

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ohio Council 8, American Federation of State,  
County and Municipal Employees, AFL-CIO, and Locals 217 and 2544,  
American Federation of State, County and Municipal Employees, AFL-CIO

Employee Organizations,

and

University of Cincinnati,  
Employer,

CASE NUMBER: 92-MED-08-0726

OPINION

MASON, Board Member:

In December, 1991, the American Federation of State, County and Municipal Employees, Ohio Council 8 and Locals 217 and 2544 AFSCME, AFL-CIO (AFSCME/Employee Organization) filed a petition for an "opt-in" election with SERB seeking to represent all non-professional employees of the University of Cincinnati's Family Practice Center (Employer/University) and include them in an existing AFSCME bargaining unit. As a result of the opt-in election, eleven (11) individuals in the classifications of LPN, Medical Assistant and Phlebotomists were added to a unit of 1,400 employees. On May 14, 1992, the Board certified the Union as the exclusive representative.<sup>1</sup>

On August 21, 1992, AFSCME filed a Notice to Negotiate and on October 27, 1992, the University of Cincinnati filed a Motion to Dismiss the Notice. AFSCME sought bargaining for the newly added employees in certain selected subjects, i.e., the contract recognition clause, bulletin boards and stewards representation, hours of work, overtime and

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<sup>1</sup> On August 26, 1992, the Board issued a Corrected Certification of Election Results and of Exclusive Representative, reflecting that the Family Practice Center employees had cast their ballots in a manner such as to have indicated the desire to be included in the pre-existing AFSCME bargaining unit.

compensatory time, uniform and laboratory coats, sick leave, sick leave conversion and vacation, and pay ranges, wages and pay steps.<sup>2</sup> The University, relying on our decision in Kent State University, SERB 92-002 (3-19-92), contended that no bargaining was required because the existing contract terms could be reasonably and sensibly applied to the new unit employees. On November 19, 1992, the Board stayed the implementation of the statutory dispute settlement process in this case and directed an expedited hearing for a ruling on the motion and all other relevant issues.

This case presents a question of first impression for this Board, i.e., the extent to which bargaining is required for employees added to an existing unit following an opt-in election when the existing unit is already covered by a contract. We recently announced in Kent State University, supra, that we would not require that additional terms be bargained for employees added to a unit without an election when the terms of the pre-existing collective bargaining agreement could be "reasonably and sensibly" applied.<sup>3</sup> AFSCME argues that the Kent rule should not apply where, as here, the new employees were added through an election. We agree and reverse the hearing officer's ruling to the contrary.

#### BARGAINING OBLIGATIONS FOLLOWING OPT-IN ELECTIONS

Following the Board-conducted election in this case, three classifications - Medical Assistant, LPN, and Phlebotomist, all employed at the University's Family Practice Center (FPC) - were added to an existing bargaining unit consisting of approximately 1,400 full-time

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<sup>2</sup> Hearing Officer's Recommended Determination (HORD), pgs.6-7.

<sup>3</sup> More specifically, the Kent State University rule holds that accretion of employees into an existing bargaining unit with a collective bargaining agreement in effect will trigger no duty to bargain if the existing collective bargaining agreement could be reasonably and sensibly applied to the newly added classifications. In those instances where substantial terms and conditions of employment are involved and where the provisions of the existing contract cannot be reasonably and sensibly applied to the newly added classifications, then the employer and employee organization must bargain. Limited bargaining is expected under Kent, however, in those situations where not all the contract clauses can reasonably and sensibly apply to the newly added employees.

employees who work at all locations where the University conducts its activities, which include the main campus, the medical center and the College of Medicine with the associated colleges, and three branch campuses.<sup>4</sup> Although the existing bargaining unit included LPNs at other facilities, it did not include LPNs or any other employees at the FPC. Similarly, although the existing unit included the classification "Blood Center Phlebotomist" it did not include the classification "Phlebotomist" and the Medical Assistant classification had never been included in this bargaining unit.<sup>5</sup>

The University unilaterally applied the existing collective bargaining agreement to the opted-in FPC employees, its position being that the agreement could reasonably and sensibly be applied in toto and therefore there was no need to bargain. Thus, the FPC employees holding LPN classifications were placed as LPNs under the contract; the Phlebotomist was placed in a different existing classification under the contract; and the Medical Assistant classification was placed under a newly created classification since that classification did not exist under the current contract. Once the University determined the classifications in which to place the newly added employees they were placed at the step closest to their existing pay rate.<sup>6</sup>

AFSCME's position was that negotiations for specific working conditions were warranted and that even assuming the contract could be applied to the opted-in employees, it was clear that with regard to the subjects at issue, the contract either did not address all the subjects or could not be applied in a reasonable and/or sensible manner.

The case law in other public sector jurisdictions regarding parties' collective bargaining obligations following an opt-in election is extremely limited. However, we find that which is available both pertinent and instructive. Those public sector jurisdictions which have

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<sup>4</sup> HORD; Finding of Fact (F.F.) #1.

