Petitions for Election of Collective Bargaining Representative

A. Filing Petition for Election of Collective Bargaining Representative

When employees wish to be represented by a union for the purposes of collective bargaining, or wish to change their exclusive bargaining representative, either an employee or group of employees, or any individual or employee organization purporting to act in their behalf, may file a petition for election of collective bargaining representative with the Labor Relations Board.[1] The petition is filed on a form supplied by the Board.

The petition form requires that the petitioner "(d)escribe in specific detail the types, classifications or groups of employees which the Petitioner claims constitute the appropriate bargaining unit", and "(i)ndicate the total number of employees in the bargaining unit". The leading cause of delay in the processing of an election petition is because the petitioner does not sufficiently define the composition of the proposed bargaining unit. When this occurs, the petitioner needs to amend the petition, before any further action is taken on the case, to provide notice to the Board and the employer specifically which employees the petitioner is seeking to represent.

B. Showing of Interest

An election petition must be accompanied by a "showing of interest" demonstrating that at least 30 percent of the employees in the proposed bargaining unit desire to be represented by the union.[2] Generally, petitioners meet this showing of interest requirement either by filing union authorization cards or a petition signed and dated by employees. The most common mistake in submitting a showing of interest is failure to date some union authorization cards or petitions. The Board does

[1] Sections 13.1, 23.1, 33.1, 53.1 63.1, and 73.1, Board Rules of Practice.
[2] Sections 13.3, 23.3, 33.3, 53.3, 63.3, and 73.3, Board Rules of Practice.

not consider an undated card or petition valid. The Board does not disclose the identities of employees whose signature cards or petitions are filed in support of the petition. The determination whether a sufficient showing of interest has been made is done administratively by the Board, and is not subject to litigation.[3]

In a situation where a union files a petition seeking to form a smaller bargaining unit of employees whom are presently included in a larger bargaining unit, the 30 percent showing of interest is based on the bargaining unit proposed by the petitioning union rather than the established unit.[4]

If a union amends an election petition to seek to represent employees in a larger bargaining unit than requested in the original petition, the fact that the union is now seeking to represent a larger unit does not require it to then have to provide newly executed cards supporting the union as the representative different from the cards submitted when the petition was initially filed. The purpose of the demonstration of an adequate showing of interest on the part of a labor organization that initiates a representation case is to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Labor Relations Board's time, effort and resources in conducting an election.[5] Sufficient employee interest refers to demonstrated expression of support by employees for a particular employee organization, not their determination on the exact composition of a bargaining unit.[6] Employees showed their interest in the union as a representative when the petition

[3] Sections 13.6, 23.6, 33.6, 53.6, 63.6, and 73.6, Board Rules of Practice.
[4] Petition for Election of Collective Bargaining Representative (Re: Burlington Airport Employees), 28 VLRB 87, 93-95 (2005).
[5] International Union of Public Employees and AFSCME Local 1369, Council 93, AFL-CIO and Town of Randolph, 34 VLRB 84, 86 (2017).
[6] Id.

was originally filed, and it is not necessary for the union to have to produce newly executed cards to continue the processing of the matter.[7]

A contrary ruling would create the risk of establishing a precedent that could result in unions having to produce newly executed cards in many situations where modest changes are made to proposed bargaining units during the processing of election petitions by agreement of the parties of decision of the Board.[8] However, it is important to note that when a union amends a petition to seek a larger bargaining unit than the one requested in the original petition, the Board will review the cards submitted when the petition was initially filed to ensure there is a 30 percent showing of interest in the larger unit.[9]

C. Timing of Election Petitions

Generally, the filing of election petitions is not subject to specific time frames. There are two notable exceptions to this general rule. First, no election may be conducted in a bargaining unit, or subdivision of the bargaining unit, within which an election has been held in the preceding 12 months.[10] Second, an existing collective bargaining contract bars a petition for decertification of the existing collective bargaining representative for most of the term of the contract.

The issue that the VLRB has been asked to decide most often concerning union representation elections concerns the timing of petitions filed either to replace an existing exclusive bargaining representative with another union or to decertify the existing representative where the petitioner is not seeking the election of another employee organization as representative. Under the Municipal Employee Relations

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[7] Id.
[8] Id. at 86-87.
[9] Id. at 87.
[10] 21 V.S.A. §1584(b), §1635(a), and 1724(h); 3 V.S.A. §941(h), 3 V.S.A. §1021(a), 33 V.S.A. §3608(a).

