

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 91-002

In the Matter of
Glass, Molders, Pottery, Plastics and Allied Workers
International Union, AFL-CIO, CIC,
Employee Organization,
and
Columbiana County Auditor's Office
Employer.

CASE NUMBER: 90-REP-12-0320

DIRECTIVE DISMISSING REQUEST FOR RECOGNITION
(Opinion attached.)

Before Chairman Owens, Vice Chairman Pottenger and Board Member Sheehan: March 7, 1991.

The Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CIC (Employee Organization) filed a Request for Recognition with the Columbiana County Auditor's Office (Employer) on or about December 21, 1990. In the Request for Recognition, the Employee Organization requested recognition as the exclusive representative of employees in the following proposed unit:

Included: All Clerical Employees

Excluded: Auditor, Columbiana County

The number of employees in the unit was listed as 14. The Employee Organization filed the Request for Recognition with the Board on December 21st, together with other documents that included a copy of a letter dated December 20, 1990, which it had written to the Columbiana County Auditor, Kent Bell, requesting job classifications and other information for positions in its proposed unit.

On January 7, 1991, in response to a Board agent's request for an alphabetized, numbered payroll list of persons currently employed in the proposed unit, the Employer filed with the Board a list of all Columbiana County Auditor employees. The list included 14 names. It did not contain the name of Auditor Bell.

For the reasons given in the attached opinion, incorporated by reference, the Board finds that the unit proposed in the Request for Recognition is inappropriate because the unit description lacks the requisite specificity. Further, the Board finds the proposed unit to be inappropriate because the Employee Organization seeks to represent a

Directive
Case No. 90-REP-12-0320
March 7, 1991
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bargaining unit different from the one described in its Request for Recognition. Accordingly, the Board dismisses the Request for Recognition without prejudice to the Employee Organization to file another one with the Employer.

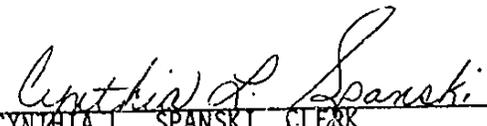
It is so directed.

OWENS, Chairman, and POTTENGER, Vice Chairman, concur. SHEEHAN, Board Member, dissents.


DONNA OWENS, 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 21st day of May, 1991.


CYNTHIA L. SPANSKI, CLERK

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STATE OF OHIO
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CASE NUMBER: 90-REP-12-0320

OPINION

Owens, Chairman:

This case provides an opportunity to return to some fundamentals of the voluntary recognition process under the Act.¹ First, the State Employment Relations Board ("SERB" or "Board") cannot certify an employee organization filing a recognition request unless the proposed bargaining unit is appropriate. Thus, R.C. §4117.05(A) provides in part,

An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by ...

* * *

(2) Filing a request with a public employer ... for recognition as an exclusive representative. (Emphasis added.)

Second, the SERB has the plenary power to " ... decide in each case the unit appropriate for purposes of collective bargaining." R.C. 4117.06(A); see also, R.C. 4117.06(B) ("The board shall determine the appropriateness of each bargaining unit ..."). (Emphasis added.) In seven years of administering the Act, the Board has recognized extremely few limitations on

¹We incorporate by reference the information in our Order Dismissing Request for Recognition issued on March 7, 1991.

its unit determination power. Certainly, the SERB has never ceded its statutory unit determination authority - nor could it - to employee organizations and/or employers. Chairman Day summed up the SERB's view in this regard when he said:

The negotiated unit may be appropriate and approvable by the SERB but another, different unit, may also be. However, that determination is for the SERB. Any other view would in effect delegate to parties the power to finally determine by agreement the statutory rights vouchsafed employees under R.C. 4117.03. This consequence would allow parties to agree in a way to deprive the SERB of the authority to make unit determinations. The SERB is the only entity with the power to approve agreed units or to determine appropriate units in contested cases.

In re State of Ohio, SERB 87-030(12-17-87), p 3-112 (footnotes omitted.)

