

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Fraternal Order of Police, Ohio Labor Council, Inc.,

Rival Employee Organization,

and

Ohio Council 8, American Federation of State, County, and
Municipal Employees, AFL-CIO,

Incumbent Employee Organization,

and

Multi-County Juvenile Attention System,

Employer.

Case Nos. 2009-REP-02-0026 & 2009-REP-02-0027

DIRECTIVE DISMISSING PETITIONS FOR REPRESENTATION ELECTION
(OPINION ATTACHED)

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: December 17, 2009.

On February 27, 2009, the Fraternal Order of Police, Ohio Labor Council, Inc. filed Petitions for Representation Election for each of two bargaining units. On July 23, 2009, the State Employment Relations Board ("SERB" or "the Board") directed the matter to hearing before the Board to determine whether the petitions were barred by an existing agreement between Multi-County Juvenile Attention System ("the Employer") and Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO. On September 16, 2009, the parties agreed to present the matter to the Board, in lieu of a hearing, under the stipulated facts. The two employee organizations filed briefs in this matter; the Employer did not attend the prehearing conference and did not otherwise participate in the hearing on this matter.

After reviewing the record, stipulations, briefs, and all other filings in these cases, the State Employment Relations Board adopts the Findings of Fact and Conclusions of Law in the attached Board Opinion, incorporated by reference, finding that the two

STATE EMPLOYMENT
RELATIONS BOARD
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Petitions for Representation Election were filed by the Fraternal Order of Police after the "contact bar" went into effect and were barred, pursuant to Ohio Revised Code § 4117.07(C)(6). Thus, the petitions are hereby dismissed.

It is so ordered.

BRUNDIGE, Chairperson; VERICH, Vice Chairperson; and SPADA, Board Member, concur.



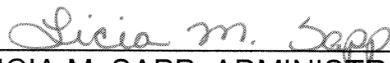
N. EUGENE BRUNDIGE, CHAIRPERSON

TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. Such Notices of Appeal shall be filed within fifteen (15) days after the mailing of the State Employment Relations Board's order as provided in Section 119.12 of the Ohio Revised Code.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 26th day of March, 2010.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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OPINION

Brundige, Chairperson:

These representation cases come before the State Employment Relations Board (“SERB” or “the Board”) upon the filing of joint stipulations of fact by the parties and the subsequent filing of briefs by the parties. The issue to be decided is whether the two Petitions for Representation Election filed by the Fraternal Order of Police, seeking to represent the bargaining units of Cooks, Maintenance Workers and Repair Workers 1 & 2 (Case No. 2009-REP-02-0026) and Youth Leaders 2 & 3 (Case No. 2009-REP-02-0027) in six counties employed by the Multi-County Juvenile Attention System are barred by Ohio Revised Code (“O.R.C.”) § 4117.07(C)(6).

On July 23, 2009, the Board directed the matter to hearing to determine whether the petitions were barred by contract as the result of the issuance of the fact-finder's report on January 30, 2009, and the Certifications of Fact-Finding Vote by Multi-County and AFSCME on February 6, 2009 and February 9, 2009, respectively, or whether the contract bar did not go into effect until March 27, 2009. For the reasons set forth herein, the Board concludes that the FOP's Petitions for Representation Election were barred pursuant to O.R.C. § 4117.07(C)(6).

I. FINDINGS OF FACT

1. Multi-County Juvenile Attention System ("Multi-County") is a "public employer" as defined by O.R.C. § 4117.01(B). (Stipulation ["Stip."] 1)

2. Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is an "employee organization" as defined by O.R.C. § 4117.01(D). (Stip. 2)

3. The Fraternal Order of Police, Ohio Labor Council, Inc. ("FOP") is an "employee organization" as defined by O.R.C. § 4117.01(D). (Stip. 3)

4. On October 25, 2007, SERB certified AFSCME as the exclusive representative of the following bargaining unit of employees of Multi-County: "All full-time and part-time Service and Maintenance employees of the Multi-County Juvenile Attention System, including Cooks; Maintenance Repair Workers 1 and 2 employed by the Employer in Carroll, Columbiana, Holmes, Stark, Tuscarawas, and Wayne Counties." On December 13, 2007, SERB certified AFSCME as the exclusive representative of the following bargaining unit of employees of Multi-County: "All full-time and part-time Youth Leaders 2 and 3 employed by the Employer in Carroll, Columbiana, Holmes, Stark, Tuscarawas, and Wayne Counties." (Stip. 4)

5. On March 26, 2008, AFSCME filed two Notices to Negotiate for the purpose of negotiating an initial collective bargaining agreement for these two bargaining units of employees. (Stip. 5; Case Nos. 2008-MED-03-0364 and 2008-MED-03-0365)

6. Over the next several months, the parties held multiple bargaining sessions, but no agreement was reached. Impasse was declared, and the parties proceeded to fact finding. With the help of fact-finder Virginia Wallace-Curry, the parties negotiated for three more days, reaching tentative agreement on several issues and electing to proceed to hearing on the remaining unresolved issues. (Case Nos. 2008-MED-03-0364 and 2008-MED-03-0365)