<sup>5</sup> AFSCME Post Hearing Brief; pgs. 1-4.

<sup>6</sup> HORD, F.F. #8.

addressed the issue, follow NLRB precedent that bargaining is mandatory after an opt-in election. These jurisdictions have distinguished bargaining obligations following the opt-in and accretion procedures by holding that employees added by accretion are bound by the terms of the existing bargaining agreement, whereas those added by opt-in election are entitled to bargain.<sup>7</sup>

The leading case in the private sector is Federal-Mogul Corporation, 209 NLRB 343, 85 LRRM 1353 (1974). In this case 140 "setup men" were added to an existing 2,000 member production and maintenance unit as a result of an Armour-Globe (opt-in) election in

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<sup>7</sup> Port of Portland v. Municipal Employees, Local 483, 27 Or. App. 479, 556 P.2d 692 (1976), - Citing Federal-Mogul, *infra*, in its decision, the Oregon Court of Appeals held that following the opt-in election, the employer could not unilaterally extend terms of the existing contract to job classifications added to the bargaining unit during the term of the contract. Instead, terms and conditions of new bargaining unit members must be negotiated and until negotiations were concluded, terms and conditions enjoyed by employees in question when they were unrepresented applied; State of Illinois, Department of Central Management Services, 2 PERI ¶ 2001 (Illinois, 1985), - Illinois Labor Relations Board, citing Federal-Mogul, held that following the opt-in election ordered in this case that if the employees voted for representation and thus inclusion in the existing bargaining unit, the employer would be obligated to bargain with the union concerning their wages, hours and working conditions; Howell Educational Secretaries Association v. Howell Public Schools, 130 Mich. App. 546, 343 N.W. 2d 616 (1983), - Michigan Court of Appeals reversed decision of Michigan Employment Relations Commission and following the Federal-Mogul majority held that the employer in that case had not committed an unfair labor practice by refusing to automatically apply the terms of the existing contract to the newly opted-in employees; City of Dubuque v. Public Employment Relations Board, 339 N.W. 2d 827 (1983) - Iowa Supreme Court reversed the decision of the Iowa Public Employment Relations Board holding that it agreed with the reasoning of the majority in Federal-Mogul in that following a self-determination election, bargaining was required. The Court specifically rejected the Board's adaptation of the Federal-Mogul minority opinion which suggested that employees voting in a "Globed" election ordinarily realized they were voting to be governed by an existing contract. The Court stated that it was more reasonable to suppose they only understood they were voting for representation by a union, and possibly for inclusion in an existing unit. The Court further stated that there was nothing in the record before them to indicate that the amended employees had at any point in the election process been informed that they would be bound by a current contract.; see also Florida Police Benevolent Association Inc., 14 FPER 19234 (Florida, 1988); and Westmoreland Intermediate Unit, 12 PPER 12347 (Pennsylvania, 1981).

which the majority of the employees voted to be represented by the exclusive representative as part of the existing unit. The employer notified the union that effective the first of the following month, it would apply the existing contract to the newly added employees. According to the employer, the contract automatically and exclusively covered the employees. The union protested but the employer implemented the announced change. As a result, the setup men lost certain benefits that they had enjoyed before the election, and began receiving the same contractual benefits as unit employees. After implementation of the change, the parties had five bargaining sessions over a period of three months. During these negotiations, the union wanted the pre-election benefits for the added employees restored and the employer responded that the contract automatically and exclusively covered the employees.

On a three-to-two vote, the NLRB concluded that the employer violated its bargaining obligation and committed an unlawful unilateral change. The majority reasoned that extending immediate coverage to globe employees would force both them and their employer into a contract never contemplated by either. This, the majority held, would violate the doctrine of H.K. Porter Co. v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed. 2d 146 (1970), holding that the parties should not be forced into contractual responsibilities they had no opportunity to negotiate. The majority found that no legal or practical justification permitted either party to escape its normal bargaining obligation, based upon a theory that the added employees must be automatically bound to terms of a contract which by its very terms excluded them. Therefore, the NLRB majority held that until the contract expired, the employer was required to bargain on an interim basis for the added employees and that after contract expiration, the parties would be obligated to negotiate a single contract to cover the entire unit including the newly added employees.<sup>8</sup>

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<sup>8</sup> The Federal Mogul dissent argued that when an exclusive representative, as a result of an Armour-Globe election, is certified to represent new employees "as part of" an existing bargaining unit for which it has already negotiated a contract, the provisions of that agreement apply automatically and equally to all employees in the unit, including those who are newly added.

