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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
Fraternal Order of Police, Ohio Labor Council, Inc.,  
Employee Organization,  
and  
State of Ohio, Office of Collective Bargaining,  
Employer.

CASE NUMBERS: 87-REP-3-0078  
87-REP-4-0124

DIRECTIVE REMANDING CASES TO HEARING  
(Opinion attached.)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Latané;  
December 3, 1987.

On March 12, 1987, the Fraternal Order of Police, Ohio Labor Council, Inc. (Employee Organization) filed a voluntary recognition request for representation of a proposed bargaining unit composed of certain state employees.

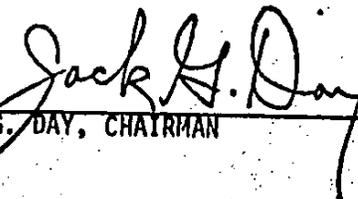
On April 24, 1987, the Employee Organization filed a representation petition seeking an election in a bargaining unit composed of State Highway Patrol Sergeants.

The State of Ohio, Office of Collective Bargaining (Employer) filed objections to the appropriateness of the two units proposed by the Employee Organization. Both cases were directed to hearing. The Board has reviewed the record, the hearing officer's recommended determinations, Exceptions and Responses.

For the reasons stated in the opinion attached, incorporated by reference, the above-styled cases are remanded to the hearing officer for determination of the appropriateness of the units and the supervisory and managerial status of the classifications in dispute.

It is so directed.

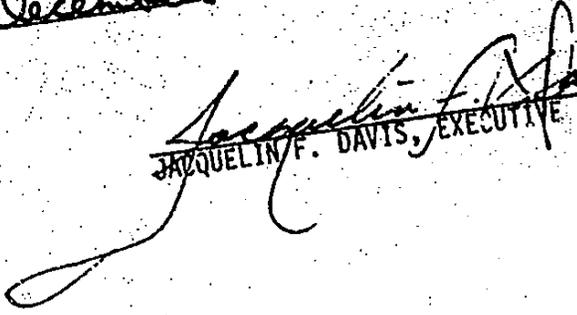
DAY, Chairman; SHEEHAN, Vice Chairman; and LATANE, Board Member, concur.

  
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JACK G. DAY, CHAIRMAN

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DIRECTIVE REMANDING CASES TO HEARING  
CASE NOS. 87-REP-3-007R AND 87-REP-4-0124  
DECEMBER 3, 1987  
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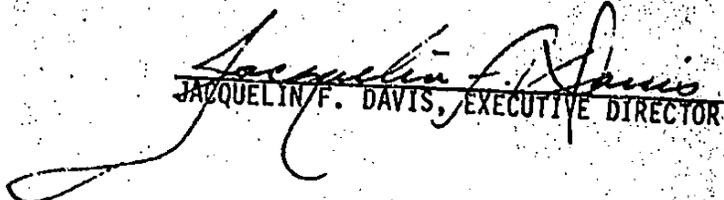
I certify that this document was filed and a copy served upon each party  
on this 12<sup>th</sup> day of December, 1987.

  
JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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DIRECTIVE REMANDING CASES TO HEARING  
CASE NOS. 87-REP-3-0078 AND 87-REP-4-0124  
DECEMBER 3, 1987  
PAGE 2 OF 2

I certify that this document was filed and a copy served upon each party  
on this 17<sup>th</sup> day of December, 1987.

  
JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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STATE OF OHIO  
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Fraternal Order of Police, Ohio Labor Council, Inc.,  
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CASE NUMBERS: 87-REP-3-0078  
87-REP-4-0124

OPINION

Day, Chairman:

Because of the identity of parties and issues, Cases 87-REP-3-0078 and 87-REP-4-0124 are combined for consideration. The facts essential to disposition in the respective cases are these:

