

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-014

In the Matter of  
Educators of Montgomery County OEA/NEA, &  
Educators of Montgomery County (Educational Aides)  
Employee Organization,  
and  
Montgomery County Board of Education,  
Employer.

CASE NUMBER: 89-REP-05-0100

DIRECTION TO SELF-DETERMINATION ELECTION  
(Opinion attached.)

Before Chairman Sheehan and Board Member Latané: May 3, 1990.

On May 1, 1989, the Educators of Montgomery County OEA/NEA (Employee Organization) filed a petition for representation election seeking a self-determination election for two units of employees. On May 18, 1989, Montgomery County Board of Education (Employer) filed objections. The Board directed the case to hearing.

The Board has reviewed the hearing officer's recommended determination, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Findings of Fact, Conclusions of Law and Recommendations of the hearing officer. The Board directs a self-determination election to be conducted in the following appropriate two units:

UNIT 1:

INCLUDED:

All regular classroom teachers.

EXCLUDED:

All other non-teaching employees, including, but not limited to, secretarial and clerical staff; all speech therapists, occupational therapists, counselors; all Regional Center employees; all part-time employees including, but not limited to, substitute teachers; all non-certificated employees; all administrative personnel including, but not limited to, superintendents, assistant superintendents, directors, supervisors, coordinators, and other employees as defined in R.C. 3319.01 and 3319.02.

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UNIT 2:

INCLUDED:

All full-time educational aides, as defined in R.C. 3319.088.

EXCLUDED:

All other non-teaching employees, including, but not limited to, secretarial and clerical staff; all speech therapists, occupational therapists, counselors; all Regional Center employees; all part-time employees including, but not limited to, substitute teachers; all non-certificated employees; all administrative personnel including, but not limited to, superintendents, assistant superintendents, directors, supervisors, coordinators, and other employees as defined in R.C. 3319.01 and 3319.02.

The election shall be held at the date, time and place to be determined by the Administrator of Representation in consultation with the parties. No later than September 8, 1990, the Employer shall serve on the Employee Organization and file with the Board a numbered, alphabetized election eligibility list setting forth the names and home addresses of all employees eligible to vote as of the pay period ending just prior to May 3, 1990.

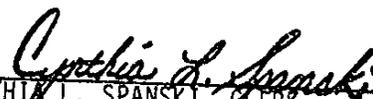
It is so ordered.

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

  
WILLIAM P. SHEEHAN, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, 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 August, 1990.

  
CYNTHIA L. SPANSKI, CLERK

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CASE NUMBER: 89-REP-05-0100

OPINION

Sheehan, Chairman:

This matter arises from a Petition for Election filed by the Educators of Montgomery County, OEA/NEA, & Educators of Montgomery County (Educational Aides)(Employee Organization). By this petition, the Employee Organization seeks a consolidation election of two units. Both units are affiliates of OEA/NEA and are composed of employees of the Montgomery County Board of Education (Employer).

The Educators of Montgomery County's bargaining unit consists of regular classroom teachers and was certified by State Employment Relations Board (SERB or Board) on May 4, 1986.<sup>1</sup> This unit's original collective bargaining agreement expired on July 31, 1989, while the current agreement expires on July 31, 1992.<sup>2</sup>

On the other hand, the Educators of Montgomery County (Educational Aides) unit is composed of full-time educational aides of the Employer.

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<sup>1</sup>Findings of Fact (F.F.) 1. References to the transcript, exhibits, stipulations, and/or findings of fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the stated facts.

<sup>2</sup>F.F. 3.

This unit was certified by the board on June 13, 1986.<sup>3</sup> While the original collective bargaining agreement expired on August 31, 1989, the current one expires on August 31, 1992.<sup>4</sup> This contract's expiration date is one month after the teachers' contract date.

Besides this one-month difference in expiration dates, the only differences between the two current collective bargaining agreements are the wage rates and the section on "Contracts, Terminations and Suspensions."<sup>5</sup> The educational aides' provision on "Contracts, Terminations, and Suspensions" is based upon Ohio Revised Code (O.R.C.) §3319.081 that relates to suspension and discharge of a non-teaching employee.

The two bargaining units in this case jointly-filed a Petition for Representation Election with SERB on May 1, 1989. The Employee Organization declared that the petition was a request for a self-determination election pursuant to O.R.C. §4117.06(D)(1).<sup>6</sup> The Employee Organization sought an election to determine whether a majority of each of the two bargaining units wished to consolidate into a single bargaining unit. The Employee

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<sup>3</sup>F.F. 1.

