VACATED by *Bassett Unified School District* (1979) PERB Order No. Ad-63

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BASSETT UNIFIED SCHOOL DISTRICT, Employer, and BASSETT EDUCATORS ASSOCIATION, CTA/NEA, Employee Organization, and BASSETT FEDERATION OF TEACHERS, AFT LOCAL 727, AFL-CIO, Employee Organization, APPELLANT.	Case No. LA-R-587 PERB Order No. Ad-57 Administrative Appeal January 30, 1979

Appearances: Richard N. Fisher, Attorney (O'Melveny & Myers) for Bassett Unified School District; Charles R. Gustafson, Attorney for Bassett Educators Association, CTA/NEA; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff) for Bassett Federation of Teachers, AFT Local 727, AFL-CIO.

Before: Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

DECISION

This case is an appeal from the Los Angeles regional director's dismissal of a decertification petition filed by Bassett Federation of Teachers, AFT Local 727, AFL-CIO (hereafter Federation). The regional director held that since Bassett Unified School District (hereafter District) and Bassett Educators Association, CTA/NEA (hereafter Association) had not terminated their 1977-80 agreement, the Federation's petition was barred by section 3544.7(b)(1) of the Educational

Employment Relations Act (hereafter EERA).1 For the reasons set forth below, we reverse the regional director's decision.

FACTS

On January 24, 1977, an election for exclusive representation of certificated employees in the District was conducted between the Association, the Federation and "no representation." A majority of employees voting cast ballots for the Association. On February 2, 1977, the Association was certified as the exclusive representative of certificated employees in the District.

On December 1, 1977, the District and the Association executed a written agreement covering wages, hours and other terms and conditions of employment.

1The Educaional Employment Relations Act is codified at Government Code sections 3540 et seq. All references are to the Government Code unless otherwise noted.

Section 3544.7(b)(1) and (2) states:

> (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, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or
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> (2) The public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition.

Hereafter, section 3544.7(b)(1) may be referred to as the "contract bar" provision of the EERA.

The agreement contained four particularly relevant provisions. Article XXI stated:

> This Agreement shall become effective pursuant to its terms upon ratification and Board of Education adoption, and shall remain in full force and effect up to and including June 30, 1980, unless earlier terminated pursuant to the express terms of Article XVII - Salaries, and shall thereafter remain in full force and effect year-by-year unless one of the parties has notified the other in writing, no later than February 1, of its intention to terminate effective on June 30.
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> While it is understood that negotiations on limited matters are (sic) required under Article XI and XIV, such negotiations are not to affect in any way the duration, validity or enforceability of the remainder of this Agreement, regardless of the outcome of such negotiations. (Emphasis added.)

Article XVII stated:

> 1. Effective as of September 1, 1977, each step of the following salary schedules is to be increased 7% over the previously effective amounts, rounded off to the nearest dollar ...
>
> 2. Effective July 1, 1978, and again on July 1, 1979, each step of the following salary schedules is to be increased 6% (rounded as before), subject to the following contingency: The District's salary obligation for each of the second and third years of this Agreement is contingent upon receipt of anticipated State income, reasonable staffing ratios and upon the availability of sufficient unallocated general funds. In this regard the District has committed itself to a diligent effort to make such funds available by appropriate cost-cutting efforts, so long as educational programs are not jeopardized. In the event that adequate unallocated funds are not deemed available for such increases, the District shall not be obligated hereunder, but the Agreement shall in such an event be terminated in its entirety as of June 30. If this occurs, the Association shall not be

> limited in its proposals to the amounts set forth hereinabove. The District shall by March 1 of each year hereunder give the Association tentative notice of its perceived ability to fund the above salary provision, and shall also give notice of its position as of June 1.
>
> Any disputes with respect to whether there is an availability of funds for the second and third-year salary increases are to be handled pursuant to applicable statutory negotiation and, if necessary, impasse procedures rather than through the grievance procedures of Article VI, and disputes with respect to whether the District has made an adequate effort to make such funds available are to be handled pursuant to the consultation provisions of Article VIII [2] rather than through the grievance procedures of Article VI. (Emphasis added.)

Article VI set forth the grievance procedure applicable to certificated employees. It provided for binding arbitration of disputes not resolved during three intermediate steps. Article XVII, supra, pecifically excluded from binding arbitration disputes concerning both the availability of funds to pay salary increases and the adequacy of the District's efforts to make such funds available.

2Article VIII states in pertinent part:

> 1. The District shall upon request consult with the Association with respect to the following matters, and shall give good faith consideration to Association input regarding such matters: (1) The definition of educational objectives, •••; (2) Determination of course content and curriculum; {3) Selection of textbooks; (4) Determination of educational materials, supplies and equipment, including communications equipment; (5) Pupil conduct and discipline policies and practices; (6) Testing methods and development of tests; (7) Utilization of education aides; and (8) Determination of in-service training programs, including content thereof.

Article XX enabled the parties to meet and negotiate on items contained within the contract "if they mutually desire to do so."

On March 1, 1978, the District gave tentative notice pursuant to Article XVII of its perceived inability to pay the salary increases established by the contract.

On April 3, 1978,[3] the Federation filed a petition to decertify the Association pursuant to Board rule 33240.[4] The petition was accompanied by proof that at least 30 percent of

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[3]At first glance it would appear that the Federation's petition was not filed within the 120-90 day window period which technically closed on April 1. However, April 1 was a Saturday, and thus the filing on April 3, a Monday, was timely.

