

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ronald T. Ridley,

Petitioner,

and

Communications Workers of America - Local 4340,

Employee Organization,

and

Cuyahoga County Sheriff's Department,

Employer.

Case Number: 93-REP-02-0018

OPINION

OWENS, Chairman:

The issue before the Board in this case is whether a decertification election may be conducted pursuant to a consent election agreement in a unit which is not Board certified.

For the reason stated below we lack such authority under the statute and hence we do not approve the Consent Election Agreement and we dismiss the petition for a decertification election with prejudice.

I.

This matter arose on February 5, 1993, when Ronald T. Ridley (Petitioner) filed a Petition for Decertification Election seeking to decertify the Communications Workers of America, Local 4340 (Employee Organization, CWA) as the representative of certain employees of the Cuyahoga County Sheriff's Department (Employer). The Employee Organization filed a motion to dismiss claiming a deemed certified status based on a three (3)

year contract executed on March 27, 1984. The case was directed to hearing to determine whether the Employee Organization is deemed certified pursuant to Section 4(A) of Amended Substitute Senate Bill 133 of the 115th General Assembly¹. Subsequently, the parties signed a Consent Election Agreement, which is now pending before the Board.

At the outset some background observations are warranted. In 1985, a SERB hearing officer conducted a hearing involving the Employer, the Employee Organization, the unit at issue (which at that time also included cooks), and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America UAW (UAW). UAW had filed a Petition for Representation Election seeking to represent the cooks.²

We take administrative notice of the Findings of Fact of the hearing officer and his Conclusions of Law adopted by the Board. The hearing officer found that the March 27, 1984 agreement between CWA and the Employer, the same agreement CWA claims as the basis of its deemed certified status in the instant case, was not a lawful written agreement, contract, or memorandum of understanding pursuant to Ohio Revised Code (ORC) §4117.05(B), and hence did not bar the petition filed by UAW to represent the cooks.³

¹The direction to hearing was erroneous and should not have occurred. The relevant unit is clearly not Board certified, and there are only two other possibilities either the unit is deemed certified or uncertified. In either case, as we explain later, the decertification petition is not sufficient, and as such cannot raise a question of representation. Hence, a hearing is not warranted.

²International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, and Cuyahoga County Sheriff. SERB Case No. 84-RC-04-0339. Hearing Officer's Recommended Determination issued on June 27, 1985; the adoption of the Hearing Officer's Recommended Determination by the Board and the direction to election was issued on October 24, 1985; the Board's certification of election results certifying the UAW as the exclusive bargaining representatives of a unit of cooks was issued on January 22, 1986.

³However, the hearing officer in his recommended determination did not reach the deemed certified status issue. The only issue before the hearing officer was the petition for election by the UAW, and that issue was sufficiently resolved based on the finding that the March 27, 1984 agreement did not constitute a contract bar. Thus, the deemed certified status issue has not been determined yet, nor will it be determined in this case. The issue before us does not depend on whether or not CWA is deemed certified, and like all other judicial or quasi judicial tribunals, we decline to issue advisory opinions.

II.

We take administrative notice of our records that the unit at issue is not a Board certified unit.

Having done that, there are two (2) possibilities, neither of which authorizes the Board to conduct an election pursuant to a Consent Election Agreement.

1. The unit at issue is "deemed certified".

Section 4(A) of Temporary Law in Senate Bill 133 states in pertinent part: "...Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative." (Emphasis Added).

SERB, as an administrative agency created by statute, has such authority in as much as given by Ohio Revised Code (O.R.C.) Chapter 4117. New Bremen v. Public Utilities Commission, 103 Ohio St. 23, 30 (1921). While an administrative agency, by virtue of its specialized expertise, has a wide latitude to interpret the statute and to implement policies it believes will best serve the public and the legislative intent, the agency may not ignore the plain language of the statute (Emphasis Added). The legislature, in the above-cited section of the Act, gave deemed certified units more protection than Board certified units. Board certified status, on the other hand, may also be terminated by decertification of the Board certified incumbent exclusive representative. Our experience shows that this extra protection creates a legal nightmare and worse, an unjust and unfair prohibition of employees to exercise their statutory rights to choose not to be represented by any employee organization. Yet, we are bound by the clear language of the statute, which allows us to change a deemed certified status only for a certified status.

In the same spirit, according to the mandate of the law and pursuant to its statutory authority, SERB promulgated rules governing petitions and elections in Ohio Administrative Code (O.A.C) Chapter 4117-5. O.A.C Rule 4117-5-01(D) defines a petition for decertification election in distinction from a petition for representation election, which is dealt with in OAC Rule 4117-5-01(C). 4117-5-01(D)(2) specifically states:

"No petition for decertification election as defined in this rule may be filed where the incumbent employee organization is deemed certified pursuant to division (A) of Section 4 of Amended Substitute Senate Bill 133 of the 115th General Assembly."

