

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ohio Association of Public School Employees,
AFSCME/AFL-CIO,

Employee Organization,

and

Montgomery County Board of Mental Retardation and
Developmental Disabilities,

Employer.

CASE NUMBER: 88-REP-03-0036

*for revised copy
go to #168*OPINION AND CERTIFICATION

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
July 14, 1988.

Davis, Vice Chairman:

I. Facts and Procedural Background

This case presents issues raised by The Montgomery County Board of Mental Retardation and Developmental Disabilities ("Employer") in its Objections to Election in which it seeks to have the Board set aside the results of a representation election involving the Ohio Association of Public School Employees, AFSCME/AFL-CIO ("Employee Organization" or "OAPSE/AFSCME"). The facts as set forth in this Opinion and Certification are not in dispute and are gleaned from the Employer's Objections, the Employee Organization's Responses, and documents contained in the Board's official public file of the case.

Pursuant to a consent election agreement executed by the parties, a secret ballot representation election was conducted by a Board election agent on June 2, 1988. Official SERB paper ballots were used, on which appeared the choices of "No Representative" and "Ohio Association of Public School Employees, AFSCME/ AFL-CIO." Printed above each choice was a small box in which the voter could mark an "X." (Consent Election Agreement, filed April 13 and 14, 1988, and Notice to Employees, issued May 4, 1988.)

The polling hours were from 9:30 a.m. to 11:30 a.m. and from 12:30 p.m. to 2:00 p.m. At the conclusion of the polling period, the Board agent began the tally of ballots by removing the ballots from the box and unfolding them. One of the ballots cast was blank, and the agent declared it void. (Employer's Objections, filed June 13, 1988, page 2 and exhibit F.) Another ballot was marked in ink in the following manner: in the "No Representative" box was an "X" and elliptical markings over it obliterating the "X"; an arrow pointed to the box for the choice of OAPSE/AFSCME, and in

that box appeared a clear and unobscured "X." (Original ballot, preserved by Administrator of Representation; Employer's Objections, page 1, and Employee Organization's Response, filed June 28, 1988, page 1 and exhibit A.) The election agent opened and examined this ballot and set it aside, commenting, "Let's hope that this ballot does not decide the outcome of the election." Prior to counting the ballots, the agent declared that the ballot would be counted as a vote for OAPSE/AFSCME. (Employer's Objections, page 1 and exhibit F.) The final count resulted in one void ballot (the blank ballot) and 117 valid ballots. Fifty-nine votes were cast for OAPSE/AFSCME and 58 were cast for "No Representative." The official Tally of Ballots was signed by representatives for both the Employer and the Employee Organization. (Tally of Ballots and Proof of Conduct of Election, both dated June 2, 1988.)

On June 13, 1988, the Employer filed Objections to Election seeking to have the Board set aside the results of the election and direct a rerun election. The objections were timely and properly filed pursuant to Ohio Administrative Code (O.A.C.) Rule 4117-5-10, except that the document lacked the proof of service required by O.A.C. Rules 4117-1-02(B) and 4117-5-10(C).

The Employer raises three objections: 1) that the blank ballot should have been included in the tally of total valid ballots cast, thus raising the number of votes needed for a majority; 2) that the ballot with unorthodox markings should have been declared void; and 3) that certain campaign literature circulated by the Employee Organization was "misleading and unattributed propaganda." (Employer's Objections, page 4.) As to the third of the objections, OAPSE/AFSCME does not contest that it distributed the three documents with which the Employer takes issue. OAPSE/AFSCME also acknowledges that the documents, set forth as attachments to the Employer's objections, are accurate copies of campaign literature. (Employee Organization's Response to Objections, filed June 20, 1988, pages 2-4.)

On June 20, 1988, the Employee Organization filed a Motion for Continuance to Answer Employer's Objection, a Motion to Inspect Ballots, and a Response to Employer's Objections. On June 23, 1988, the Board granted OAPSE's Motions and directed the Administrator of Representation to make the ballot in issue available for inspection by OAPSE/AFSCME representatives. On June 28, 1988, the Employee Organization filed a full response to the Employer's Objections.

II. Issues

This case presents five issues:

- 1) Whether the Employer's Objections to Election should be dismissed because the document does not include proof of service;
- 2) Whether a hearing is necessary or required to resolve the issues raised by the Employer;
- 3) Whether the blank ballot should be considered void and thus not included in the total used to determine majority outcome;

- 4) What standard should be used in evaluating unorthodox markings on a ballot, and whether the ballot at issue in the instant case was properly evaluated; and
- 5) Whether the campaign literature circulated by the Employee Organization constitutes objectionable conduct warranting a rerun election pursuant to O.A.C. Rule 4117-5-06(D).

III. Discussion and Analysis

A. Procedural Matters

1. Proof of Service

The document filed by the Employer is inadequate in that it lacks proof of service upon the other party. O.A.C. Rules 4117-1-02(B) and 4117-5-10(C) clearly establish that both service and proof of service are required for objections to elections. Under these rules, documents lacking proof of service may be rejected by the Board as improperly filed or, as in most cases, will be returned to the filing party by the Clerk's Office without completion of the filing process. O.A.C. Rule 4117-1-02(E) provides some latitude for such inadequacies; it permits the Board to waive technical defects in any document "if no undue prejudice would result." In this case, it is obvious that service was effected because the Employee Organization submitted a timely response. Thus, no harm or undue prejudice was suffered. Under the circumstances, the Board will waive the defect and will consider the objections on the merits.