[4]Cal. Admin. Code, tit. 8, sec. 33240, which states:

> (a) A petition for an election to decertify an existing exclusive representative may be filed with the regional office pursuant to section 3544.5(d) of the Act by an employee within the unit or an employee organization.
>
> (b) The petition shall contain the following information:
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> (1) The name, address and telephone number of the petitioner, and the name, address and telephone of the agent to be contacted if any;
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> (2) The name, address and county of the employer;
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> (3) The name and address of the incumbent exclusive representative;
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> (4) A description of the established unit;
>
> (5) The approximate number of employees in the unit;
>
> (6) The date the incumbent exclusive representative was recognized or certified;

the employees in the established unit no longer desired that the Association continue to be their exclusive representative. It stated:

> The existing contract will "...be terminated in its entirety as of June 30.••" if the District does not grant the incumbent exclusive agent a six (6) percent raise. (Article XVII A-2)

By letter to the PERB regional office in Los Angeles on April 12, the District reacted to the petition. It stated:

> Although the information reqgarding (sic) the AFT request for decertification did not come as a total surprise, I am unable to react since the certificated collective bargaining still has more than two years to go until it expires.

Fn. 4 Cont'd.

> (7) The effective date and the expiration date of a current agreement covering employees in the established unit;
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> (8) A statement that the employees in the established unit no longer desire the recognized or certified employee organization as their exclusive representative.
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> (c) The petition shall be accompanied by proof that at least 30 percent of the employees in the established unit either:
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> (1) No longer desire to be represented by the incumbent exclusive representative; or
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> (2) Wish to be represented by another employee organization.
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> (d) The petitioner shall concurrently serve a copy of the petition, excluding the proof of at least 30 percent support on the employer, the incumbent exclusive representative, and any other employee organization known to claim to represent employees in a unit. A statement of service shall be sent to the regional office with the petition.

> It is true that the provisions of Article XVII provide for termination of the agreement as of June 30 of either of the first two years (see page 51), it is premature for the District to be certain as to its ability to pay the provided increase. The District's budget for 1978-79 has not yet been developed.

On April 20, 1978, the regional director requested the District, the Association and the Federation to file points and authorities addressing the issue of the timeliness of the Federation's petition. All parties complied with her request. The record does not indicate clearly whether the District gave the Association notice of its position on June 1.

On June 29, the District and the Association executed a document entitled "June 1978 Addendum to 1977-80 Agreement." See Appendix A. The addendum "deleted and replaced" Articles XI and XIV of the 1977-80 contract with two new Articles of the same numbers. It also stated:

> ...The District and Association agree that the District would have been able to meet the tentative salary agreement for the 1978-79 school year as provided in Article XVII (Salaries) but for the legal and fiscal constraints posed by the passage of Proposition 13 and Senate Bill 154. Accordingly, the Association has determined that it should not cause the Agreement to be prematurely terminated pursuant to Article XVII-A, and that instead the contract should be continued in full force and effect, except as modified herein, for the balance of its stated term (until June 30, 1980). All 1977-78 salary schedules and rules (including step and column advancement rules} shall be continued in effect for the 1978-79 school year, unless amended pursuant to continuing negotiations between the District and Association as provided hereinafter.

DISCUSSION

The collective negotiations model is designed to enhance employer-employee relations5 by creating a stable relationship between the employer and its employees acting through their freely chosen representative. Chula Vista City School District (9/18/78) PERB Decision No. 70; Oakland Unified School District (10/19/78) PERB Order No. Ad-48. Stability is achieved when the employer and employees, through their freely chosen representative, execute and cooperatively administer a comprehensive agreement governing employees' terms and conditions of employment.

The election of an exclusive representative is a necessary first step in the collective negotiations process. The EERA accordingly sets forth a comprehensive elections process. Section 3544 et seq. It prohibits a broad spectrum of employer conduct that would impinge on employees' free choice of a collective representative. Section 3543.5.

5Gov. Code sec. 3540 states in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy...

Once an exclusive representative has been selected, the EERA guarantees it a one-year period free from organizational challenge. Section 3544.7(b)(2). This provision gives the employer and exclusive representative a reasonable period of time to negotiate a collective agreement.

If the parties execute a collective negotiations agreement, section 3544.7(b)(1) generally bars rival organizations from filing a petition to decertify the exclusive representative until 120 days before expiration of the agreement.[6] Through this provision, the signatories to the contract are enabled to cooperate for the life of the agreement without threat of external disruption. See Kheel, Labor Law, section 13.04 et seq. In this way, the goal of stability in labor relations is acheived.

In the event that the exclusive representative and the employer do not reach an agreement within 12 months after certification, the EERA again gives weight to employee free choice and allows the filing of a petition for decertification. Section 3544.7(b)(2), supra.

In recognition that stability in labor relations must not be had fully at the expense of the representational desires of the employees, the EERA places a three-year limitation on the permissible duration of collective negotiating agreements. Section 3541.3(h).

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[6]Section 3544.7(b)(1) does not necessarily apply to all collective negotiating agreements. It is within the province of the Board to decline to protect collective negotiating agreements that are in conflict with the purposes of the EERA. See discussion infra.

At first glance, the 1977-80 agreement in this case would appear to be protected by the contract bar provision of the EERA. However, the National Labor Relations Board (hereafter NLRB) has made clear that not all collective bargaining agreements are protected by the NLRB's contract bar rule. While this Board is not bound by NLRB decisions, it takes cognizance of them in analogous areas of law. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [87 LRRM 2453]; Sweetwater Union High School District (11/23/76) EERB Decision No. 4.

