[Cite as *Laborers' Internatl. Union of N. Am., Local 860 v. Cuyahoga Cty.*, 2017-Ohio-8552.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Laborers' International Union of North America, Local 860,	:	
Appellant-Appellant,	:	No. 17AP-292
	:	(C.P.C. No. 13CV-10735)
v.	:	(REGULAR CALENDAR)
County of Cuyahoga, Ohio, et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on November 2, 2017

On brief: *Mangano Law Offices Co., L.P.A., Basil W. Mangano,* and *Ryan K. Hymore,* for appellant. **Argued:** *Ryan K. Hymore.*

On brief: *Michael DeWine,* Attorney General, *Lori J. Friedman,* and *Joshua M. Cartee,* for appellee State Employment Relations Board. **Argued:** *Joshua M. Cartee.*

On brief: *Jonathan M. Scandling,* and *Robin M. Wilson,* for appellee Cuyahoga County. **Argued:** *Jonathan M. Scandling.*

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Appellant, Laborers' International Union of North America, Local 860 ("Union"), appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Employment Relations Board ("SERB") dismissing the Union's petition for a representation election. For the following reasons, we affirm.

I. Factual and Procedural Background

{¶ 2} Appellee, County of Cuyahoga, Ohio ("Cuyahoga County"), is a "public employer" under R.C. 4117.01(B), and the Union is an "employee organization" under R.C. 4117.01(D). In April 2012, the Union filed a petition for a representation election, pursuant to R.C. 4117.05 and 4117.07, seeking to represent the following proposed bargaining unit Cuyahoga County employees: "All regular full-time and part-time Social Service Supervisors employed in the Division of Senior and Adult Services and Division of Children and Family Services." (Apr. 6, 2012 Petition for Representation Election.) Cuyahoga County objected to the petition, asserting that the approximately 103 Social Service Supervisors are "supervisors," and therefore are not "public employees," as defined in R.C. 4117.01(C), subject to the collective-bargaining provisions of R.C. Chapter 4117.

{¶ 3} In late 2012, a SERB Administrative Law Judge ("ALJ") held a five-day evidentiary hearing on the matter. In June 2013, the ALJ issued a determination detailing her findings of fact and conclusions of law. The ALJ concluded that the Social Service Supervisors are "supervisors" under R.C. 4117.01(F) and not "public employees" under R.C. 4117.01(C). Consequently, the ALJ recommended that SERB dismiss the Union's petition for a representation election. In September 2013, SERB issued an order adopting the ALJ's findings of fact and conclusions of law. SERB therefore dismissed the Union's petition for a representation election.

{¶ 4} The Union appealed SERB's order to the trial court pursuant to R.C. 119.12. In April 2017, the trial court affirmed SERB's order based on its finding that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶ 5} The Union timely appeals.

II. Assignments of Error

{¶ 6} The Union assigns the following errors for our review:

> 1. The failure of the Trial Court to construe the definition of the term "supervisor" in accordance with law was unreasonable and repugnant to the purpose of R.C. Chapter 4117.
>
> 2. The Trial Court erred in finding there was reliable, probative, and substantial evidence to support the administrative agency decision.

III. Discussion

{¶ 7} Because they involve interrelated issues, we address the Union's first and second assignments of error together. The Union asserts in its first assignment of error that the trial court erroneously construed the term "supervisor" for the purpose of R.C. Chapter 4117. In its second assignment of error, the Union contends that the trial court erred in finding there was reliable, probative, and substantial evidence to support SERB's decision to dismiss the Union's petition for a representation election.

A. Standard of Review

{¶ 8} In reviewing an order of an administrative agency under R.C. 119.12, a common pleas court must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and whether the order is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110 (1980). The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955).

{¶ 9} The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. While an agency's findings of fact are not conclusive, they are presumed correct and " 'must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.' " *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 37, quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993). An appellate court's review of an administrative decision's findings of fact is more limited. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The appellate court is to determine only whether the common pleas court abused its discretion. *Id*. An abuse of discretion involves more than an error of law or judgment; it

connotes an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} As to purely legal questions, courts generally exercise plenary review. *Ohio Historical Soc.* at 471, citing R.C. 119.12; *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.). However, courts must afford due deference to SERB's interpretation of R.C. Chapter 4117. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257 (1988), paragraph two of the syllabus. "It was clearly the intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117. * * * This authority must necessarily include the power to interpret the Act to achieve its purposes." *Id.* at 260; *see State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 353 (1994) (courts "must afford deference to SERB's interpretation of R.C. Chapter 4117"). Consequently, judicial review of SERB's construction of a statute in that chapter is "limited to whether SERB's policy is unreasonable or in conflict with the explicit language of R.C. Chapter 4117." *Id.*

B. Analysis

{¶ 11} At issue is whether the trial court erred in affirming SERB's order dismissing the Union's petition for a representation election based on its conclusion that the Social Service Supervisors in the proposed bargaining unit are "supervisors" under R.C. 4117.01(F). Because the record and law support SERB's order, the trial court did not err in affirming that order.

