

Decertification of Bargaining Representative

When employees no longer wish to be represented by a union for the purposes of collective bargaining, either an employee or group of employees, or any individual or employee organization purporting to act in their behalf, may file a petition for decertification of collective bargaining representative with the Board.¹ The Board made clear in a recent decision that it is without jurisdiction over a decertification petition filed by a municipal employer. The Board held that “when the Municipal (Employee Relations) Act previously explicitly provided a municipal employer with the ability to file a petition to decertify the presently certified bargaining agent, and then the Legislature removed this provision from the Act, the Legislature intended to no longer allow a municipal employer the ability to file a petition to decertify the presently certified bargaining agent.”²

The petition is filed on a form specified by the Board. A decertification petition must be accompanied by a “showing of interest” demonstrating that at least 30 percent of the employees in the existing bargaining unit no longer desire to be represented by the incumbent union. The discussion above on election of a collective bargaining representative with respect to sufficiency and validity of showing of interest, and timing of petitions, also is applicable to decertification petitions.

In addition, an issue with respect to the timeliness of a decertification petition can arise under circumstances where the employer has voluntarily recognized a union and then employees subsequently file a decertification petition before the employer and union have negotiated an initial collective bargaining contract. In such situations, the Board has determined that an employer and union are entitled to a

¹ Sections 13.1, 23.1 33.1, 53.1, 63.4, and 73.4, Board Rules of Practice.

² Decertification Petition of Bellows Falls Village Corporation, 34 VLRB 403, 404 (2018).

reasonable time to bargain and to execute the contracts resulting from such bargaining before a decertification petition is timely.³

What constitutes a “reasonable time” is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. In determining whether a reasonable time has passed, the Board examines the factual circumstances unique to the parties’ recognition and bargaining to determine whether, under the circumstances, the parties have had sufficient time to reach agreement. In so doing, the Board looks to the degree of progress made in negotiations, whether or not the parties were at an impasse, and whether the parties were negotiating for an initial contract.⁴

Upon receipt of a valid petition for decertification of a collective bargaining representative, the Board sends a copy of the petition to the employer and incumbent union, and makes two requests of the employer at the outset: 1) immediately post copies of the petitions at place(s) normally used for employer-employee communications; and 2) file with the Board a list of the names of the employees in the bargaining unit. This list is used by the Board in determining whether a sufficient showing of interest has been made by the petitioner.⁵

Also, upon the filing of a petition for decertification of collective bargaining representative, the Board requests the employer and incumbent bargaining representative to notify the Board within a seven business days: 1) whether any collective bargaining agreement is in effect which would bar an election, and 2)

³ Teamsters Local 597 v. Green Mountain Transit Agency, Green Mountain Transit Agency v. Teamsters Local 597, 27 VLRB 128, 148 (2004).

⁴ Id.

⁵ Sections 13.7 - 13.9, 23.8 - 23.9, 23.11, 33.7 - 33.8 and 33.10, 53.7 – 53.9, 63.7 – 63.9, and 73.7 – 73.9, Board Rules of Practice.

whether any questions of unit determination or representation exist, which questions shall be specified.⁶

In one municipal case, the Board addressed whether an employer unfair practice of unilaterally implementing an employee handbook that addressed mandatory bargaining subjects a week after employees filed a decertification petition to remove the incumbent bargaining representative compromised the integrity of the election process so that the Board should not proceed towards conducting an election. The Board weighed the democratic rights of employees with the effects of the employer's improper action, and ultimately concluded that other remedies were sufficient to redress the employer's unfair labor practice and preserve the integrity of the representation election. The Board held:

The status quo is restored through the Employer rescinding the handbook and retrieving all copies of the handbook distributed to the employees. The employees' wages, hours and other conditions of employment are returned to what existed prior to improper implementation of the handbook. This is the appropriate state of affairs given the status of contract negotiations.

Conditions and relationships are recreated that would have existed but for the Employer's unilateral implementation by requiring the Employer to: 1) cease and desist from bargaining directly with employees, 2) inform all bargaining unit employees that the Employer continues to recognize the Union as the employees' collective bargaining representative, and 3) negotiate with the Union concerning the provisions of the handbook addressing mandatory subjects of bargaining. This is sufficient to remedy the ill effects of the Employer improperly bypassing the Union and imposing unilateral changes directly on employees. These measures make it clear to employees represented by the Union that the Employer's unilateral action was improper and the Employer needs to negotiate with the Union. Further, the remedies . . . suffice to allow employees to freely choose whether they wish to be represented by the Union absent the deleterious effects of the improper action of the Employer.⁷

⁶ Sections 13.8(C), Section 23.11, Section 33.10, Section 53.8(C), Section 63.8, and Section 73.9, Board Rules of Practice.

⁷ Teamsters Local 597 v. Green Mountain Transit Agency, 27 VLRB 128, 151 (2004).

In practice, it is rare that questions of unit determination are raised upon filing of decertification petitions. In one municipal case, an employer responded to a decertification petition by asserting that the employees in the applicable bargaining unit should be divided into two bargaining units. The Board declined the request to reconfigure the existing unit, stating:

Questions of unit determination which are appropriate to raise in response to decertification petitions . . . are those which reflect changes in positions since the unit was originally certified by the Board. This ensures that any positions added to, or deleted from, the bargaining unit since the time the unit was originally certified by the Board are properly accounted for so that the defined grouping of employees voting in the decertification election is accurate.

However, a response to a decertification petition is not an appropriate time for a party to seek to reconfigure the existing bargaining unit structure. We conclude, as has the National Labor Relations Board, that the statutory decertification provisions are designed to provide a method for determining whether an existing unit of employees desires to continue their current representation, and it is not permitted to vary that unit and have an election among a different grouping of employees.⁸

In so holding, the Board indicated that this did not mean that an employer is never permitted to seek to reconfigure an existing bargaining unit structure. The employer may file a unit clarification petition to seek a reorganization of an existing bargaining unit or units “where no question concerning the majority status of the exclusive bargaining representative is pending at the time the unit clarification petition is filed.”⁹

If unit issues are not raised and an existing collective bargaining agreement does not bar an election, the Board will proceed to conduct an election in which

⁸ Petition for Decertification of Collective Bargaining Representative (Re: Town of Shelburne), 21 VLRB 233, 235-236 (1998).

⁹ Id.; Section 34.1, Board Rules of Practice.

employees vote on whether they wish to be represented by the incumbent bargaining representative. The discussion on the procedure for elections discussed above, in the section on election of a collective bargaining representative, also applies to decertification elections with the proviso that the decertification petitioner is a party to proceedings along with the incumbent union and the employer.

Under the State Employees Labor Relations Act, the Judiciary Employees Act, the State Labor Relations Act, the Independent Direct Support Providers Labor Relations Act, and the Early Care and Education Providers Labor Relations Act, the union must receive a majority of valid votes cast in a decertification election to remain certified as exclusive bargaining representative.¹⁰ Under the Municipal Employee Relations Act, however, due to a specific statutory provision, there must be a majority of valid votes cast against the incumbent bargaining representative for the incumbent to be decertified.¹¹

Subsequent to expiration of the period for objecting to the conduct of the election, and if the Board has not set aside the election as a result of any objection filed, the Board issues an order of certification or decertification of the bargaining representative, as applicable.¹²

¹⁰ Sections 13.20, 23.25 53.20, 63.19, and 73.20, Board Rules of Practice.

¹¹ 21 V.S.A. Section 1724(e).

¹² Sections 13.23, 23.28, 33.27, 53.23, 63.22, and 73.23, Board Rules of Practice.