Thus, both pursuant to the language of the statute, as well as to our own rules, a decertification petition targeted at a deemed certified unit may not be considered, nor may the Board decertify a deemed certified incumbent representative via a decertification election.

We are aware of the fact that all parties involved signed a Consent Election Agreement to have a decertification election. As a rule, SERB listens very attentively to the wishes of the parties, especially when all parties express the same desire. However, SERB cannot ignore the plain language of the statute even when all parties request such action. SERB has never approved a Consent Election Agreement signed by all parties when the unit involved combined classifications proscribed by the statute. For example, SERB will not allow safety forces to strike even if all parties agree in a collective bargaining agreement to a dispute settlement procedure allowing such a strike. As the guardian of O.R.C. 4117, it is our obligation to enforce the law, the parties wishing otherwise notwithstanding. Thus, if the unit at issue is deemed certified, the Consent Election Agreement pending before us must be denied and the Petition for Decertification Election must be dismissed.

III.

If the unit at issue is not deemed certified (which is the only other possibility because we know it is not Board certified), then we have before us a privately negotiated collective

bargaining agreement whereby the employer chose to deal with an employee organization outside the framework of Chapter 4117. Thus, the second possibility in this case :

2. The unit at issue is neither Board certified nor deemed certified.

Employers and employee organizations which collectively bargain without asking for SERB's blessing and without going through a certification process, may not then benefit from the application of Chapter 4117.

For example, the statutory duty to bargain cannot be invoked by a party which signs a private contract and which is not Board certified or deemed certified. Thus, any unilateral changes in term and conditions of employment, or a refusal to bargain may not have statutory remedy under Chapter 4117 if the parties involved negotiated a private deal. The employee organization that opted to privately negotiate with an employer without being certified may be raided at any time and does not have the statutory protection of the contract bar. The employer that opted to privately negotiate with a union of its choice, which is not the certified exclusive bargaining representative of its employees, may be involved in an illegal "sweetheart" deal in violation of O.R.C. §4117.11(A)(2) if the union is not also the employees' choice. And these are only a very few examples of the consequences of bargaining between employers and uncertified unions, outside of Chapter 4117.

Still, private collective bargaining agreements outside SERB's scope do exist here and there. If the case before us involves such an agreement, then the question is whether a decertification election may be conducted in a unit which has never been certified. Clearly, conducting decertification elections when under the law there is nothing to decertify is a futile and meaningless act and, as such, a waste of public money. Moreover, the goal of decertifying an exclusive bargaining representative is to abolish the statutory right of that representative and the statutory duty of the employer to bargain collectively. When a union has never been certified neither the duty nor the right to bargain exist. Therefore, a statutory decertification procedure and a decertification election would be pointless, and the Board has no reason to direct such an election.

Thus, if the unit before us is neither deemed certified nor Board certified, conducting a decertification election is a futile act, inappropriate for SERB. To summarize, the only situation where a decertification election may properly take place is in a unit which has been certified by SERB. Stated another way, the Board cannot decertify that which it has never certified. The CWA unit before us is not Board certified and hence, the pending decertification petition must be dismissed.

IV.

The question still remains - what can employees do when they are caught between an employer and a non Board certified employee organization which bargain collectively in complete disregard of their wishes? As stated above, filing a Petition for Decertification Election is not an option available to the employees in such a situation, since SERB has the authority to conduct a decertification election only in a Board certified unit. However, other options are available.

One option is to notify the employer that the majority of the employees do not want to be represented by the employee organization involved. If the employer continues to bargain with that employee organization, the employees have the statutory right to file with SERB an unfair labor practice charge alleging an O.R.C. §4117.11(A)(2) violation⁴. This option is valid only if the unit is not certified. If the unit is deemed certified, the employer has a duty to bargain and no such violation occurs. Thus, filing a charge alleging an O.R.C. §4117.11(A)(2) violation will also determine the certification status.

Another option is for the employees to file with SERB a Petition for Representation Election, signing cards for another employee organization or creating their own employee organization. If the existing unit is not certified, such a petition may be filed anytime since no

⁴There is, of course, a timeliness question with regard to filing an unfair labor practice charge. In the case at issue, we take administrative notice of the fact that the last collective bargaining agreement between CWA and the Employer expired and negotiations are stayed pending action on the decertification petition. Thus, notifying the Employer at this point, while it is still relevant to the current negotiations, is still timely.

contract bar protection lies for uncertified representatives. If the unit is deemed certified, the window period or the period after the expiration of the contract and before a new contract is effective, as provided by O.R.C. 4117.07(C)(6), is the time to file the petition.