The NLRB generally will not direct an election when a valid contract is in existence. Polar ware Co. (1962) 139 NLRB 1006, [51 LRRM 1452]; Road Materials, Inc. (1971) 193 NLRB 990 [78 LRRM 1448]. However, such a contract must meet certain requirements. It must be in writing and signed by the parties. Pittsburg Plate Glass Co. (1957) 118 NLRB 961 [40 LRRM 1296]; Peter Paul Inc. (1973) 204 NLRB 241 (83 LRRM 1310]. It must provide for exclusive recognition of the bargaining agent (Dover Ceramic Co. (1956) 115 NLRB 1040 [37 LR.RM 1488], J.P. Sand and Gravel Co. (1976) 222 NLRB 83 [91 LRRM 1187]) cover an appropriate unit (Central General Hospital (1976) 223 NLRB 110 [91 LRRM 14331 provide substantial terms and conditions of employment (Consolidated Cement Corp. (1957) 117 NLRB 492 [39 LRRM 1262], Appalachian Shale Products Co. (1958) 121 NLRB 1160 [42 LRRM 1506); and

extend for a definite and reasonable term (Nash-Kelvinator Corp. (1954) 110 NLRB 447 [35 LRRM 1074], Pacific Coast Association of Pulp & Paper Manufacturers (1958) 121 NLRB 990 [42 LRRM 1477]).

It is undisputed that the collective negotiations agreement in this case is sufficiently comprehensive in scope to meet the above requirements. The parties consider the crucial issue to be whether this case is governed by the NLRB's decfsion in Deluxe Metal Furniture Company (1958) 121 NLRB 995 (42 LRRM 1470), which held that a midterm modifications provision does not remove the contract bar unless the contract actually has been terminated. The District and the Association argued, and the regional director found, that Article XVII was a "modifications" clause. They argue that the Deluxe rule applies here o bar the Federation's petition. The Federation argues, however, that the article calls not for modification, but for "termination in the event that a six percent raise does not occur."7

7The Federation argues:

> If the parties had desired to negotiate a modification clause or a reopener clause, they would have done so. But Article XVII, by providing for termination, obviously contemplates something other than negotiations toward the modified contract. The only possible interpretation of the clause is that, if the teachers did not receive the six percent increase which they were expecting, then they are free to take whatever action they deem appropriate in order to obtain what they consider to be proper compensation from the school district.

Whether a "modifications" clause is involved in this case is at best questionable. The clause at issue here, Article XVII, does not provide for modification.8 Rather, it gives the District the option to terminate the contract at the end of the first or second year. It equally may be considered to create a one year contract, renewable for a second and a third year at the District's option. These unilateral options are not equivalent to the bilateral power to modify addressed in Deluxe. Technical distinctions, however, are inessential to our disposition of this case. For even if this contract involves a modifications clause identical to the one in Deluxe, we are not obliged to follow the ruling of that case.

The NLRB adopted Deluxe after more than 20 years of experimentation concerning contract bar principles. In its earliest days, the NLRB permitted employees to change bargaining representatives, even in the face of valid contracts. New England Transportation Company (1936) 1 NLRB 130 [1 LRRM 97]; Swayne and Hoyt, Ltd. (1936) 2 NLRB 282 (1 LRRM 99]. The NLRB reversed this position in 1939. It then held that representation elections generally would not be conducted during the lifetimes of collective bargaining agreements. National Sugar Refining Co. (1939) 10 NLRB 1410 [3 LRRM 544].

8Article XX of the contract, which is not put in issue by the parties, enables the contracting parties to meet and negotiate on items contained within the contract "if they mutually agree to do so."

For fifteen years following its decision in National Sugar, the Board increasingly weighted contract bar principles in favor of stability in bargaining relationships.

This basic approach was applied to numerous types of contract clauses. As the NLRB evolved, it gave protection to contracts containing automatic renewal clauses (see Mill B, Inc. (1942) 40 NLRB 346 [10 LRRM 62], reversing American Oak Leather Furniture Co. (1941) 31 NLRB 1155). It applied the contract bar principle to prematurely extended contracts (see Republic Steel Corporation (1949) 84 NLRB 483 [24 LRRM 1286], and compare Northwestern Publishing Co. (1946) 71 NLRB 167 [18 LRRM 1476] and Wichita Union Stockyards Co. (1942) 40 NLRB 369 [10 LRRM 65]). It also applied the principle to modifications of collective bargaining agreements (see Western Electric Compa?y (1951) 94 NLRB 54 [28 LRRM 1002], S & W Fine Foods (1947) 74 NLRB 1316 [20 LRRM 1269], and compare Chapman Valve Manufacturing Co. (1942) 40 NLRB 800 [10 LRRM 79] and Duquesne Light Co. {1946) 71 NLRB 336 [18 LRRM 1498]).

This trend, however, was reversed in General Electric Company (1954) 108 NLRB 1290. General Electric confronted a collective bargaining contract that contained a modifications clause enabling either party to renegotiate any aspect of the agreement within prescribed time periods. In the event that the parties failed to reach agreement, the contract authorized the union to strike, in which event the employer could terminate the contract. The NLRB held that such a contract did not merit the protection of the contract bar rule. The Board held:

> We fail to perceive how a contract which contains such a broad provision for midterm modification, and which contains no inhibitions on the Union's right to strike to enforce its demands, and expressly provides the privilege of termination by one party only, can be said to have stabilized the relationship between the parties for the full nominal term of their contract. Under this provision, once notice is given nothing remains of the entire contract but the meaningless terminal date, which is itself subject to extinction.

The Board continued:

> Viewed realistically, this contractual provision insures no greater degree of stability than does the usual automatic-renewal clause, which the Board has consistently held opens a contract to a timely rival petition. In either situation, until the time for giving notice has passed, or the parties have executed a new or modified contract, the degree of industrial stability which the Board's contract-bar principles were designed to preserve does not exist. In neither situation, therefore, is there any rational basis for denying to the employees, on the basis of a timely petition, an immediate opportunity to exercise their franchise. (General Electric Company (1954) supra, 108 NLRB at pages 1291, 1292. (Emphasis added.)

General Electric remained the policy of the NLRB for four years. In 1958, the NLRB reversed itself in Deluxe Metal Furniture Co. (1958) supra, 121 NLRB 995 [42 LRRM 1470]. It held:

> A midterm modification provision, regardless of its scope, will not remove a contract as a bar unless the parties actually terminate the contract. . . . (121 NLRB at page 1003.)

