decision No. 68-68, at 2, n. 2.

375, Dist.Council 37, AFSCME, Decision No. 6-95, enf'd, 249 A.D.2d 74, 669 N.Y.S.2d 1017 (1st Dept. 1998), that "[t]he "unusual or extraordinary circumstances" to which §1-02(r) refers applies to facts arising in the context of the certification year and not to facts arising in the context of the contract bar, i.e., outside the certification year period."[7] Id. at 17. However, there the Union's petition was brought under §1-02(r), and the meaning of §1-02(g) was not necessary to the disposition of the case. Our consideration of this issue now squarely before us compels the conclusion that the unusual or extraordinary circumstances exceptions to the certification bar rule is incorporated by cross-reference into the post-expiration contract bar rule.[8] This conclusion is consistent with our flexible application of the contract bar rule in other cases.[9]

Further, public policy in the public sector supports this view. In the context of a bargaining relationship, circumstances which result in a lack of union representation may arise. If we were to apply our contract bar rule with no exception in circumstances where the status of the exclusive bargaining representative is not clear or where there has been a loss or an

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[7] The Board's reference to §1-02(r), now refers to §1-02(t). See fn. 2 herein.

[8] The Supreme Court of New York enforced Civil Serv. Technical Guild on the grounds that even if the Board applied its certification and contract bar rules in a manner which allowed for some exceptions, the petition was untimely because petitioner had shown no "unusual or extraordinary circumstances." Civil Serv. Technical Guild, No. 116355, at 10 (S.D.N.Y. Jan.10, 1997). [The Appellate Division affirmed without comment.]

[9] See Detective Investigators Benevolent Ass'n of New York City, Inc., Decision No. 35-73 (petition timely filed pursuant to window period in contract bar rule, but petition found untimely due to circumstances which warranted extension of contract bar to protect the bargaining process); Terminal Employees, Local 832, IBT, Decision No. 27-72 (same); District Council 37, AFSCME, Decision No. 64-70 (although the contract bar rule was not specifically discussed, the Board processed a petition during the duration of the contract due to the bargaining representative's disclaimer of interest.)

abandonment in representation, we would be leaving both the municipal employer and the employees vulnerable to either competing representational claims or no representation at all. Such a regulatory scheme would be contrary to the purposes of preserving labor stability and employee free choice and is clearly not what the drafters of the Rules or the New York City Collective Bargaining Law intended. We readily acknowledge that an underlying purpose behind strict contract bar rules in the public sector is the need to afford public employers and unions ample time to bargain. However, this purpose cannot be used as a means to disregard regulatory language that specifically provides needed flexibility in situations that warrant special treatment.[10]

PERB's strict application of its contract bar rule does not compel us to reach a different result.[11] While PERB's contract bar rule, like OCB's, is codified in its Rules of Procedure, the substantive rules adopted by PERB differ in many respects from OCB's. Most importantly, there are no specific or generally stated exceptions to the contract bar provisions in PERB's rules.[12]

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[10]Unlike PERB and OCB, the NLRB's "contract bar policies are compelled neither by the Act nor by judicial decision, but are rather discretionary rules which may be applied or waived as the facts in a given case may require in the interests of effectuating the policies of the Act." Hershey, 42 LRRM a 1462 (1958). As a result, the NLRB has recognized several exceptions to the contract bar rule. American Sunroof Corp., 243 N.L.R.B. 1128 (1979)(disclaimer exception); International Harvester Co., 111 N.L.R.B. 276 (1955)(defunctness exception); Hershey, 42 LRRM 1460 (1958)(schism exception); New Jersey Natural Gas, Co., 101 N.L.R.B. 251, 252 (1953)(change in unit/merger exception.)

[11] Dutchess County Sheriff's Employees Ass'n, 26 PERB ¶3080, at 3155 (1993); Wappingers Central School Dist., 20 PERB ¶3043 (1987).

[12] PERB has recognized one exception to its contract bar rules -- where there has been an improper practice by a party which interfered with the bargaining process, PERB will extend the contract bar to afford the parties an adequate opportunity to bargain. Village of Sloatsburg, 20 PERB ¶4003, n. 7 (1987); *aff'd on other grounds* 20 PERB ¶3014 (1987); City University of

Further, PERB has held that:

> '[w]e do not interpret the Taylor Law as requiring every local board established pursuant to the provisions of § 212 to conduct its representation proceedings in a manner identical with the procedures adopted by this Board. Diversity of experience and flexibility of procedures are one of the keynotes of that part of the Taylor Law which provides for the establishment of local boards to consider disputes under their jurisdiction.' We will not interfere with the exercise of that discretion absent some showing that it will `effectively deprive employees of the rights granted to them by Article 14 of the Civil Service Law.'[13]

Accordingly, PERB's strict application of its own contract bar rule does not preclude this Board from interpreting our own Rules and finding some exception to the contract bar doctrine.[14]

However, even assuming the OCB Rules provide for some exception to the contract bar doctrine prior to the contract's expiration, we are not persuaded to recognize the Hershey exception to the contract bar rule in this case. In Hershey, where the petitioner alleged that a schism in the bargaining representative warranted the processing of an otherwise untimely petition, the NLRB reiterated its definition of a schism as a basic intraunion conflict over policy at the highest level of an international union, a conflict that results in a disruption of existing intraunion relationships and which causes employees to take an action that creates confusion in the bargaining relationship. Id. at 1462-63. The NLRB held that when there is a schism and an

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New York, 20 PERB ¶3069, at 3148 (1987).