The specific requirement of service on election objections is a new rule, effective on May 18, 1987. The Board has attempted to be tolerant in allowing for adaptation to the requirement.¹ Still, more than a year has passed since promulgation. Leniency has limitations. The Board admonishes that any representative attempting to practice before the Board is obligated to acquaint himself or herself with the Board's procedural rules, not the least of which is the required proof of service. Proof of service confirms

¹During and after adoption of the 1987 revisions to O.A.C. Chapters 4117-1 through 4117-25, the Board went well beyond the statutorily required efforts to publicize the rule changes, including the new proof of service requirements of O.A.C. Rules 4117-1-02(B) and 4117-5-10(C). To widely disseminate information about these rules, the Board held free, two-hour briefing sessions in eight Ohio cities, including Dayton. Booklets containing both O.R.C. Chapter 4117 and the new rules were produced and made available by the agency. Notices that the rules had been revised were repeatedly published in issues of the SERB Quarterly, and the proof of service issue was specifically addressed in Volume 3, No. 5, Spring 1988 issue. The revised rules were published in the SERB Official Reporter in June 1987.

to the Board and the parties not only that service was effected, but how, when, and where. These factors protect all parties if questions as to the sufficiency of service arise. The value has been unquestioned in the courts since the basic requisites of civil procedure were laid down. The Board does not wish to impose overly legalistic or technical requirements upon those who practice before it, but certain legalistic and technical requirements have legitimate and important purposes. Parties and representatives must be on notice that failure to comply with procedural requirements is done at substantial risk, and mere absence of harm is no guarantee of leniency by the Board in such matters.

2. Hearing

The Board has considered whether a hearing is necessary in this case and concludes that it is not. There are no facts in dispute, nor is the collection of additional evidence necessary. There is nothing more to be added with regard to either of the ballots at issue, nor about the literature circulated by the Employee Organization.

The Board members have examined the original of the unusually marked ballot and determine the proper resolution based upon the document, the arguments of the parties and the law. The Board scrupulously maintains the secrecy of balloting as required by Ohio Revised Code (O.R.C.) §4117.07(C)(2). Thus, any inquiry about either the blank ballot or the ballot with unorthodox markings could jeopardize the secrecy of the process and would contravene the sanctity of the secret ballot. On these issues, not only is a hearing unnecessary, it also is undesirable.

As to the Employee Organization's literature, there is no dispute as to the content or the fact of distribution. Again, the Board has reviewed these documents and the arguments of the parties and is able to resolve the issues without the time and cost-consuming process of a hearing.

Neither O.R.C. Chapter 4117 nor O.A.C. Chapter 4117-5 establishes any right to a hearing on matters of election objections. Pursuant to O.A.C. Rule 4117-5-10(B) hearings often are held in election objection cases when issues of material fact are in dispute or matters of law are in need of further development. Neither factor is present in this case. The facts are agreed and embodied in the documents at issue. Each party has presented its legal arguments and has had the opportunity to respond to those of the other party. A hearing would serve only to delay resolution and cause unnecessary expenditures by the parties and the Board.

²In a case raising a similar issue regarding an unusually marked ballot, the Franklin County Court of Common Pleas held that no hearing was required. Franklin County Bd. of Commissioners v. SERB, Case No. 86 CV-10-462 (Franklin Co. Common Pleas, 1-6-87), SERB 1987 Official Reporter, pp. 4-16, vacated on other procedural grounds, Franklin County Bd. of County Commissioners v. SERB, Case No. 87 AP-98 (10th Dist. Ct. of Appeals, Franklin County, 12-15-87), SERB 1987 Official Reporter, page 4-94.

B. Substantive Issues

1. Blank Ballot

The Employer argues that the blank ballot should not be considered void but, rather, should be counted as a valid ballot and included in the tally for determination of the majority result. The Employer presents little analytical theory and no legal support for its position. The Employer's argument, set forth verbatim in its entirety, is:

It is the position of the employer that this ballot should have been counted as an abstention and applied toward the total number of ballots cast, which would change the total number of ballots to 118. It is the position of the Employer that, as an Employee Organization must exhibit proof of majority interest in representation, the effect of the blank ballot in question, should inure to the benefit of "no representative."

Employer's Objections, page 2. This position is illogical. O.R.C. §4117.07(C)(3) requires that an employee organization obtain "a majority of the valid ballots cast." A blank ballot cannot be considered a valid ballot because it expresses no choice; it is not a vote. It is an expression neither for nor against representation. If anything, it is simply the voter's statement that he or she has no preference. As stated by the United States Court of Appeals for the Fifth Circuit in NLRB v. Vulcan Furniture Manufacturing Corporation, 214 F.2d 369, 34 LRRM 2449, 2451, cert. denied, 348 U.S. 873 (1954), in approving the National Labor Relations Board's long-standing policy that blank ballots are void:

... employees who could have voted but declined to do so would be considered as having assented to the will of the majority of those who did vote. This rule is applicable here where eligible voters went to the polls but, by casting blank ballots, declined to indicate their preference and, in effect, waived their right to vote for or against the union.

See also Q-F Wholesaler, Inc., 87 NLRB No. 129, 25 LRRM 1252 (1949).