We again emphasize that employers have a duty to bargain only with Board certified and deemed certified bargaining representatives. Employee organizations that bargain without being certified are putting themselves at the whim of employers and have no statutory protection regarding bargaining rights. Employers that bargain with an uncertified employee organization could be committing an unfair labor practice if they are involved in a "sweetheart" deal. We do encourage all those parties who bargain collectively outside the framework of 4117 to avail themselves of the protection of the statute.

A few comments are warranted in regard to the dissenting opinion. In a number of areas, we do not agree with our dissenting colleague's statement of the facts and the law, and we wish to point out a few examples. First, the status of the Employee Organization at this facility was not in question prior to February 5, 1993, when the decertification petition in this case was filed. The 1984 case mentioned in the dissent did not involve the employees in our case, but involved only the cooks, who were carved out as a separate unit.

Second, the citation to *In re Lake County Board of Mental Retardation and Developmental Disabilities*, SERB 92-004 (4-20-92) is distinguishable from this case. In that case the issue was changing a deemed certified unit by conducting an opt-in election to add employees to the deemed certified unit; whereas this case involves the possibility of conducting a decertification election in what might be a deemed certified unit. This distinction is important and is supported by the ruling of the 10th District Court of Appeals and the Common Pleas Court both in Franklin County. In *Lake County Board of Mental Retardation and Developmental Disabilities v. SERB*, 1993 SERB 4-12 (10th Dist Ct. App Franklin 2-11-93) the Court said: "The purpose of the restrictions in R.C. 4117.07(C)(6), 1983 SB 133, Section 4(A), and Ohio Administrative Code Rule 4117-5-01(f) is to promote stability in labor relations by controlling the ability to change bargaining representatives. SERB properly found it significant that the exclusive bargaining agent would not change as a result of the

PATMR/DEA merger. The trial court deferred to SERB's reasoning and noted that '[t]o allow 2 units to merge is not similar to granting an avenue to attack the chosen representative'. This result, in addition to being in accordance with law, promotes a public policy of stability in labor relations." (Emphasis added).

The case at issue, unlike the two (2) Lake County cases, does not involve a simple change in the bargaining unit but also involves a decertification petition which is tantamount to granting an avenue to attack the representative, and hence the substantive difference.

The real bottom line is that SERB cannot ignore the statutory language and its own rules which do not allow a decertification election if the unit is deemed certified, and make a decertification election senseless if the unit is outside the scope of Chapter 4117.

No doubt elections are the most democratic way of determining employees wishes. However, legislatures on all levels enacted laws and regulations to govern elections. In our law we have a garden variety of rules governing elections, like the contract bar rule, election bar, certification bar, showing of interest requirement, no decertification of deemed certified unit rule, and more. The Dissent's approach selectively ignores some SERB rules and invokes others. The majority does not believe this promotes orderly and constructive relationships between a public employer and its employees.

For all of the above, the consent election is denied, and the decertification petition is dismissed with prejudice.

Pottenger, Vice Chairman, concurs.

MASON, dissenting:

I cannot agree with the majority's refusal to conduct an election or even a hearing in this matter.

On February 2, 1993, at least 50 percent of the public employees in a unit of Cuyahoga County Sheriff's Department workers filed a petition with the Board alleging that they no longer wished to be represented by Communications Workers of America, Local 4340 (Employee Organization or CWA). CWA responded with a letter to SERB's representation administrator, suggesting that because CWA and the Sheriff's Department had entered a three-year contract dated March 27, 1984, CWA was a deemed-certified representative and therefore, the petition was inappropriate. The Petitioner disputed CWA's claim of deemed certified status and supplied a second three-year contract between the parties, this one signed June 1, 1985, and pointed out the overlapping duration dates.

Faced with this conflicting evidence of the CWA's status, the Board on April 15, 1993, directed the matter to hearing "to determine whether the employee organization is deemed certified...and for all other relevant issues." The Notice of Hearing and Prehearing Order, issued on May 6, 1993, indicated that the Board "had found reasonable cause to believe the petition was sufficient and that there exists a question concerning representation...." R.C. 4117.07(A)(1) requires that a hearing be directed whenever the Board finds reasonable cause to believe a question concerning representation exists.

However, the matter was not heard, and the employee organization's status was not resolved. Rather than allow its representation status to be formally determined through a hearing, CWA has joined with the Petitioner, and the Employer in agreeing to a secret ballot election to determine whether it would continue to represent unit employees.

Under the unique circumstances of this case, an election should be ordered as the parties have requested pursuant to the consent election agreement or, at the very least, a hearing should be conducted to resolve the representation question.

The status of the employee organization at the Cuyahoga County Sheriff's Department has been in question since the inception of SERB. Just eight (8) days after the collective bargaining law went into effect, a representation petition was filed by a rival employee organization (International Union, United Automobile, Aerospace and Agricultural Implement Works of America (UAW)) seeking to represent separately a group of cooks originally in this same unit. The CWA objected on the grounds that an election was barred by a "contract" covering the cooks and others, which it had recently signed with the Sheriff.

