

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

IN THE MATTER OF THE )  
DECERTIFICATION PETITION ) No. 12292-PDC  
OF THE NICHOLS HILLS )  
POLICE OFFICERS ASSOCIATION. )

ADOPTION OF PROPOSED FINDINGS,  
DISCUSSION AND ORDER

The Public Employees Relations Board ("PERB"), having reviewed the record herein, as well as the Proposed Findings, Discussion and Order submitted by its duly appointed Hearing Officer, finds that the same should be and are affirmed and adopted as the PERB's decision and order.

Dated this 13<sup>th</sup> day of June, 1989.

Donald L. Copelin  
CHAIRMAN

dp.da.12292-PDC

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PROPOSED FINDINGS, DISCUSSION AND ORDER

Comes now the duly appointed hearing officer of the Public Employees Relations Board (hereinafter the "Board" or "PERB") and upon review of the pleadings, briefs and oral arguments presented by the parties, recommends that the Board find as follows:

I.

PROPOSED FINDINGS

1. This action for decertification was filed by the Nichols Hills Police Officers Association on February 8, 1989.

2. On March 6, 1989, the incumbent Union (FOP Lodge No. 193) filed its Motion to Dismiss asserting that the Petition for Decertification should be dismissed based upon the blocking charge rule originally announced by the Board in the case of In Re Certification of Bethany Firefighters Association, PERB Case No. 12282FF, April 20, 1988.

3. The incumbent Union has an outstanding unfair labor practice pending before this Board in Fraternal Order of Police Lodge No. 193 v. City of Nichols Hills, Case No. 199,

wherein the Union alleges that the City took illegal and obstructionist positions in bargaining in order to unilaterally implement its own positions, all of which amounted to bad faith refusal to bargain.

4. On March 22, 1989, the Board appointed the undersigned to hear oral arguments and report back to the Board his findings and recommendations.

## II.

### PROPOSED DISCUSSION

The Public Employees Relations Board (PERB) will look to federal labor law cases for guidance where the federal statute parallels state legislation. Stone v. Johnson, 690 P.2d 459, 462 (Okla. 1984). The Fire and Police Arbitration Act, 11 O.S. §§ 51-101, et seq. (FPAA), concerning decertification procedures, requires the Board to investigate the facts alleged in a decertification petition, hold a hearing if there is "reasonable cause" to believe that a question of representation exists, and, if so, direct that an election be conducted, tracks the language of the National Labor Relations Act, thus inviting PERB to look to federal precedent for general guidance on this issue. Compare, 11 O.S. § 51-103.B.2 with 29 U.S.C. § 159 (c)(1).

The NLRB and the federal courts look to several factors to determine whether the invocation of the blocking charge rule is appropriate. These include (1) the seriousness of the alleged unfair labor practices and (2) the time period

that has elapsed between the alleged commission of unfair labor practice charges or the filing of those charges, and the filing of the decertification petition; and (3) whether the Board, on the facts of the particular case in front of it, has carefully balanced the policy objectives of promoting employees' freedom of choice, in the selection of union representatives and maintaining established, stable bargaining relationships.

In Blanco v. NLRB, 641 F.Supp.415 (D.D.C. 1986), 123 LRRM 2815, the Court upheld the Board's decision to dismiss a decertification petition under the blocking charge rule. On December 31, 1984, the incumbent union which had acted as exclusive bargaining agent for six years, filed unfair labor practice charges with the Board, charging the employer with (1) interrogating employees concerning their relationships with the Union; (2) encouraging employees to withdraw from the Union; (3) promising promotions for employees abandoning union activities; (4) threatening employees with discharge if they remained union members or joined the union. Following an investigation, the Board's regional counsel issued a complaint on February 28, 1985.

In the meantime, a decertification petition was filed before the Board on January 23, 1985, which petition was supported by 30% of the employees in the bargaining unit as required by Board rules. The Board did not immediately dismiss the decertification petition, but commenced an

investigation and hearing focusing on the issue of whether the employee filing the decertification petition was a supervisory employee.

On September 13, 1985, the Board's Regional Director issued an amended unfair labor practice complaint based on new evidence indicating that management personnel had initiated and supported the decertification petition. On September 19, 1985, the Regional Director invoked the "blocking charge" rule and decided to hold the decertification petition in abeyance in view of the pending unfair labor practice complaints.

In refusing to set aside the Board's Order, the Court noted that the Board had broad discretion to determine when a decertification petition could proceed in the face of pending unfair labor practice charges. The critical requirement was that the Board exercise its discretion, i.e., that it not automatically dismiss or delay a petition for decertification simply because unfair labor practices are pending, but that it carefully consider whether the invocation of the blocking charge rule is appropriate on the facts of the particular case. Blanco, 641 F.Supp. at 418.

The Blanco Court described the factors which supported the Board's decision to invoke the blocking charge rule. First, the unfair labor practice charges were filed four weeks before the decertification petition. Second, the Regional Director did not dismiss the decertification

petition immediately, but rather, commenced an investigation into the representation issue and invoked the blocking charge rule only after evidence came to light indicating that the decertification petition may have resulted from impropriety on the part of management. Id. The Court also gave weight to the seriousness of the alleged unfair labor practice charges, stating that the "decertification petition appeared to raise issues related to and dependent upon resolution of the unfair labor practice charges." Id.