As noted by the Employer, to consider an unmarked ballot valid would increase the number of votes necessary for the Employee Organization to amass a majority and effectively would cause the ballot to be construed as a vote against the Employee Organization. Because the voter has chosen to state no choice, considering the ballot valid and as a vote for "No Representative" would be contrary to the voter's freedom to express no preference. The blank ballot is no different from a voter who refrains from voting all together. O.R.C. §§4117.07(C)(3) and 1117.05(A)(1), in keeping with common electoral processes, require only a simple "majority of valid ballots cast" and "majority of the voting employees," respectively; these provisions most certainly do not require a majority of all eligible employees, voting and non-voting. The Ohio General Assembly knew how to impose such an unusual and demanding requirement, as is evidenced by the

terminology of O.R.C. §4117.14(C)(6) which requires a three-fifths vote of the "total membership" of the legislative body or of the employee organization to reject a fact-finder's report. No such unusual standard applies in representation elections. To count as a portion of the majority a blank ballot that states no vote, cast by an employee who effectively has refrained from voting, would be contrary to the statute and logic. The designation on the Tally of Ballots of one void ballot is proper and stands.

2. Unusually Marked Ballot

a) The Standard

With regard to the ballot with unorthodox markings, the Board agent in this case properly evaluated the ballot as a vote for OAPSE/AFSCME and counted the ballot accordingly. In conducting elections, the Board strives to give effect to the intent of the voter where possible. Thus, the Board will avoid excessively rigid or overly technical marking requirements in those situations where the intent of the voter can be reasonably ascertained from the face of the ballot. If the voter's intent is not clear, the ballot is void. When the intent is clear, the ballot shall be counted accordingly unless markings on the ballot reveal the identity of the voter. Any ballot with identifying or potentially identifying markings is void because it poses a threat to the continued protection and guarantee of the secrecy of voting.

This standard is one that is commonly employed by labor relations agencies throughout the United States. The NLRB states in its case handling manual:

If the voter's intention is clear despite unorthodox marking, extra markings, or erasures, the ballot should be counted in accordance with the intention displayed, unless the voter's name, number or other means of identification appears on the ballots.

NLRB Case Handling Manual, Section 11340.7. See also NLRB v. Leonard Creations of California, 638 F.2d 111, 106 LRRM 2488 (CA 9, 1981); Hydro Conduit Corp., 260 NLRB 1352, 109 LRRM 1320 (1982); J.L.P. Vending Company, Inc., 218 NLRB No. 119, 89 LRRM 1385 (1975); St. Petersburg Junior College, 3 NPER 10-12009 (Florida PERC, 11/25/80); and Commonwealth of Massachusetts and NAGE MAP, Local R1-207, 7 NPER 22-16007 (Mass. MLRC 7/20/84). Similarly, Ohio general election procedures from the pre-electronic voting era enunciate a similar standard. O.R.C. §3505.28 provides:

No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice.

See also, King v. Kerwin, 149 Ohio St 498, NE 2d 662 (1948). The Ohio Secretary of State's Manual of Instructions for Polling Place Officials addresses the application of O.R.C. §3505.28 and, on page 14, states that "the intent of the voter is the governing factor." (Emphasis in original.)

The application of this standard to a ballot with unorthodox markings is a determination made by the Board's election agent on-site after sorting but prior to counting the ballots.³ Questions as to an agent's decision may be raised with the Board through election objections, as has been done in this case.

b) Application of the Standard

The Employer has objected to the Board agent's application of the foregoing standard in the instant case, arguing that, even though the markings on the ballot "may indicate the intent of the voter, the Employer still objects to the tallying of that ballot as the clear intent of the voter was not expressed by such a ballot." The Employer relies upon the case of Duvall Transfer, 232 NLRB 843, 97 LRRM 1185 (1977), in which the NLRB declared void a ballot with similar markings.

While the Board is not bound by NLRB holdings, we often look to the precedents of other jurisdictions for guidance and perspective. With regard to the case cited by the Employer, however, the Board is unpersuaded for two reasons: 1) the decision does not present a logical, good policy that enhances the goal of giving effect to the voter's intent; and 2) the decision has been expressly overruled by the NLRB itself and the principle has been rejected by the courts.

In Abtex Beverage Corp., 237 NLRB 1271, 99 LRRM 1107 (1978), the NLRB expressly overruled its previous holding in Duvall Transfer. At the time the NLRB decided Duvall Transfer, it was operating under the standard that any ballot containing marking in both boxes ("a dual-marked ballot") was void, even though the NLRB in nearly all other situations followed its long-standing policy of counting ballots from which the voter's intent could be determined. The standard of automatic rejection of any dual-marked ballots was expressly reversed in Abtex Beverage Corp., wherein the NLRB upheld the regional director's ruling that a ballot was a valid vote for the labor organization when a clear "X" appeared in the union box and it was "reasonable to infer from the marking in the 'No' box that the voter, having used a pen, could not erase his mark and attempted to obliterate the mark...." Thus, unlike the citations offered by the Employer, the current position taken by the NLRB as to dual markings eliminates an overly

³The Board agent followed proper procedure in setting the ballot aside while the remainder of the ballots were sorted and then making his determination prior to commencing the actual counting of the ballots. The comment made by the agent upon unfolding the ballot merely acknowledged the unusual nature of a ballot that, by virtue of its variation from the norm, required special attention. While election agents should refrain from commentary during the course of official proceedings, the agent's comment in this case was not problematic.

technical restriction that had crippled and contravened the NLRB's laudable goal of giving effect to a voter's intent. The current NLRB approach is consistent with that purpose. Other states have extended validity to ballots in which a mark in one ballot was obliterated and the other box marked in a clear and unobscured manner. See Orange County School District, 12 FPER Para. 17036 (Fla. PERC 12/13/85), and Commonwealth of Massachusetts and NAGE MAP, Local RI-207, 7 NPER 22-16007 (Mass. MLRC 7/20/84). Similarly, the Ohio Secretary of State's Manual of Instruction for Polling Place Officials includes as an example of a valid ballot a dual-marked ballot in which one of the "Xs" is crossed through with two horizontal lines.