Thus, in a voluntary recognition case, the SERB can certify the employee organization only in an appropriate unit, and only the SERB, not the parties, can determine the appropriate unit. We discern absolutely nothing in R.C. 4117.05(A)(2)(b) or any other provision of the Act that would change this.² Our jurisdiction to determine unit appropriateness rests independently upon R.C. 4117.05(A) and 4117.06(A), as quoted above.

²Though arguing that R.C. 4117.05(A)(2)(b) requires us to certify the Employee Organization here because we did not receive any item mentioned in 4117.05(A)(2)(b)(i) through (iv), particularly substantial evidence pursuant to (iv) that the proposed unit was inappropriate, our dissenting colleague admits that the Board nevertheless may determine an "incoherent" unit to be inappropriate and refuse to certify for this reason. We see no difference between this and the Board determining, as here, that the unit is inappropriate because its description lacks the requisite specificity or does not describe the unit which the employee organization seeks to represent. Furthermore, the Board has received evidence that the proposed unit is inappropriate, consisting of the recognition request itself, the copy of the Employee Organization's December 20, 1990, letter to Auditor Bell, and the list of Columbiana County Auditor employees which Auditor Bell filed with the Board. All of this evidence was received within 21 days of the recognition request filing. Hence, even if R.C. 4117.05(A)(2)(b)(iv) places a condition on the SERB's unit determination power, that condition has been met.

It would not further orderly and constructive relationships between employers and employees if the parties, by their agreement on or failure to object to a unit, thereby deprived the SERB of power to determine the appropriateness of that unit. The Act obliges the Board, not the parties, to guard the rights and interests of employees, employers, and the public in determining appropriate units. See R.C. 4117.06(B). Nowhere is the Board's protection of these rights and interests more critical than in the voluntary recognition process, where an employee organization becomes the employees' official bargaining representative under the Act without a secret-ballot election.

Another fundamental of the voluntary recognition process is that the parties have the responsibility of developing an appropriate unit.³ The SERB does not do it for them. So when the unit description is flawed, the Board has not hesitated to dismiss recognition requests on this basis. See, In re Columbiana County Engineer, Case No. 84-VR-07-1659 (11-14-84) (unit inappropriate because description lacked the requisite specificity); In re City of South Euclid, Case No. 84-VR-07-1531 (12-12-84) (unit description

³Unit determinations are not adversarial proceedings. So, R.C. 4117.05(A)(2)(b)(iv) does not, as the dissent claims, create a burden of proof for those who object to the proposed unit on grounds that it is inappropriate. The statutory provision merely specifies when and, together with Admin. Rule 4117-3-03(B), how such persons should submit to us their evidence showing the inappropriateness of the unit. Furthermore, the Act does not make the unit proposed in a recognition request automatically an appropriate unit when no substantial evidence is received under R.C. 4117.05(A)(2)(b)(iv). That no such evidence is submitted does not mean we thereby have evidence that the unit is appropriate. Accordingly, regardless of the procedure for objecting persons to submit their evidence to the Board, we may solicit, obtain, and analyze evidence bearing on the appropriateness of the unit in order to fulfill our obligations under R.C. 4117.05(A) and 4117.06(A).

lacked requisite specificity); In re City of Norwood, Case No. 85-VR-01-2691 (3-5-86) (unit description lacked requisite specificity).

Unit description responsibilities spring from the Act, which directs the employee organization to describe the bargaining unit. See R.C. 4117.05(A)(2). By administrative rule, the Board has implemented this statutory command and requires a "description of the bargaining unit which the employee organization proposes to represent, specifying inclusions and exclusions and the approximate number of employees in the unit...." Admin. Code Rule 4117-3-01(A)(2). The Request for Recognition form prescribed by the Board requires the employee organization to use job titles where applicable in describing the proposed unit.⁴