Act, a petition normally will be considered timely only if filed during the period 90 to 60 days prior to a contract's expiration date, or after the expiration thereof if a successor agreement has not become effective.[11] The Board has found petitions untimely when they were filed shortly after a successor agreement has been executed.[12]

The Board discussed at length the purpose of the contract bar policy in a municipal case:

> The objective of this contract bar doctrine is to achieve a reasonable balance between the competing interests of stabilizing the employer-union relationship and free employee choice of a representative. The "open" period of ninety (90) to sixty (60) days prior to a contract expiration date provides employees with an opportunity for a free choice of bargaining representatives at reasonable intervals. The barring of a petition for the remainder of a contract term provides a settled work environment and stabilization of the employer-union relationship necessary for productive labor relations.
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> The (Police Officers Association) questions the contract bar doctrine because the Municipal Employee Relations Act (MERA) establishes no time limit for filing a representation petition. It is true MERA does not contain a specific time limitation on the filing of a petition. However, the establishment of such time limits is consistent with the overall intent of MERA.
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> It is the "purpose and policy" of MERA to "provide orderly and peaceful procedures for preventing the interference by either (municipal employees and municipal employers) with the legitimate rights of the other". 21 V.S.A. § 1721. MERA provides the municipal employer and the exclusive bargaining agent of employees "shall bargain in good faith with respect to wages, hours and conditions of employment, and shall execute a written contract incorporating any agreement reached". 21 V.S.A. § 1725(a). See also 21 V.S.A. § 1722 (4) and (8). A necessary implication arising from these provisions is that the parties negotiating the contract shall be entitled to

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[11] Section 33.2, Board Rules of Practice. Petition for Election of Collective Bargaining Representative (Re: Burlington Airport Employees), 28 VLRB 87, 95-96 (2005). Village of Essex Junction Employees Association and Local 1343, AFL-CIO and Village of Essex Junction, 14 VLRB 157, 158-59 (1991).

[12] St. Albans Police Officers Association and Local 1343, AFSCME, AFL-CIO and City of St Albans, 8 VLRB 46 (1985). Petition for Decertification of Collective Bargaining Representative (Re: Town and Village of Ludlow Employees), 32 VLRB 48 (2012).

> peaceful implementation of it during its term. Otherwise, the purpose of MERA to "provide orderly and peaceful procedures" governing relations between employers and employees would be violated. Obviously, the indiscriminate permitting of representation petitions during a contract's term would promote disorderly and disruptive labor relations.
> . . . The petition filed here is clearly untimely under the contract-bar policy we have established because it was filed 13 days after the City and AFSCME executed a contract and well in advance of the "open" period for filing a petition. To consider the petition timely would be unfair to AFSCME and the City who negotiated a contract in good faith and should be able to implement it without the disruptive influence of a pending representation petition. [13]

The rationale behind barring the filing of petitions in the 60 days prior to the expiration of the agreement is to allow the parties to negotiate free from the threat of a challenge to the majority status of the employee representative.[14] The contract bar policy will not necessarily be one that the Board will apply in all situations. It is a policy that the Board may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements.[15] The burden is on the petitioner to present sufficient justification for waiving the normal time period.[16]

The Board has qualified the contract-bar policy in cases where contracts have terms longer than three years. In such cases, contracts operate as a bar to petitions only the first three years. The contract bar will no longer apply as of the third-year anniversary date of the effective date of the contract and petitions will be considered timely if filed between that date and until at least the expiration date of the contract. The Board stated that "this achieves the desired balance between stabilizing the

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[13] St. Albans Police Officers Association and Local 1343, AFSCME, AFL-CIO and City of St Albans, 8 VLRB 46, 52-54 (1985).
[14] Vermont State Housing Authority, 4 VLRB 257 (1981).
[15] St. Albans, supra.
[16] Petition for Decertification of Collective Bargaining Representative (Re: City of Montpelier Public Works Employees, 23 VLRB 162, 163 (2000).

employer-union relationship and providing employees with an opportunity for a free choice of bargaining representative at reasonable intervals."[17]