The Board theorized that the modifiability of a collective negotiations agreement only impacts on labor stability when the contract actually has been terminated. It stated:

> ••. [I]t is clear that the parties intend and expect that their bargaining relationship will continue for the full specified period, and that the termination part of the clause is one to be exercised, if at all, as a last resort. It should not be assumed that because one or more of the conditions precedent *have* been met the parties will exercise their right to terminate the contracts. On the contrary, having engaged in bargaining sessions which are frequently long and arduous, and having finally arrived at an agreement, the parties in all probability would be unwilling, during midterm modification negotiations, to abandon their contract thereby sacrificing the mutual benefits achieved. Such a contract is as effective in stabilizing labor relations, until the parties actually elect to terminate, as any other contract. For, even without such a provision, a contract may be terminated by mutual assent of the parties. (121 NLRB at page 1004.)

Apart from these policy considerations, the decision also gave great weight to considerations of administrative convenience, predictability of result, and speedy resolution of questions concerning representation. See Deluxe Metal Furniture Co. (1958) supra, 121 NLRB at page 1004. And see BNA, 1967 Labor Relations Yearbook 210.

That the NLRB currently follows a policy favoring stability in bargaining relationships does not persuade us that this Board should strike a similar balance. The NLRB decided Deluxe more than three decades after private sector collective bargaining began. In California, however, the principle of public employee collective negotiations is a new one. Public school employees have had little exposure to the system of collective negotiations instituted by the EERA. They have had little experience with which to gauge the representational

abilities of their exclusive representatives. It therefore would be ill-advised to articulate a blanket rule disabling employees frcm exercising their free choice in all instances where a collective negotiations agreement is in place. We accordingly decline to bind ourselves to the broad rule articulated in Deluxe.

The status of the collective negotiations agreement in the present case remains to be determined. It is beyond dispute that a collective negotiations agreement is the sine gua .!12.!! of stable labor relations. In apprising employees of the material aspects of their work and in setting forth timeframes and procedures to be followed in the event of employer-employee conflict, collective negotiations agreements eliminate many of the uncertainties and unstable elements of the labor-management relationshipo Not all collective negotiations agreements effectuate stability, however. Those that do not should not be given the protection of the contract bar rule, regardless of the convenience and timesaving that might result from establishing a hard and fast administrative formula.

While that contract bar rule is statutory and asserts a clear prohibition in the face of an existing "lawful written agreement," the Board recognizes that an agreement resulting from collective negotiations does not fit the common mold, but has an identity and character of its own. That identity--and the consequent test of "lawfulness"--is created by the language of the EERA itself.

Section 3540 indicates that a fundamental purpose of the EERA is the improvement of personnel management and employer-employee relations in the public school system throughout the medium of collective negotiations.

Section 3540.1(h) defines "meeting and negotiating" as the mutual good faith effort to reach agreement on matters within scope and the reduction of any agreement to a written document which shall become binding on the parties when bilaterally accepted.

Inherent in these two provisions is the concept that as issues are resolved through negotiations, the resulting mutual accommodations of the parties, memorialized in a binding agreement for some fixed period, will result in a stabilization of the employment relationship. To give a purely technical and narrow meaning_ to the phrase "lawful written agreement" would be to give sanctification even to spurious arrangements and to deny to employees relief from purported agreements which might contain nothing more than a recognition clause and term of duration. While this example may be extreme, it nevertheless serves to illustrate that the phrase "lawful written agreement" is not meant to apply to a document which fails to meet the stated purposes of the EERA either because of the lapse of its substantive provisions or because it is terminable at the will of the employer.

The collective negotiations agreement in the present case is an example of such a contract. On the one hand, it supplied substantial terms and conditions of employment for the first

year of its purported three-year term. On the other hand, Article XVII significantly diminished the certainty and stability of the parties' collective negotiations relationship after the first year. It permitted the employer unilaterally to terminate the contract if it deemed funds not to be available. The employer gave tentative notice of termination in March of 1978. Thus, beginning in March, a cloud was cast over the contract. The terms and conditions of employment for the 1978-80 period were in suspension. The decision whether to continue those terms agreed upon in December 1977 rested in the hands of the District alone. In this case, as in General Electric (1954) supra, 108 NLRB 1290, "the degree of stability which the .•. contract bar principles were designed to preserve [did] not exist" once the District gave notice of termination in March.

The employer's ability to remold the contract particularly undermined whatever stability may have been inherent in it. Article XVII effectively changed the bilateral process of negotiations into a unilateral one at the end of its first and second years of operation. It gave the District the power to cast aside the parties' three-year agreement over wages, hours of employment, leave and safety policies, procedures for processing grievances, transfers and evaluations, and all else contained within it. It allowed the District to use its power of termination as a foil to force a reduction in salary increases. It effectively gave the District the option of opening--or closing--the door for the filing of a

decertification petition by terminating the contract. In essence, it gave the employer the power, after one year, to determine the advantageousness of continuing with the contract, and to continue it, or not to continue it, as it saw fit. The employee organization, on the other hand, was obliged to uphold the terms of the contract, no matter how disadvantageous they came to be, for the entire potential duration of the contract period. We are hard pressed to see how this arrangement effectuated stable labor relations.

That the contract required the employer to make "diligent" efforts to secure adequate funds does alter these findings. Disputes arising under Article XVII were excluded specifically from the scope of Article VI, the binding arbitration provision of the agreement. This exclusion precluded a neutral, third party determination of the availability of funds. It is true that Article XVII stated that disputes concerning the availability of funds were "to be handled pursuant to applicable statutory negotiation . . ." However, the employer is under no duty to make concessions in meeting and negotiating. In addition, the agreement gave the Association only a limited right of "consultation" in the event that it disputed whether the District had made adequate efforts to make funds available.9 This scheme heightened the lack of stability that inhered in the contract upon the employer's giving tentative notice of termination.

9see footnote 2, ante.