7. On January 30, 2009, Fact-finder Virginia Wallace-Curry issued a report and recommendation, which incorporated "all tentative agreements reached between the parties during the course of negotiations" and set forth recommendations regarding the other unresolved issues. (Stip. 6; Case Nos. 2008-MED-03-0364 and 2008-MED-03-0365)

8. On February 5, 2009, a Petition for Decertification Election was filed with SERB for these two bargaining units. SERB subsequently issued a Notice to Employees stating: "Any organization that claims to represent or is known to have an interest in representing any employees in the proposed unit may file a motion to intervene accompanied by evidence in support of intervention * * * no later than the close of business on March 2, 2009." No motions to intervene were filed. (Stip. 7; Case No. 2009-REP-02-0020)

9. On February 6, 2009, Multi-County filed Certifications of Fact-finding Vote accepting the fact-finding report and recommendation. (Stip. 8)

10. On February 9, 2009, AFSCME filed Certifications of Fact-finding Vote accepting the fact-finding report and recommendation. (Stip. 9)

11. Within days of ratification, AFSCME spokesperson Louis Maholic contacted the Multi-County spokesperson and demanded that Multi-County execute the collective bargaining agreement ("CBA"). However, Multi-County refused. The parties then engaged in several discussions regarding the execution of the CBA, and Multi-County persisted in its refusal. (Case Nos. 2008-MED-03-0364 and 2008-MED-03-0365)

12. On February 27, 2009, the FOP filed a Petition for Representation Election for each of these two bargaining units. (Stip. 10)

13. On March 5, 2009, SERB dismissed the Petition for Decertification Election. (Stip. 11; Case No. 2009-REP-02-0020)

14. On March 27, 2009, Multi-County and AFSCME filed with SERB a collective bargaining agreement that was executed on March 19, 2009, and has the effective dates of March 19, 2009 through March 18, 2012. (Stip. 12; Case Nos. 2008-MED-03-0364 and 2008-MED-03-0365)

15. On July 23, 2009, the Board directed the matter to hearing before the State Employment Relations Board to determine whether the petitions were barred by any existing agreement between Multi-County and AFSCME. On September 16, 2009, the FOP and AFSCME agreed to present the matter to the Board, in lieu of a hearing, under the stipulated facts contained herein. (Multi-County did not appear at the prehearing conference and did not otherwise participate in the hearing on this matter.)

II. DISCUSSION

There are three “stop signs” that can occur in the representation process. O.R.C. § 4117.05(B) contains a “certification bar” that prevents an employer from voluntarily recognizing, or SERB from certifying, an employee organization as the exclusive representative where an exclusive representative already exists “if there is in effect a lawful written agreement, contract, or memorandum of understanding between the public employer and another employee organization”; this section applies to both Board-certified and deemed-certified exclusive representatives.

O.R.C. § 4117.07(C)(6) contains an “election bar” that prohibits SERB from conducting an election in a bargaining unit during the 12 months following a Board-conducted election. O.R.C. § 4117.07(C) also contains a “contract bar” and provides in relevant part as follows:

(C) The board shall conduct representation elections by secret ballot cast, at the board’s discretion, by mail or electronically or in person, and at times and places selected by the board subject to the following:

* * *

(6) *The board may not conduct an election under this section in any appropriate bargaining unit within which a board-conducted election*

was held in the preceding twelve-month period, nor *during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative.* (emphasis added)

Petitions for elections may be filed with the board no sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement, or after the expiration date, until the public employer and exclusive representative enter into a new written agreement.

For the purposes of this section, extensions of agreements do not affect the expiration date of the original agreement.

The “election bar” is our focus in the present case. “Under O.R.C. § 4117.07(C)(6), SERB may not conduct an election in a bargaining unit during the term of a lawful collective bargaining agreement.” *In re Fairfield County Human Services Dept*, SERB 99-020 (6-30-99) at p. 3-126. Although a Petition for Representation Election may be filed during the window period occurring “no sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement,” the “contract bar” precludes SERB from conducting an election challenging an incumbent union’s exclusive representation rights during the term of the collective bargaining agreement.

The “contract bar” doctrine has a twofold purpose. On one hand, it affords the contracting parties and the represented employees a reasonable period of uninterrupted stability in their relationship. This stability allows the union to focus its resources, undividedly and without risk of usurpation, on advocating for its employees and on fostering its relationship with the employer, rather than warding off competition from rival unions. Stability also adds integrity and meaning to the election process. When a union wins an election, it gains exclusive representation rights—not just for a given instant, but for the duration of the agreement.

On the other hand, stability is not intended to be absolute or permanent. Therefore, O.R.C. § 4117.07(C) helps to preserve employee free choice by providing them the opportunity, at reasonable times, to change or eliminate their bargaining representative if they wish to do so. The statute thus prevents an incumbent from

indefinitely insulating itself against legitimate challenges to its status as the exclusive representative.

With these important yet arguably competing interests in mind, we turn to the narrow question presented in this case:

When the parties submit their collective bargaining negotiations to fact finding under O.R.C. § 4117.14(D), what constitutes a “lawful collective bargaining agreement” within the meaning of O.R.C. § 4117.07(C) sufficient to prevent SERB from conducting an election until after the existing agreement expires?