While it is clear that the NLRB must look to the facts of each particular case to determine whether the blocking charge rule should be invoked, a review of the cases suggests those areas where the use of the blocking charge rule will be upheld. The courts have uniformly held that an employers' refusal to recognize and bargain with the union is the type of unfair labor practice which will justify the dismissal of a subsequently filed decertification petition. Thus, in Franks Bros. Co. v. NLRB, 321 U.S. 702, 88 L.Ed.1020 (1944), the Supreme Court agreed with the Board that an unlawful refusal to recognize and bargain with the union "disrupts employees' morale, deters their organizational activities, and discourages their membership in unions." 321 U.S. at 704. The Court affirmed the Board's decision not to proceed with a decertification election, notwithstanding that the union had apparently lost majority support following the filing of the unfair labor practice charges:

The Board might well think that, were it not to adopt this type of remedy [requiring employer to recognize and bargain with union], but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law.

Id. at 705. Accord: NLRB v. Consolidated Machine Tool Corp., 163 F.2d 376 (2d Cir. 1947), on rehearing, 167 F.2d 470.

The use of the blocking charge rule has also been upheld where the unfair labor practice involved an employer's instigation of and continuing support for the decertification campaign, Sperry Gyroscope, Division of Sperry Rand, 136 NLRB 294 (1962); where the employer engaged in sham bargaining, Big Three Industries, 82 LRRM 1411 (1973); or where the employer had conditioned its contract offer on employees' refraining from engaging in protected activity such as hand billing and picketing, City Markets, Inc., 118 LRRM 1279 (1984).

A review of the cases also suggests guidelines to determine when the "taint" of an unfair labor practice has been sufficiently dissipated as to permit the holding of a

decertification election. Where the unfair labor practice charge involved a total refusal to bargain, it is not necessary that the employer actually arrive at a collective bargaining contract in order to remove the taint of the unfair labor practice. All that is required is that "a bargaining relationship, once rightfully established, must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. After such a reasonable period, the Board may, in a proper proceeding and in a proper showing, take steps in recognition of changed situations that might make appropriate changed bargaining relationships." Frank Bros., 321 U.S. at 705-706.

The Board's decision in ARMCO Drainage and Metal Products, Inc., 116 NLRB 1260 (1956), suggests when such "a reasonable period" has passed so as to permit a decertification petition to proceed. In ARMCO, the Board issued an order requiring the employer to recognize and bargain with the union. Subsequently, the employer and union, over a six month period, participated in nine bargaining conferences, lasting a total of fifty hours. No agreement was reached. The Board refused to dismiss a decertification petition which was filed after bargaining had proven unsuccessful, stating that "[t]he only purpose of the bargaining order is to remedy the antecedent refusal to bargain and that once this purpose has been achieved, the order has no further effect." Id. at 1262.

The PERB is concerned with protecting the rights of all parties to this dispute. It is clear that the mere filing or existence of an unfair labor practice before this Board will not justify dismissal of a decertification action. Such a policy would be manifestly unjust to those asking to oust an incumbent Union.

On the other hand a city should not be allowed to effectively destroy an incumbent Union by committing unfair labor practices calculated to or which have the effect of undermining the employees' confidence in their elected representative. Unlike the NLRB, the Board has no investigative or prosecutorial function and must therefore depend on the parties appearing in an adversarial proceeding to present evidence of the appropriateness of imposition of the blocking charge rule.

It is obvious that not every unfair labor practice charge will be of sufficient gravity to justify dismissal or even delay of a decertification action. The Board must determine on a case-by-case basis, if the charge would, if true, be sufficient to justify an inquiry by the Board into whether a free and untrammelled election is possible. The Board is persuaded that the allegations made in Case No. 199 support such an inquiry but not a dismissal. This balance of interests is delicate but also requires prompt resolution to fully protect the interests of the parties.

Therefore, the Board concludes that this petition for decertification should not be dismissed subject to the following order:

III.

PROPOSED ORDER

1. The decertification petition filed herein is not dismissed but temporarily stayed pending further order of this Board.

2. The unfair labor practice charge filed herein captioned Fraternal Order of Police Lodge No. 193 v. City of Nichols Hills, Case No. 199 shall be heard by this Board within ten (10) days of the date of adoption of this order by the Board or at such other date agreeable to the parties.

3. If the parties wish to present Proposed Findings of Fact and Conclusions of Law in Case No. 199, the same shall be filed within ten (10) days of the date of hearing said case.

4. The decision of the Board shall be entered within twenty (20) days of the date of the hearing of Case No. 199.

5. If the City is found not to have committed any unfair labor practices in Case No. 199, the Board will order an election in this case pursuant to its rules.

6. If the City is found to have committed one or more unfair labor practices in Case No. 199, the Board will conduct a hearing within ten (10) days of entry of its

decision in Case No. 199 to determine if the blocking charge rule should be applied.

Dated this 25 day of May, 1989.

Respectfully submitted,



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DOUGLAS B. ALLEN  
ASSISTANT ATTORNEY GENERAL

HEARING EXAMINER

dp.DA.PERB-122.92