1) Case No. 87-REP-3-0078

On March 12, 1987, the Fraternal Order of Police, Ohio Labor Council, Inc. (FOP) filed a voluntary recognition request for representation in a proposed bargaining unit composed of state employees - Liquor Control Investigator Supervisors I and II and Liquor Control Assistant Investigator Administrator. The State of Ohio, Office of Collective Bargaining (OCB), filed objections to the appropriateness of the unit proposed by the FOP. OCB claimed that all the employees in question were either supervisory or managerial and that the FOP unit was barred under the doctrines of collateral estoppel and res judicata by virtue of earlier State Employment Relations Board (SERB) determinations in the case of In re State

of Ohio, Case No. 84-RC-04-0002.<sup>1</sup> Some of the employees whose representation rights are presently in issue were placed in State Unit #2 by the determination in the latter case. No exceptions were filed by the FOP. Thereafter, the FOP consented to an election in Case No. 85-RC-03-3502 and stipulated that the classification "Liquor Control Investigator 3" was supervisory. That classification was later changed to Liquor Control Investigator Supervisor I.

2) Case No. 87-REP-4-0124

On April 24, 1987, the FOP filed a representation petition seeking an election in a bargaining unit composed of State Highway Patrol Sergeants. The OCB objected and cited comparable grounds to those in Case No. 87-REP-3-0078 in support except that a defense of "equitable estoppel" was substituted for "collateral estoppel". Highway Patrol Sergeants had been placed in State Unit #1 by the SERB determination in the State Case (No. 84-RC-04-0002). No exceptions were filed by the FOP. It entered a consent election agreement in Case No. 85-RC-04-3501 which excluded Highway Patrol Sergeants without any stipulation as to the sergeant's status as supervisors or managers.

I

The hearing officer has concluded, among other things, that the bargaining units sought in both cases are barred "by the doctrine of collateral estoppel" and recommends that both "petitions" (i.e., request for

<sup>1</sup>Case No. 84-RC-04-0002 determined only the appropriateness of a major state unit. Representation rights were not decided. Decisions deciding representation issues were not reached until Case Nos. 85-RC-03-3502 and 85-RC-04-3501. In the latter two cases new appropriateness conclusions were made by consent agreements approved by SERB. The representation sought in the present cases involves employees excluded in Case Nos. 85-RC-03-3502 and 85-RC-04-3501, plus some employees in new classifications.

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voluntary recognition and petition for representation) be dismissed. However, his report suggests that FOP be allowed accretive proceedings during the window period of the current collective bargaining agreements to seek representation status except for employees in the classification of "Liquor Control Investigator 3."<sup>2</sup>

The issues are:

1. Whether or not Case No. 87-REP-3-0078 is barred by the doctrines of collateral estoppel and res judicata.
2. Whether or not Case 87-REP-4-0124 is barred by the doctrines of equitable estoppel and res judicata.

II

A crucial preliminary question in these cases is whether collateral estoppel, res judicata and equitable estoppel have any relevance to appropriate unit determinations in labor law.

They do not. For their application occurs in relatively ancient legal processes long preceding and completely alien to unit determinations under a labor law statute like the Ohio public employee collective bargaining enactment (Ohio Revised Code, Chapter 4117).

The concepts of collateral estoppel and res judicata are defenses not considered identical but with something in common. Both are litigation

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<sup>2</sup>This last classification was subject to exclusion from current case No. 87-REP-3-0078 (according to the hearing officer's dictum in the instant cases) because of the previous stipulation defining the classification in Case No. 85-RC-03-3502. The hearing officer's dictum is not necessary to his decision. It is doubly alien here because SERB would reject its premise even were it necessary to the hearing officer's conclusion. The hearing officer's suggestion for future accretive proceedings in each of the present cases also is dictum which SERB need not and does not adopt.

dampeners.<sup>3</sup> They apply most aptly to put controversies between the involved parties permanently to rest. Normally, those parties have no continuing relationships which survive, or are dependent upon, the outcome of the litigation. Moreover, in contrast to appropriate unit determinations, litigated issues falling within either the res judicata or collateral estoppel principles are precluded from further consideration.