The parties offer two competing theories. AFSCME contends that the contract bar begins once both parties have ratified the fact-finder’s report and recommendations. FOP argues that ratification is not sufficient; the contract bar does not begin until both parties have executed the collective bargaining agreement. Guided by notions of plain statutory interpretation, legislative intent, and sound labor policy, we agree with AFSCME and conclude that ratification is sufficient to begin the contract bar.

We begin our statutory analysis by noting, importantly, that the term “collective bargaining agreement” is not used in the language of the contract bar doctrine. If the legislature intended for the contract bar to apply only when a collective bargaining agreement has been executed, it could have indicated its intention unequivocally with ease, simply by using that term. But it did not. Instead, the statute explicitly states that the contract bar activates during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative.” Thus, the plain language of the statute signals that the legislature intended the contract bar to apply to a broader scope of circumstances than merely an executed collective bargaining agreement.

Having concluded that the statute contemplated contract bar coverage beyond an executed collective bargaining agreement, we must next determine if a fact-finder’s recommendation is to be included. O.R.C. § 4117.14(C)(6)(a) provides, in pertinent part that “if neither party rejects [the fact finder’s] recommendations, the recommendations shall be deemed agreed upon as the *final resolution of the issues submitted*.” In other words, so long as the fact-finder’s agreement is not expressly rejected – whether it is

affirmatively approved or merely rejected by an insufficient majority – it shall become a governing, binding agreement between the parties. Logically, then, the fact-finder's recommendations along with the issues on which the parties had reached tentative agreement, constituted a "lawful collective bargaining agreement"; therefore, it falls within the literal scope of the "contract bar" doctrine.

Furthermore, the Board has repeatedly recognized that an employer commits an unfair labor practice when it refuses to execute a collective bargaining agreement after ratification of the agreement or the imposition of an agreement by operation of law. See, e.g., *In re East Palestine City School Dist Bd of Ed*, SERB 86-011 (3-20-86); *In re New Lexington Ed Assn/Ohio Federation of Teachers*, SERB 95-009 (6-26-95). By precluding the parties' ability to choose whether or (generally) when to execute a collective bargaining agreement, the Board makes clear that a ratified agreement becomes legally effective before the agreement is executed. It is thus inescapable that after an agreement has been ratified but before it is executed, such agreement constitutes a "lawful collective bargaining agreement."

Finally, AFSCME points our attention to legitimate policy reasons supporting this interpretation. To demarcate the line at executing an already binding agreement, as FOP favors, would confer upon the employer an effective veto power against the union. If it chooses, the employer may sign the agreement and submit to the duly elected employee representative; or instead, it may refuse to sign and leave open a window through which any rival union may enter and compete with the incumbent for representation rights. Indeed, nothing in the language of the statute or consistent with the intent of the legislature convinces us that the legislature intended to give the employer such a power, and we decline to do so here. To conclude otherwise would not only run contrary to our previous holdings, it would drastically undermine the important balance between stability and free choice that the statute intended and that the Board has sought to maintain.

III. APPLICATION

In the instant cases, the parties submitted their dispute for fact-finding. The fact-finder then issued its report on January 30, 2009, which incorporated “all tentative agreements reached between the parties during the course of negotiations” and set forth recommendations regarding the other unresolved issues. After the report was issued, the parties held ratification votes. As of February 5, 2009, both AFSCME and Multi-County had fully ratified the report. Multi-County then filed a Certification of Fact-Finding Vote accepting the fact-finding report and recommendations on February 6, 2009. AFSCME followed, filing its Certification on February 9, 2009. Neither party rejected the report within seven days of its issuance (and in fact, voted for ratification). Therefore, the fact-finding report was “deemed agreed upon as the final resolution of the parties”; it constituted a “lawful collective bargaining agreement”; and it thus precluded the filing of a representation petition at that time.

IV. CONCLUSIONS OF LAW

1. Multi-County Juvenile Attention System is a “public employer” as defined by O.R.C. § 4117.01(B).
2. Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO is an “employee organization” as defined by O.R.C. § 4117.01(D).
3. The Fraternal Order of Police, Ohio Labor Council, Inc. is an “employee organization” as defined by O.R.C. § 4117.01(D).
4. The FOP’s Petitions for Representation Election were filed after the “contract bar” went into effect and were barred, pursuant to O.R.C. § 4117.07(C)(6).

V. DETERMINATION

For the reasons set forth above, the Petitions for Representation Election filed by the Fraternal Order of Police Election are barred, pursuant to Ohio Revised Code § 4117.07(C)(6), and they are hereby dismissed.

Vice Chairperson Verich and Board Member Spada, concur.

SERB

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Sherrie J. Passmore, Executive Director

Case Nos. 2009-REP-02-0026 & 2009-REP-02-0027

CERTIFICATION

I, the undersigned Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order (with Opinion Attached) of the State Employment Relations Board entered on its journal on the 26th day of March, 2010

Sherrie Passmore
Executive Director