Since the contract effectuated stable labor relations only during the course of its first year, it must be considered to be for one year's duration for the purpose of section 3544.?(b)(1).10 The Federation's petition therefore was timely filed during the appropriate window.period. The regional director's dismissal of the petition is reversed.

This decision, however, should not be read to extend carte blanche to employee organizations desiring to oust exclusive representatives when collective negotiating agreements are in effect. Where valid collective negotiating agreements are operational, the Board generally will not process a petition to decertify unless it is filed within the "window period" between 120 and 90 days prior to the expiration date of the agreement. Section 3544.?(b)(1). This case establishes an exception to that rule when the collective negotiating agreement in question gives the employer the unilateral power to terminate or modify its terms. The resolution of contract-bar related issues arising outside of this limited context is left to later cases.

10In view of this conclusion, it is unnecessary to determine whether the legal effect of Article XVII was to cause the contract to be one for one year's duration, renewable at the option of the District. See discussion supra at page 12.

ORDER

The Los Angeles regional director's dismissal of the decertification petition filed by Bassett Federation of Teachers, Local 727, AFL-CIO, against Bassett Educators Association, CTA/NEA, is reversed. The regional director is directed to process the decertification petition filed by the Federation.

By: Harry Gluck, Chairperson Jirilou Cossack Twohey, MEmber

Raymond J. Gonzales, Member, dissenting:

I dissent from the majority's decision to allow the Federation's decertification petition to be processed. The plain languag of Government Code section 3544.7(b)(1) requires the Board to dismiss this petition.

Section 3544.7(b)(1) provides:

> No election shall be held and the petition shall be dismissed whenever:
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> 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, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

No party has disputed the fact that a lawful written agreement was in effect when the decertification petition was filed.[1]

[1]I will discuss the majority's implication that this agreement was not a "lawful written agreement" infra.

The parties only dispute whether Article XVII of that agreement[2] constitutes a modification clause or a termination clause. Thus, the only question is whether or not June 30, 1978 should be considered the expiration date of the agreement.

As of the date the petition was filed, the District had given tentative notice of its perceived inability to fund a six percent salary increase. This, however, did not make a contrapt termination inevitable. It merely set in motion a bilateral negotiations process as to whether funds were in fact available. Until the agreement actually terminated, we cannot say that it would inevitably terminate prior to its stated expiration date.[3] The parties gave themselves ample time to negotiate modifications *to* the agreement, and in fact did modify the agreement so as to avoid terminating it. Therefore, on its face, I do not think that the March 1 tentative notice causd the expirc;tion date of the contract to change.

I also do not think that midterm modification clauses should be cause for PERB to drop the contract bar. While I have always agreed with the majority that NLRB decisions are not binding on PERB, I find the reasoning in Deluxe Metal Furniture Co. (1958)

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[2]Article XVII is set forth at pp. 3-4 of the majority opinion, ante.

[3]This case is distinguishable from South East Ohio Eg Producers (1956) 116 NLRB 1076 [38 LRRM 1406), cited by t e Federation in its appeal. In that case, a specific event occurred which automatically set a new termination date for the contract. In the present case, a new termination date did not automatically arise when the District gave tentative notice; the District still had to provide notice on June 1, and even then termination was not inevitable.

121 NLRB 995 [42 LRRM 1470] persuasive, particularly in view of the plain statutory language of section 3544.7(d)(1). Deluxe Metal held that "[a] midterm modification provision, regardless of its scope, will not remove *a* contract as a bar unless the parties actually terminate the contract . . ." This seems consistent with section 3544.7(b)(1)'s requirement that decertification petitions shall be dismissed whenever there is currently in effect a lawful written agreement.

The majority argues that the contract provision in this case is not really a modification clause of the type discussed in Deluxe Metal since it gives the District the option to terminate the contract at the end of the first or second year. The District, however, cannot exercise this option without negotiating and, if necessary, participating in impasse procedures in good faith,[4] that is, with a subjective intent to reach agreement.[5] The NLRB, in Deluxe Metal, stated:

> Modification clauses containing provision for unilateral termination by notice if agreement is not reached . . . will be treated in the same manner as any other request for mid-term modification and will not remove the contract as a bar.

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[4]Article XVII provides that "[a]ny disputes with respect to whether there is an availability of funds for the second and third-year salary increases are to be handled pursuant to applicable statutory negotiation and, if necessary, impasse procedures . . ." Applicable statutory procedures require good faith. Government Code section 3543.5(c) and (d).

[5]see Pajaro Valley Unified School District (5/27/78) PERB Decision No. 51.

The clause in question in the present case seems to me to fall within the purview of this language. Therefore, I would find the reasoning of Deluxe Metal clearly relevant even though it deals with a private sector case.

The majority, however, declines to bind itself to the reasoning in Deluxe Metal.[6] After going through a lengthy analysis of the evolution of the Deluxe Metal rule, my colleagues reason that since public employee collective negotiating is new in California, PERB, in effect, should be less protective of negotiated agreements than the Deluxe Metal rule requires.

I believe that the majority gives itself more flexibility in dealing with the contract bar provision of the EERA than is permitted by the statute. Unlike the NLRB, which, in developing its own contract bar rule, was able to modify the rule in response to its changing perceptions of labor relations, PERB is bound by a statutory contract bar provision, the interpretation of which is controlled by legislative intent. Yet the majority seems to imply that the Legislature's intent with respect to the application of section 3544.7(d)(1) is a flexible concept which may change as public employees gain more exposure to collective negotiations. The majority is apparently trying to gain the flexibility of a case-made rule in spite of the fact that it is dealing with statutory language.

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[6]My colleagues, who are generally the ones to rely on private sector decisions, find it convenient in this instance to ignore the obvious applicability of Deluxe Metal.

