

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 89-03

89-035

In the Matter of  
Richard J. Skufca,  
Petitioner,  
and  
Fraternal Order of Police, Ohio Labor Council, Inc.,  
Employee Organization,  
and  
City of Macedonia,  
Employer.

CASE NUMBER: 89-REP-11-0240

OPINION AND ORDER

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané:  
December 7, 1989.

Davis, Vice Chairman:

FACTS

This action arises from a Petition for Decertification Election filed by Richard J. Skufca ("Petitioner"). The petition relates to a unit of "sergeants and above" employed by the City of Macedonia ("Employer" or "City") and currently represented by the Fraternal Order of Police, Ohio Labor Council, Inc. ("FOP," "Union," or "Exclusive Representative").

The facts in this action are based solely upon documents available in the public files of the instant case and of Case No. 89-REP-02-0047, the representation proceeding that gave rise to certification. No hearing was held because (a) a hearing was unnecessary in that the Board resolves the matter on the basis of facial elements presented in the petition, and (b) hearings in such representation matters are not required. See, e.g., Montgomery County Bd. of Mental Retardation and Developmental Disabilities, SERB 88-012 at 3-59 and 3-60 (9-15-88), and Franklin County Board of Commissioners v. SERB, No. 86-CV-10-462, 1987 SERB 4-16, (C.P., Franklin, 1-6-87), vacated on other procedural grounds, Franklin County Bd. of Commissioners v. SERB, No. 87-AP-98, SERB 1987 Official Reporter, p. 4-94, (10th Dist. Ct. of App., Franklin, 12-15-87).

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In May 1989, the FOP was certified as the exclusive representative of appropriate unit. The Board granted this certification without an election pursuant to the "voluntary recognition" procedures of Ohio Revised Code ("O.R.C.") §4117.05(A)(2).<sup>2</sup> As required by that provision, and by

O.R.C. §4117.05(A)(2) provides:

(A) An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by either:

(2) Filing a request with a public employer with a copy to the State Employment Relations Board for recognition as an exclusive representative. In the request for recognition, the employee organization shall describe the bargaining unit, shall allege that a majority of the employees in the bargaining unit wish to be represented by the employee organization, and shall support the request with substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the bargaining unit wish to be represented by the employee organization. Immediately upon receipt of a request, the public employer shall either request an election under division (A)(2) of section 4117.07 of the Revised Code, or take the following action:

(a) Post notice in each facility at which employees in the proposed unit are employed, setting forth the description of the bargaining unit, the name of the employee organization requesting recognition, and the date of the request for recognition, and the employees that objections to certification must be filed with the State Employment Relations Board not later than the twenty-first day following the date of the request for recognition;

(b) Immediately notify the State Employment Relations Board of the request for recognition.

The State Employment Relations Board shall certify the employee organization filing the request for recognition on the twenty-second day following the filing of the request for recognition, unless by the twenty-first day following the filing of the request for recognition it receives:

Footnote continued on next page.

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Ohio Administrative Code ("O.A.C.") Rules 4117-3-01 and 4117-3-03, the FOP had submitted to the Board satisfactory evidence that a majority of employees in the unit wished to have the FOP represent them for purposes of collective bargaining. The City, in compliance with O.R.C. §4117.05(A)(2)(a), posted a notice advising employees of the FOP's filing and specifying the date by which objections could be filed. No objections or petitions were filed. Accordingly, as required by O.R.C. §4117.05(A)(2)(b), the Board on May 11, 1989, voted to certify the FOP as the exclusive representative of all employees in the unit. Certification Pursuant to Request for Recognition, Case No. 89-REP-02-0047, filed and served May 16, 1989.

The instant decertification petition was filed November 13, 1989, and requests that the Board conduct an election pursuant to O.R.C. §4117.07 to determine whether a majority of employees wish to retain or decertify the FOP as their exclusive representative.

ISSUE

The questions raised by this petition are whether certification pursuant to O.R.C. §4117.05(A)(2) operates as a bar to a representation election and, if so, what is the duration of the bar.

ANALYSIS

A. The Concept of the Traditional Election Bar

Resolution of the issue in this case turns on whether the principles of the traditional "election bar" should apply when certification arises

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Footnote 2, continued:

(i) A petition for an election from the public employer pursuant to division (A)(2) of section 4117.07 of the Revised Code;

(ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish to be represented by the employee organization filing the request for recognition;

(iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten per cent of the employees in the described bargaining unit wish to be represented by such other employee organization; or

(iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

without an election. Thus, we begin our analysis with an examination of the purpose and philosophy of the basic election bar concept.

