

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

84-009

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In the Matter of
Dayton Fraternal Order of Police,
Lodge No. 44,

Petitioner,

and

City of Dayton,

Respondent.

Case No. 84-VR-04-0231
84-RC-04-0320

ORDER

Before Chairman Day, Vice-Chairman Sheehan and Board Member Fix; November 20, 1984.

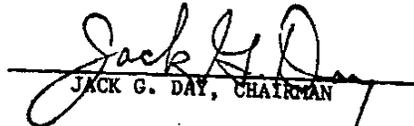
A Request for Voluntary Recognition was filed by the Dayton Fraternal Order of Police, Lodge No.44 (FOP) with the State Employment Relations Board and the City of Dayton (City) on or about April 4, 1984. The bargaining unit proposed by the FOP consisted of police officers holding the ranks of sergeant, lieutenant, and captain. On April 5, 1984, the City of Dayton filed a Petition for Representation Election pursuant to Section 4117.07 of the Revised Code. On May 31, 1984, the City filed a Motion to Dismiss, arguing that the employees included in the proposed unit are not "public employees" as defined in Section 4117.01(C) of the Revised Code because they are "supervisors" within the meaning of Section 4117.01(F) of the Revised Code.

On June 14, 1984, the hearing officer issued a recommendation that the City's Motion To Dismiss be granted. The FOP subsequently filed exceptions to the hearing officer's recommendation, and the City responded with a memorandum opposing the exceptions.

The Board grants the City's Motion to Dismiss for the reasons stated in the attached opinion, incorporated herein by reference.

It is so ordered.

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 21st day of November, 1984.

By


KENNETH H. BARLOW
EXECUTIVE DIRECTOR

11/21/84

STATE OF OHIO
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Police, Lodge #44,

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v.

City of Dayton,

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OPINION

* * *

Day, Chairman:

The City of Dayton (Movant or City) petitioned for an election after the Dayton Fraternal Order of Police, Lodge #44 (Union or Lodge) requested recognition. Both actions were pursuant to R.C. 4117.05(A)(2). Dayton now moves for dismissal of both cases.¹

The Union request defined the unit:

"Sergeants, lieutenants and captains of the Dayton Police Department."

This implicates the supervisor question, for "Supervisors" are not "public employees" within the meaning of the collective bargaining law (law, statute, or R.C. 4117) for the public sector. R.C. 4117.07(C)(10).

The supervisor exemption has a complex life in the statute. It is first given a broad definition [R.C. 4117.01(F)] then both narrowed and arguably expanded again [R.C. 4117.01(F)(2)]. Reproduction of the relevant portions of the statute will illustrate these expansions and contractions:

BROAD DEFINITION — R.C. 4117.01(F): "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

¹ This places it in the peculiar position of moving for the dismissal of its own case as well as the union's.

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public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment; provided, however: . . .

* * *

NARROWED DEFINITION - R.C. 4117.01(F)(2)²: With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department.

EXPANDED SPECIAL DEFINITION - R.C. 4117.01(F)(2) (continued): Where prior to June 1, 1982, a public employer pursuant to a judicial decision rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that such members are supervisors, those members of a police or fire department do not have the rights specified in Chapter 4117. of the Revised Code for the purposes of future collective bargaining. The State Employment Relations Board shall decide all disputes concerning the application of this division. (Emphasis added.)

The exemption raises these questions:

- (1) does the last sentence in R.C. 4117.01(F)(2) so limit the definition of supervisors in police and fire departments that the Dayton Police Officers in the unit sought here are exempted; and
- (2) if so, is SERB empowered to declare the judicial decision exemption unconstitutional either because it is special legislation under the State Constitution or because it denies equal protection under both the State and United States Constitutions?

² R.C. 4117.01(F)(2) is divided in the text for demonstration purposes only. Actually the narrow and expanded portions are separate sentences in the same paragraph.

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I

(1) Does the last sentence in R.C. 4117.01(F)(2) so limit the definition of supervision in police and fire departments that the Dayton Police Officers in the unit sought here are exempted?

The hearing officer recommends that the question be answered "Yes."
The question is properly answered "Yes."

The Dayton Police Department is the only public employer brought to the Board's attention that "pursuant to a judicial decision rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that such members are supervisors. . ."

There is no contrary evidence in the record to cast doubt upon the proposition that the language of R.C. 4117.01(F)(2) was intended to apply, and does apply, exclusively to the Dayton Police Department. Hence it is obvious that the statute was intended to exempt the Dayton safety employees who fit the statutory category. It follows that the unit including them is inappropriate.

II

(2) Is SERB empowered to declare the judicial decision exemption unconstitutional either because it is special legislation under the State Constitution or because it denies equal protection under both the State and United States Constitutions?

The hearing officer recommends that the question be answered "No."
The question is properly answered "No."

It may be that the exemption in the next to last sentence of R.C. 4117.01(F)(2) violates Section 26, Article II of the Ohio Constitution. That constitutional section provides, in relevant part, that:

". . .all laws of a general nature shall have a uniform operation throughout the State; . . ."

This provision for uniform operation "prohibit[s] non-uniform classifications if such be arbitrary, unreasonable or capricious. . ." Garcia v. Siffrin (1980) 63 Ohio St. 2nd 259,272. And it may well be that the "arbitrary, unreasonable or capricious" test is met by the language in R.C. 4117.02(F)(2). For, in effect, it declares that Dayton police officers

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are supervisors because of a judicial decision made before the statute was passed and it may be the fact that Dayton police officers and no other safety force employees in the state are reached by the exemption. If so, a conclusion of arbitrary and unreasonable caprice might follow since only they, among all the safety officers in the State, are not entitled to the "rights" specified in Chapter 4117 of the Revised Code."

It is conceivable also that the uniquely exclusive specificity of the "judicial decision" exemption offends the equal protection provisions of the Ohio Constitution and the equal protection clause in the Fourteenth Amendment of the United States Constitution.

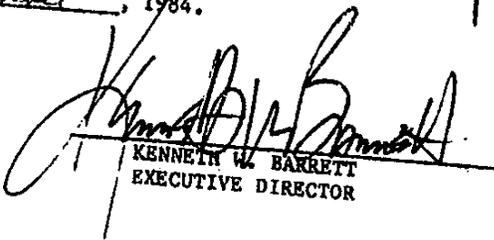
However, both the special legislation and equal protection discussions are deliberately couched in tentative language in this opinion. While a court might rely on either or both concepts to declare the exemption unconstitutional, the Board cannot. For it is the creature of the statute and has not the authority to destroy any part of its creator.

The second question must be answered "No" because SERB is powerless to give any other.

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 21st day of November, 1984.


KENNETH W. BARRETT
EXECUTIVE DIRECTOR

3 Section 1, Article I; Section 26, Article II.

4 Section 1, Article XIV.

5 See PLYLER v. DOE (1982) 457 U.S. 202 213: "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power [of] the State. . .to classify persons subject to its laws as nonetheless excepted from its protection. (Emphasis added). PLYLER v. DOE (1982) 457 U.S. 202, 213. While Plyler involved a different kind of inequality of treatment, its rhetoric seems particularly apt to describe a governing principle for the present case.