<sup>4</sup>F.F. 3.

<sup>5</sup>F.F. 3.

<sup>6</sup>O.R.C. §4117.06(D)(1) states that

In addition, in determining the appropriate unit, the board shall not: Decide that any unit is appropriate if the unit includes both professional and nonprofessional employees, unless a majority of the professional employees and a majority of the nonprofessional employees first vote for inclusion in the unit.

Organization stated in the petition that it did not request a representation election.

On May 18, 1989, the Employer filed a Position Statement objecting to the petition and requesting its dismissal.

On September 8, 1989, after investigating the petition, SERB directed the question of representation to a hearing since it found reasonable cause to believe that a question of representation existed pursuant to O.R.C. §4117.07(A).<sup>7</sup>

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<sup>7</sup>O.R.C. §4117.07(A) provides that

When a petition is filed, in accordance with rules prescribed by the state employment relations board:

(1) By any employee or group of employees, or any individual or employee organization acting in their behalf, alleging that at least thirty per cent of the employees in an appropriate unit wish to be represented for collective bargaining by an exclusive representative, or asserting that the designated exclusive representative is no longer the representative of the majority of employees in the unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties;

(2) By the employer alleging that one or more employee organizations has presented to it a claim to be recognized as the exclusive representative in an appropriate unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties.

If the board finds upon the record of a hearing that a question of representation exists, it shall direct an election and certify the results thereof. No one may vote in an election by mail or proxy. The board may also certify an employee organization as an exclusive representative if it determines that a free and untrammelled election cannot be conducted because of the employer's unfair labor practices and that at one time the employee organization had the support of the majority of the employees in the unit.

On November 21, 1989, a hearing was held before a SERB Hearing Officer. The Hearing Officer issued a recommended determination that: (1) the Petition for Representation Election is a proper form for consolidating two existing units, (2) SERB has the jurisdiction to conduct a self-determination election during the term of any lawful collective bargaining agreement, and (3) a bargaining unit consisting of teachers and educational aides is appropriate if the majority of both groups vote for inclusion in the unit.

The Employer excepted to the Hearing Officer's Recommended Determination and the Employee Organization responded to the exceptions.

I.

One of the issues before SERB is whether the Petition for Representation Election is the proper form for consolidating existing units. The Employer argues that this Petition for Representation Election is not the proper form since the Employee Organization seeks to consolidate units which it already represents. The Employer contends that the proper form is a Petition for Amendment of Certification pursuant to Ohio Administrative Code Rule (O.A.C.) 4117-5-01(E).

According to O.A.C. 4117-5-01(E),

In the absence of a question of majority representation, ... a petition for amendment of certification may be filed .... The purposes of such petitions are: (1) For amendment of certification, to alter the composition of the unit by adding, deleting, or changing terminology in the unit description; ...

O.A.C. 4117-5-01(G) provides that a petition for amendment of certification will be permitted only if the group of employees added to a unit is substantially smaller than the number of employees in the existing unit.

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In the case before us, sixty-three (63) employees are in the teachers' unit and eighty-two (82) employees are in the educational aides' unit.<sup>8</sup> Neither unit is substantially smaller than the other. Therefore, the Employer's claim that the election petition should be construed as a petition for amendment of certification must be rejected since neither unit is substantially smaller than the other. Such similarity in unit size simply means that a Petition for Amendment of Certification is not the proper form for consolidating these units.

After reviewing SERB's forms, it is obvious that no proper form exists for the purpose of merging bargaining units. Nevertheless, the Board will not prevent unit mergers simply because it does not have the proper form. Such a decision would elevate form over substance and deny employees, such as those before us, from having a unit composed of professional and nonprofessional employees which is expressly granted in O.R.C. §4117.06(D)(1).

According to O.R.C. §4117.06(D)(1), a majority of both professional and nonprofessional employees must vote for inclusion in one unit in order for the Board to find that unit appropriate.<sup>9</sup> This is commonly known as a

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<sup>8</sup>F.F. 5.

<sup>9</sup>The Board must decide whether such a consolidated unit is appropriate pursuant to O.R.C. §4117.06(B) which provides that:

The board shall determine the appropriateness of each bargaining unit and shall consider among other relevant factors: the desires of the employees; the community of interest; wages, hours, and other working conditions of the public employees; the effect of over-fragmentation; the efficiency of operations of the public employer; the administrative structure of the public employer; and the history of collective bargaining.