The principle of "election bar" establishes that a conclusive representation election blocks the holding of another election in the same unit for twelve months. This concept is widely accepted within the field of labor relations<sup>3</sup> and is codified in O.R.C. §4117.07(A)(6):

The Board may not conduct an election under this section in any appropriate unit within which a board-conducted election was held in the preceding twelve-month period....<sup>4</sup>

Where an employee organization has prevailed in an election, the bar ensures that the new exclusive representative and the employer have an ample period of stability in which to commence and develop a productive bargaining relationship. The union is given one year of unchallenged representation before it can be attacked by a rival union or a decertification effort, and the employer is protected from any complicating representation processes that may confuse its obligation to bargain. Similarly, where the majority of employees in an election have chosen to have no representation, the one-year bar serves to ensure that the workforce and employer will not immediately be faced with a new or repetitious representation contest.

As noted by the United States Supreme Court in Brooks v. NLRB, 348 U.S. 96, 35 LRRM 2158 at 2159 (1954), the concept of election bar and the presumption of the union's continuing majority support (developed first through the case law of the National Labor Relations Board and the courts and then codified in 1947 as a result of the Taft-Hartley Act) is based upon these factors:

- (a) In the political and business spheres, by an election the voters are bound by their choice for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations.

<sup>3</sup>See, e.g., Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. §159(C)(3), which provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See also, e.g., Cal. Gov't. Code §3577(b)(2); Conn. Labor Rel. Act Section 6(a)(3); Fla. Stat. §447.307(3)(d); Fla. Admin. Code Rule 38D-17.06; Hawaii Rev. Stat. §89-7; Maine Rev. Stat. Ann. Title 26, §979-F(2)(D); Minn. Stat. §179.12, Subdiv. 12; New Jersey Admin. Code §19:11-2.8(b); and Pa. Cons. Stat. §605(7).

<sup>4</sup>The Board has interpreted this provision as imposing a one-year bar from the time of actual certification of the election results. O.A.C. Rule 4117-5-11(C).

- (b) Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting--in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present--is not comparable to the privacy and independence of the voting booth.
- (c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.
- (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.
- (e) In situations, not wholly rare, where unions are competing, raiding and strife will be minimized if elections are not at the hazard of informal and short-term recall.

As is reflected by the foregoing analysis, the traditional concept of election bar is rooted in solid, logical reasoning and legitimate policy considerations. We now examine whether these considerations apply as well to certification resulting from the non-electoral process of O.R.C. §4117.05(A)(2).

B. Should O.R.C. §4117.05(A)(2) Certification Operate As A Bar?

The Ohio Revised Code is silent as to any bar that should exist as a result of certifications obtained through O.R.C. §4117.05(A)(2). The statute is clear, however, as to the intended effect of such certifications. O.R.C. §4117.05(A)(2) provides a streamlined procedural option that may be pursued where there is a clearly demonstrated majority and where there are no objections to the bargaining relationship. The process produces a certification that is as complete and effective as certification based upon an election.

It follows, therefore, that the principles that have given rise to the election bar apply with equal force and logic to O.R.C. §4117.05(A)(2) certifications. Indeed, the considerations enunciated by the United States Supreme Court in Brooks v. NLRB, id., are as salient and valid in the

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instant case as they are when applied to electoral determinations.<sup>5</sup> A bar emanating from certification without an election is necessary to instill a sense of stability and commitment in the employer and the employees, to allow the union "ample time for carrying out its mandate" without unrealistic pressure of imminent rejection; and to minimize the imbalance caused by the potential of "raiding and strife" associated with short-term recall. To deny or reduce the period of unchallenged majority status in this instance would substantially deplete the significance and utility of O.R.C. §4117.05(A)(2) certification and would, in fact, be contrary to the goal of labor stability enunciated in O.R.C. §4117.22.<sup>6</sup>

Indeed, even under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, which has no statutory provision comparable to O.R.C. §4117.05(A)(2), the courts and the National Labor Relations Board have held that when an employer properly and voluntarily agrees to recognize a union as an exclusive representative, that recognition agreement, whether written or oral, operates as a bar for a "reasonable time." See, Kelier Plastics Eastern, Inc., 157 NLRB 583, 61 LRRM 1396 (1966). See also, NLRB v. Montgomery Ward & Co., 399 F. 2d 409, 68 LRRM 2933 (7th Cir. 1968), and Royal Coach Lines, 282 NLRB 1038, 124 LRRM 1246 (1987).

