

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 92-019

In the Matter of
Professionals Guild of Ohio,
Employee Organization,
and
Butler County Board of Mental Retardation
and Developmental Disabilities,
Employer.

CASE NUMBERS: 87-REP-05-0132
92-REP-07-0147

DIRECTIVE AND OPINION

Before Chairman Owens, Vice Chairman Pottenger, and Board Member Sheehan: September 24, 1992.

On October 15 and 16, 1987, in Case No. 87-REP-05-0132, the Board conducted a secret ballot representation election for certain employees of the Butler County Board of Mental Retardation and Developmental Disabilities (Employer). The results of the election were 152 votes cast for the Professionals Guild of Ohio (Employee Organization), 102 votes cast for "no representative," and zero challenged ballots. The parties settled post-election objections filed by the Employer by consenting to a rerun election, conducted July 28 and 29, 1988.

The results of the rerun election were 86 votes cast for the Employee Organization, 84 votes cast for "no representative," and 11 challenged ballots. After investigation of the determinative challenged ballots, the Board directed that challenged ballots cast by voters Rader, Evans and Hardin be opened and counted, and ruled that the remaining 8 challenged ballots remain sealed. Among Rader, Evans and Hardin, two ballots were

U9

cast for the Employee Organization and one ballot was cast for "no representative," bringing the totals on the revised tally to 88 votes cast for the Employee Organization and 85 votes cast for "no representative." As a result, on March 16, 1989, the Employee Organization was certified as the exclusive representative of the relevant unit of employees.

On appeal by the Employer, the 10th District Court of Appeals (court) ruled that the ballots cast by Evans and Hardin should not have been counted, and that the ballots cast by voters Bain, Cox and Hayes (which the Board ruled should remain sealed) should be opened and counted.

Based on the court's remand and instructions, the ballots cast by Bain, Cox and Hayes were opened and counted on July 13, 1992. All three voted for "no representative." A second revised tally was issued reflecting those results (an 88 to 88 tie) and reflecting that a rerun election was required.

After the second revised tally was issued, both the Employer and the Employee Organization timely filed objections, the Employer's with a motion to issue a tally consistent with the court's opinion.

The Employee Organization responded to the Employer's objections. The Employer then filed an unopposed motion for extension of time to respond to the Employee Organization's objections, followed by such a response. The Employer's motion for extension of time is hereby granted, and the Employer's response has been considered by the Board.

The second revised tally issued in Case No. 87-REP-05-0132, which indicates that a rerun election is required, is incorrect. This is true because, as stated above, when the ballots of Rader, Evans and Hardin were opened and counted, two votes were added to the Employee Organization's total and one vote was added to the "no representative" total. Therefore,

it can be concluded that either both of the erroneously counted ballots (cast by Evans and Hardin) were cast for the Employee Organization, or one was cast for each choice. As a result, when accounting for these ballots, the final result is either an 88 to 86 count in favor of "no representative," or an 87 to 87 tie, in which case "no representative" prevails pursuant to Ohio Administrative Code Rule 4117-5-09(A), which states:

(A) In order to prevail in an election, a choice must receive more than fifty per cent of the number equal to the total valid ballots cast, provided, however, that in any representation election in which the choices are an employee organization and "no representative," and the resulting vote is equally divided, it will be determined that "no representative" has prevailed; provided, further, that in a decertification election in which the resulting vote is equally divided between the incumbent representative and "no representative," it will be determined that the incumbent has prevailed.

Therefore, it is not possible, based on the ballots cast by eligible employees as determined by the court, that the Employee Organization received the majority required for certification pursuant to Ohio Revised Code § 4117.07(C)(3), which states:

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

(3) The board may not certify a representative unless the representative receives a majority of the valid ballots cast;...

Therefore, the Board grants the Employer's July 20, 1992, motion to issue another revised tally in Case No. 87-REP-05-0132 reflecting that "no representative" has prevailed.

Meanwhile, in Case No. 92-REP-07-0147, the Employee Organization filed a new Petition for Representation Election seeking an election for a similar unit of nonprofessional employees. The Employer filed objections followed by a motion to dismiss. The Employee Organization did not respond. The motion to dismiss is denied, and the matter is directed to hearing to determine an appropriate bargaining unit.

POTTENGER, Vice Chairman:

A few comments are warranted here to explain our decision to deny the Employer's motion to dismiss the new Petition for Representation Election in Case 92-REP-07-0147.

