

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 87-012

In the Matter of  
Northern Ohio Patrolmen's Benevolent Association,  
Employee Organization,

and

Service, Hospital, Nursing Home and Public Employees  
Union, Local #47,  
Incumbent Organization,

and

Cuyahoga County Board of Commissioners  
Employer.

CASE NUMBER: 86-REP-9-0281

OPINION

Day, Chairman:

In this case, the incumbent union raises a single question of first impression. The question is: Whether Section 4(A) of the Temporary Law blocks a rival employee organization's petition for representation election seeking to dislodge a deemed certified incumbent in a unit which is otherwise appropriate and encompassed within but less than coterminous with an existing deemed certified unit?

In this instance, for reasons adduced below, the question is answered, "No."

I

A deemed certified unit exists here. It is larger than the smaller unit sought by a rival organization and includes all the employees in the smaller unit. Service, Hospital, Nursing Home and Public Employees Union,

There is no other claimed impediment to an election or the authority of the State Employment Relations Board (SERB or Board) to order it and conduct it.

Local #47 (SEIU or Local #47) is the incumbent union. The Northern Ohio Patrolmen's Benevolent Association (NOPBA) is the challenger. NOPBA seeks to represent a group of security employees who make up the smaller, included unit. That unit's description is:

Included:

All regular full time Security Officers I and II employed by the Cuyahoga County Board of Commissioners

Excluded:

All other employees.

Unless Section 4(A) of the Temporary Law is an impediment, the unit sought is an appropriate one and SERB must order an election.

Section 4(A) provides:

"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 Employment Relations Board has certified an exclusive representative."

The second and last full sentence is the operative part of Section 4(A) for present purposes. The only specific strictures in it are that any challenge to a certified incumbent be mounted "by another employee organization" under the provisions of Chapter 4117 and that the challenger succeed in being certified by SERB.<sup>2</sup> Remarkably there is not a

<sup>2</sup>The certification requirement obviously cannot be satisfied in the absence of a successful challenge.

legislative word suggesting that new certifications in deemed certified units must be confined to successful challenges either to the entire unit or not at all. Hence, arguably Section 4(A) itself provides sufficient authority to support any petition for an election in an appropriate unit within the confines of a deemed certified unit but less than coterminous with it.<sup>3</sup> However, a proposition this broad is not necessary for a disposition of the representation issue in the instant case.

SERB cases have been in the vicinity of the present issue but for reasons of factual differences have never had to reach it and decide it squarely. In the case styled In the Matter of Ohio Nurses Association and University of Cincinnati (1985), Case No. 84-UC-10-2214, 2 OPER 2626 (1985), management petitioned unilaterally during the window period to "clarify" a deemed certified bargaining unit.<sup>4</sup> In fact, the petition sought to amend the unit by excluding "supervisors, management level employees, and/or confidential employees." Whether the petition raised a question of

<sup>3</sup>Section 4(D) does not imply, as the incumbent suggests, a contrary view. 4(D) is simply a special purpose clause designed to cover the contingency exemplified in agreements or memoranda of understanding granting non-exclusive recognition.

<sup>4</sup>See Ohio Administrative Code 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."

\*(In effect at all times relevant to In the Matter of Ohio Nurses Association and University of Cincinnati, id.)

representation was neither decided nor addressed.<sup>5</sup> The decision to dismiss the petition was based on the fact that the exclusions sought were not for classifications for which combination for bargaining was forbidden by Chapter 4117. Thus, the management petition failed because it had bargained for the employees in the job categories in question, and bargaining for such employees in combination with others was permissive only and neither compelled nor forbidden.<sup>5</sup> However, dictum in the case suggested that had proscribed combinations been involved a petition to amend might have succeeded even though a "deemed certified" [Section 4(A)] unit was involved.<sup>7</sup>

A second case, In the Matter of Public Employees of Ohio, Local Union No. 450 and University of Cincinnati (1985) Case No. 84-RC-07-1550, resulted in the dismissal of a petition for representation election in a unit comprised of part of a "deemed certified" unit. The basis for dismissal was the inappropriateness of the smaller unit. The legal propriety of partial

<sup>5</sup>Query - Whether under Section 4(A) of the Temporary Law there can ever be a representation question absent a rival union?

<sup>6</sup>See Section 4117.03(C).

<sup>7</sup>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 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." In the Matter of Ohio Nurses Association and University of Cincinnati, supra.

dislodgement of a deemed certified representative by a rival union was at best implicit dictum. Hence, the question of partial displacement of a bargaining unit representative in a deemed certified unit has never been decided by SERB. And, given the factual posture of the instant case, it is still unnecessary to reach the broad undecided question to warrant a conclusion that a representation election is not barred by Section 4(A).

Here the petitioner proposes a representation election in a unit composed entirely of security force employees. Joinder of this category with any other for collective bargaining is proscribed under the statute.<sup>8</sup> This is a factor bespeaking appropriateness of the unit despite Section 4(A) considerations. No others are advanced.

The security unit is appropriate. The "deemed" certification is not a bar, at least where a security unit is involved.

III

The recommendations of the Hearing Officer are adopted for the reasons adduced in this opinion. A representation election is directed in the unit described in the Hearing Officer's conclusion of law number 5. Sheehan, Vice Chairman, concurs.

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8R.C. 4117.06(D): "...in determining the appropriate unit, the Board shall not:  
"(2) Include...any public employee employed as a guard to enforce against other employees rules to protect property of the employer or to protect the safety of persons on the employer's premises in a unit with other employees."