

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Fraternal Order of Police, Ohio Valley Lodge #112,
Employee Organization,
and
City of Loveland,
Employer.

CASE NUMBER: 84-RC-05-1095

DIRECTION TO OPEN AND COUNT CHALLENGED BALLOT
(OPINIONS ATTACHED)

Before Chairman Day, Vice Chairman Sheehan and Board Member Fix, May 30, 1985.

Pursuant to Ohio Revised Code Section 4117.07, on May 9, 1985, agents of the Board conducted a secret ballot election for a unit of sergeants and lieutenants employed by the City of Loveland (Employer).

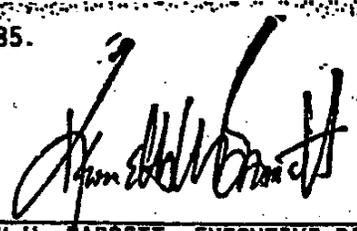
Of three (3) ballots cast, one (1) vote was cast for the Fraternal Order of Police, Ohio Valley Lodge #112, one (1) vote was cast for "no representative," and one (1) ballot was challenged. For the reasons stated in the attached Opinions, incorporated by reference, the Administrator of Elections is directed to open and count the challenged ballot and to issue a revised tally of ballots.

It is so directed.

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 14 day of June, 1985.


KENNETH W. BARRETT, EXECUTIVE DIRECTOR

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OPINION

Fix, Board Member:

On May 9, 1985, a recognition election was held in the City of Loveland (City) to determine if a proposed unit consisting of sergeants and above wished to be represented exclusively by Fraternal Order of Police, Valley Lodge 112.

The election revealed one vote for representation and one opposed. The City has challenged the third ballot, that of Lt. Robert Hayden, on the basis that he has been designated to act in the absence of the chief. The City requests the State Employment Relations Board (SERB or Board) to uphold its challenge.

I

The single issue before the Board is: Should the City's challenge to the ballot be upheld?

The answer is "no" for facts and reasons adduced below.

(MORE)

II

On March 28, 1985, the Board issued an opinion and order which stated in pertinent part:

"The Board considers the three lieutenants eligible for inclusion in a bargaining unit. Where the City of Loveland notifies SERB of the category of person designated to act in the absence of the chief...pursuant to Section 4117.01(F)(2) of the Ohio Revised Code, that person shall be excluded from the bargaining unit." (Emphasis added.)

On April 30, 1985, the Board received from Loveland City Manager Wayne Barfels a copy of eligible voters for the voting unit consisting of police officers, rank of sergeant and above. The list contained three names, including that of Lt. Hayde. whose ballot is now challenged.

On May 9, 1985, a recognition election was held and on May 16, 1985, the Board received the City's request to uphold the challenge to Lt. Hayden's ballot.

III

Not until May 16, 1985, three weeks after issuance of the eligibility list and a week after the election, did SERB know the City had designated one lieutenant to act in the absence of the chief.

Copies of correspondence sent to SERB by the City and received May 16, 1985, reveal the City notified Lt. Hayden and counsel for the City on April 17 and April 18, 1985, respectively, of the designation of a person to act in the absence of the chief. And yet the eligibility list, dated April 26, 1985, and sent by the City to SERB showed no indication of this designation. It contained the names of all three lieutenants.

(MORE)

17

IV

By waiting until after the election to object to the eligibility list, the City has, in effect, waived its right to object pursuant to Ohio Administrative Code Rule 4117-5-07(C).¹

In addition, the City failed to notify SERB of the designation of a lieutenant to act in the absence of the chief until after the election.

The City waived its right to object pursuant to O.A.C. Rule 4117-5-07(C). The unit was established at the time of the election. Ohio Revised Code Section 4117.06(D)(6) contains no prohibition against inclusion of an acting chief in a bargaining unit.

Therefore, the Board finds the unit appropriate and orders the Administrator of Elections to open the challenged ballot and revise the tally.

Day, Chairman, and Sheehan, Vice Chairman, concur.

¹Ohio Administrative Code Rule 4117-5-07 (C). Failure to object in writing to the board to the form or content of the election eligibility list prior to the commencement of an election shall constitute a waiver of the objection if the objecting party knew of the defect prior to the election, or through the exercise of reasonable diligence should have known.

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CONCURRING OPINION

Day, J., concurring:

This case illustrates the flexibility for unit design while staying within the perimeters imposed by the statute.

R.C. 4117.01 is a definitional section. And in it [R.C. 4117.01(C)] public employees are defined. The definition is limited by fourteen exceptions and a special description for the supervisor exception in police and fire departments. The consequence is a much narrowed definition of supervisors in those departments. Only chiefs and those persons who, in the chief's absence, exercise his authority and perform his duties are deemed supervisors. [R.C. 4117.01(F)(2)]

Employers are compelled to bargain collectively with an exclusive representative chosen by employees covered under R.C. 4117 unless excepted from the definition of public employees. However, employees in the excepted categories of R.C. 4117.01(C)(1)-(14) may bargain with their employer if the latter is willing to do so.¹ This conclusion is buttressed both by the

1 See State, ex rel. Ohio Council 8 v. Spellacy (1985) 17 Ohio St. 3d 112; and see Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO and City of Canton (1985), Case Nos. 84-RC-04-0230, 84-RC-04-0087, 84-RD-10-2212.

City of Loveland

-2-

cases cited in the margin and R.C. 4117.03(C). That section provides:

"(C) Nothing in Chapter 4117. of the Revised Code prohibits public employers from electing to engage in collective bargaining, meet and confer, discussions, or any other form of collective negotiations with public employees who are not subject to Chapter 4117. of the Revised Code pursuant to division (C) of section 4117.01 of the Revised Code."

In addition, there is a significant implication in the legislature's enactment of R.C. 4117.06(D) and R.C. 4117.03(B). The former specifically proscribed unit combinations of certain designated job categories. Other combinations were forbidden unless specified processes were observed. R.C. 4117.03(B) flatly denied bargaining rights to "persons on active duty or acting in any capacity as members of the organized militia." These enactments coupled with the omission of prohibitions in R.C. 4117.01(C) indicate, under classic principles of statutory construction, that only those prohibitions specifically announced were meant to be excluded.

This rationale makes possible and supports the decision in this case. For police and fire chiefs and their alter egos do not represent categories of persons with whom the statute prohibits a collective bargain. Hence when the employer failed to take timely action in the present case, it effectively waived its permissive right not to bargain; and bargaining in a unit including all three lieutenants became its legal obligation. The Board so found for the reasons analyzed in the main opinion.

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20