The majority refers to overruled NLRB cases in making its argument that the agreement in this case is not sufficiently stable. Is it not more logical to assume that the Legislature, in creating a contract bar, had the current NLRB policy, in existence since 1958, in mind rather than overruled policies? Thus, I think the policy set forth in Deluxe Metal is an appropriate guide to legislative intent in this case. This is particularly so since that policy comports with the language of section 3544.7(d)(1) requiring the Board to dismiss petitions when a lawful written agreement is in effect.

The majority, trying to get around the statutory language apparently finds the agreement negotiated by the parties in this case "unlawful." It seemingly believes the agreement is not "lawful" because it does not result in a stabilization of the employment relationship.

I totally disagree with the majority's interpretation of the phrase "lawful written agreement." I cannot believe that the Legislature in using that term intended to give PERB the authority to evaluate the content of collective negotiation agreements to ensure that they meet PERB standards for stability. I cannot believe that the Legislature intended an agreement which sets terms and conditions of employment to become unlawful merely because it contains a clause giving one party the ability to terminate the contract when specific conditions are met. The majority's notion of lawfulness gives it almost unlimited freedom to refuse to enforce the contract bar provision in the face of otherwise perfectly valid written agreements.

The majority, in effect, is imposing its judgment on the terms of the contract rather than limiting its role to that of interpreting and applying the EERA. I do not believe that the Legislature intended the use of the word "lawful" to give the Board such discretion in deciding when to apply section 3544.7(b)(1).

The majority's notion of stability, which it equates with lawfulness, is also quite flexible. Stability apparently does not only go to whether the terms and conditions of employment are likely to continue, but also to who has the power to decide whether the agreement will continue. Thus, stability, and hence lawfulness, is equated with one-sidedness. This seems to me to be an inexcusable interference with the parties' ability to make agreements to fit their needs.

The agreement in this case is an example. The clause in question is a reasonable contract modification clause, given the exigencies of public school finance. The parties wanted a three-year agreement and wanted to increase salaries six percent each year. They recognized, however, that circumstances might arise which would preclude such an increase, and therefore tried to develop a reasonable solution. They agreed that if the District could not pay the contractual increase, contract negotiations should start from scratch, with both parties free to make new proposals on all subjects. While the District is given the ultimate authority to decide whether or not it is in fact able to pay the increase, the parties ensured some degree of joint decision-making by requiring the District to meet and negotiate and participate in impasse procedures in good faith. Although the majority seems to find this agreement one-sided,

unstable, and unlawful, I do not think it is an inherently unfair solution to a problem facing all school districts which attempt to negotiate multi-year contracts.

I believe the majority is unreasonably interfering with the parties' ability to negotiate a multi-year agreement which retains some flexibility. Such flexibility is almost mandatory in the public sector where funding is uncertain and the employer may be unable *to* meet negotiated wage increases. The majority's decision, however, has greatly increased the risk the parties take in developing contract modification clauses. If the parties are not exceedingly careful to avoid crossing the line between flexibility and instability, they run the risk of PERE allowing decertification proceedings to begin. The majority's unwarranted evaluation of contract modification clauses thus appears to discourage stable multi-year relationships and encourage the instability inherent in decertification attempts. I fail to see how this effectuates the purposes of the EERA.

d J.-Gd'rizalis, Membr

PUBLIC EMPI.DYMENr REI.ATICNS BOARD

OF THE STATE OF CALIFORNIA

BASSEIT UNJi lED SCHOOL DISTRICT,. Employer, and BASSEIT EDUCAlORS ASSOCIATION, CTA/NFA, Employee Organization, and BASS'EIT FEDERATION OF TEA01ERS, AFT LOCAL 727, AFL-CIO, Enployee Organization.	Case No . IA-R-587 ORDER DISMISSIN:; PEtlTION FOR DECERTIFICATION

earances : Charles R. Gustafson, Attorney for Bassett Educators Association, /NE'A; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff) for Bassett Federation of Teachers, AFl' Local 727, AFL-CIO; Richard N. Fisher, Attorney (O'Melveny & Myers) for Bassett Unified School District.

BACKGROUND

On January 24, 1977, a unit election for exclusive representation of certificated e:nployees in the Bassett Unified School District (District) was conducted between Bassett Educators Association, CT.A/NF.A (Association), Bassett Federation of Teachers, AFI' Local 727, Afl.-CIO (Federation) and no representation. A majority of the valid ballots having been cast for the Association, on February 2, 197.7 the Association was certified as the exclusive representative for certificated errployees in the District.

On Decemer 1, 1977, a written agreerrent covering wages, hours and other tenns and conditions of er.ployrrent was signed by representatives of the Di.strict and the Association and thereafter adopted by the District's &::lard of Education.

Article XXI of the agreem:nt, "Duration and Negotiation Procedures", states tl-iat t. e agreerrent "shall remain in full force and effect up to and including

June 30. 1980, unless earlier terminated pursuant to the express terms of Article XVII - Salaries . . ." Article XVII of the agreem=nt provides that the District shall pay a six (6) percent general sa.la:ry increase to the bargaining unit effective July 1 in the second and third years of the agreem:nt "contingent upon receipt of anticipated State inc. reasonable staffing ratios and upon the availability of sufficient unallocated general funds." In the event that adequate unallocated funds are not "deen;d" available, Article XVII further provides that "the District shall not be obligated hereunder, but the agreem:nt shall in such an event be tennina.ted in its entirety *as* of June 30." Addition.ally, the·agreenent states that the Di.strict shall on both March 1 and June 1 give the Association tentative notice of its perceived ability to fund the above-m:mtioned sala:cy provisions. Lastly, Article XVII provides that "any disputes with respect to whether there is an availability of funds for the second or third year ala.ry increases are to be handled pursuant to applicable statutory negotiation and, if necessa:cy, izit>asse procedures. . . and disputes with respect to whether the Di.strict has made an adequate effort to make such funds available are to be handled pursuant to the consultation provisions of Article VIII. . .."