In the present case, the Employee Organization clearly failed in the foregoing responsibilities. For one, the unit proposed in its Request for Recognition lacks the specificity required by R.C. 4117.05(A)(2) and Admin. Code Rule 4117-3-01(A)(2). Contrary to the instructions on the Request for Recognition form, the Employee Organization used no titles or classifications for the positions to be included in the unit. Its failure was made particularly significant by the fact it filed with the Board a copy of its December 20, 1990, letter to Auditor Bell, which showed it was including different job classifications in its proposed unit (but did not name those classifications). Under the circumstances, we find that the unit

⁴The use of job titles or classifications in a recognition request is a reasonable requirement. It allows the Board to determine whether the unit may contain combinations of employees prohibited by R.C. 4117.06(D); determine whether the unit may contain employees exempt from the Act pursuant to R.C. 4117.01(C); and assess the community interest and other factors pursuant to R.C. 4117.06(B). It also notifies the employees holding those jobs that they are being included in or excluded from the unit, since the employer's notice to the employees of its receipt of a recognition request repeats the unit description contained in the request.

proposed in the Request for Recognition is inappropriate because the unit description lacks the necessary specificity.

The proposed unit is also inappropriate because the Employee Organization seeks to represent a unit different from the one described in its Request for Recognition. It seeks to represent a unit of all employees of the Auditor's Office (except the Auditor) and not a unit of all clerical employees as stated in the recognition request. This contravenes R.C. 4117.05(A)(2) and Admin. Code Rule 4117-3-01(A)(2), requiring a "description of the bargaining unit which the employee organization proposes to represent."

The Employee Organization and the Employer both have submitted evidence which leads the Board to conclude that the intended bargaining unit is all employees of the Auditor's office, not all clerical employees. The Employee Organization's Request for Recognition excludes the Auditor from an ostensible unit of "clerical" employees. The exclusion of the Auditor from a clerical unit makes no sense. It does make sense, however, if the intended unit actually is all employees of the Auditor's office.

Additionally, in response to a Board agent's request for a list of persons currently employed in the proposed unit, Auditor Bell filed with the Board on January 7, 1991, a "list of Columbiana County Auditor employees as of date." This list plainly is a list of all his employees and in no way indicates it is limited to just clerical employees. The list contains 14 names, which is the precise number of employees who, according to the Employee Organization's Request for Recognition, are in the bargaining unit. (Mr. Bell himself is not on the list.)

The Board concludes, therefore, that the Employee Organization seeks to represent a bargaining unit different from the one described in its Request

for Recognition.⁵ Thus, the unit stated in the Request for Recognition is inappropriate.

To summarize, the unit proposed in the Request for Recognition is inappropriate because the unit description lacks the requisite specificity and because it does not describe the unit which the Employee Organization seeks to represent. Since the parties have the responsibility of developing an appropriate unit and the SERB should not do it for them, we dismiss the Request for Recognition without prejudice to the Employee Organization to file another one.⁶ See, Columbiana County Engineer, City of South Euclid, City of Norwood, supra.

Pottenger, Vice Chairman, concurs.

⁵The Board is troubled by the fact the Employee Organization did not sign the "Declaration and Certification of Filing of Showing of Interest" on its Request for Recognition filed with the Board. The Request for Recognition form requires an employee organization, by its representative, to sign this. The Declaration states that the representative has read the contents of the recognition request and that the statements it contains are true and correct to the best of the representative's knowledge and belief. Despite this omission, however, the Board bases its decision to dismiss the Employee Organization's Request for Recognition on the inappropriateness of the bargaining unit. We need not decide whether the Request for Recognition also could be dismissed for failure of the Employee Organization to sign the Declaration.

⁶The dissent claims we have dismissed the recognition request because the unit as described might include employees who are not public employees under R.C. 4117.01(C) or include a prohibited combination of classifications under R.C. 4117.06, and that we should have directed the case to a hearing. He mischaracterizes our holding. We dismiss the recognition request because the unit description is flawed and the Employee Organization clearly did not meet its responsibilities under the Act and the Board's rules to describe the unit. Directing the case to a hearing would serve no purpose other than to put the Board into the position of performing responsibilities which the Employee Organization should have performed in the first instance.