Equitable estoppel is also a preclusive defense but applies to a claim by a person or entity whose own conduct has been such that fairness forecloses consideration of the issue.<sup>4</sup> Again there is no necessary continuing relationship between the parties after the defense puts the claim to rest.

By contrast, bargaining unit determinations have only limited preclusive effects. This is so, and must be, because under the Ohio statutory program, a unit has status as a legal entity only so long as the employees in it want to continue a bargaining agent, subject only to the contract bar and election bar exceptions. Units are not designed to exist in perpetuity. Rather the unit objective is to put venue boundaries around the bargaining

<sup>3</sup>See Appendix "A".

<sup>4</sup>In Lex Meyers Chevrolet Co., Inc. v. Buckeye Finance Co. (Appeals 10th Dist. 1958) 8 O.O. 2d 171, 173, the court adopted and followed the doctrine of equitable estoppel as defined in Ohio Jurisprudence 2d:

"The purpose of equitable estoppel is to prevent actual or constructive fraud, and the doctrine should always be so applied as to promote the ends of justice. In determining its application the counterequities of the parties are entitled to due consideration. The doctrine is available only in defense of a legal or equitable right or claim made in good faith, and can never be used to uphold crime, fraud, injustice, or wrong of any kind."

"An estoppel arises when one is concerned in or does an act which in equity will preclude him from averring anything to the contrary, as to where another has been innocently misled into some injurious change of position."

representative's authority while preserving the principals' right (i.e., the employees' right) to change the bargaining agent and to do so in the same or a different unit. A new surrogate may seek to represent the employees in the same unit or a larger or smaller one if found by SERB to be appropriate.<sup>5</sup> In any event the employees and management must continue to live together in some relationship or other (union or non-union) regardless of the outcome of a representation controversy.

Freedom of choice requires unit flexibility. Thus, the Ohio statute requires SERB to determine units appropriate for bargaining, directs that certain considerations be taken into account in that determination but couples the direction with a wide discretion.<sup>6</sup> And that discretion is not shackled to any one of the several units that might be deemed appropriate in a particular case.<sup>7</sup> However, despite the protean character of unit determinations imposed by concern for freedom of choice,

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<sup>5</sup>A bargaining unit may come into being, be eliminated, absorbed by another, enhanced by accretion, or diminished by fragmentation so long as any change in an existing unit or the creation of a new one falls within the standards of R.C. 4117.06(B). Those standards are applied under the auspices of SERB and the agent is then voted upon by the employees in the unit according to the election requirements provided in R.C. 4117.07.

<sup>6</sup>R.C. 4117.06(B):

"The board shall determine the appropriateness of each bargaining unit and shall consider among other relevant factors: the desires of the employees; the community of interest; wages, hours, and other working conditions of the public employees; the effect of over-fragmentation; the efficiency of operations of the public employer; the administrative structure of the public employer; and the history of collective bargaining." (Emphasis added.)

<sup>7</sup>R.C. 4117.06(C):

"The board may determine a unit to be the appropriate unit in a particular case, even though some other unit might also be appropriate."

the right to change an established unit is not an unlimited one, for some measure of stability is necessary. Accordingly, labor law has developed stabilization rules which respond to the requirements of free choice but, at the same time, recognize the need for some fixed but not unlimited life for bargaining units. The consequence is that a union which wins bargaining rights has only a limited respite from challenge by a rival employee organization.

These objectives are reflected in the election bar and contract bar concepts. The Ohio law codifies these defenses in R.C. 4117.07(C)(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."

As stabilizers, election bar and contract bar provide temporary preclusion. They represent an accommodation between the objectives of free choice and a practical, reasonable, but not unlimited, stability.

These special provisions in a specialized statute take precedence over litigation quieting doctrines imparted from general law and developed to answer problems far different from those arising with the emergence of modern labor law with its concern for allowing shifting choices of bargaining representatives within flexible units. These concerns permit the hampering of change only by the time limits imposed by a contract bar or an election bar. It follows that the doctrines of equitable estoppel, collateral estoppel and res judicata have no relevance to appropriate unit

\*See also R.C. 4117.09(D):

"No agreement shall contain an expiration date that is later than three years from the date of execution. The parties may extend any agreement, but the extensions do not affect the expiration date of the original agreement."

