

**BEFORE THE STATE BOARD OF MEDIATION  
STATE OF MISSOURI**

ELSWORTH SCHIEFFER,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
CITY OF CAPE GIRARDEAU, PUBLIC	)	
WORKS DEPARTMENT,	)	Public Case No. RD 2009-037
	)	
and	)	
	)	
INTERNATIONAL UNION OF OPERATING	)	
ENGINEERS, LOCAL 148,	)	
	)	
Respondents.	)	

**DECISION**

In this case a putative member of a previously Board-certified bargaining unit of workers in the Street and Sanitation Divisions of the Public Works Department of the City of Cape Girardeau petitions for decertification of the union that has been designated as the unit's bargaining representative. Due to the substantive assistance provided by the City to the petitioner's efforts to obtain support among bargaining unit members for decertification, the Board dismisses the petition for decertification.

**INTRODUCTION**

On March 23, 2008, Elsworth Schieffer filed a petition seeking decertification of International Operating Engineers, Local 148, as the certified collective bargaining representative of a unit of workers in the Street and Sanitation Divisions of the Public Works Department of the City of Cape Girardeau. Respondents are the City of Cape Girardeau, Public Works Department (City), and Local 148. Local 148 contends that the petition for decertification should be dismissed because (1) Mr. Schieffer is not currently a member of the certified bargaining unit, and (2) the City provided substantive assistance in Mr. Schieffer's efforts to generate support for decertification. The City reports that it is neutral with regard to the question of decertification.

This Board is authorized to hear and decide whether an organization has or retains majority support to serve as the exclusive bargaining representative of a bargaining unit. § 105.525, RSMo. The Board held a hearing in St. Louis, Missouri, on August 12, 2009, to allow the parties to provide testimony and other evidence regarding the issues raised by Local 148. Board Chairman Jim Avery, Employer Member Emily Martin, and Employee Member Peggy Cochran were present in person to hear the case. Mr. Schieffer and representatives of the City and Local 148 attended the hearing and had a full opportunity to present evidence and make arguments. The parties were also given the opportunity to file post-hearing briefs. The City and Local 148 did so.

Based on our review of the whole record, including the evidence presented, arguments made, and briefing filed, we issue the following Findings of Fact, Conclusions of Law, and Order.

#### **FINDINGS OF FACT**

International Operating Engineers, Local 148, is the certified collective bargaining representative of a unit of workers in the Street and Sanitation Divisions of the Public Works Department of the City of Cape Girardeau. On February 4, 2009, the Local 148 business representative for this bargaining unit and worker representatives of the bargaining unit met with the City Manager and other officers of the City to meet and confer about employment conditions. The meeting ended without resolution.

Afterwards, a number of unit members that had attended the meeting came to Elsworth Schieffer, a fleet maintenance service technician employed in the Street Division who had also attended, and told him they were embarrassed by the conduct of the Local 148 business representative because he had asked a series of questions that had caused some agitation among the City officers. Although Mr. Schieffer did not testify as to the topic of the questions, the Local 148 business representative testified that he thought the questions referred to likely were the ones he asked near the end of the meeting concerning the City's position that it would not put any agreements reached with the bargaining unit into writing.

In addition to telling Mr. Schieffer they were embarrassed by the business representative's questions, they also told him they had not even known who the business representative was or why he was at the meeting. Several also asked Mr. Schieffer how they could "get the union out." In response to this sentiment, Mr. Schieffer did some research on the internet to learn the process for decertifying Local 148 as the certified bargaining representative for the unit of employees in the Street and Sanitation Departments.

On February 11, 2009, with the permission of the City Public Works Director, Mr. Schieffer posted a notice next to the time clock stating that he would be holding meetings in the break room the next morning prior to the beginning of each shift to discuss taking action to decertify the union. Mr. Schieffer prepared a statement to read at each meeting so that he would be certain that he relayed the same information to all the workers in the Street and Sanitation Divisions regardless of which meeting they attended.

Mr. Schieffer's meetings began before the start of each shift. At the meetings, he read his statement and then asked for questions. The meetings did not end until after the time the shifts were to begin. After his early morning meetings, Mr. Schieffer used his lunch hour to hold meetings at other facilities during times when the unit members at those facilities took breaks. He did not clock in to work himself until after his lunch period. Although the meetings ran until after work time was to begin, Mr. Schieffer testified that no one signed the decertification petitions he had prepared until they were on a break or at lunch.

At Mr. Schieffer's meeting before the 6:00 a.m. start of a shift of Sanitation Division workers, several unit members attended, as did the Sanitation Superintendent, Mike Tripp, who was the supervisor of at least some of the unit members in attendance. Mr. Tripp asked questions of a unit member who spoke out at the meeting in support of Local 148. Mr. Tripp's questions concerned union dues and whether there was a contract between the union and the City. This meeting lasted until about 6:30 a.m.

Another of the meetings occurred before the 7:00 a.m. beginning of a shift of workers in the Street Division. In addition to unit members, several supervisors and foremen were also

present at this meeting, but none asked questions. Mr. Schieffer ended this meeting at about 7:15 a.m.