Contracts of definite duration for terms up to three years normally will bar a petition for their entire period except for the period 90 to 60 days prior to the contract expiration date.[18] Where a party asserts that a contract is a bar to an election, the party must show that the contract was fully executed, signed and dated prior to the filing of the decertification petition.[19]

The Board did not apply the contract bar policy where there was an agreement between a union and a municipal employer which had a duration of 61 days. The Board determined that the agreement did not operate as a bar to a representation election petition filed by a challenger union. The Board held that contracts of less than 90 days duration do not constitute bars to elections absent exceptional circumstances. The Board reasoned:

> (O)ur contract bar doctrine has the dual objectives of achieving a reasonable balance between the competing interests of stabilizing the employer-union relationship and free employee choice of a representative at reasonable intervals. Judged against these objectives, agreements of less than 90 days generally fail to meet either objective. Given their brevity, they provide little in the way of stabilizing the employer-employee relationship. Further, because they are less than 90 days, they provide for either an abbreviated period, or no period, during which employees may act to remove a bargaining representative with which they are disenchanted.[20]

Under the State Labor Relations Act, the Board has adopted the identical 90 to 60 day contract bar rule developed under the Municipal Act.[21] The Board also has

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[17] Enosburg Falls Water and Light Department Employees Association and Local 300, IBEW and Enosburg Falls Water and Light Department, 11 VLRB 77, 85-86 (1988).
[18] Enosburg Falls Water and Light Department, 11 VLRB 77 (1988).
[19] Town of Castleton and AFSCME, AFL-CIO, 13 VLRB 127, 136 (1990).
[20] Petition of the New England Police Benevolent Association (Re: Town of Northfield Police Department), 32 VLRB 328, 334 (2013).
[21] Section 23.2, Board Rules of Practice.

adopted a contract bar rule under the State Employees Labor Relations Act, but the open time period for filing petitions differs. A petition normally will be considered timely only if filed during the period 150 to 120 days prior to the date the General Assembly convenes in regular session for the year during which the collective bargaining agreement expires, or if filed after the expiration date of the agreement, if a successor agreement has not become effective.[22] In one case filed under the State Employees Labor Relations Act, the Board dismissed a petition as untimely filed where it was filed months after the normal time period and the petitioning union did not provide justification why the normal time period should be waived. The Board determined that to rule otherwise would be unfair to the incumbent bargaining representative and the State who negotiated a contract at a time following the open period in which they were entitled to negotiate free from the threat of challenge to the majority status of the employee representative. The Board concluded this would be contrary to the settled work environment and stabilization of the employer-union relationship necessary for productive labor relations.[23]

The Board has adopted the same contract bar rule under the Judiciary Employees Labor Relations Act, the Independent Direct Support Providers Labor Relations Act, and the Early Care and Education Providers Labor Relations Act as exists under the State Employees Act.[24]

Another contract bar issue is whether an election petition filed by an employee organization to replace the incumbent bargaining representative is timely in situations where the petition is filed after the expiration date of the contract and a successor agreement is not effective. The Board has concluded that such petitions

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[22] Section 13.2, Board Rules of Practice.
[23] New England Police Benevolent Association Petition for Election of Collective Bargaining Representative (Re: Sworn Law Enforcement Officers), 33 VLRB 4, 5 – 7 (2014); *Affirmed*, 2015 VT 51 (2015).
[24] Sections 53.2, 63.2, and 73.2, Board Rules of Practice.

are timely. The Board has interpreted Board Rules of Practice to provide an opportunity for a petition to be filed after the contractually provided date of expiration of a contact even when the contract remains in effect, as long as a successor agreement has not become effective.[25]

A further issue concerns whether an existing collective bargaining contract bars a petition to add employees to the existing bargaining unit. Under the Municipal Act, the VLRB has determined that the contract bar rule does not apply to an incumbent union seeking to add employees previously not represented by a union, and not covered by a contract.[26] However, if those employees vote to be represented by the union, the terms of the existing contract are not extended to them.[27] The parties only are required to negotiate in good faith with respect to wages, hours and conditions of employment of the employees.[28]

Also, in cases under the Municipal Act where a union is seeking to add employees to an existing bargaining unit, the Board uniformly conducts an election among just the employees the union is seeking to add to the bargaining unit to determine whether they wish to be represented by the union. Employees in the existing bargaining unit do not vote.[29]