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determinations under the Ohio statute. To hold otherwise would set units in concrete, a result obviously not practical in labor relations and not intended by the General Assembly when it adopted Chapter 4117 giving SERB wide discretion in determining units and carefully safeguarding the right of employees to make new bargaining choices in a variety of conceivably appropriate units.

However, because bargaining agents were chosen in appropriate units and contracts negotiated which the OCB claims impede the representation claims in the present cases, it is necessary to determine whether the employees for whom representation is presently sought are part of those units and covered by contracts with time to run,<sup>9</sup> or are so related to such contracts that the doctrine of contract bar blocks any union effort to secure representation rights for them at this time.<sup>10</sup>

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<sup>9</sup>Even if the doctrine of collateral estoppel were applicable, the question of the right of the employees involved in these cases to petition for a representation election in an appropriate unit would be unimpeded. For the discussion *infra* will demonstrate that the issues involved in Cases 87-REP-3-0078 and 87-REP-4-0124 (the instant cases) are not identical to those determined in defining employees within the bargaining units in the cases of In re State of Ohio No. 84-RC-04-0002 and 85-RC-03-3502 and 85-RC-04-3501. In the latter cases it was simply determined that the employees presently implicated were not part of the units in which elections were held. Some of the classifications are new. Others involved exclusions achieved either by consent or stipulation but did not seal forever the right to representation for the excluded employees. What was decided, and no more, was that the excluded employees were not within the unit for which an agreement for election was reached. Without conceding that collateral estoppel has any relevance to bargaining unit determinations, it is arguable that if it were relevant, no full and fair opportunity to litigate their status was ever afforded the excluded employees. Such an omission does not impugn the integrity of the agreed unit, but it certainly rebuts the defense of collateral estoppel when the excluded employees attempt to secure representation rights in a different unit.

<sup>10</sup>The election defense is not a factor in these cases because any elections with any possible relevance are more than a year old. See R.C. 4117.07(C)(6) quoted in the text at footnote 8.

III

The contracts which OCB asserts in bar cover the units in FOP and AFSCME/OCSE and the State of Ohio, Case No. 85-RC-03-3502 and FOP and State of Ohio, OCB, Case No. 85-RC-04-3501.

1. Case No. 87-REP-3-0078

The appropriate unit in 85-RC-03-3502 was established as part of a consent election agreement. SERB approved because the management and union agreed to unit inclusions which did not violate any prohibition set by statute.<sup>11</sup> The consent excluded certain classifications on the ground that employees in them were either supervisory or professional.<sup>12</sup> The unit for which the FOP currently seeks representation (Case No. 87-REP-3-0078) includes some classifications of employees excluded from the stipulated unit in 85-RC-03-3502.

2. Case No. 87-REP-3-0124

The appropriate unit in 85-RC-04-3501 was established as part of a consent election agreement between the management and union incorporating highway patrol job classifications in the unit description. These inclusions did not violate any prohibition in the statute.<sup>13</sup> The agreed unit excluded certain specific classifications for some of which the FOP currently seeks representation rights in Case No. 87-REP-3-0124.

In each of the instant cases, the basic question is whether the contract bar defense applies to employees excluded from the unit for which a

<sup>11</sup>SERB's established policy in consent elections is to approve any unit to which the parties can agree so long as the job classifications or categories included in the unit composition are not prohibited by statute.

<sup>12</sup>See Stipulation, p.2. attached to the consent election agreement in Case No. 85-RC-3-3502.

<sup>13</sup>See fn. 10.

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subsequent contract has been negotiated when the exclusion was by stipulation of job character, e.g., supervisory or professional, or by enumeration of job classifications in a consent election agreement.