The contract raised as a bar in that matter is the same one which the CWA has submitted as evidence of its deemed-certified status in this case. The hearing officer at that time, examining the circumstances of the contract's execution, made certain factual findings, which were adopted by the Board and which called into question the arm's-length nature of the CWA's bargaining relationship with the Sheriff. He found, for example, that the petitioned-for cooks had never agreed to have CWA represent them but were advised that the sheriff had "signed them up for CWA and that it was either that or nothing."¹ Ultimately, he found that the so-called contract executed on March 27, 1984, contained so few substantive provisions, that it did not bar the UAW petition for the cooks, and he ordered an election.

The hearing officer never reached the issue of whether CWA was the deemed certified representative of the remaining employees, who have petitioned the Board here, and was therefore entitled to enforce its bargaining rights under Chapter 4117, or whether it was simply "uncertified" and therefore entitled to no 4117 bargaining rights and protection. For the past nine years, CWA has continued to serve as bargaining representative with its status unresolved.

Because an election is the most expeditious manner of resolving this representation question, and the fairest to the public employees who have petitioned us, I favor it.

¹Finding of Fact No. 4, Hearing Officer's Proposed Order, In re International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and Cuyahoga County Sheriff, Case No. 84-RC-04-0339.

CWA has not been found to be the deemed-certified representative, and so does not enjoy any special protection under the statute or the rules against decertification elections.

Even if it were deemed certified, CWA has agreed to submit to an election and therefore, to forego any special protection. To prohibit CWA from consenting to the possibility of decertification is tantamount to preventing CWA or any other deemed-certified representative from disclaiming interest in representing employees. The Board has never taken the position that deemed-certified representatives must continue to represent employees in perpetuity, whether they wish to or not. Disclaimers of interest, for example, are granted routinely without inquiry into the status of the employee organization.

The Board has previously addressed the issue of a deemed certified exclusive representative waiving "special" statutory protections in *In re Lake County Board of Mental Retardation and Developmental Disabilities*, SERB 92-004 as follows:

It is well established that "the General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences." *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 53, 242 N.E. 2d 566 (1968). The Act must be construed "to effect a just and reasonable result." *Gulf Oil Corp. Kosydar*, 44 Ohio St. 2d 208, 217, 339 N.E. 2d 820 (1975)...Even if we read the statute to give extra protection to exclusive representatives in deemed-certified units, nothing precludes the exclusive representative itself from initiating unit changes. Clearly, since the exclusive representative is the one who benefits from this extra protection, it is also the one who should be able to waive its special protection...(emphasis added)

In this same case, the Board cites a prior example of a union relinquishing the "extra protection" of the deemed-certified status so that the Board could conduct an election "for expedient certification leading to negotiations" where a question of its deemed certified status was being litigated. *In re Princeton City School District Bd of Ed*, SERB 86-008 (2-28-86) and *In the matter of Princeton Association of Classroom Education, OEA/NEA and Princeton City Board of Education*, SERB Case No. 85-RC-04-343. In this case, the resolution of the unfair labor practice filed by the union took two years. In the interim, to avoid such an unreasonable delay, the parties utilized the election procedures and the matter was resolved within six months. The principles established in these prior Board actions are applicable in this case.

It is obvious that the drafters of Chapter 4117 did not foresee the possibility that a union which had claimed to be the "deemed certified" exclusive representative might subsequently withdraw that claim. It is equally obvious that the law was intended to give public employees the right to be represented by an employee organization of their own choosing. Under the unique circumstances of this case, a liberal construction of Chapter 4117 is required to avoid a forfeiture of these public employees' basic rights. Consequently, an election should be conducted as the parties themselves have requested.

If an election is not ordered, then at the very least the Board should conduct the hearing it originally ordered, to determine at least the status of this Employee Organization. The Petitioner, the Employer and CWA all have an interest in knowing whether CWA is deemed certified under Chapter 4117. If it is not, neither the Employer nor the CWA has the right under the Collective Bargaining Act to bargain a contract for these public employees. However, this determination cannot be made without directing and conducting the hearing mandated by R.C.4117.07(A)(1).

I disagree with the majority's suggestion that the resolution of the union's representation status lies in an unfair labor practice proceeding. Questions of representation should be resolved through statutory or agreed-upon representation procedures. The majority's suggested resolution puts the employer between the proverbial rock and hard place. If it bargains, it may be committing a violation of R.C. 4117.11(A)(2). If it does not, it may have violated R.C. 4117.11(A)(5). Also, I am not convinced that such a charge would be timely, since the underlying problem arose nine (9) years ago.

The Board's action in this case amounts to a missed opportunity to promote orderly and constructive relationships between a public employer and its employees as the Act requires. R.C. 4117.22