

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Board of Trustees of Butler Township, Ohio et al,	:	
	:	
Relators,	:	
	:	
v.	:	No. 08AP-163
	:	
The Ohio State Employment Relations Board et al.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 30, 2008

*Taft Stettinius & Hollister LLP, and Timothy G. Pepper, for
relator Board of Trustees of Butler Township, Ohio.*

*Nancy H. Rogers, Attorney General, and Anne Light Hoke,
for respondents.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relators, Board of Trustees of Butler Township, Ohio and Reed Rohr, commenced this original action in mandamus seeking an order compelling respondents Ohio State Employment Relations Board ("SERB") and two of its members, to stay the issuance and implementation of an R.C. 4117.14(G) final offer settlement award issued

by a SERB-appointed conciliator until such time as SERB determines Reed Rohr's R.C. 4117.07(A)(1) petition to decertify the bargaining unit representative.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate found that relator failed to identify any statute or administrative rule that required SERB to stay collective bargaining during the pendency of a decertification petition. Although it had previously been SERB's policy to stay negotiations when a decertification petition was pending, the magistrate concluded that this past policy was insufficient to create a clear legal right that could be enforced by mandamus. Therefore, the magistrate has recommended that we grant respondents' motion to dismiss the amended complaint.

{¶3} Relator, Board of Trustees of Butler Township, Ohio filed objections to the magistrate's decision arguing that R.C. Chapter 4117 grants it a clear legal right to a stay of collective bargaining under these circumstances. However, relator does not identify any specific statute or administrative rule that requires a stay of collective bargaining during the pendency of a decertification petition. Rather, relator contends that a clear legal duty to issue a stay arises from the legislative intent underlying R.C. Chapter 4117. We disagree.

{¶4} No provision in R.C. Chapter 4117 or in the Ohio Administrative Code grants relators a clear legal right to a stay of collective bargaining during the pendency of a decertification petition. In the absence of a statute or administrative rule requiring a stay, mandamus is not warranted. We recognize that there may be policy reasons supporting the issuance of a stay in these circumstances. Nevertheless, policy reasons,

unless clearly expressed in a statute or rule, are insufficient to create the clear legal duty required for relief in mandamus. Accordingly, we overrule relator's objections.

{¶5} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Motion to dismiss granted;
writ of mandamus denied.*

McGRATH, P.J., and BRYANT, J., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Board of Trustees of Butler Township, Ohio et al,	:	
	:	
Relators,	:	
	:	
v.	:	No. 08AP-163
	:	
The Ohio State Employment Relations Board et al.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered July 21, 2008

Taft Stettinius & Hollister LLP, and Timothy G. Pepper, for relator Board of Trustees of Butler Township, Ohio.

Reed Rohr, pro se.

Nancy H. Rogers, Attorney General, and Anne Light Hoke, for respondents.

IN MANDAMUS
ON RESPONDENTS' MOTION
TO DISMISS THE AMENDED COMPLAINT

{¶6} In this original action, relators Board of Trustees of Butler Township, Ohio and Reed Rohr request a writ of mandamus ordering respondents Ohio State Employment Relations Board ("SERB") and two of its members to stay the issuance and implementation of an R.C. 4117.14(G) final offer settlement award issued by a SERB appointed conciliator until such time as SERB determines Reed Rohr's R.C. 4117.07(A)(1) petition to decertify the bargaining unit representative.

Findings of Fact:

{¶7} 1. On February 28, 2008, relator, Board of Trustees of Butler Township Ohio ("Butler Township Trustees" or "relator"), filed this mandamus action against SERB and two of its members. In the original complaint filed February 28, 2008, relator named SERB chair Craig R. Mayton and SERB member Michael G. Verich as respondents. The complaint alleged that, upon information and belief, the position of vice-chair of SERB is vacant.

{¶8} 2. On March 17, 2008, the magistrate held a conference with counsel. It was agreed at the conference that Butler Township Trustees would file an amended complaint.

{¶9} 3. On March 25, 2008, Butler Township Trustees filed an amended complaint in which Reed Rohr joined as a relator. Besides SERB, Mayton and Verich, the amended complaint also named as a respondent Butler Township Professional Fire Fighters, IAFF Local No. 4491 ("the union").

{¶10} 4. According to the amended complaint, Charles Kohler was appointed by SERB to act as a conciliator in collective bargaining between Butler Township Trustees and the union.

{¶11} 5. According to the amended complaint, SERB charged Kohler with the responsibility to issue a final offer settlement award ("award") pursuant to R.C. 4117.07.

{¶12} 6. According to the amended complaint, Rohr is a member of a SERB certified bargaining unit consisting of certain employees of Butler Township Trustees.

{¶13} 7. According to the amended complaint, Rohr filed a petition to decertify the union, and the petition meets the requirements of R.C. 4117.07(A)(1) and Ohio Adm.Code 4117-5-01(D).

{¶14} 8. According to the amended complaint, Butler Township Trustees repeatedly moved SERB to stay the issuance and implementation the conciliator's award, but SERB refused to issue the requested stay.

{¶15} 9. According to the amended complaint, Butler Township Trustees have a clear legal right under R.C. Chapter 4117 to a stay of the issuance and implementation of the conciliator's award, and SERB has a clear legal duty to order a stay.