It is a matter of no legal significance that the exclusion is achieved (1) by stipulation attached to a consent election agreement, or (2) merely by enumerating exclusions in such an agreement, or (3) decided by SERB. For in each instance the employees in question would be outside the unit. And any contract asserted in bar applies only to the unit it covers. Obviously, then, it cannot bar representation proceedings for employees not in the covered unit.

Thus, the employees in any classification not within a contract sheltered unit have the right to petition for a representation election at any time they can muster a proper showing of interest. They are not compelled to wait for the statutory window period because there is no contract bar by which they are bound.

Whether an election will be ordered by SERB in such a claimed unit will depend, of course, on whether the petitioner seeks an election in an appropriate unit in accord with R.C. 4117.06(B). And a statutory determination essential to effecting the statutory right to collective bargaining cannot be foreclosed by the fact that employees in the unit sought were excluded by a previous negotiation of a different unit. The negotiated unit may be appropriate and approvable by SERB but another, different unit may also be.<sup>14</sup> However, that determination is for SERB.

<sup>14</sup>See R.C. 4117.06(C) which permits SERB the discretion to determine which of several units may be appropriate. For some or all of the several considerations which appear in R.C. 4117.06(B), more than one unit may be appropriate in a particular employer's operation.

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Any other view would in effect delegate to parties the power to finally determine by agreement the statutory rights vouchsafed employees under R.C. 4117.03. This consequence would allow parties to agree in a way to deprive SERB of the authority to make unit determinations. SERB is the only entity with the power to approve agreed units or to determine appropriate units in contested cases.<sup>15</sup>

IV

The instant cases are remanded to the hearing officer for hearings to determine whether the representation rights sought in Case Nos. 87-REP-3-0078 and 87-REP-4-0124 apply to units appropriate within the meaning of R.C. 4117.06(B).

Sheehan, Vice Chairman, and Latané, Board Member, concur.

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<sup>15</sup>Of course, a unit with no members save excepted ones, see, p.e., R.C. 4117.01(C) could not successfully seek an election. The nub of such a case would be the question of eligibility for collective bargaining when the right to representation is contested. An attempt to seek representation rights for clearly exempt employees is highly unlikely for such an attempt would be a quixotic adventure.

APPENDIX A

"The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action.... Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case.... As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication ..."

(Citations and footnotes omitted.) Allen v. McCurry (1980) 449 U.S. 90, 94. "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies....' Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.... Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.... 'Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.... To preclude parties from contesting matters that they

have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

"These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.... Preclusion of such nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. And the cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right." (Citations and footnotes omitted.)

Montana v. United States (1979) 440 U.S. 147, 153-154.  
"The doctrine of collateral estoppel is an important element of our legal system. It provides a necessary degree of finality to decisions rendered by our courts. Finality is a desirable objective in administrative proceedings as well.

"We recognize the need for flexibility in applying the doctrine of collateral estoppel to the administrative decision making process; however, because of the need for finality, we hold that ordinarily where an administrative proceeding is of a judicial nature and where the parties have had an adequate opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding...." Superior's Brand v. Lindley (1980) 62 Ohio St. 2d 133, 135.

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The federal jurisdiction has dropped mutuality as a necessary element in collateral estoppel. Allen v. McCurry, supra, 94-95, but Ohio apparently has not, except in special circumstances. See Goodson v. McDonough Power Equipment, Inc. (1983) 2 Ohio St. 3d 193, 200-201:

"... it is apparent that this court has not abandoned the principle of mutuality by a review of cases that have been decided since Hicks. The viability of the general rule of the identity or mutuality of parties requirement is supported by a number of recent cases in which the issue was central to the decisions reached by this court."

\* \* \*

"The application of the concept of collateral estoppel requires an identity of both parties and issues.... In ascertaining whether there is an identity of such parties a court must look behind the nominal parties to the substance of the cause to determine the real parties in interest...."

"The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense. Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.... Collaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural

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and/or factual circumstances presented therein... where there has been a change in the facts since a prior decision, which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in a later action." (Citations and footnotes omitted.)

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