The Board agent in the instant case properly applied the standard in evaluating the ballot. The Board has examined the original ballot and agrees that the intent of the voter is clear. The voter's effort to obliterate the ink markings in the "No Representative" box and the clear and unobscured "X" in the OAPSE/AFSCME box indicate that the voter was casting his or her ballot for OAPSE/AFSCME. The certainty of this conclusion is buttressed by the voter's addition of an arrow pointing to the choice of OAPSE/AFSCME. The decision rendered by the Board agent stands. The voting in this election is properly reflected by the Tally of Ballots.

3. Campaign literature

In reviewing any election objection based upon the circulation of campaign literature, the guarantees of the First Amendment to the United States Constitution are paramount. The First Amendment guarantees and protects freedom of speech, including the distribution of leaflets and flyers in the course of representation campaigns. Stark County Engineer, SERB 85-012 (4/4/85). Recognizing that freedom of speech is essential to a fair and meaningful representation campaign, the Board has promulgated rules to "ensure a free atmosphere for the development of opinions and the dissemination of information and ideas for and against representation for purposes of collective bargaining." O.A.C. Rule 4117-5-06(D). Open, active exchange of information is imperative to enable the voters to make informed choices. Extreme caution must be exercised in any case that raises the possibility of restricting or penalizing such information flow.

The issues presented by the literature in this case do not require or provide the proper vehicle for the Board to articulate a precise policy on allegedly misleading campaign materials. In this case, the Board need go no further than to state that the three documents cited by the Employer do not give rise to objectionable material that would warrant setting aside the results of the election. The Employer's position that the documents are objectionable is based upon an assumption that the voters are woefully undiscerning and mindless in their examination of campaign literature. An election will not be set aside because of the mere potential that an unusually unsophisticated voter might be momentarily confused by some of the campaign assertions.

When evaluating literature of this nature, the Board considers the voters to possess basic intelligence and the ability to recognize and

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understand campaign literature for what it is. The Board bears in mind that campaign literature does not exist in a vacuum. Most voters are aware of the positions of the parties and evaluate campaign materials accordingly. The Board's rules promoting open and free dissemination of ideas enhance the opportunity for the voters to receive and evaluate information regarding the arguments and promotional points of the parties.

In the instant case, the first item to which the Employer objects is a flyer printed on OAPSE/AFSCME letterhead. The flyer has the heading "Lie To You...Never!" Immediately under the heading are two sentences introducing and attributing a quotation from a leaflet written by Superintendent Kenneth W. Ritchey. At the conclusion of the two-paragraph quotation, Superintendent Ritchey's signature is reproduced. On the reverse side of the document is OAPSE/AFSCME's critical commentary about the quote. The Employer argues that the document constitutes a "misleading appropriation of the signature of the Superintendent" in that "an inattentive recipient of that document could assume that the Superintendent was affiliated with or in support of the Employee Organizations or any of its positions." (Employer's Objections, page 3.)

Even a cursory glance at the content of the flyer makes it clear that OAPSE/AFSCME is merely quoting the Superintendent. There is no suggestion that the Superintendent is attempting to communicate with employees by writing to them on union letterhead stationery. Taken as a whole, the document is not misleading and simply is a vehicle for the expression of ideas and commentary. Certainly, it does not present grounds for setting aside an election.

The second document in question is a letter from then OAPSE/AFSCME local Interim Vice President Mickey Reed to "fellow employees." It recounts the author's experience at a hearing before the Personnel Board of Review (PBR) and the efforts that the OAPSE/AFSCME representative had made on his behalf. The Employer objects to Reed's description of the PBR hearing officer's action. The Employer states that the letter contains "assertions of fact which the circulator knew or had reason to know were totally untrue." Actually, the Employer objects only to one sentence of the full-page, single-spaced letter. That sentence is:

The [PBR] hearing officer ordered the Montgomery County Board of MR/DD to put me on the correct pay scale which means that I will receive an hourly pay increase of \$2.44 total, plus the Montgomery County Board of MR/DD was ordered to pay me back pay which will total approximately eight to nine thousand dollars.

(Employer's Objections, page 3 and Exhibit B.) The elements of this statement which the Employer argues constitute "blatant and total fabrications" and "misleading and fraudulent statements" (Employer's Objections, page 3) are that, although the PBR hearing was held on May 24, 1988, and although the hearing officer did state that she would recommend that the PBR issue an order consistent with her position in agreement with Reed's appeal, no actual order or formal recommendation had been issued by the PBR hearing officer or PBR. (Employer's Objections, page 3, and Employee Organization's Response, filed June 20, 1988, page 3.) In fact,

on June 8, 1988, the PBR hearing officer issued her recommendation that Reed had been reduced in pay and that he should be reassigned to a higher pay range. A formal order adopting this recommendation was issued by PBR on July 1, 1988. Ronald Reed v. Montgomery County Board of Mental Retardation and Developmental Disabilities, PBR Case No. 88-RED-03-0144 (Order issued July 1, 1988; Report and Recommendation issued June 8, 1988). While Reed's letter did not accurately describe certain of the technical and legal aspects of the PBR proceeding, this shortcoming is nothing more than a slight misstatement as to the procedural status of the agency's action. Reed's right to express his observations about OAPSE/AFSCME representation are unquestionable. The slight misrepresentation present in this document does not constitute objectionable material.