In the afternoon of this same day that Mr. Schieffer held his meetings, city workers received word that the Public Works Director, Tim Gramling, was calling a mandatory meeting at the Public Works Building at 2:00 p.m. to discuss the meetings that had been held earlier that day relating to the union. Mr. Gramling called the meeting to address concerns that had been brought to his attention as having arisen throughout the Public Works Department as a result of Mr. Schieffer's meetings. Mr. Gramling did not call the meeting a mandatory meeting. He asked the supervisors under him to ask the employees that had concerns to come to a meeting at 2:00 p.m. The 2:00 p.m. start time for the meeting was during normal work hours for many bargaining unit members. Most of the employees of the City's Street and Sanitation Divisions attended, including members of management. Additionally, Mr. Gramling asked David Milam, the City's Human Relations Manager, to be at the meeting in case there were questions about the union or employment law.

A good number of people (Mr. Gramling testified that "[t]here may have been 40, 50, maybe") attended the 2:00 p.m. meeting. Mr. Gramling started the meeting by saying that he wanted to address concerns relating to City policies and working conditions that had arisen following the meetings earlier that day. As part of his remarks, Mr. Gramling gave a summary of union activity with the City since the 1970s. He also stated that the City's position is not to enter into bargaining agreements with any employee group within the City and "explained to the employees [that a bargaining agreement] is basically what the Union is seeking, is for the City to sign that agreement." As one individual at the meeting recalled, Mr. Gramling made the comment that "the Union's been around, but there's never been a contract as long as he's been there, and he doubts if there's ever . . . one as long as he's there."

A question regarding union dues was referred to David Milam, the human relations manager. Mr. Milam answered that if a worker did not want to be in the union, that worker should "check with the union representative to find out because he thinks that if you don't join

the union that they could charge you a fair share due.” Mike Tripp, the Sanitation Superintendent that had spoken at one of Mr. Schieffer’s meetings earlier that day, asked Mr. Milam if the cards unit members could sign to indicate support for decertification of the union could be signed in private. Mr. Milam answered that the cards had to be signed publicly.

The meeting in the Public Works Building ended after about an hour. About 45 minutes of the meeting involved discussion about the union, while the remaining 15 minutes concerned overtime and snow removal. No representative of Local 148 had attended the meeting.

### **CONCLUSIONS OF LAW**

Local 148 contends that the decertification petition filed by Mr. Schieffer must be dismissed because the City provided support for the petition. The City responds that it is neutral with regard to the petition and that it has attempted to act in a manner consistent with that neutrality. Missouri case law and this Board’s past decisions are silent regarding the effect of employer support, if any, on the decertification process. In such cases, the Board may look to decisions of the National Labor Relations Board for guidance. *Baer v. Civilian Personnel Div., St. Louis Police Officers Ass’n*, 747 S.W.2d 159, 162 (Mo. App. W.D. 1988); *Int’l Assoc. of Fire Fighters, Local 2665 v. North Jefferson County Ambulance Dist.*, Case No. R 2000-049, at 10 (SBM 2001); *Teamsters, Local 245 v. City of Springfield*, Case No. R 86-032, at 5 (SBM 1986).

Decertification proceedings are intended “to provide a remedy exclusively for and in behalf of employees and not of employers.” *Star Brush Mfg. Co.* 100 NLRB 679, 680 (1952). Where the employer goes beyond the bounds of strict neutrality and has offered support to a petition to decertify, the decertification petition must be dismissed. *Bond Stores, Inc.*, 116 NLRB 1929, 1930-31 (1956). “It is well settled that an employer violates [the National Labor Relations Act] by ‘actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.’” *Mickey’s Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007) (quoting *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), *enfd. sub nom. mem. NLRB v R.T. Blankenship & Assocs.*, 210 F.3d 375 (7th Cir. 2000)). In deciding whether an employer has gone beyond the bounds of

neutrality “the appropriate inquiry is ‘whether the Respondent's conduct constitutes more than ministerial aid.’” *Mickey's Linen*, 349 NLRB at 791 (quoting *Times Herald*, 253 NLRB 524, 524 (1980)). Or, as stated in *Armored Transport Inc.*, 339 NLRB 374, 377 (2003):

An employer may not provide more than ministerial aid in the preparation or filing of the petition. The decision regarding decertification and the responsibility to prepare and file a decertification petition belongs solely to the employees. “Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it.” *Harding Glass Co.*, 316 NLRB 985, 991 (1995), and cases cited therein.

In this case, although perhaps unintentionally, the City and its management staff strayed beyond the strict neutrality required of an employer in its actions relating to a decertification campaign.

At Mr. Schieffer's 6:00 a.m. meeting on February 12, 2009, the Sanitation Supervisor, Mike Tripp, asked questions concerning union dues and whether there was a contract between the union and the City. These questions injected into the meeting the issues of whether Local 148 might one day charge union dues to unit members and whether the lack of an agreement between the City and Local 148 might indicate that the union was not acting vigorously enough in the interests of the unit members. Although these are relevant issues, it was not the place of management to raise them. The questions could have been taken by unit members as a sign that management opposed the continuation of Local 148 as the bargaining representative of the unit.