{¶ 12} The enactment of R.C. Chapter 4117 established a framework for resolution of labor disputes in the public sector by creating new rights and by setting forth specific procedures and remedies for asserting those rights. *Crable v. Ohio Dept. of Youth Servs.*, 10th Dist. No. 09AP-191, 2010-Ohio-788, ¶ 9, citing *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167 (1991); *see Dayton v. Fraternal Order of Police, Captain John C. Post Lodge No. 44*, 2d Dist. No. 18158 (June 2, 2000) ("R.C. Chapter 4117 sets forth the rights and obligations of public employers, public employees, and public employee organizations insofar as they engage in collective bargaining.").

{¶ 13} R.C. 4117.03(A) provides that "public employees" have the right to participate in any employee organization of their own choosing, to have a labor

organization represent them, to bargain collectively, to present grievances, and to engage in other activities typically associated with collective bargaining. *Crable* at ¶ 9 (the enactment of "R.C. 4117.03 gave public employees the right to organize as collective bargaining units."). A "public employee" under R.C. Chapter 4117 is generally defined as "any person holding a position by appointment or employment in the service of a public employer." R.C. 4117.01(C). A "supervisor" is specifically excluded from being a "public employee" as that term is used in R.C. Chapter 4117. R.C. 4117.01(C)(10). R.C. 4117.01(F) defines a "supervisor" in pertinent part as "any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

{¶ 14} SERB has exclusive original jurisdiction regarding whether "particular parties or groups are 'public employees.' " *Carter v. Trotwood-Madison City Bd. of Edn.*, 181 Ohio App.3d 764, 2009-Ohio-1769, ¶ 58 (2d Dist.); *see Doctors' Professional Assn. v. State Emp. Relations Bd.*, 10th Dist. No. 03AP-760, 2004-Ohio-5839 (reviewing SERB's determination that physicians and psychologists who served as consultants for Ohio Rehabilitation Services Commission, Bureau of Disability Determination, were not public employees); *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210, 212-13 (1994) (upholding SERB decision that city of Hamilton transit workers were public employees). While an individual employee may be identified by name, and distinguished from other employees in a proposed bargaining unit due to the unique responsibilities of that employee, it is not improper for SERB, as a matter of practicality and efficiency, to categorize employees in groups for the purpose of determining employment status under R.C. Chapter 4117. *See Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO v. State Emp. Relations Bd.*, 144 Ohio App.3d 96, 104 (10th Dist.2001) (evidence supported SERB's finding that state of Ohio assistant public defenders were public employees except for one named assistant public defender who was found to be a supervisor due to his hiring, evaluating, and directing responsibilities).

{¶ 15} In construing R.C. 4117.01(F), SERB considers an employee to be a "supervisor" if the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in R.C. 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. *In re Mahoning Cty. Dept. of Human Servs.*, SERB No. 92-006 (June 5, 1992). For the purpose of determining supervisory status, SERB defines independent judgment to be the "opportunity to make a clear choice between two or more significant alternative courses of action without plenary review or approval." *In re Ohio Atty. Gen.*, SERB No. 2000-002, at 18 (Mar. 3, 2000). SERB has also determined that an employee who assigns tasks equally and as needed to balance the workload among employees who work independently on a routine schedule of familiar tasks exercises no independent judgment "beyond choosing between narrowly defined parameters." *In re Univ. of Cincinnati*, SERB No. 89-028, at 19 (Oct. 12, 1989). Because supervisory issues are questions of fact, SERB determines supervisory status on a case-by-case basis. *In re City of Hamilton*, SERB No. 2010-012 (Aug. 12, 2010). Lastly, SERB places the burden of establishing an employee's exclusion from collective bargaining eligibility under R.C. 4117.01(C) on the party seeking the exclusion. *In re Fulton Cty. Engineer*, SERB No. 96-008 (June 24, 1996).