{¶16} 10. According to the amended complaint, SERB has a policy to automatically grant an employer's motion to stay collective bargaining when a decertification

petition is pending. Relators allege that a statement of SERB's policy is found in an opinion released by SERB in *In re Marion Cty. Children's Servs. Bd.*, SERB 92-017.

{¶17} 11. According to the amended complaint, on March 3, 2008, after this original action had been filed, conciliator Kohler issued his award.

{¶18} 12. According to the amended complaint, on March 6, 2008, Butler Township Trustees moved SERB to stay the implementation of the award pending resolution of the decertification petition. On March 20, 2008, SERB denied the motion.

{¶19} 13. According to the amended complaint, the union has opposed holding an election under the decertification petition on grounds that the conciliator's award constitutes a binding contract between Butler Township Trustees and the union.

{¶20} 14. On April 16, 2008, respondents moved to dismiss the amended complaint.

{¶21} 15. On May 8, 2008, relators filed their memorandum in opposition to the motion to dismiss.

{¶22} 16. On May 20, 2008, respondents filed a reply.

{¶23} 17. On June 2, 2008, relators filed a surreply

{¶24} Conclusions of Law:

{¶25} It is the magistrate's decision that this court grant respondents' motion to dismiss the amended complaint.

{¶26} R.C. 4117.07 provides:

(A) When a petition is filed, in accordance with rules prescribed by the state employment relations board:

(1) By any employee or group of employees, or any individual or employee organization acting in their behalf * * * asserting that the designated exclusive representative is no

longer the representative of the majority of employees in the unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties;

(2) * * *

If the board finds upon the record of a hearing that a question of representation exists, it shall direct an election and certify the results thereof. * * *

* * *

(C) The board shall conduct representation elections by secret ballot 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.

{¶27} R.C. 4117.14(G) provides statutory guidelines applicable to final offer settlement proceedings. Thereunder, R.C. 4117.14(G) provides:

(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers[.] * * *

* * *

(8) Final offer settlement awards made under Chapter 4117. of the Revised Code are subject to Chapter 2711. of the Revised Code.

* * *

(10) The conciliator shall make written findings of fact and promulgate a written opinion and order upon the issues presented to the conciliator, and upon the record made before the conciliator[.] * * *

R.C. 4117.14(H) provides:

All final offer settlement awards and orders of the conciliator made pursuant to Chapter 4117. of the Revised Code are subject to review by the court of common pleas having

jurisdiction over the public employer as provided in Chapter 2711. of the Revised Code. * * *

{¶28} R.C. 4117.14(l) provides:

The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award.

{¶29} It is well settled that in order for a writ of mandamus to issue, the relator must demonstrate: (1) that relator has a clear legal right to the relief prayed for; (2) that respondents are under a clear legal duty to perform the acts requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29.

{¶30} It is axiomatic that in a mandamus proceeding, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, at ¶18.

{¶31} R.C. Chapter 4117 provides the statutes applicable to public employee collective bargaining. It further establishes SERB. R.C. 4117.02.

{¶32} Clearly, neither R.C. Chapter 4117 nor any provision of the Ohio Administrative Code adopted by SERB provides to the relators a clear legal right to a stay of collective bargaining during the pendency of a decertification petition. Nor do the relators specifically rely upon any statutory provision under R.C. Chapter 4117 to support their claim for mandamus relief. Relators do rely heavily upon SERB's policy pronouncement in an opinion it rendered in 1992. In that opinion, the three-member SERB wrote:

* * * It has been a longstanding policy of this Board, reaffirmed herein, that a petition for decertification (or representation) alone entitles one to conclude that an employer has a good faith doubt of continuing majority status and warrants a withdrawal from bargaining with the incumbent union until the representation issue is resolved. In re Cleveland City School District Board of Education, SERB 85-003 (1985). Thus, SERB's policy is to automatically grant an employer's motion to stay negotiations when a decertification petition is pending. SERB's rationale for this policy is that as long as a question of representation is pending resolution by an election, a neutral stance on the Employer's part is warranted until the representation dispute is decided. A continuation of the bargaining process with the incumbent employee organization might taint the '**laboratory conditions**' which are essential for the coming election by giving one party an advantage over the other. Also, the imminent possibility of changing or eliminating the employee representation justifies staying negotiations upon an Employer's motion until an election has established which party, if any, the employer is to negotiate with. Thus, it is sound policy to stay ongoing negotiations with the incumbent organization on a motion by the employer, so long as a question of representation is pending before the Board in the form of petition for representation or decertification. * * *

In re Marion, at 3. (Emphasis sic.)

{¶33} In effect, relators invite this court to judicially create a legal duty enforceable in mandamus from the SERB announced policy. This court has no authority to create the legal duty that relators seek to enforce by mandamus. *Pipoly*, supra.

{¶34} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the relator can prove no set of facts entitling him to relief. See *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242.

{¶35} Based upon the foregoing analysis, the magistrate concludes that the amended complaint fails to state a claim upon which relief in mandamus can be granted.

{¶36} Accordingly, it is the magistrate's decision that this court grant respondents' motion to dismiss the amended complaint and that this action be dismissed by this court.

/s/ Kenneth W. Macke
KENNETH W. MACKE

MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).