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"vote for inclusion" election or a self-determination election. In re Mercer County Joint Twp Community Hospital, SERB 86-041 (10-2-86), the Board found that the "vote for inclusion" election has to be conducted by SERB election procedure.

Since this self-determination vote requires an election, the most appropriate SERB form would be an election form. The only existing SERB election form is the Petition for Representation Election.<sup>10</sup> The Employee Organization, in this case, filed its request for a self-determination election on a Petition for Representation Election form and also designated that it sought consolidation of two existing units. The Board finds that such a filing is adequate since no proper form exists and the filing served adequate notice on the Employer of the union's consolidation intentions.

Furthermore, the Board may, at its discretion, waive technical defects in filing. See In re Martin, SERB 89-023 (9-8-89). Filing a request for consolidation on a Petition for Representation Election form when there exists no proper one qualifies as a technical defect. Moreover, there is no evidence that the Employer was unaware of the true nature of the self-determination request. The Employer's arguments in its Position Statement and its Prehearing Statement are based upon its understanding that the Employee Organization sought to consolidate two bargaining units into one unit.

However, allowing a request for a consolidation election to be filed on a Petition for Representation Election form should only be considered a

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<sup>10</sup>This Board does not consider a Petition for Decertification Election an appropriate form for determining whether existing bargaining units shall be consolidated.

stopgap measure. A proper SERB form must be developed and SERB is empowered to create one pursuant to O.R.C. §4117.02(H)(8)<sup>11</sup> and O.A.C. 4117-1-01(B).<sup>12</sup>

For the above-reasons, the Board finds that the Employee Organization's petition for a self-determination election was properly filed.

II.

The second issue involves SERB's jurisdiction to conduct the consolidation election. The Employer argues that SERB lacks jurisdiction to decide this case. The Employer contends, in essence, that the Employee Organization did not timely file the election petition since the petition was filed while the contracts of both units were in force and it was not filed within the two bargaining units' "window periods."

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<sup>11</sup>O.R.C. §4117.02(H)(8) states that

In addition to the powers and functions provided in other sections of Chapter 4117. of the Revised Code, the board shall:

\* \* \*

Promulgate, amend, and rescind rules and procedures and exercise other powers appropriate to carry out this chapter....

<sup>12</sup> O.A.C. 4117-1-01(B) provides that

The board may issue such orders and take such other action not specifically provided for in these rules as may be necessary to accomplish the purpose of promoting orderly and constructive relationships between all public employers and their employees to the extent not contrary to Chapter 4117. of the Revised Code or Chapters 4117-1 to 4117-25 of the Administrative Code.

Pursuant to the statutory construction of O.R.C. §4117.07(A)<sup>13</sup> and O.R.C. §4117.07(C)(6),<sup>14</sup> an election is precluded among employees currently covered by a valid collective bargaining agreement based upon the contract bar rule. See In re Mad River-Green Local Bd. of Ed., SERB 86-029 (7-31-86), dismissed for mootness in SERB v. Mad River-Green Local Board of Education, 1988 SERB 4-1 (2d Dist Ct App, Clark, 12-28-87). The only exception to this bar is the "window period," which is no sooner than 120 days or later than 90 days before the contract expires. O.R.C. §4117.07(C)(6). During this period an election petition may be filed. See In re Ohio University, SERB 85-053 (10-4-85). Additionally, an election petition may be filed after an agreement expires.

The Employer argues that the contract bar rule and the "window period" rule applies to the consolidation election before the Board and, thus, prevents the election.

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<sup>13</sup>See footnote 7.

<sup>14</sup>O.R.C. §4117.07(C)(6) provides that

The board shall conduct representation elections by secret ballot at times and places selected by the board subject to the following:

\* \* \*

The board may not conduct an election under this section in any appropriate bargaining unit within which a board-conducted election was held in the preceding twelve-month period, nor during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative.

Petitions for elections may be filed with the board no sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement, or after the expiration date, until the public employer and exclusive representative enter into a new written agreement.