[13] Monroe County Chapter of the Civil Serv. Employees Ass'n, Inc., 5 PERB ¶3072, at 3121 (1972), citing Local 237, IBT, 2 PERB ¶3005, at 3265, and AFSCME, Council 66, 4 PERB ¶3063, at 3716 (1971).

[14] Contrary to Petitioner's assertion, in Frank Belardo, 25 PERB ¶4649 (1992), PERB did not recognize, reject or even consider the schism doctrine. Rather, that case concerned the issue of whether the union's disavowal of its representation obligations mid-term of a contract was a breach of its duty of fair representation. Id. at 4878.

existing contract would no longer serve to promote labor stability, the NLRB will put aside the contract bar and direct an election in order to achieve industrial stability and protect employees' rights to choose their bargaining representatives. 42 LRRM at 1464. [15]

The holding in Hershey was not that a mere schism warranted setting aside the contract bar rule. Rather, the schism must destabilize the bargaining relationship such that giving effect to the existing contract would be contrary to the underlying purpose of the contract bar rule. Id. at 1462-63. As a result of an intraunion conflict at the highest level of the union, the employer in Hershey was faced with competing claims for representation during the contract period.[16] Accordingly, the NLRB held that the schism in the union undermined the stability of the bargaining relationship which necessitated setting aside the contract bar rule and processing the petition.

In this instance, the facts asserted by the Petitioner in no way demonstrate a schism of the

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[15] The NLRB articulated additional criteria needed before the schism exception would be applied: an open meeting must be held to discuss the merits of the conflict, the employees involved must have had due notice of the meeting, and the action must be taken within a reasonable period of time after the conflict arises. Hershey, at 1464.

[16]The NLRB held that the facts in Hershey clearly demonstrated a schism in the certified bargaining representative. There, the certified bargaining representative was a local affiliated with an international union (Bakery Confectionery Workers International Union, "BCW"). The international union was accused of unethical practices and upon refusing to comply with certain recommendations was suspended and ultimately expelled from membership in the AFL-CIO. The AFL-CIO then chartered a new international (American Bakery Confectionery Workers International Union, "ABC") with the same jurisdiction that BCW previously held. As a result, the local's membership nearly unanimously voted to disaffiliate from BCW and affiliate with ABC. Shortly thereafter, ABC gave a charter to the local which informed the employer that it expected the employer to continue to recognize it as the exclusive bargaining representative. Meanwhile, the employer was also advised by BCW that it was obligated to only recognize a local of that union. Id. at 1461-62.

nature found by the NLRB in Hershey. The supposed conflict is that allegations of fraud and corruption among various officers of DC 37 have resulted in several criminal indictments and convictions and that, consequently, certain bargaining unit members became dissatisfied with their membership in DC 37 or its representation and sought to join the Laborers. No conflict at the highest level of the union has disrupted the existing intraunion relationships. Even assuming Petitioner's allegations demonstrate a schism, the stability of the existing bargaining relationship was not undermined by the asserted conflict. Rather, we note administratively that AFSCME -- a national union -- appointed an administrator to oversee the operations and responsibilities of its local (DC 37), and DC 37 continued to act as the bargaining representative of thousands of New York City employees -- it filed and arbitrated grievances and continued to negotiate collective bargaining agreements with the City.

Moreover, Petitioner does not allege any other facts which demonstrate unusual or extraordinary circumstances to warrant another exception to the contract bar rule. Rather, based on the facts alleged, Petitioner had the opportunity to file the petition during the window period prior to the expiration of the contract, from October 2, 1999 through November 1, 1999. The showing of interest presented with the petition demonstrates that petitioner had more than a sufficient showing of interest completed by October 1, 1999. In addition, most of the facts Petitioner highlights as reasons its petition could not have been filed earlier – the time needed to draft a constitution and by-laws or hold interest meetings – took place in advance of the window period in the contract. Accordingly, Petitioner raises nothing compelling which prevented the

petition from being timely filed.[17]

In sum, we find that the contract bar rule codified in §1-02(g) of OCB Rules incorporates the provisions of §1-02(t) and provides that only in "unusual or extraordinary circumstances" will the Board find exception to the post-expiration contract bar rule. The Laborer's petition was untimely inasmuch as the petition was filed outside the window period and prior to the contract's expiration.[18] The unusual and extraordinary circumstances exception to the contract bar rule is not applicable in this instance. Moreover, the facts of this case do not present any circumstances under which an exception to our contract bar rule could be recognized. Therefore, the petition is dismissed.

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[17] Finally, Petitioner asserts that the contract bar rule should not apply because alleged fraud and misconduct in DC 37's ratification process, invalidated the contract in effect at the time the petition was filed. Since DC 37 and the City appear to have given effect to the terms of the contract for nearly four years prior to the filing of the petition, Petitioner's assertion that there was a defect in the ratification process is not sufficient to conclude the contract was "invalid." Moreover, the Board's jurisdiction to determine whether defects in ratification -- an intra-union process -- nullified the agreement is questionable. Jose Velez, Decision No. B-1-79, at 2. (The Board has no jurisdiction over claims involving internal union officer elections.); See County of Steuben, 17 PERB ¶4044 (1984).

[18] Since the duration of the collective bargaining agreement in this instance was for five years, Petitioner actually had two window periods during which its petition could have been timely – between 150 and 180 days prior to the end of the third year of the contract and between 150 and 180 days prior to the fifth year of the contract. In the Matter of Raymond Shiels, Decision No. 9-90, at 3.

ORDER

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition filed by the Independent Laborers Union be, and hereby is dismissed.

DATED: New York, New York
June 14, 2001

MARLENE A.GOLD
Chairperson

GEORGE NICOLAU
Member

DANIEL G. COLLINS
Member