

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
v.
Marion County Children's Services Board,
Respondent.

Case Number: 90-ULP-11-0726

OPINION

SHEEHAN, Board Member:

This case comes before the Board upon exceptions to the Hearing Officer's Proposed Order.

Ohio Council 8, AFSCME (AFSCME,OC8) was certified by SERB as the exclusive bargaining representative of a bargaining unit of Marion County Children's Services Board's (Respondent) employees on January 8, 1987 (Stip. 3). The parties entered into a collective bargaining agreement commencing January 1, 1988 and terminating on December 15, 1990 (Stip. 3). On August 21, 1990, a petition to decertify the exclusive representative was filed by Roberta L. Lazenby with the State Employment Relations Board (SERB) (Stip. 5). This petition was accompanied by individually signed and dated written statements of 11 of the 14 bargaining unit employees, each of which stated:

I am an employee of the Marion County Children's Services Board employed in the bargaining unit represented by American Federation of State, County and Municipal

Court of Common Pleas on January 29, 1991 and January 31, 1991²
(F.F. 8).

The issue before us is whether, once a petition for decertification has been dismissed by SERB, an employer may continue to suspend bargaining based on a good faith doubt as to the union's continued majority status.

The hearing officer found that the Employer's good faith doubt of AFSCME's continuing majority status was not invalidated by the dismissal of the Petition for Decertification Election.

In its Exceptions to the hearing officer's Proposed Order, the Complainant asserts that absent a pending decertification petition, the Employer violates O.R.C. §4117.08(A) when it refuses to bargain

² On December 19, 1990, Roberta Lazenby filed a second Petition for Decertification Election, in Case Number 90-REP-12-0315, seeking to decertify AFSCME as the exclusive representative of certain employees of Marion County Children's Services Board. This petition was accompanied by statements signed by 12 of the 14 bargaining unit members, stating that they no longer wished to be represented by AFSCME, OCS and that they authorized Lazenby to act as their agent in filing the petition. On July 2, 1991, the Board directed this matter to hearing for determination of an appropriate bargaining unit and for all other relevant issues. The matter was set for hearing on October 3, 1991. On October 3, 1991, the parties engaged in an extensive prehearing conference where numerous stipulations of fact and exhibits were submitted to the hearing officer. The parties waived their right to an evidentiary hearing. All post-hearing briefs were filed by November 12, 1991. The hearing officer, in his recommended determination, recommended that the processing of the second Petition for Decertification Election be held for disposition pending the Board's final order in this case.

In accordance with the hearing officer's recommendation, the Board ordered on February 20, 1992 that the petition in Case No. 90-REP-12-0315 be held pending the resolution of the instant matter.

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with AFSCME, and that when there is nothing affecting certification pending before SERB, all the rights and duties that were suspended by the pending petition are reinstated, absent some court action.

OC8 also filed Exceptions to the Hearing Officer's Proposed Order, in which it asserts that because a public sector employer has no role in conferring representational status on an employee organization, an employer should not be able to ignore a Union's certified status and eliminate its own duty to bargain without a revocation of the Union's certification by SERB. Thus, OC8 contends that where there is no decertification petition pending, the Employer should not be permitted to unilaterally refuse to bargain with the exclusive representative certified by SERB. The Employer argued, and the hearing officer found, that it continued to have a good faith doubt as to the union's continued majority status which justified its termination of the bargaining relationship.

We agree with the excepting parties, that the Respondent's refusal to bargain with OC8 following SERB's dismissal of the Petition for Decertification Election constitutes a violation of O.R.C. §4117.11 (A)(5). It has been a longstanding policy of this Board, reaffirmed herein, that a petition for decertification (or representation) alone entitles one to conclude that an employer has a good faith doubt of continuing majority status and warrants a withdrawal from bargaining with the incumbent union until the representation issue is resolved. In re Cleveland City School

District Board of Education, SERB 85-003 (1985). Thus, SERB's policy is to automatically grant an employer's motion to stay negotiations when a decertification petition is pending. SERB's rationale for this policy is that as long as a question of representation is pending resolution by an election, a neutral stance on the Employer's part is warranted until the representation dispute is decided. A continuation of the bargaining process with the incumbent employee organization might taint the "laboratory conditions" which are essential for the coming election by giving one party an advantage over the other. Also, the imminent possibility of changing or eliminating the employee representation justifies staying negotiations upon an Employer's motion until an election has established which party, if any, the employer is to negotiate with. Thus, it is sound policy to stay ongoing negotiations with the incumbent organization on a motion by the employer, so long as a question of representation is pending before the Board in the form of petition for representation or decertification. We do not agree with the hearing officer, however, that good faith doubt may be established apart from a pending petition. We recognize that our reliance upon the filing of a petition to demonstrate good faith doubt is a departure from bargaining principles applied by the NLRB to the private sector, which apparently were relied upon by the Employer.³ Although we

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NLRA §8(a)(5) states:
It shall be an unfair labor practice for an employer-

find that NLRB precedent is often persuasive and appropriately applied to the public sector, here a departure is clearly warranted by statutory language and policy considerations.

Chapter 4117 neither provides for voluntary recognition of bargaining representatives outside the certification process nor contemplates voluntary withdrawal of recognition. Even when an employer is willing to voluntarily recognize a bargaining agent, this agent must be certified by SERB. (O.R.C. §4117.05(A)(2)). Clearly, under Ohio law, certification is the benchmark which triggers a bargaining obligation.