The final document to which the Employer objects is a flyer circulated by OAPSE/AFSCME urging employees to "Vote OAPSE/AFSCME." At the top of the simple flyer appears an enlarged, poorly reproduced copy of the Employer's logo. The artistic design of the logo is blurred and cannot be identified, but the wording surrounding the logo is legible and states: "A Brighter Tomorrow ... within reach." Beneath the enlarged, reproduced, and centered logo is printed "Make It Within Yours!" and "Vote OAPSE/AFSCME, June 2." The Employer objects to the use of the Employer's logo on a document that does not identify OAPSE/AFSCME as the producer but solicits a vote on behalf of OAPSE.

This document does not present any misleading or fraudulent effort by OAPSE/AFSCME. OAPSE/AFSCME merely was attempting to play on the slogan of the Employer, and the voters would recognize this. No reasonable person would conclude from the make-shift flyer with the poorly reproduced and enlarged logo that the Employer was endorsing OAPSE/AFSCME. This final document presents nothing that could have tainted the electoral process.

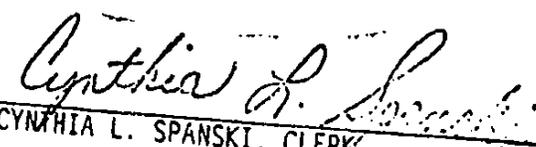
The Employer's objections on all counts are dismissed. The results of the election as tallied on June 2, 1988, stand and are certified. Pursuant to O.R.C. §§4117.05(A) and 4117.07(C), OAPSE/AFSCME is certified as the exclusive representative of all employees in the bargaining unit.

It is so directed.

SHEEHAN, Chairman, and LATANE, Board Member, concur.


JACQUELIN F. DAVIS, VICE CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 15th day of August, 1988.


CYNTHIA L. SPANSKI, CLERK

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 88 - 1

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OPINION AND CERTIFICATION
(Corrected Version)

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I. Facts and Procedural Background

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Pursuant to a consent election agreement executed by the parties, a secret ballot representation election was conducted by a Board election agent on June 2, 1988. Official SERB paper ballots were used, on which appeared the choices of "No Representative" and "Ohio Association of Public School Employees, AFSCME/ AFL-CIO." Printed above each choice was a small box in which the voter could mark an "X." (Consent Election Agreement, filed April 13 and 14, 1988, and Notice to Employees, issued May 4, 1988.)

The polling hours were from 9:30 a.m. to 11:30 a.m. and from 12:30 p.m. to 2:00 p.m. At the conclusion of the polling period, the Board agent began the tally of ballots by removing the ballots from the box and unfolding them. One of the ballots cast was blank, and the agent declared it void. (Employer's Objections, filed June 13, 1988, page 2 and exhibit F.) Another

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On June 13, 1988, the Employer filed Objections to Election seeking to have the Board set aside the results of the election and direct a rerun election. The objections were timely and properly filed pursuant to Ohio Administrative Code (O.A.C.) Rules 4117-5-10 and 4117-1-02(B).

The Employer raises three objections: 1) that the blank ballot should have been included in the tally of total valid ballots cast, thus raising the number of votes needed for a majority; 2) that the ballot with unorthodox markings should have been declared void; and 3) that certain campaign literature circulated by the Employee Organization was "misleading and unattributed propaganda." (Employer's Objections, page 4.) As to the third of the objections, OAPSE/AFSCME does not contest that it distributed the three documents with which the Employer takes issue. OAPSE/AFSCME also acknowledges that the documents, set forth as attachments to the Employer's objections, are accurate copies of campaign literature. (Employee Organization's Response to Objections, filed June 20, 1988, pages 2-4.)

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On July 14, 1988, the Board at its regular public meeting considered the Employer's Objections. The case report that had been submitted to the Board with the Objections indicated that the document was procedurally deficient in that it lacked proof of service as required by O.A.C. Rules 4117-1-02(B) and 4117-5-10(C). The Board determined that, because the Employee Organization obviously had received the Objections and had responded thereto, no harm had been suffered and the technical defect in the document would be waived pursuant to O.A.C. Rule 4117-1-02(E). The Board considered the Objections on the merits, voting to dismiss the Objections and to certify the results of the election.

On August 19, 1988, the Employer filed with the Board a Motion to Correct Opinion in which the Employer tactfully noted that the Objections as filed did contain a proper proof of service. Investigation of the original file revealed that, in fact, the Employer's Objections were fully in compliance with the proof of service requirements of O.A.C. Rules 4117-1-02(B) and 4117-5-10(C). The final page containing the proof of service inadvertently had been omitted in copies circulated within the agency. On September 1, 1988, the Board voted to grant the Employer's motion and to issue a corrected opinion deleting all references to the lack of proof of service.

II. Issues

This case presents four issues:

- 1) Whether a hearing is necessary or required to resolve the issues raised by the Employer;
- 2) Whether the blank ballot should be considered void and thus not included in the total used to determine majority outcome;
- 3) What standard should be used in evaluating unorthodox markings on a ballot, and whether the ballot at issue in the instant case was properly evaluated; and
- 4) Whether the campaign literature circulated by the Employee Organization constitutes objectionable conduct warranting a rerun election pursuant to O.A.C. Rule 4117-5-06(D).

III. Discussion and Analysis

A. Hearing

The Board has considered whether a hearing is necessary in this case and concludes that it is not. There are no facts in dispute, nor is the collection of additional evidence necessary. There is nothing more to be adduced with regard to either of the ballots at issue, nor about the literature circulated by the Employee Organization.

