85-022

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ohio Nurses Association,

Employee Organization,

and

University of Cincinnati (University Hospital),

Employer.

CASE NUMBER: 84-UC-10-2214

DISMISSAL OF PETITION

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix; May 22, 1985.

The University of Cincinnati (University Hospital) has filed a Petition For Clarification Of Bargaining Unit seeking to amend the existing bargaining unit by excluding "supervisors, management-level employees, and/or confidential employees." For the reasons stated in the attached opinion, incoporated by reference, the petition is dismissed.

It is so ordered.

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

JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 24th day of May, 1985.

KENNETH W. BARRETT, EXECUTIVE DIRECTOR

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CASE NUMBER: 84-UC-10-2214

OPINION

Day, Chairman:

The University of Cincinnati (University Hospital) filed a Petition for Clarification of Bargaining Unit[1] on October 19, 1984. Examination of the petition discloses that in fact the petitioner (University Hospital or employer) seeks to amend[2] the bargaining unit by excluding "supervisors, management level employees, and/or confidential employees."

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[1]Administrative Code Rule 4117-5-01 PETITIONS: WHO MAY FILE.

* * *

(C) In the absence of a question of representation, a petition for clarification of an existing bargaining unit or for amendment of the certification of an exclusive representative may be filed by the exclusive representative or by the employer. For a Unit designated by a collective bargaining agreement entered into prior to April 1, 1984, such petition may not be filed except during the period of one hundred twenty days to ninety days before the expiration date of the collective bargaining agreement or at any other time during the term of the collective bargaining agreement if the petition is submitted by mutual agreement of the parties.

4117-5-02

(D) A petition for clarification of an existing bargaining unit or for amendment of the certification of an exclusive representative shall contain the following:

* * *

(3) The proposed clarification of the bargaining unit or the proposed amendment of the certification of the exclusive representative;

[2]For present purposes "amend" means "redesign" the bargaining unit to provide new perimeters. By contrast, "clarification" signifies a factual inquiry to determine whether a particular job description brought the job within or outside the boundaries of an included or excluded job category.

For reasons adduced below the petition is dismissed.

I

The unit in issue became part of a bargained agreement effective January 20, 1984. That contract expired on January 19, 1985. Thus it is apparent that the advent of the contract preceded April 1, 1984, the effective date of the statute[3] and is subject to Section 4(A) of the temporary statutory language.[4] That section coupled with R.C. 4117.05(B)[5] governs the exclusive representation status of employee organizations recognized before April 1, 1984. And it is clear from the total statutory reference that the boundaries of exclusive representation are fixed by the unit in which

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[3]Ohio Revised Code, Chapter 4117.

[4]Section 4(A) S.B. 133:
(A)Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code. Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employement Relations Board has certified an exclusive representative. (Emphasis added.)

And cf. Section 4(B) Any employee organization otherwise recognized by the public employer without a written contract, agreement, or memorandum of understanding shall continue to be recognized until challenged as provided in this act, and the Board has certified an exclusive representative. (Emphasis added.)

[5]4117.05 [Employee organization exclusive representative] * * *
(B) Nothing in this section shall be construed to permit a public employer to recognize, or the state employment relations board to certify, an employee organization as an exclusive representative under Chapter 4117 of the Revised Code if there is in effect a lawful written agreement, contract, or memorandum of understanding between the public employer and another employee organization which, on the effective date of this section, has been recognized by a public employer as the exclusive representative of the employees in a unit or which by tradition, custom, practice, election, or negotiation has been the only employee organization representing all employees in the unit; this restriction does not apply to that period of time covered by any agreement which exceeds three years. For the purposes of this section, extensions of agreement do not affect the expiration of the original agreement. (Emphasis added.)

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pre-April 1, 1984 recognition occurred. Beyond this, the legislative command, expressed specifically in the relevant enactments, requires that the "deemed certified" recognition acquired before April 1, 1984, continue indefinitely unless displaced. Displacement, according to the Act, occurs when an incumbent employee organization is successfully "challenged" by a rival employee organization with consequent State Employment Relations Board (SERB or Board) certification.

II

There is no displacement contention in the present case. The single question here is whether under the circumstances, the Board will change the unit on the unilateral petition of one of the parties even during the window period?[6]

III

The legislative enactments germane to the issue are plain. The consequences are not so obvious.

A "deemed certified" representative cannot be displaced except by a competing employee organization. Of course, the exclusive representative could bargain away part of its exclusiveness but can lose it involuntarily only as the statute provides. There is one exception to this principle. That exception is operative when the unit in question combined classifications before April 1, 1984, which could not have been joined after that date. The strong statutory strictures against the combinations prohibited in R.C. 4117.06(D)(1)-(6) linked with time limitations in R.C. 4117.05(B), applicable to pre-April 1, 1984, agreements reflect an intent under specified conditions to limit the contract bar effects of pre-April 1

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[6]See fn. 1, supra. "Window period" is shorthand for the language in Administrative Code Rule 4117-5-01(C): "...one hundred twenty days to ninety days before the expiration date of the collective bargaining agreement."

agreements and also restrict the effectiveness of agreed upon but prohibited job combinations in the same unit. The latter objective may not be as clear as the intent to restrict the contract bar defense, but it is hardly conceivable that the legislature intended to proscribe specific job combinations in the same unit (as it obviously did) and at the same time intended to allow those combinations to stand indefinitely simply because they were negotiated before the effective date of the Act.

If followed, these principles may ultimately place pre-April 1, 1984, unit combinations of prohibited categories negotiated by "deemed certified" representatives on the same plane with such combinations when negotiated by post-April 1, 1984, voluntarily recognized or certified exclusive representatives.[7]

V

Why then should not the modification sought here be allowed? The answer lies in the nature of the changes sought. The present petition seeks exclusions whose combination with other job categories are not forbidden. Any exclusive representative and employer could negotiate the combinations in effect in this case without violating the statutory proscriptions. The point is that there is a different legislative intent manifest where the job classification combinations are not specifically proscribed as in R.C. 4117.06(D)(1)-(6). For example, there are categories described in R.C. 4117.01, e.g. supervisors, whose inclusion an employer could successfully resist. This does not mean resistance is imperative. If the parties

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[7]This conjecture assumes successful challenges or negotiated changes. A section of the statute relevant to these considerations is R.C. 4117.08(D)(9). The pertinent part of that subsection provides:

* * *

"The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement..." (Emphasis added.)

mutually agree to bargain for such categories, there is no legal impediment.[8] What is protected against in the case of such categories is compulsion. But, in the present case, because there is by law no impediment to agreement, the employer must live with its bargain until the "deemed certified" representative with whom it made the bargain loses its status by the legislatively ordained method; that is, displacement by another employee organization under the provisions of R.C. 4117 or by a new bargain.

VI

The question is answered, "No." The unit may not be amended. The petition is dismissed.

Sheehan, Vice Chairman, and Fix, Member, concur.

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[8]See Ohio Council 8, American Federation of State, County and Municipal Employees and City of Canton, (1985) Case Nos. 84-RC-04-0230, 84-RC-04-0087 and 84-RD-10-2212.

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