Reviewing the dual policy considerations behind the contract bar rule and its "window period" specification sheds light upon the purpose of these rules. The contract bar rule intends to protect the exclusive representation status of the employee organization from attacks by rival employee organizations and by decertification attempts for the limited time of the contract period, which cannot exceed three years. Furthermore, this rule promotes stable labor relationships between the exclusive representative and the public employer for the period of the contract. However, in order to ensure the statutory right of employees to choose a different employee organization or to decertify the incumbent one, the "window period" has been established. The lifting of the contract bar rule for the "window period" guards against a situation where an employer and a union implement a successor collective bargaining agreement immediately following the expiration of the previous one and, thus, successfully bar any attempt of decertification or changing of bargaining agent by the employees.

Based upon these considerations, the contract bar and "window period" apply to situations where the exclusive bargaining agent status of an employee organization is being challenged either by a rival organization or by a decertification process. This framework has no relationship to a consolidation election in which a union and the employees in the unit want one unit to be formed from two or more of the bargaining units. In the instant case, the Employee Organization does not seek to oust the exclusive representative of the bargaining units, but to consolidate the two units it currently represents.

The Michigan courts were confronted with this merger issue in the case of Lansing School District v. MERC, 94 Mich. App. 200, 288 N.W. 2d 399, 104 L.R.R.M. 2175 (1980), appeal after remand 117 Mich. App. 485, 324 N.W. 2d 62 (1982). The union sought an employee-preference election to determine whether the employees in its custodial-maintenance-supply employees' unit and the employees in its cafeteria workers' unit wished to merge into one unit. MERC ordered an election be held in both units to determine if the units should merge. The court determined that the Michigan statute only allowed MERC to grant employees the right to vote in representation cases. However, the court recognized that the Michigan statute did not prevent employees from voting in elections in which employees would vote to merge with another unit of their union. Thus, the court found MERC had implicit authority to order elections for consolidation.

In Saginaw Board of Education and SEIU, Local 582, 8 NPER ¶116129 (MERC 6-24-85), the Michigan Commission relied upon Lansing School District and ordered an election of three SEIU non-teacher bargaining units. The employees were to vote about consolidating into a single bargaining unit. Thus, Michigan again has allowed consolidation of units represented by the same union even though Michigan has no explicit statutory authority.

In contrast, Ohio's collective bargaining act has a provision that allows for merger between professional and nonprofessional employees. O.R.C. §4117.06(D)(1). Additionally, Ohio has a statutory mandate that one of the factors the board is to consider in determining whether a unit is appropriate is the "effect of over-fragmentation". O.R.C. §4117.06(B). Thus, there is statutory authority in Ohio to permit consolidation elections.

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For all of these above reasons, this Board finds that the contract bar rule does not bar this consolidation election.

In regards to the "window period" rule, the Employee Organization did file its petition during the "window period" of one of the contracts. Since the expiration dates of the two collective bargaining agreements are 31 days apart, it is impossible to file a petition during the "window period" of both contracts. In cases such as the one before us, an employee organization should not have to file, and could not possibly file, during the "window period" of both contracts.

For all the above reasons, we find that the contract bar rule and the "window period" rule do not apply to self-determination elections for consolidating units. The Board does not lack jurisdiction to decide this case. Thus, SERB directs a self-determination election to be held in the two bargaining units to determine whether a majority of each bargaining unit's employees wishes to merge into one unit.

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CASE NUMBER: 89-REP-05-0100

CONCURRING OPINION

Board Member Latané:

I agree that a self-determination election should be allowed in this case.

This case differs from In re Trotwood Madison City School District, Case No. 88-REP-06-0115 (corrected directive issued 3-15-90), in which I dissented, in that neither bargaining unit is deemed certified and in that the Petition in this case was filed within a window period, namely that of the contract with the first expiration date. In Trotwood-Madison, id. the Petition was not filed within either window period, and the merger involved a deemed certified and a Board certified unit.

I agree that two bargaining units represented by the same employee organization should be allowed to merge by self-determination election. However, I do not believe that contract bar restrictions and the window period rule which apply to representation and decertification elections should be totally waived in self determination elections.

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The hearing officer stated, in footnote 5 of his Recommended Determination that

For sound policy reasons, I believe that the Board should nevertheless apply the one-year election bar to self-determination elections in order to discourage election manipulations.

I agree, and for the same reasons believe that a petition for merger of two bargaining units must be filed within the window period of one of the contracts.

Requests for bargaining unit merger are rare, and should be decided on a case by case basis. In this case, with the expiration date of the second contract occurring one month following the expiration date of the first, there should be a minimum of disruption as a result of the merger. I therefore concur that a self-determination elections be directed in the two bargaining units of classroom teachers and educational aides represented by the Educators of Montgomery County OEA/NEA.

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