In such cases, the exclusive representative's status has not received certification or legitimization from the NLRB. Therefore, it is understandable that a more fluid bar (i.e., "reasonable time") would apply to such recognition. Under the Ohio statute, however, O.R.C. §4117.05(A)(2) provides a Board-controlled process that results in official certification--not mere accession by an employer. Such certification is the product of statutory procedural safeguards and is intended to have the same effect as certification emanating from a Board-conducted representation election under O.R.C. §4117.07. Hence, we see no purpose in deviating from the twelve-month bar imposed by O.R.C. §4117.07(A)(6).

Sound policy reasons, logic, the experience of other jurisdictions, and the interpretative mandate of our own statute lead to the inescapable conclusion that, to give full effect to O.R.C. §4117.05(A)(2) certifications, we must impose a twelve-month certification bar on subsequent representation elections. As with the election bar, the one-year period will run from the date on which the Board votes to certify the exclusive representative. See O.A.C. Rule 4117-5-11(C).

<sup>5</sup>The second factor enumerated by the Court in Brooks was in reference to the union's presumption of continued majority status in the face of an employer's attempt to withdraw recognition during the certification year and is not relevant to the general discussion of election bar.

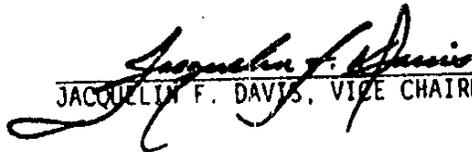
<sup>6</sup>O.R.C. §4117.22 requires that the Board construe Chapter 4117 "liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees." Without a guaranteed period of stability in the representational circumstances of a workforce, there is no satisfactory opportunity for the development of orderly and constructive labor-management relationships.

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Accordingly, the instant decertification petition, having been filed only six months after certification, is dismissed as having been prematurely filed.

It is so ordered.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member, concur.

  
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JACQUELIN F. DAVIS, VICE CHAIRMAN

While not conceding that Ohio Revised Code Section 119.12 applies in this instance, the Board hereby notifies you that an appeal may be perfected by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 29<sup>th</sup> day of December, 1989.

  
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CYNTHIA E. SPANSKI, CLERK

0478B:JFD/jlb:12/28/89:f

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Davis, Vice Chairman:

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ISSUE

The questions raised by this petition are whether certification pursuant to O.R.C. §4117.05(A)(2) operates as a bar to a representation election and, if so, what is the duration of the bar.

ANALYSIS

A. The Concept of the Traditional Election Bar

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Footnote 2, continued:

(i) A petition for an election from the public employer pursuant to division (A)(2) of section 4117.07 of the Revised Code;

(ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish to be represented by the employee organization filing the request for recognition;

(iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten per cent of the employees in the described bargaining unit wish to be represented by such other employee organization; or

(iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

without an election. Thus, we begin our analysis with an examination of the purpose and philosophy of the basic election bar concept.

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The Board may not conduct an election under this section in any appropriate unit within which a board-conducted election was held in the preceding twelve-month period....<sup>4</sup>

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- (a) In the political and business spheres, by an election the voters are bound by their choice for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations.

<sup>3</sup>See, e.g., Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. §159(C)(3), which provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See also, e.g., Cal. Gov't. Code §3577(b)(2); Conn. Labor Rel. Act Section 6(a)(3); Fla. Stat. §447.307(3)(d); Fla. Admin. Code Rule 38D-17.06; Hawaii Rev. Stat. §89-7; Maine Rev. Stat. Ann. Title 26, §979-F(2)(D); Minn. Stat. §179.12, Subdiv. 12; New Jersey Admin. Code §19:11-2.8(b); and Pa. Cons. Stat. §605(7).

<sup>4</sup>The Board has interpreted this provision as imposing a one-year bar from the time of actual certification of the election results. O.A.C. Rule 4117-5-11(C).