The Board members have examined the original of the unusually marked ballot and have determined the proper resolution based upon the document, the arguments of the parties, and the law. The Board scrupulously maintains the secrecy of balloting as required by Ohio Revised Code (O.R.C.) §4117.07(C)(2). Thus, any inquiry about either the blank ballot or the ballot with unorthodox markings could jeopardize the secrecy of the process and would contravene the sanctity of the secret ballot. On these issues, not only is a hearing unnecessary, it also is undesirable.

As to the Employee Organization's literature, there is no dispute as to the content or the fact of distribution. Again, the Board has reviewed these documents and the arguments of the parties and is able to resolve the issues without the time and cost-consuming process of a hearing.

Neither O.R.C. Chapter 4117 nor O.A.C. Chapter 4117-5 establishes any right to a hearing on matters of election objections. Pursuant to O.A.C. Rule 4117-5-10(B) hearings often are held in election objection cases when issues of material fact are in dispute or matters of law are in need of further development. Neither factor is present in this case. The facts are agreed and embodied in the documents at issue. Each party has presented its legal arguments and has had the opportunity to respond to those of the other party. A hearing would serve only to delay resolution and cause unnecessary expenditures by the parties and the Board.

B. Blank Ballot

The Employer argues that the blank ballot should not be considered void but, rather, should be counted as a valid ballot and included in the tally for determination of the majority result. The Employer presents little analytical theory and no legal support for its position. The Employer's argument, set forth verbatim in its entirety, is:

It is the position of the employer that this ballot should have been counted as an abstention and applied toward the total number of ballots cast, which would change the total number of ballots to 118. It is the position of the Employer that, as an Employee Organization must exhibit proof of majority interest in representation, the effect of the blank ballot in question should inure to the benefit of "no representative."

Employer's Objections, page 2. This position is illogical. O.R.C. §4117.07(C)(3) requires that an employee organization obtain "a majority of the valid ballots cast." A blank ballot cannot be considered a valid ballot because it expresses no choice; it is not a vote. It is an expression neither for nor against representation. If anything, it is simply the voter's statement that he or she has no preference. As stated by the United States Court of Appeals for the Fifth Circuit in NLRB v. Vulcan Furniture Manufacturing Corporation, 214 F.2d 369, 34 LRRM 2449, 2451, cert. denied,

In a case raising a similar issue regarding an unusually marked ballot, the Franklin County Court of Common Pleas held that no hearing was required. Franklin County Bd. of Commissioners v. SERB, Case No. 86 CV-10-462 (Franklin Co. Common Pleas, 1-6-87), SERB 1987 Official Reporter, pp. 4-16, vacated on other procedural grounds, Franklin County Bd. of County Commissioners v. SERB, Case No. 87 AP-98 (10th Dist. Ct. of Appeals, Franklin County, 12-15-87), SERB 1987 Official Reporter, page 4-94.

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348 U.S. 873 (1954), in approving the National Labor Relations Board's long-standing policy that blank ballots are void:

... employees who could have voted but declined to do so would be considered as having assented to the will of the majority of those who did vote. This rule is applicable here where eligible voters went to the polls but, by casting blank ballots, declined to indicate their preference and, in effect, waived their right to vote for or against the union.

See also Q-F Wholesaler, Inc., 87 NLRB No. 129, 25 LRRM 1254 (1949).

As noted by the Employer, to consider an unmarked ballot valid would increase the number of votes necessary for the Employee Organization to amass a majority and effectively would cause the ballot to be construed as a vote against the Employee Organization. Because the voter has chosen to state no choice, considering the ballot valid and as a vote for "No Representative" would be contrary to the voter's freedom to express no preference. The blank ballot is no different from a voter who refrains from voting all together. O.R.C. §§4117.07(C)(3) and 4117.05(A)(1), in keeping with common electoral processes, require only a simple "majority of valid ballots cast" and "majority of the voting employees," respectively; these provisions most certainly do not require a majority of all eligible employees, voting and non-voting. The Ohio General Assembly knew how to impose such an unusual and demanding requirement, as is evidenced by the terminology of O.R.C. §4117.14(C)(6) which requires a three-fifths vote of the "total membership" of the legislative body or of the employee organization to reject a fact-finder's report. No such unusual standard applies in representation elections. To count as a portion of the majority a blank ballot that states no vote, cast by an employee who effectively has refrained from voting, would be contrary to the statute and logic. The designation on the Tally of Ballots of one void ballot is proper and stands.

C. Unusually Marked Ballot

1) The Standard

With regard to the ballot with unorthodox markings, the Board agent in this case properly evaluated the ballot as a vote for OAPSE/AFSCME and counted the ballot accordingly. In conducting elections, the Board strives to give effect to the intent of the voter where possible. Thus, the Board will avoid excessively rigid or overly technical marking requirements in those situations where the intent of the voter can be reasonably ascertained from the face of the ballot. If the voter's intent is not clear, the ballot is void. When the intent is clear, the ballot shall be counted accordingly unless markings on the ballot reveal the identity of the voter. Any ballot with identifying or potentially identifying markings is void because it poses a threat to the continued protection and guarantee of the secrecy of voting.

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This standard is one that is commonly employed by labor relations agencies throughout the United States. The NLRB states in its case handling manual:

If the voter's intention is clear despite unorthodox marking, extra markings, or erasures, the ballot should be counted in accordance with the intention displayed, unless the voter's name, number or other means of identification appears on the ballots.