{¶ 16} Here, SERB determined that the approximately 103 Social Service Supervisors within the proposed bargaining unit assign work to public employees using independent judgment and therefore are supervisors and not public employees for the purpose of R.C. Chapter 4117. The Union argues that the record demonstrates that none of the Social Service Supervisors assign work to social workers using independent judgment because they generally allocate cases using a round-robin system, without regard to the particulars of the assigned cases. The Union further argues that, even if there is evidence showing that a few Social Service Supervisors assign work to social workers using independent judgment, that evidence was insufficient to support SERB's finding that all of the Social Service Supervisors are not public employees. According to the Union, SERB's order must be reversed due to the absence of specific and individualized evidence showing that each of the Social Service Supervisors assigns cases to social workers using independent judgment. The Union's arguments are unpersuasive.

{¶ 17} We find that the trial court did not abuse its discretion in concluding that the record contains reliable, probative, and substantial evidence that the Social Service Supervisors have the authority to assign work to social workers, exercise their authority to assign work to social workers, and use independent judgment in assigning work to social workers. Further, we reject the Union's contention that the trial court, in affirming SERB's order, misconstrued the term "supervisor" for the purpose of R.C. Chapter 4117.

{¶ 18} The evidence presented at the SERB hearing supported SERB's finding that Social Service Supervisors are expected to, and actually do, exercise independent judgment as it relates to the assignment of cases to social workers. The evidence demonstrated that Cuyahoga County employs hundreds of social workers who provide assistance to neglected or abused children and adults. Social Service Supervisors directly oversee the county's social workers and distribute cases to those social workers, resulting in each social worker typically carrying approximately 14 cases at any given time. Each Social Service Supervisor has 5 or 6 social workers who report to them. Senior Social Service Supervisors supervise the approximately 103 Social Service Supervisors who are in the proposed bargaining unit.

{¶ 19} The testimony of Senior Social Service Supervisors at the hearing indicated that Social Service Supervisors are expected to assign cases to social workers in furtherance of the overarching goal of fairly and equitably distributing caseloads among the social workers. There is no mandated case distribution system, however, and each Social Service Supervisor has discretion to decide the manner in which cases are assigned to the social workers who report to him or her. As a result, each Social Service Supervisor has his or her own "system" that he or she uses. For example, one Social Service Supervisor explained that he uses a rotational assignment system he developed and refined based on his own idea and input from the social workers who report to him. Further, the testimony of Senior Social Service Supervisors indicated that, while Social Service Supervisors generally assign cases on a systematic rotational basis, they sometimes assign cases based on the nature of those cases and the particular abilities of the social workers receiving the cases. For example, a Social Service Supervisor may assign a case involving severe mental health issues to a particular social worker because that worker had demonstrated a strong proficiency in handling that type of case. Or a

case involving a teenage mother may be assigned to a social worker who is particularly adept at dealing with teenagers.

{¶ 20} Based on the evidence presented, we find SERB reasonably determined that "although it is true that the practicalities of a high volume operation require systematic approaches, Social Service Supervisors exercise independent judgment when they determine that their units will utilize a particular distribution system and what the guidelines will be." (June 24, 2013 SERB Recommended Determination at 18.) Additionally, SERB reasonably found that Social Service Supervisors sometimes deviate from the rotational system they have established based on qualitative factors. Therefore, we conclude the trial court did not abuse its discretion in finding that reliable, probative, and substantial evidence supported SERB's decision to dismiss the Union's petition for a representation election.

{¶ 21} Lastly, we disagree with the Union's assertion that the trial court erred in not requiring SERB to make individualized determinations regarding each of the approximately 103 Social Service Supervisors in the proposed bargaining unit. The Union's suggestion that Cuyahoga County needed to present direct evidence regarding the actual activities of each Social Service Supervisor in the proposed bargaining unit fails to acknowledge SERB's ability to make reasonable inferences from the evidence presented at the hearing. Namely, it was reasonable for SERB not to require Cuyahoga County to present direct evidence regarding each Social Service Supervisor within the proposed bargaining unit in order for the county to demonstrate that all employees within the proposed bargaining unit are supervisors under R.C. 4117.01(F) and not public employees for the purpose of R.C. Chapter 4117.

{¶ 22} For these reasons, we find that the trial court did not err in affirming SERB's order dismissing the Union's petition for a representation election. Accordingly, we overrule the Union's first and second assignments of error.

IV. Disposition

{¶ 23} Having overruled the Union's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.