

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

International Association of Fire Fighters, Local 2672,

Employee Organization,

and

Jackson Township Trustees, Franklin County,

Employer.

Case No. 98-MED-06-0628

**DIRECTIVE GRANTING MOTION TO DISMISS
AND DISMISSING NOTICE TO NEGOTIATE
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
January 14, 1999.

On June 16, 1998, the International Association of Fire Fighters, Local 2672 ("Employee Organization") filed with the State Employment Relations Board ("Board") a Notice to Negotiate with the Jackson Township Trustees, Franklin County ("Employer"). On September 22, 1998, the Employer notified the Board of the individual who had been selected by the parties to serve as fact finder. On October 1, 1998, the Board sent a letter to the parties confirming the appointment of the fact finder. On October 29, 1998, the Employer filed a "Motion to Dismiss" and a "Motion to Expedite and to Stay." On November 5, 1998, the Employee Organization filed a "Memorandum Contra Motion to Dismiss" and a "Memorandum in Support of Motion to Expedite and to Stay." On November 9, 1998, the Employer filed a "Reply Memorandum in Support of Motion to Dismiss." On December 1, 1998, the Employee Organization filed a "Supplemental

Memorandum Contra Motion to Dismiss.” On December 7, 1998, the Employer filed a “Supplemental Reply Memorandum in Support of Motion to Dismiss.” On December 9, 1998, the Employee Organization filed a “Second Supplemental Memorandum Contra Motion to Dismiss.” On December 10, 1998, the Board granted the motion to stay fact-finding pending disposition of the related motions. On January 7, 1999, the Employer filed a “Second Supplemental Reply Memorandum in Support of Motion to Dismiss.”

After reviewing the record in this case, the Board grants the motion to dismiss and dismisses for lack of subject matter jurisdiction the Notice to Negotiate.

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.

/s/ SUE POHLER
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 State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas 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 26th day of January, 1999.

/s/ LINDA S. HARDESTY
CERTIFIED LEGAL ASSISTANT

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OPINION

VERICH, Board Member:

This mediation case comes before the State Employment Relations Board (“SERB” or “Board”) upon the filing of a motion to dismiss by the Jackson Township Trustees, Franklin County (“Township”). For the reasons below, we grant the motion to dismiss, lift the stay of fact-finding, and dismiss for lack of subject matter jurisdiction the Notice to Negotiate.

I. BACKGROUND

On August 22, 1984, the International Association of Fire Fighters, Local 2672 (“Local 2672”) [formerly known as the Jackson Township Professional Fire Fighters, Local #2672 of the I.A.F.F.] was certified by the Board as the exclusive representative for a bargaining unit of lieutenants and fire fighters employed in the Jackson Township Fire Department. See “Order of Certification Pursuant to Request for Voluntary Recognition” in *Jackson Township Professional Fire Fighters, Local #2672 of the I.A.F.F. and Jackson Township Fire Department*, Case No. 84-VR-04-0730 (8-23-84). The Township filed no objections or petitions objecting to the Request for Voluntary Recognition.

On March 5, 1987, the Board approved adding the rank of captain to the bargaining

unit of lieutenants and fire fighters. See “Clarification of Bargaining Unit” in *International Association of Fire Fighters, Local 2672 and Jackson Township, Franklin County*, Case No. 87-REP-1-0016 (3-16-87). Since the Township did not object to the request, the Board construed the Petition for Clarification of Bargaining Unit as mutually filed and approved the request.

On June 16, 1998, the International Association of Fire Fighters, Local 2672 (“Local 2672”) filed a Notice to Negotiate. On September 16, 1998, the Board notified the parties, pursuant to Ohio Revised Code (“O.R.C.”) § 4117.14(C)(2), who was appointed to provide mediation services. On September 17, 1998, the Board provided the parties with the names and biographies of five potential members of the fact-finding panel under the statutory fact-finding procedure. On September 22, 1998, the Township’s representative notified the Board of the individual who had been selected by the parties to serve as fact finder. On October 1, 1998, the Board sent a letter to the parties confirming the appointment of the fact finder.