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- (b) Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting--in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present--is not comparable to the privacy and independence of the voting booth.
- (c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.
- (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.
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As is reflected by the foregoing analysis, the traditional concept of election bar is rooted in solid, logical reasoning and legitimate policy considerations. We now examine whether these considerations apply as well to certification resulting from the non-electoral process of O.R.C. §4117.05(A)(2).

B. Should O.R.C. §4117.05(A)(2) Certification Operate As A Bar?

The Ohio Revised Code is silent as to any bar that should exist as a result of certifications obtained through O.R.C. §4117.05(A)(2). The statute is clear, however, as to the intended effect of such certifications. O.R.C. §4117.05(A)(2) provides a streamlined procedural option that may be pursued where there is a clearly demonstrated majority and where there are no objections to the bargaining relationship. The process produces a certification that is as complete and effective as certification based upon an election.

It follows, therefore, that the principles that have given rise to the election bar apply with equal force and logic to O.R.C. §4117.05(A)(2) certifications. Indeed, the considerations enunciated by the United States Supreme Court in Brooks v. NLRB, *id.*, are as salient and valid in the

instant case as they are when applied to electoral determinations.<sup>5</sup> A bar emanating from certification without an election is necessary to instill a sense of stability and commitment in the employer and the employees, to allow the union "ample time for carrying out its mandate" without unrealistic pressure of imminent rejection; and to minimize the imbalance caused by the potential of "raiding and strife" associated with short-term recall. To deny or reduce the period of unchallenged majority status in this instance would substantially deplete the significance and utility of O.R.C. §4117.05(A)(2) certification and would, in fact, be contrary to the goal of labor stability enunciated in O.R.C. §4117.22.<sup>6</sup>

Indeed, even under the National Labor Relations Act, 29 U.S.C. §151 et seq, which has no statutory provision comparable to O.R.C. §4117.05(A)(2), the courts and the National Labor Relations Board have held that when an employer properly and voluntarily agrees to recognize a union as an exclusive representative, that recognition agreement, whether written or oral, operates as a bar for a "reasonable time." See, Keller Plastics Eastern, Inc., 157 NLRB 583, 61 LRRM 1396 (1966). See also, NLRB v. Montgomery Ward & Co., 399 F. 2d 409, 68 LRRM 2933 (7th Cir. 1968), and Royal Coach Lines, 282 NLRB 1038, 124 LRRM 1246 (1987).

In such cases, the exclusive representative's status has not received certification or legitimization from the NLRB. Therefore, it is understandable that a more fluid bar (i.e., "reasonable time") would apply to such recognition. Under the Ohio statute, however, O.R.C. §4117.05(A)(2) provides a Board-controlled process that results in official certification--not mere accession by an employer. Such certification is the product of statutory procedural safeguards and is intended to have the same effect as certification emanating from a Board-conducted representation election under O.R.C. §4117.07. Hence, we see no purpose in deviating from the twelve-month bar imposed by O.R.C. §4117.07(A)(6).

Sound policy reasons, logic, the experience of other jurisdictions, and the interpretative mandate of our own statute lead to the inescapable conclusion that, to give full effect to O.R.C. §4117.05(A)(2) certifications, we must impose a twelve-month certification bar on subsequent representation elections. As with the election bar, the one-year period will run from the date on which the Board votes to certify the exclusive representative. See O.A.C. Rule 4117-5-11(C).

<sup>5</sup>The second factor enumerated by the Court in Brooks was in reference to the union's presumption of continued majority status in the face of an employer's attempt to withdraw recognition during the certification year and is not relevant to the general discussion of election bar.

<sup>6</sup>O.R.C. §4117.22 requires that the Board construe Chapter 4117 "liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees." Without a guaranteed period of stability in the representational circumstances of a workforce, there is no satisfactory opportunity for the development of orderly and constructive labor-management relationships.

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Accordingly, the instant decertification petition, having been filed only six months after certification, is dismissed as having been prematurely filed.

It is so ordered.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member, concur.

  
JACQUELIN F. DAVIS, VICE CHAIRMAN

While not conceding that Ohio Revised Code Section 119.12 applies in this instance, the Board hereby notifies you that an appeal may be perfected by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 29<sup>th</sup> day of December, 1989.

  
CYNTHIA L. SPANSKI, CLERK

0478B:JFD/jlb:12/28/89:f