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8

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In The Matter Of

Franklin Local Teachers Association,

Employee Organization,

and

Franklin Local School District Board  
of Education,

Case Nos. 84-RC-04-0181  
84-RC-04-0270  
84-VR-04-0275

OPINION

Public Employer.

In this representation case a the Hearing Officer has made a "recommended determination" after hearing. Exceptions by Franklin Local Teachers Association (Association or Union) to the recommended determination have raised three issues. The first is whether learning disability tutors should be included in the unit. Both parties are now agreed that the tutors should be included. And it is apparent that the inclusion is not inconsistent with the statutory standards. The learning disability tutors will be included. Two questions remain:

- A) Should the unit appropriate for collective bargaining include full-time substitute teachers with over sixty (60) consecutive school days in a specific assignment?

The Hearing Officer recommended the question be answered "No."

For reasons to be adduced, the question is properly answered "No."

- B) Should an order be entered certifying the Association as the exclusive bargaining agent for the employees in the unit without the necessity for a representation election?

The Hearing Officer recommended that the question be answered "No."

For reasons to be adduced, the question cannot be properly answered for lack of evidence.

I

"Should the unit appropriate for collective bargaining include full-time substitute teachers with over sixty (60) consecutive school days in a specific assignment?"

Revised Code Section 3319.10 governs the employment status of substitute teachers. The statutory provisions effectually establish temporary employee status for those teachers who are not under contract nor entitled to a contract:

42

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
PAGE -3-

II

"Should an order be entered certifying the Association as the exclusive bargaining agent for the employees in the unit without the necessity for a representation election?"

This question raises important questions of statutory interpretation involving policy issues which in turn implicate the legislative intention in designing methods for certification.

The relevant portions of the pertinent statutory sections provide:

"Sec. 4117.05. (A) An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by. . .:

\* \* \*

"(2) Filing a request with a public employer with a copy to the State Employment Relations Board for recognition as an exclusive representative. . .Immediately upon receipt of a request, the public employer shall. . .request an election under division (A)(2) of section 4117.07 of the Revised Code. . .

\* \* \*

"The State Employment Relations Board shall certify the employee organization filing the request for recognition on the twenty-second day following the filing of the request for recognition, unless by the twenty-first day following the filing of the request for recognition it receives:

"(1) A petition for an election from the public employer pursuant to division (A)(2) of section 4117.07 of the Revised Code; (Emphasis added)

"(ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish to be represented by the employee organization filing the request for recognition;

<sup>2</sup> R.C. 4117. permits an alternative to an employer request for an election. However, that option is deleted from the statutory text reproduced in this opinion. This is done to permit and enhance the focus on the election option.

24

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
PAGE -4-

"(iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten per cent. of the employees in the described bargaining unit wish to be represented by such other employee organization; or

"(iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit.

\* \* \*

"Sec. 4117.07. (A) When a petition is filed, in accordance with rules prescribed by the State Employment Relations Board:

\* \* \*

"(2) By the employer alleging that one or more employee organizations has presented to it a claim to be recognized as the exclusive representative in an appropriate unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties.

"If the board finds upon the record of a hearing that a question of representation exists, it shall direct an election and certify the results thereof. . ."

Although the words "voluntary recognition" appear nowhere in R.C. 4117.05 that section is generally referenced as the "voluntary recognition" section because it does provide procedure which may result in the certification of an exclusive bargaining representative without the necessity for an election. However, a variety of conditions may frustrate recognition absent a representation election. One of the latter (under certain circumstances) is an employer petition [see R.C. 4117.05(A)(2) and R.C. 4117.07(A)(2)].

This option and other impediments to voluntary recognition listed in the statute [R.C. 4117.05(A)(b)(1) - (iv)] are not conjoined. Thus, the election option is separate and the plain language of the statute describes the process set in motion when an employer petitions for an election following a request for recognition as exclusive representative. First, there is an investigation "of the petition" by the Board. If the results of the investigation will support a "reasonable cause to believe that a question of representation exists", the Board must provide for an "appropriate hearing on due notice to the parties." After that if the Board finds "upon the record of a hearing" that "a question of representation exists", it must direct an election and certify the results.

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
PAGE -5-

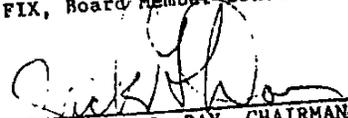
Accordingly, the first question is "what will support reasonable cause to believe a representation question exists." The employer's petition alone unless clearly frivolous, will support reasonable cause at the investigation stage and compel a hearing on the merits of the question. At very least, with events in this posture, certification of the claiming union is blocked pending the taking of evidence at the hearing and decision on the merits. At the hearing the petitioning employer has the burden of proving the existence of a representation issue by a preponderance of the evidence. Assuming that the requisite proofs are made, the Board will order an election and certify the results.

A major question arises what to do if the employer's proof fails? This could occur if it adduces no proofs at all; fails to show that substantial questions exist respecting the appropriateness of the unit or introduces no evidence to demonstrate that the basis of the union claim for majority status is without foundation. This recital of evidential flaws may not exhaust the possibilities. However, they serve to illustrate the point that a failure of proof confronts the Board with the necessity of deciding whether under the circumstances it must certify the union without an election. In effect the question is whether the employer's failure to prove that a bona fide representation question exists is the same in legal contemplation under R.C. 4117.05 and .07 as a failure to challenge the union's majority status at all?

The Board may, in an appropriate case, have to answer that question. However, that question is not here. For the hearing evidence was not directed at the representation issue. This was so because policy was not clear. The prevailing assumption by the agency and the employer was that simple filing for an election was sufficient to determine that a representation issue was presented. What has been said demonstrates that this is not the case. Thus, under these circumstances, it would be unfair to charge the employer with a failure to meet its burden of proof.

Under these conditions, a further hearing is directed on the single question, "Does a representation issue exist?"

DAY, Chairman; SHEEHAN, Vice-Chairman; and FIX, Board Member concur.

  
JACK G. DAY, CHAIRMAN

I hereby certify that this document was filed and a copy served upon each party on this 8<sup>th</sup> day of Nov, 1984.

By \_\_\_\_\_  
KENNETH W. BARRETT  
EXECUTIVE DIRECTOR

26