NLRB Case Handling Manual, Section 11340.7. See also NLRB v. Leonard Creations of California, 638 F.2d 111, 106 LRRM 2488 (CA 9, 1981); Hydro Conduit Corp., 260 NLRB 1352, 109 LRRM 1320 (1982); J.L.P. Vending Company, Inc., 218 NLRB No. 119, 89 LRRM 1385 (1975); St. Petersburg Junior College, 3 NPER 10-12009 (Florida PERC, 11/25/80); and Commonwealth of Massachusetts and NAGF MAP, Local RI-207, 7 NPER 22-16007 (Mass. MLRC 7/20/84). Similarly, Ohio general election procedures from the pre-electronic voting era enunciate a similar standard. O.R.C. §3505.28 provides:

No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice.

See also, King v. Kerwin, 149 Ohio St 498, NE 2d 662 (1948). The Ohio Secretary of State's Manual of Instructions for Polling Place Officials addresses the application of O.R.C. §3505.28 and, on page 14, states that "the intent of the voter is the governing factor." (Emphasis in original.)

The application of this standard to a ballot with unorthodox markings is a determination made by the Board's election agent on-site after sorting but prior to counting the ballots.² Questions as to an agent's decision may be raised with the Board through election objections, as has been done in this case.

2) Application of the Standard

The Employer has objected to the Board agent's application of the foregoing standard in the instant case, arguing that, even though the markings on the ballot "may indicate the intent of the voter, the Employer still objects to the tallying of that ballot as the clear intent of the

The Board agent followed proper procedure in setting the ballot aside while the remainder of the ballots were sorted and then making his determination prior to commencing the actual counting of the ballots. The comment made by the agent upon unfolding the ballot merely acknowledged the unusual nature of a ballot that, by virtue of its variation from the norm, required special attention. While election agents should refrain from commentary during the course of official proceedings, the agent's comment in this case was not problematic.

voter was not expressed by such a ballot." The Employer relies upon the the case of Duvall Transfer, 232 NLRB 843, 97 LRRM 1185 (1977), in which the NLRB declared void a ballot with similar markings.

While the Board is not bound by NLRB holdings, we often look to the precedents of other jurisdictions for guidance and perspective. With regard to the case cited by the Employer, however, the Board is unpersuaded for two reasons: 1) the decision does not present a logical, good policy that enhances the goal of giving effect to the voter's intent; and 2) the decision has been expressly overruled by the NLRB itself and the principle has been rejected by the courts.

In Abtex Beverage Corp., 237 NLRB 1271, 99 LRRM 1107 (1978), the NLRB expressly overruled its previous holding in Duvall Transfer. At the time the NLRB decided Duvall Transfer, it was operating under the standard that any ballot containing marking in both boxes ("a dual-marked ballot") was void, even though the NLRB in nearly all other situations followed its long-standing policy of counting ballots from which the voter's intent could be determined. The standard of automatic rejection of any dual-marked ballot was expressly reversed in Abtex Beverage Corp. wherein the NLRB upheld the regional director's ruling that a ballot was a valid vote for the labor organization when a clear "X" appeared in the union box and it was "reasonable to infer from the marking in the 'No' box that the voter, having used a pen, could not erase his mark and attempted to obliterate the mark...." Thus, unlike the citations offered by the Employer, the current position taken by the NLRB as to dual markings eliminates an overly technical restriction that had crippled and contravened the NLRB's laudable goal of giving effect to a voter's intent. The current NLRB approach is consistent with that purpose. Other states have extended validity to ballots in which a mark in one box was obliterated and the other box marked in a clear and unobscured manner. See Orange County School District, 12 FPER Para. 17036 (Fla. PERC 12/13/85), and Commonwealth of Massachusetts and NAGE MAP, Local RI-207, 7 NPER 22-16007 (Mass. MLRC 7/20/84). Similarly, the Ohio Secretary of State's Manual of Instruction for Polling Place Officials includes as an example of a valid ballot a dual-marked ballot in which one of the "Xs" is crossed through with two horizontal lines.

The Board agent in the instant case properly applied the standard in evaluating the ballot. The Board has examined the original ballot and agrees that the intent of the voter is clear. The voter's effort to obliterate the ink markings in the "No Representative" box and the clear and unobscured "X" in the OAPSE/AFSCME box indicate that the voter was casting his or her ballot for OAPSE/AFSCME. The certainty of this conclusion is buttressed by the voter's addition of an arrow pointing to the choice of OAPSE/AFSCME. The decision rendered by the Board agent stands. The voting in this election is properly reflected by the Tally of Ballots.

D. Campaign literature

In reviewing any election objection based upon the circulation of campaign literature, the guarantees of the First Amendment to the United

States Constitution are paramount. The First Amendment guarantees and protects freedom of speech, including the distribution of leaflets and flyers in the course of representation campaigns. Stark County Engineer, SERB 85-012 (4/4/85). Recognizing that freedom of speech is essential to a fair and meaningful representation campaign, the Board has promulgated rules to "ensure a free atmosphere for the development of opinions and the dissemination of information and ideas for and against representation for purposes of collective bargaining." O.A.C. Rule 4117-5-06(D). Open, active exchange of information is imperative to enable the voters to make informed choices. Extreme caution must be exercised in any case that raises the possibility of restricting or penalizing such information flow.