The Employer argued that the existing contract between the parties constitutes a bar to the filing of a representation petition where the petition is not filed during the "window period." The Employer also argued that even if SERB decertifies the Professional Guild of Ohio as directed by the Franklin County Court of Appeals, the petition is premature because it was filed prior to such action.

We do not agree. By issuing a revised tally, according to the court's direction, finding that "no representative" has prevailed in Case No. 87-REP-05-0132, the certification of the Employee Organization is null and void nunc pro tunc. In other words, the certification, erroneously conferred, was void from its inception. Neither a void certification, nor a contract with an erroneously certified employee organization can bar a Petition for Representation Election.

In its motion to dismiss the new petition, the Employer additionally argued that a hiatus period should be declared, following the decertification of the Employee Organization, similar to an election or

52

certification bar. Such a hiatus period would preclude the filing of any petition for representation for a period of at least one year to "allow sufficient time for the Employer and employees to recover from the proceedings and, hopefully, enjoy labor peace." (Employer's motion to dismiss).

O.R.C. §4117.07(B)(6) provides that the Board may not conduct a representation election in a bargaining unit where a Board-conducted election was held in the preceding twelve-month period. The policy considerations behind this election bar are clear. Election campaigns take a toll on labor relations in the workplace. Emotions are high, and public money is spent. Such policy considerations are not applicable to the case at issue. The last election in the relevant bargaining unit took place on July 28 and 29, 1988, more than four years ago. While we are aware that the parties have been litigating for years, the scene of the action was the court room, not the workplace, and thus under the circumstances of this case we do not see the necessity of any hiatus period not mandated by law.

In addition to the election bar, the law also provides for a one year certification bar in O.A.C. Rule 4117-5-11(C). Where an employee organization is certified, with or without an election, no representation petition will be processed for a one-year period. The policy allows a newly certified bargaining agent time to do what it had been elected to do, i.e., to negotiate a collective bargaining agreement.

To summarize, none of the policy considerations for election bar or certification bar apply to the case at hand.

Accordingly, the motion to dismiss the Petition for Representation Election in Case 92-REP-07-0147 is hereby denied.

However, we find that a question of representation exists with regard to the unit description in the above-mentioned petition.

The petitioned-for unit reflects neither the unit as originally certified by SERB, nor the unit description in the parties' contract. The Employer has taken the position that the petitioned-for unit is inappropriate. Hence, on the unit issue alone we direct the case to hearing to determine the appropriate bargaining unit.¹

The Board denies the Employer's motion to dismiss filed August 3, 1992, in Case No. 92-REP-07-0147 because, based on the results of the rerun election conducted July 28 and 29, 1988 in Case No. 87-REP-05-0132, the Board certifies that no employee organization has received a majority of the ballots cast. Therefore, the petition filed in Case No. 92-REP-07-0147 is not premature, is not barred by contract, nor barred by the certification of an employee organization. Furthermore, the rerun election conducted in July, 1988 does not bar an election now or in the future. Therefore, the Board directs Case No. 92-REP-07-0147 to hearing to determine an appropriate bargaining unit.

It is so directed.

¹ The Employer mentioned in its motion that the Petition for Representation Election was not served upon the Employer or the Butler County Board of Mental Retardation Developmental Disabilities but only on its representative, its lawyer. We do not find this improper filing in this case. O.A.C. Rule 4117-4-03(B) states in relevant part: "All documents shall include proof of service to the other parties to the proceedings or their representatives." (Emphasis added.)

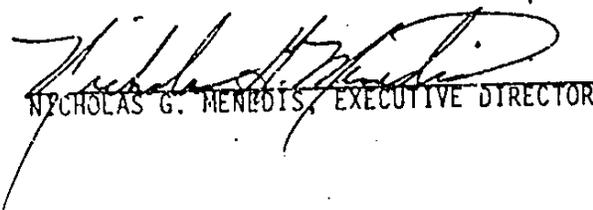
Directive and Opinion
Case Nos. 87-REP-05-0132 and 92-REP-07-0147
Page seven of seven

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


DONNA OWENS, CHAIRMAN

You are hereby notified that an appeal may be perfected in Case No. 87-REP-05-0132, 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 by certified mail on this 2nd day of October, 1992.


NICHOLAS G. MENDIS, EXECUTIVE DIRECTOR

0870r

55