Only SERB has the power to certify an employee organization as the exclusive bargaining agent, and only SERB can take away such a

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

NLRA §9(a) states:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . .

Under the NLRB, an employer can voluntarily recognize a union as the representative of its employees without going through the certification process of the NLRB.

In contrast, O.R.C. 4117.11 (a)(5) states:

It is an unfair labor practice for a public employer, its agents, or representatives to; refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to 4117 of the Revised Code.

In Chapter 4117, even voluntary recognition must go through the certification process of SERB, and 'recognized as the exclusive representative' refers to the grandfathered unit which is treated in Chapter 4117 as 'deemed certified.' (Emphasis added.)

certification. The duty to bargain in Ohio Revised Code §4117.08(A) exists as long as a certified or deemed certified exclusive bargaining agent exists and may temporarily be stayed only by SERB action.

Accordingly, we do not believe the Ohio statute contemplates allowing an employer to decide unilaterally to terminate a bargaining relationship conferred by certification.

There is no statutory basis for such unilateral action, and moreover, such action flies in the face of any good labor policy.

Further, a review of private sector law in the area of good faith doubt convinces us that allowing employers to suspend bargaining obligations on this basis undermines labor stability and proliferates litigation to an extent not warranted by any benefits it affords. Although the record here does not indicate that the Employer engaged in such conduct, frequently the concept leads to polling of employees by their employer to substantiate a "good faith doubt" which itself may bring about unfair labor practices.⁴ Allowing employers to suspend bargaining obligations based on good faith doubt creates a conflict between the termination of the collective bargaining process by the employer on one hand, and the

⁴ Polling creates several policy problems. Polling, where it involves interrogation of employees about whether they wish to be represented by the union can easily lead to allegations of coercive interference in violation of R.C.4117.11(a)(1), and determining whether an employer has good faith doubt can create an administrative and evidentiary nightmare. See Texas Petrochemicals, 132 LRRM 1279 (1989).

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statutory duty to bargain with the certified bargaining representative on the other hand. Such a conflict has a resolution in the private sector where the employer may petition the NLRB for a Board-conducted election under Section 9(c)(1)(B) of the NLRA (an RM election). However, this is not the case in the public sector. Chapter 4117 does not contemplate an employer-initiated election where no petition is pending before the Board. Thus, in the public sector, allowing an employer to act on its "good faith doubt" without Board action leads to an irresolvable conflict, which does not encourage good and sensible public policy. A public employer must bargain collectively with a certified employee organization so long as the organization retains its certification. A public employer is not relieved of this obligation simply because it feels a majority of its employees no longer support the certified employee organization. The obligation to bargain imposed by Chapter 4117 depends not upon the majority status of the employee organization, but rather upon the certification of the employee organization by SERB as exclusive bargaining agent. The duty to bargain, once imposed, is relieved only upon revocation of certification by the Board or temporarily by granting a motion to stay. See District School Board of Trustees, Palm Beach Junior College and United Faculty of Palm Beach Junior College, 4 FPER 4069 (January 4, 1978).

Our adherence to SERB policy stated in Cleveland does not mean that employers must bargain perpetually with certified

representatives of dissatisfied employees. They must, however, rely on the procedures afforded by statute for decertification or representation election petitions which are initiated by employees or employee organizations rather than by employers.⁵

The way for dissatisfied employees to oust the certified bargaining agent is to file a proper and timely decertification petition with SERB. If they choose to file a proper and timely decertification petition, SERB will conduct a decertification election as soon as possible. If they choose not to file or if their decertification petition is not valid and is dismissed, they will continue to be represented by the existing certified bargaining agent.

To summarize, once a petition for decertification or representation by a rival employee organization is pending, SERB will stay negotiations upon an employer's motion to stay. The stay shall automatically expire when the petition which prompted the employer's motion has been withdrawn or dismissed, or upon the certification of results of the election conducted pursuant to the petition.

In the case at issue, the Respondent committed an unfair labor practice by refusing to resume negotiations with AFSCME after the

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Support for this position can be found in those courts' rulings that employers have no standing to appeal SERB's dismissal of decertification petitions. The only party with standing in such cases is the employees themselves. See e.g. Miami University v. SERB, 1990 SERB 4-111 (10th Dist Ct App, Franklin, 12-6-90).

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decertification petition which had been pending before the Board had been dismissed. The proper procedure, which was not followed here, is for an employer, who wishes to stay bargaining in light of an election petition, to file a motion to stay negotiations with the Board. A stay will be granted only upon the filing of such a motion.

Chairman Owens, and Vice Chairman Pottenger concur.



NOTICE TO EMPLOYEES FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

A. WE WILL CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and from refusing to bargain collectively with the representative of its employees' certified pursuant to Chapter 4117 of the Revised Code where no valid decertification petition is pending before the Board, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

B. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all Marion County Children's Services Board buildings where the employees work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Marion County Children's Services Board shall cease and desist from the actions set forth in paragraph A.

MARION COUNTY CHILDREN'S
SERVICES BOARD
90-ULP-11-0726

FROM THE STATE EMPLOYMENT RELATIONS BOARD

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MARION COUNTY CHILDREN'S
SERVICES BOARD
90-ULP-11-0726

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for sixty (60) consecutive days.