The issues presented by the literature in this case do not require or provide the proper vehicle for the Board to articulate a precise policy on allegedly misleading campaign materials. In this case, the Board need go no further than to state that the three documents cited by the Employer do not give rise to objectionable material that would warrant setting aside the results of the election. The Employer's position that the documents are objectionable is based upon an assumption that the voters are woefully undiscerning and mindless in their examination of campaign literature. An election will not be set aside because of the mere potential that an unusually unsophisticated voter might be momentarily confused by some of the campaign assertions.

When evaluating literature of this nature, the Board considers the voters to possess basic intelligence and the ability to recognize and understand campaign literature for what it is. The Board bears in mind that campaign literature does not exist in a vacuum. Most voters are aware of the positions of the parties and evaluate campaign materials accordingly. The Board's rules promoting open and free dissemination of ideas enhance the opportunity for the voters to receive and evaluate information regarding the arguments and promotional points of the parties.

In the instant case, the first item to which the Employer objects is a flyer printed on OAPSE/AFSCME letterhead. The flyer has the heading "Lie To You...Never!" Immediately under the heading are two sentences introducing and attributing a quotation from a leaflet written by Superintendent Kenneth W. Ritchey. At the conclusion of the two-paragraph quotation, Superintendent Ritchey's signature is reproduced. On the reverse side of the document is OAPSE/AFSCME's critical commentary about the quote. The Employer argues that the document constitutes a "misleading appropriation of the signature of the Superintendent" in that "an inattentive recipient of that document could assume that the Superintendent was affiliated with or in support of the Employee Organizations or any of its positions." (Employer's objections, page 1.)

Even a cursory glance at the content of the flyer makes it clear that OAPSE/AFSCME is merely quoting the Superintendent. There is no suggestion that the Superintendent is attempting to communicate with employees by writing to them on union letterhead stationery. Taken as a whole, the document is not misleading and simply is a vehicle for the expression of

ideas and commentary. Certainly, it does not present grounds for setting aside an election.

The second document in question is a letter from then OAPSE/AFSCME local interim Vice President Mickey Reed to "fellow employees." It recounts the author's experience at a hearing before the Personnel Board of Review (PBR) and the efforts that the OAPSE/AFSCME representative had made on his behalf. The Employer objects to Reed's description of the PBR hearing officer's action. The Employer states that the letter contains "assertions of fact which the circulator knew or had reason to know were totally untrue." Actually, the Employer objects only to one sentence of the full-page, single-spaced letter. That sentence is:

The [PBR] hearing officer ordered the Montgomery County Board of MR/DD to put me on the correct pay scale which means that I will receive an hourly pay increase of \$2.44 total, plus the Montgomery County Board of MR/DD was ordered to pay me back pay which will total approximately eight to nine thousand dollars.

(Employer's Objections, page 3 and Exhibit B.) The elements of this statement which the Employer argues constitute "blatant and total fabrications" and "misleading and fraudulent statements" (Employer's Objections, page 3) are that, although the PBR hearing was held on May 24, 1988, and although the hearing officer did state that she would recommend that the PBR issue an order consistent with her position in agreement with Reed's appeal, no actual order or formal recommendation had been issued by the PBR hearing officer or PBR. (Employer's Objections, page 3, and Employee Organization's Response, filed June 20, 1988, page 3.) In fact, on June 8, 1988, the PBR hearing officer issued her recommendation that Reed had been reduced in pay and that he should be reassigned to a higher pay range. A formal order adopting this recommendation was issued by PBR on July 1, 1988. Ronald Reed v. Montgomery County Board of Mental Retardation and Developmental Disabilities, PBR Case No. 88-RED-03-0144 (Order issued July 1, 1988; Report and Recommendation issued June 8, 1988). While Reed's letter did not accurately describe certain of the technical and legal aspects of the PBR proceeding, this shortcoming is nothing more than a slight misstatement as to the procedural status of the agency's action. Reed's right to express his observations about OAPSE/AFSCME representation are unquestionable. The slight misrepresentation present in this document does not constitute objectionable material.

The final document to which the Employer objects is a flyer circulated by OAPSE/AFSCME urging employees to "Vote OAPSE/AFSCME." At the top of the simple flyer appears an enlarged, poorly reproduced copy of the Employer's logo. The artistic design of the logo is blurred and cannot be identified, but the wording surrounding the logo is legible and states: "A Brighter Tomorrow ... within reach." Beneath the enlarged, reproduced, and centered logo is printed "Make It Within Yours!" and "Vote OAPSE/AFSCME, June 2." The Employer objects to the use of the Employer's logo on a document that does not identify OAPSE/AFSCME as the producer but solicits a vote on behalf of OAPSE.

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This document does not present any misleading or fraudulent effort by OAPSE/AFSCME. OAPSE/AFSCME merely was attempting to play on the slogan of the Employer, and the voters would recognize this. No reasonable person would conclude from the make-shift flyer with the poorly reproduced and enlarged logo that the Employer was endorsing OAPSE/AFSCME. This final document presents nothing that could have tainted the electoral process.

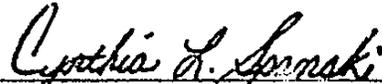
The Employer's objections on all counts are dismissed. The results of the election as tallied on June 2, 1988, stand and are certified. Pursuant to O.R.C. §54117.05(A) and 4117.07(C), OAPSE/AFSCME is certified as the exclusive representative of all employees in the bargaining unit.

It is so directed.

SHEEHAN, Chairman, and LATANE, Board Member, concur.


JACQUELIN DAVIS, VICE CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 15th day of September, 1988.


CYNTHIA L. SPANSKI, CLERK

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