D. Employer Response to Election Petition

Upon receipt of a valid petition for election of a collective bargaining representative, the Board sends a copy of the petition to the employer and makes two

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[25] Village of Essex Junction Employees' Association and Local 1343, AFSCME, AFL-CIO and Village of Essex Junction, 14 VLRB 157 (1991). Petition for Election of Collective Bargaining Representative (Re: Burlington Airport Employees), 28 VLRB 87, 95-96 (2005).
[26] Local 1369, AFSCME, AFL-CIO and Town of Barre, 12 VLRB 7, 19 (1989). IBEW Local 300 and Village of Morrisville Water and Light Dept., 13 VLRB 243, 245 (1990).
[27] Id.
[28] Id.
[29] Washington County Employees Association and Washington County, 19 VLRB 261 (1996).

requests of the employer at the outset: 1) to immediately post copies of the petition at place(s) normally used for employer-employee communications; and 2) to file with the Board within a week a list of the names of the employees proposed by the union to be included in, or added to, the bargaining unit. This list is used by the Board in determining whether a sufficient showing of interest has been made by the union.[30]

The Employer also is required to notify the Board within a specified time, not less than 15 days, whether a question of unit determination or representation exists. Under the Municipal Employee Relations Act and the State Labor Relations Act, where there is no incumbent bargaining representative or the incumbent bargaining representative is seeking to expand the existing bargaining unit, the Employer has three options: 1) agree that the bargaining unit proposed by the union is appropriate, and voluntarily recognize the union as exclusive bargaining representative of the employees petitioned for, provided statutory standards are met;[31] 2) agree that the proposed bargaining unit is appropriate and agree to a consent election to be conducted by the Board;[32] or 3) indicate specific questions of unit determination or representation which exist.[33]

Under the State Employees Labor Relations Act and the Judiciary Employees Labor Relations Act, the employer has the choice of the latter two options, but is not able to agree to voluntarily recognize the union.[34] Under the Independent Direct Support Providers Labor Relations Act and the Early Care and Education Providers Labor Relations Act, the State needs to notify the Board whether there is a question

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[30] Sections 13.7 - 13.9, 23.8 - 23.10, 33.7 - 33.9, 53.7 – 53.9, 63.7 – 63.9, and 73.7 – 73.9, Board Rules of Practice.
[31] Sections 23.10 and 33.9, Board Rules of Practice; 21 V.S.A. §§ 1543 and 1724(c).
[32] Sections 23.10 and 33.9, Board Rules of Practice.
[33] Id.
[34] Sections 13.8(B) and 53.8(B), Board Rules of Practice; 3 V.S.A. §§ 941, 1021.

of representation.[35] The State may voluntarily recognize a union as exclusive bargaining representative under the Early Care and Education Providers Labor Relations Act if the labor organization demonstrates that it has the support of a majority of the providers in the unit it seeks to represent and no other employee organization seeks to represent the providers.[36]

Under each of the statutes administered by the Board except the Independent Direct Support Providers Labor Relations Act and the Early Care and Education Providers Labor Relations Act, upon the filing of a petition for election of collective bargaining representative where there is an incumbent bargaining representative, the Board requests the employer and incumbent bargaining representative to notify the Board within a specified time, but not less than 15 days: 1) whether any collective bargaining agreement is in effect which would bar an election, and 2) whether any questions of unit determination or representation exist, which questions shall be specified.[37] Under the Independent Direct Support Providers Act and the Early Care and Education Providers Labor Relations Act, the Board requests the State to notify the Board whether any collective bargaining agreement is in effect which would bar an election or whether any questions of representation exist.[38]

In cases where it is appropriate for the employer to voluntarily recognize the union as bargaining representative, and the employer does so, the Board issues an order certifying the voluntary recognition.[39] If the employer agrees to a consent election, the Board will conduct an election. Elections are discussed below. If the employer raises unit determination issues, those issues must be resolved before an election is conducted.

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[35] Section 63.8, and Section 73.9, Board Rules of Practice.
[36] 33 V.S.A. §3607(e).
[37] Sections 13.8(C), Section 23.11, Section 33.10, Section 53.8(C), Board Rules of Practice.
[38] Section 63.8(C), Section 73.9(C), Board Rules of Practice.
[39] Sections 23.13 and 33.12, Board Rules of Practice.