On October 29, 1998, the Township filed a “Motion to Dismiss” and a “Motion to Expedite and to Stay.” In the motion to dismiss, the Township requested that the Notice to Negotiate and the statutory dispute settlement procedure be dismissed because the Township “very recently became aware that it is no longer a public employer as defined in R.C. 4117.01(B).” In its other motion, the Township requested that its motion be expedited and that the fact-finding and the statutory dispute settlement procedure be stayed until the Board issues a decision on the motion to dismiss. On November 5, 1998, Local 2672 filed a “Memorandum Contra Motion to Dismiss” and a “Memorandum in Support of Motion to Expedite and to Stay.” On November 9, 1998, the Township filed a “Reply Memorandum in Support of Motion to Dismiss.” On December 1, 1998, Local 2672 filed a “Supplemental Memorandum Contra Motion to Dismiss.” On December 7, 1998, the Township filed a “Supplemental Reply Memorandum in Support of Motion to Dismiss.”

On December 9, 1998, Local 2672 filed a “Second Supplemental Memorandum Contra Motion to Dismiss.” On December 10, 1998, the Board granted the motion to stay fact-

finding pending disposition of the related motions. On January 7, 1999, the Township filed a "Second Supplemental Reply Memorandum in Support of Motion to Dismiss." On January 14, 1999, the Board granted the motion to expedite.

II. DISCUSSION

O.R.C. § 4117.01 provides in part:

As used in this chapter:

* * *

(B) "Public employer" means the state or any political subdivision of the state located entirely within the state, including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census; county; *township with a population of at least five thousand in the unincorporated area of the township according to the most recent federal decennial census*; school district; governing authority of a community school established under Chapter 3314. of the Revised Code; state institution of higher learning; public or special district; state agency, authority, commission, or board; or other branch of public employment. (emphasis added).

In its motion to dismiss, the Township asserts that it is not a public employer under O.R.C. § 4117.01(B). The most recent federal decennial census is the 1990 Census of Population and Housing ("1990 Census"). Under the 1990 Census, the unincorporated area of Jackson Township has a total population of 4,742.¹ The Township argues that O.R.C. Chapter 4117 no longer applies to it since it does not meet the statutory definition of a public employer.

¹See 1990 Census (Motion to Dismiss, Exhibit 2).

Local 2672 asserts that it is the deemed-certified exclusive representative of the bargaining unit under § 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367 (effective 10-6-1983), and can only be displaced as the exclusive representative under that section's provisions.² Local 2672 also asserts that the Township has voluntarily submitted to SERB's jurisdiction in this proceeding as well as in a series of proceedings dating back to 1984. In its supplemental filing, Local 2672 also contends that the Township is a "political subdivision of the state" or that the fire district falls under "other branch of public employment" as those terms are used in O.R.C. § 4117.01(B).

Under Local 2672's first argument, its status as the exclusive representative of the bargaining unit was established under O.R.C. Chapter 4117 through the filing and granting of a Request for Voluntary Recognition in 1984. Local 2672 did not become the exclusive representative as the result of a written contract, agreement, or memorandum of understanding by the Township in existence on April 1, 1984. Thus, Local 2672 is not a deemed-certified representative of the bargaining unit.

Local 2672's second argument is that the Township, having entered into collective bargaining agreements with Local 2672 since 1990, is now required to continue to do so and, thus, has waived its exemption from O.R.C. Chapter 4117. No waiver is found in this case. It is fundamental that subject matter jurisdiction cannot be waived. *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14, 15; *Baltimore & Ohio Railroad Co. v. Hollenberger* (1907), 76 Ohio St. 177, 182-183; *Springfield City School Support*

²This uncodified provision provides:

(A) Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code. 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.

Personnel v SERB, 1992 SERB 4-85, 4-86 (10th Dist Ct App, Franklin, 12-30-92).

In *State, ex rel. Ohio Council 8, v. Spellacy* (1985), 17 Ohio St.3d 112, 1984-86 SERB 366, the Ohio Supreme Court held that a public employer whose employees were exempt from the provisions of O.R.C. Chapter 4117 could, within its discretion, enter into a collective bargaining agreement but could not be required to do so. O.R.C. § 4117.03(C) also recognizes the discretionary right of a “public employer” to enter into a collective bargaining agreement with employees otherwise exempt from O.R.C. Chapter 4117, but it does not mandate such action.