Mr. Schieffer's 6:00 a.m. and 7:00 a.m. meetings on February 12 both encroached into work time. Supervisors were present at both meetings. Their failure to stop the meetings when the workers' shifts started could have been taken as management support of Mr. Schieffer's efforts.

Whether or not the meeting called by Mr. Gramling at 2:00 p.m. on February 12, 2009, could, in and of itself, also have been taken as a sign of support for the proposed decertification petition is a closer call. The meeting did occur during work time, was believed by at least some unit members to be mandatory, and was called as a result of Mr. Schieffer's meetings, but it was

called for the legitimate purpose of addressing workplace unease. As the meeting progressed, however, Mr. Gramling's remarks first straddled the fence between a legitimate attempt to calm employee fears on one hand and intrusion into matters that must be left to unit members without employer commentary on the other by giving a historical summary of the City's relations with the union. He then crossed that fence by stating that the City had taken the position that it would not enter into bargaining agreements with any employee group and then adding that a bargaining agreement with the City is what the union was trying to achieve. These paired comments, whether meant to or not, plainly indicated a view on the part of the City that the primary objective of Local 148 was unobtainable. The statement of this view by a senior City official had the unavoidable effect of undercutting the union and signaling support on the part of the City for decertification of Local 148.

The statements of David Milam, the City's human relations manager, also trod on ground reserved exclusively for unit members. First, when answering a worker's question regarding union dues, he properly referred the worker to his union representative, but then stated his opinion that if unit members did not join the union they could be charged "a fair share due." As with Mr. Tripp's question at the earlier meeting, this is a relevant issue, but not one to be injected by the employer.

Second, Mr. Milam's response to the question about whether the cards indicating support for decertification could be signed in private resulted in significant management interference in the decertification process. Not only did his answer that the cards had to be signed publicly leave unit members with the understanding that the City could keep a tally of who supported decertification, which could well affect the positions taken by unit members on the question, but the answer was not correct. An employer is not permitted to learn its employees' individual positions concerning the certification or decertification of a union. *NLRB v. B.A. Mulligan Lumber and Mfg. Co.*, 535 F.3d 271, 281 (4th Cir. 2008). This is a personal and private decision of each individual employee. See *Madeira Nursing Ctr. v. NLRB*, 615 F.2d 728, 730-31 (6th Cir. 1980) (case concerns union authorization cards). The inevitable result of

making employees' decisions regarding union preference available to the employer would be the chilling of the right of employees to freely express their sentiments one way or the other. See *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1167 (8th Cir. 2000) (concluding that it is unfair labor practice for employer to obtain names of employees signing union authorization cards by any means, direct or indirect); *Madeira Nursing Ctr.*, 615 F.2d at 731 (concluding that union support cards are closed records that cannot be obtained by an employer under the Freedom of Information Act). Mr. Milam's incorrect statement that decertification cards had to be signed publicly inevitably influenced (and quite possibly decisively so) unit members as they decided whether or not to sign on in support of Mr. Schieffer's decertification petition.

The comments and conduct of City officers during Mr. Schieffer's decertification campaign provided substantive assistance to his efforts and thereby require the dismissal of the decertification petition in this case. It does not matter that Mr. Schieffer independently initiated the proceedings or that the City's actions undercutting the union and providing support to Mr. Schieffer's efforts may not have been intentional. See *Mickey's Linen*, 349 NLRB at 791. In that case, Judy Wickhorst, a unit employee soliciting signatures to decertify the union asked a management employee, David Cerda, to translate for her when she approached two non-English speaking unit members. Cerda initially declined, but then changed his mind. With Cerda serving as translator, Wickhorst asked the two other unit employees whether they wanted to pay union dues and told them they could do better than the union. Cerda then stood by with Ms. Wickhorst as the two other employees signed her decertification petition. *Id.* at 790. Despite merely acceding to the request of a unit member to serve as interpreter during her brief discussion with the two other employees, the NLRB concluded that Cerda's mere presence with, and translation for, Wickhorst amounted to improper management assistance in the decertification process because the two employees being solicited by Wickhorst could reasonably have felt coerced by Cerda's conduct. *Id.* at 791. Similarly, whatever their intent, the conduct of City officers in this case reasonably resulted in an understanding on the part of

unit members that the City supported decertification and that they would be better off if they went along.

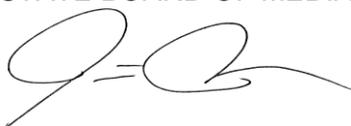
Because the Board concludes that the petition for decertification in this case must be dismissed due to the substantive assistance provided by the City, it is unnecessary for it to reach the question of whether or not Mr. Schieffer is a member of the certified bargaining unit with standing to file the petition.

**ORDER**

Because of the support provided by the City to the decertification petition filed in this case, the Board dismisses the petition.

Signed this 2<sup>nd</sup> day of February, 2010.

STATE BOARD OF MEDIATION



James G. Avery, Chairman



Peggy Cochran, Employee Member



Emily Martin, Employer Member

(SEAL)