On April 3, 1978, the Federation filed with the Los Angeles Regional Office of the Public E.n;>loymmt Relations Board (PERB) a representation petition

pursuant to Goverrmem; Code section 3544.5(d)[1] regardi.i...g the certificated employee tmit :in the Di ttict. At the time the Federation filed its petition, the above-rrentioned collective negotiating agreen:ent existed between the District and the Association. Pursuant to the request of t'li.e Regional Director, on May 1 and 2, 1978 the Association, Federation and District filed their respective !lEilDranda of points and authorities regarding the above-captioned matter.

ISSUE

IX:les the collective negotiating agreerent betw'een the District and the Association bar the Federation's representation petition pursuant to section 3544.7(b)(1)

DISCUSSION AND CONa.USIONS

'Ihe California. Suprene Court has held that when the Labor Managenent Relations Act[2] (U1RA) does not contain specific wording caq:iarable to State legislation regarding the public employee-employer relations but where federal precedents under the U1RA effectively reflect the sa.tm il'iterests as those which

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[1]All section references are to the C'.alifornia Goverment Code unless otherwise specified.

Sec. 3544.5(d) states:

> A petition may be filed with the board [PERB], in accordance with its rules and regulations, requesting it to i.nvestigate and decide the question of whether employees have selected or wish to select an exclusive representative or to dete:i:mi.ne the appropriateness of a unit, by:
> ***
> (d) AfJ. enployee organization alleging that the etq)loyees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, p-rovided that such petition is supported by current dues deduction authorizations or other evidence such as notarized rranbership lists, cards, or petitions frcm 30 percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incunbent exclusive representative.

[2]u.s.c. sec. 151 et seq. 1he Labor Management Relations Act amended the National Labor Relations Act.

prcm.J.1.gated the inclusion of specific language in the State legislation, the federal precedents provide "reliable if analogous authority on the issue." Firefighters Union *v.* City of Vallejo (1974) 12 Cal.3d 608, 615-617, 87 L™ 2453. See also Sweetwater Union High School District (11/23/76) EERB Decision No. 4. 'Ihe statutory "contract bar" language contained in section 3544.7(b)(1) is quite similar to the contract bar doctrine developed by the Nat:ional Labor Relations Board (NI.RB). Accordingly, in reaching this decision, cognizance is taken of c.ase law developed under the I.MRA.

Section 3544.7(b)(1) provides for the dismissal of a decertification petitic:1 and bars an election during the term of a collective negotiating agreem:mt. Section 3544.7(b)(1) states:

> No election shall be held and the petition shall be dismissed whenever:
>
> (1) There is currently in effect: a lawful written agre.em;nt negotiated by the public sch:X>l eaployer and-another employee organization covering any e:I;>loyees included in the unit described in the request for recognition, or unless the request for recognition is filed less th.an 120 days, but n:ore th.an 90 days, prior to the expiration date of the agreenent.

In order to bar a petition for an election, an agree.m:nt tI1.1St be written, signed by authorized representatives of both parties, have a definite duration, contain substantial tel:'IDS and conditions of enployment and cover all enployees in the appropriate unit. Appalachian Shale Products Co. (1958) 121 NLRB 1160, 42 LRRM 1506. None of the parties apparently disputes the fact that the agreement in question meets the requirements of Appalachi.an Shale. The Federation, h<Y.VeVer, argues that Article XVII, section (A)(2) rerroves the agreemnt as a bar. Both the District and the Association argue that Article XVII is in effect a mid-term rrodi.fication provision and t:ha.t the agree:rent is and will continue to be a bar

until such time as it is actually te:rmi.nated. 11-.e District concedes that in the event the agreemnt is te:rmi.nated, a decertification petition filed after tennination but before the execution date of a new contract would be ti.m=ly.

As noted by the NLRB's General Counsel in An Outline of Law and Procedure in Representation c:ases :

> The major objective of the Board's [NLRB's] contract-bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of :industrial stability and freedcm of errployees' choice. This doctrine is intended to afford the contracting parties and the enployees a reasonable period of stability in their relationship without interruption and at the saire tinE to afford the enployees the opportunity, at reasonable tinEs, to change or elim:i.na.te thef' bargaining repre-sentative, if they wish to do so.

In the landmark decision in l:'eluxe Metal Funri.ture Co. (1958) 121 NLRB 995, 42 LRRM 1470, the NLRB, in revising and reviewing its "contract bar" doctrine , established rules of tinEliness regarding the three district procedural stages

'Which arise "When a contract approaches tennina.t:i.on: (1) the open period during which decertification petitions may be filed; (2) the insulated period :inm:diatly following the open period during which decertification petitions will not be considered t:i.lrely filed and tilie parties are penrd..tted to negotiate "free from the threat of over-hanging rivalry and uncertainty"; and (3) the post-tenn:i.nal period during which; if no contract is entered into dtn::i..ng the insulated period, a decertification petition may be entertained.[4]

Deluxe :involved a three-year contract, October 1955 to January 1958, willch "shall thereafter be continued for one year periods unless notice of te:rm:i.na.tion or mdification in writing by registered mail is given by either party to this

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[3]An Outline of Law and Procedure in Representation Cases , Office of the General Counsel, National Lafur Relations BOaid (1974), p. 74.

[4]For a discussion of l:'eluxe and the specific time periods established by the NLRB therein, see tbrris , The I:leveloping Labor Law (1971) , pp. 177-180.

agreement." In Nove!:Iber 1957, notice of a desire to m:idi.fy was given to the loyer by the exclusive representative. On January 20, 1958, the employer and the exclusive representative signed and ratified a "Merorandt:m of Understanding." A decertification petition was filed by a canpeting labor organization with the NLRB Regiooal Office the following day .January 21, 1958.