The obligation to bargain exists in O.R.C. § 4117.08 for public employers. SERB may exercise jurisdiction for labor relations purposes over the Township if it is a “public employer.” *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 474, 1993 SERB 4-35, 4-38. In *In re Village of Riverside*, SERB 94-010 (6-3-94) at 3-67 - 3-68, we discussed this statutory definition of a “public employer” and held:

Pursuant to the statutory definition, where a township or a municipal corporation is involved, the size of the population is the controlling factor whether the township or the municipal corporation is a public employer. The way to determine the size of the population, according to the statute, is through the most recent federal decennial census. This legislative designation of the recent federal decennial census as the only source for population data to determine the public employer status serves two purposes. First, administrative convenience is clearly achieved where a specific and unique source is designated as controlling. Second, stability is achieved where the size of the population and with it the status of public employer is determined only once in ten years. Without such decennial designation daily movements of population would have to be checked, public employer status would be gained and lost regularly and with it a chaos created in labor relations where contractual obligations are unmet, promises are undelivered and the door is wide open to manipulation. Thus, the Legislature's choice of the federal decennial census as the source for population data actually promotes labor peace and stability by fixing the public employer status at a certain point in time for the next ten years. (emphasis added).

The most recent federal decennial census has determined that the population of the

unincorporated area of Jackson Township is 4,742. Therefore, Jackson Township does not meet the statutory definition for a “public employer” and cannot be required to negotiate with Local 2672 under O.R.C. Chapter 4117.

In its third and fourth arguments, Local 2672 contends that we should look elsewhere within the definition to determine that the Township is a public employer. To carry out this request, we would need to interpret other provisions of the statute to circumvent the language dealing directly with township population. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we should not resort to rules of statutory interpretation; an unambiguous statute is to be applied, not interpreted. *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph 5 of the syllabus. O.R.C. § 4117.01(B) is clear and unambiguous when it looks to a clearly specified census to determine whether a public body is a public employer. *In re Mingo Junction Safety Forces Assn., Local No. 1* (1991), 74 Ohio App.3d 313, 318, 1991 SERB 4-59, 4-61. *See also City of Pataskala v. Fraternal Order of Police, Ohio Labor Council, Inc., et al.*, Case No. 98CVF04-2805 (CP, Franklin, 12-23-98) (*appeal pending*).

Without a petition for amendment of certification and direct evidence of the establishment of a fire district as the public employer for this bargaining unit, we cannot reach the question of dismissing the Township as the employer of the bargaining unit. It is also not possible to recognize the Township’s size as being defined by the population of the area serviced by its fire department. O.R.C. § 4117.01(B) clearly limits any population consideration to the number of residents of the Township’s population in its unincorporated area as it existed at the time of the last federal decennial census. Thus, we must reject these arguments and find as a matter of law that the Township is not a public employer for purposes of O.R.C. Chapter 4117.

III. CONCLUSIONS OF LAW

1. The International Association of Fire Fighters, Local 2672 is an “employee

organization” as defined by O.R.C. § 4117.01(D). It has been the Board-certified exclusive representative for a bargaining unit of lieutenants and fire fighters employed by the Jackson Township Trustees, Franklin County since 1984, with captains having been added to the bargaining unit in 1987.

2. The Jackson Township Trustees, Franklin County is not a “public employer” as defined by O.R.C. § 4117.01(B) because the population in the unincorporated area of Jackson Township is less than five thousand according to the most recent federal decennial census.

IV. DETERMINATION

For the reasons above, we grant the motion to dismiss filed by the Jackson Township Trustees, Franklin County. We also lift the stay of fact-finding that has been in effect since December 10, 1998, and dismiss the Notice to Negotiate for lack of subject matter jurisdiction since the Township has no statutory duty to resume negotiations under that procedure.

Pohler, Chairman, and Gillmor, Vice Chairman, concur.