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STATE OF OHIO
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In the Matter of
State Employment Relations Board,
Complainant,

v.

Glass, Molders, Pottery, Plastics and Allied Workers
International Union, AFL-CIO, CLC,

Employee Organization,

and

Columbiana County Auditor's Office,

Employer.

CASE NUMBER: 90-REP-12-0320

DISSENTING OPINION

Sheehan, Board Member:

The case before us could not be easier and simpler. The Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CLC (Employee Organization) filed a Request for Recognition seeking to represent a clerical unit at the Columbiana County Auditor's Office (Employer). In its Request for Recognition the Employee Organization described the bargaining unit by specifying the inclusions and exclusions and the approximate number of employees in the unit in complete compliance with Ohio Administrative Code Rule 4117-3-01(A)(2).

The proposed unit is:

Included: All Clerical Employees.

Excluded: Auditor, Columbiana County.

The Employee Organization supported the request in accordance with our rules with substantial evidence to demonstrate that a majority of the employees in the bargaining unit wish to be represented by the Employee

Organization. The Employer complied with the posting requirements and the State Employment Relations Board was notified of the Request for Recognition. Once all the above took place, the statute in O.R.C. §4117.05(A)(2)(b) is very clear on what should happen next:

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:

(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. (Emphasis added).

Within the twenty-one (21) days following the filing of the Request for Recognition none of the items mentioned in (i) to (iv) above was received by the Board. In such a case the language of the statute is very clear and unambiguous--"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." (Emphasis added). Hence, the statute mandates certification. It is not left to the Board's discretion to certify or not to certify if no substantial evidence is there pointing to the inappropriateness of the proposed unit. Obviously, if a proposed unit on its face is clearly inappropriate, the Board will not certify it. For example, the Board would not certify a unit of full-time deputies in a sheriff's department together with non-deputized employees or a unit with an incoherent description. But to dismiss, as the majority does here, a perfectly appropriate unit on its face of clerical employees with no objections filed and no substantial evidence to the contrary just because of some speculative possibility of inappropriateness is arbitrary, capricious and abuse of discretion.

The majority argued that the unit as described might include employees who are not public employees pursuant to O.R.C. §4117.01(C) or include a prohibited combination of classifications under O.R.C. §4117.06. There was no evidence whatsoever, only a baseless assumption by the majority, that the petitioned for unit might contain such classifications. This argument does not merit dismissal of the Request. First, the inclusion of public employees not subject to Chapter 4117 under §4117.01(C) is the prerogative of the employer. O.R.C. §4117.03(C) states:

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

In the instant case the Employer had the statutory twenty-one days to raise any objections it wished to the bargaining unit. None was raised.

Thus, even if the proposed unit of clerical employees contained supervisory or confidential employees, it is the prerogative of the Employer to choose to allow them in the unit and to bargain with them. If the Employer has no objections, then the inclusion of such classifications in the unit is not inappropriate.

Second, clearly O.R.C. §4117.06 vests the Board with the authority and the responsibility to determine an appropriate unit for bargaining. But in O.R.C. §4117.05(A)(2)(b) the statute specifies how, in the special case of Requests for Recognition, the Board goes about making this determination and the statute clearly puts the burden of proof on anyone who objects to the proposed unit and not on the Employee Organization which filed the Request for Recognition.

The statute states:

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:

* * *

(iv) Substantial evidence ... that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

The majority did exactly the opposite. In complete disregard to the clear language of the statute it put the burden of proof on the Petitioner.

Moreover, had the majority in good faith worried about the possible inappropriateness of the unit it should have directed the Request for Recognition to hearing and not dismissed it. It is well established both under SERB law as well as under federal law that what employees actually do,

and not their classifications and job descriptions, determines whether they are supervisory, confidential or professional.

Of course sending every representation case to hearing, even when neither party raises any objections and the unit on its face is appropriate (as is the case here), will delay the process, undermine the Legislature's intent and represent an imprudent expenditure of public money. Dismissing the case though serves no purpose at all. Moreover, it is clearly illegal.

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