In addressing the issue of whether the above-quoted clause reo:oved the contract as a ba:r, the NLRB held:

> A mid-teJ:m trodification ion, regardless of its scope will not raoove a contract as a bar unless the parties actually terminate the contract. 1he Board believes it best to permit the pa:rt:ies to IIDdify or ammd any of the substantive provisions of their contract, in accordance with aey mdification clause--whether broad or na:n:ow in scope--ar by nutual assent: at any tim! during its te:rm. 'I1ms, no mi.d-te:r.m trodification clause. nor *aif1f* action pursuant thereto short of actual tenninati.on, will rerove a contract as a bar . . . .. Modification clauses containing provision for unilateral tennination by notice if agreen:ent is not reached or permitting a strike or lockout in support of *grzy* ·danand made during the mdification negotiations and the right to teI:minate thereafter , will be treated in the sarre manner as any other re.quest for mid-':erm rrcdification and will not rem:>Ve the contract as a bar.
>
> . . . All the parties will need to prove and the Board [NLRB] will need to detenrrl.ne is whether the contract has been te?mi.nated. When parties include in their fixed term contract a *clause* certain steps SUCh as negotiations , deidloCk, and/or s · or lOCkOUt as conditions precedent to te:rmina.tion. the contract will continue to be abar regardless of WhiCh of its conditions shOrt of termination basbeeri mt.

The NLRB explained the rationale behind its ruling by stating:

> It is believed that to hold this type of contract not a bar is to disregard the significance of these inter-rrediate steps. For, by includ:ing a clause conta.:ining such conditions precedent to temination it is clear that t:he parties intend and expect that their bargaining relationship will continue for the full specified period. and that the ten:nination pa.rt of the clause is one to be exercised, if at all, as a la.st resort . It should not be asSUlll:d that because one or rore of the conditions precedent

> have been met the parties will exercise their right to terminate the contracts. On the contrary, having engaged in bargaining sessions which are frequently long and arduous, and having finally arrived at an agreement, the parties in all probability would be unwilling, during mid-term modification negotiations to abandon their contract thereby sacrificing the mutual benefits achieved. Such a contract is as effective in stabilizing labor relations, until the parties actually elect to terminate, as any other contract. 921 NLRB 1003-1004 [Emphasis added.] [Footnote omitted.]

'Ihe NLRB *has* consistently follcmed the Deluxe precedent in cases involving contract bar issues . Th.us, in Ellison Brothers Oyster 9:.'mpany (1959) 124 NLRB *U25,* 44 LRRM 1629, a then exist:i.ng contract between the exclusive representative and the enployer was held to bar a decertification petition filed by a rival labor organi.zation even though the exclusive representative gave notice of its desire to mdify the contract eight mnths prior to its expirati.0n date. The NLRB declared:

> It is clear that the parties agreed that this nod.ce was pursuant to the provision in the contract providing for mi.dtel.'lll mdification of the contract with rega:rd to wages only. The Board [NLRB] has established the rule that no action pursuant to a midterm oodi.ficati.on clause short of actual t:erminati.on of a contract will rem::ive a contra.ct *as* a bar except Yilere notice is given imrediat:ely prior to the auta:oatic renewal date of such contract:. *As* the Union's notice in this case was for the purpose of ba:rga.ining as to wages only and *was* g:i.ven 6 !IDilt:hs before the autanatic renewal date of the contract, *we* find that the contract autcxoa.tically renaved itself on February 1, 1959, and is a bar to this proceeding. 124 NLRB at *U26* [Footnote emitted. }

See also Providence Television, Inc. (1971) 194 NLRB 759, 79 l..RRM 1079, holding, pursuant to the policy stated in Deluxe, that the agreanent therein, *as* automatically **rd** for one year and an:e:ided to include a broad trJ:i.d-term m::xli.fication provision, was a contract for a fixed term whic.fi operated to bar a decertification petition.

An examination of the language of the agreement betr.veen the District and the Association and particularly .Article XVII in the instant natter reveals that the parties clearly intended to provide for mid-teJ:m salary m:xii.ficati.ons during the agree:mnt e s tam, Decaiber 1, 1977 through June 30, 1980, by providing for a six (6) percent salary :irlc:rea.se for the second and third years of the agreen:ent: contingent upon sufficient unallocated *funds* frcm which to provide said salary increase. Article XVII further obligates the District to give notice of its perceived financial condition by. certain dates with issues regarding the availability of funds for the second and third *year* salary inc:reases to be resolved through statutory negotiations and, if necessary, in;>asse procedures. 'Ibe conditions precedent to ter.mination contained in the instant mid-tenn m:xlification clause of notice by the District of its perdeived .fi.nancial condition, negotiations and mpasse procedures are similar to the privat:e sector provisions enunciated in Deluxe for negotiations, deadlock, and/or strike or lockout and held by the NLRB to not rem:Ne the contract as a bar. .As held in Deluxe, and reinforced in Ellison Brothers and Providence Television, vfueil the parties include in their fixed-tenn contract *a* mid-tem. n:r:xiification clause requiring certain conditions precedent to te:mtination, the contract will continue to be a bar regardless of which of its conditions short of tennination has been JJEt.

It is therefore concluded that the mid-term. mdification clause contained in Article XVII, or any action pursuant thereto short of actual te-rm:i..:na.tion, does not ren::ove the contract bet:'!Neen the District and the Association as a bar to the Federation's decertification petition pursuant to section 3544.7(b)(l). The Federation's petition filed on April 3, 1978 m.ist accordingly be dismissed.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, · dismissed.

This Administrative Order shall beccue final on June 26, 1978 unless a party files a timely stat:aIBlt of exceptions and supporting brief within ten (10) calendar days follcwing the date of se:r:vi.ce of this Ad:ninistrative Order. !my statare:nt of exceptions and supporting brief !IIJSt be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself.

Dated: June 16, 1978

FRANCES A. i<RtfEiliU '
Regional Director