In the public sector, citing Federal-Mogul as legal authority, the Florida Public Employee Relations Commission directed secret ballot elections in Florida Police Benevolent Association Inc., supra, to determine whether nonprofessional employees in a state security-services unit desired inclusion of professional correctional probation officers in that unit, and whether such professional probation officers desired to be represented by the police union in the security-services unit or to remain in the state professional unit. The Commission ruled that upon the association's certification, the State and the association were to bargain over the terms and conditions of employment that would apply to the employees at issue. Distinguishing the bargaining obligations of the parties where positions are accreted into an existing unit versus positions being added to a unit via an "opt-in" election, the Commission held:

Under federal law, positions accreted or clarified into a bargaining unit, rather than included through a representation election, are automatically covered by an existing collective bargaining agreement. Here, the association filed a representation petition rather than a clarification petition, and sought a commission-conducted election. That proceeding raised a question concerning representation and thus did not constitute an accretion. The terms of the existing contract could therefore not be applied to the newly added employees.

Not only are cases from other jurisdictions persuasive, but statutory law in Ohio is clear regarding bargaining obligations following an "election." Specifically, O.R.C. 4117.04 (B) provides, in pertinent part, that:

A public employer shall bargain collectively with an exclusive representative designated under section 4117.05 of the Revised Code for purposes of Chapter 4117. of the Revised Code. (Emphasis added.)

O.R.C. 4117.05 states in pertinent part:

(A) An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by....

(1) Being certified by the state employment relations board when a majority of the voting employees in the unit select the employee organization as their representative in a board-conducted election under section 4117.07 of the Revised Code; (Emphasis added.)

Similar to the above-cited cases in other jurisdictions, the employees in the present matter were added to the existing unit by "voting" themselves into the unit. AFSCME filed a petition for representation seeking a SERB conducted opt-in election, not a petition for amendment or unit clarification which could have led to an accretion.<sup>9</sup> Like SERB's regular petition for representation election, an opt-in petition involves a question of representation. It is distinguished only by the fact that employees voting in the latter will be added to an existing bargaining unit already represented by the exclusive representative, whereas following a

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<sup>9</sup> The hearing officer, concluding that there was no distinction between those situations appropriate for accretions and opt-in elections, decided that the bargaining principles set forth in Kent should apply to an opt-in election and proceeded to analyze which terms of the existing contract could be reasonably and sensibly applied to the new employees. Specifically, the hearing officer held:

"The distinction for purposes of bargaining between adding employees to an existing unit by accretion and adding them by election is an NLRB distinction which does not fit the Ohio Collective Bargaining law...Actually, there is no difference between the accretion in Kent and adding the employees by election in the case at issue....Moreover, there is absolutely no reason why the legal theories and the policy behind the Kent rule apply only to cases of accretion and not to opt-in elections, when the only difference between situations where elections are appropriate and when accretion is appropriate is the number of employees to be added which for accretion under Rule 4117-5-01(G) must be substantially smaller than the number of employees in the existing unit."

There is, however, another important distinction to consider where opt-in elections are at issue. While elections are directed where a question of representation exists (O.R.C. §4117.01(A)(2), SERB's rules specifically require that the addition of employees through petitions for unit clarification or amendment of certification not raise a question of majority representation. See OAC 4117-5-01(E); 4117-5-02(D)(4).

regular representation election, those employees form their own unit. Following certification of the bargaining representative in a regular representation election, the employer and employee organization must bargain a contract for those employees involved. Employees who have exercised the right to voluntarily select a bargaining agent and to join an existing unit already represented by that agent through the opt-in procedure are entitled to no less under Chapter 4117.

Thus, beginning with the case now before us, if a group of employees elects a bargaining representative during the term of an existing bargaining agreement through an opt-in election and votes to be included in a unit already represented by that collective bargaining agreement, they may not invoke automatic coverage under the existing agreement. Likewise, the employer cannot unilaterally extend the terms of an existing contract to job classifications added to the bargaining unit as the result of an opt-in election. Rather, until the existing contract has expired, the parties will be required to bargain on an interim basis for the newly-added employees.<sup>10</sup> During these negotiations, the terms and conditions of employment, or pre-election status, enjoyed by the employees in question when they were unrepresented shall apply. Normal O.R.C. §4117.14 procedures, including the right to develop an alternative dispute resolution procedure, shall apply to the parties' interim negotiations. However, as to the fact-finding vote required under O.R.C. §4117.14 (C)(6) those voting shall include only those members of the employee organization who are in the voting group which was opted-in. Further, opted-in employees who are strike permitted under §4117.14 (D)(2) may do so pursuant to normal statutory procedures. Only those employees in the voting group added by the election will be permitted to strike.

In accordance with O.R.C. §4117.14(B)(1), the parties will be obligated to negotiate a single successor contract to cover the entire unit, including the new employees.

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<sup>10</sup> Procedures outlined at §4117.14 (B)(2) for bargaining an initial contract, shall apply. This is not to say that in every case the parties will need to bargain an entire new agreement. They may mutually agree to extend any or all the terms of the existing agreement to the opted-in employees.

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The stay of implementation of the statutory dispute settlement procedure outlined in Ohio Revised Code Section 4117.14 is lifted and the parties are ordered to bargain regarding the wages, hours, and terms and conditions of employment applicable to the FPC employees. The Motion to Dismiss Notice to Negotiate is denied.

Owens, Chairman and Pottenger, Vice Chairman, concur.

uc.op/writers

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