STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Cincinnati Technical College Chapter of American Association of University Professors,

Employee Organization,

and

Cincinnati Technical College,

Employer.

CASE NUMBER: 93-REP-05-0098

OPINION

MASON, Board Member:

This case comes before the State Employment Relations Board (Board) on exceptions from a Hearing Officer's Recommended Determination (HORD) issued on April 1, 1994. The key issue before the hearing officer was whether the 1989 consent election agreement of the parties to exclude employees with positions created pursuant to separate, privately funded arrangements or special purpose funding grants (e.g., Perkins funds) now estops the Cincinnati Technical College Chapter of American Association of University Professors (AAUP) from adding such employees, specifically the pre-tech advisors and counselors, to the existing bargaining unit over the objection of the employer.

The hearing officer recommended that the Board direct an "opt-in" election, whereby the employees would vote on whether they wish to be represented by AAUP in the existing bargaining unit, or to remain unrepresented. For the reasons stated below, the Board finds that under the facts and the circumstances of this case, no "opt-in" election should be held, and the pre-tech advisors and counselors should not be added to the existing bargaining unit.

I. BACKGROUND

Cincinnati Technical College (CTC) is a two-year, state-supported institution of higher education located in Hamilton County, Ohio. Under Ohio Revised Code (O.R.C.) § 4117.01(B), CTC is a "public employer." Pursuant to a representation election, the Board, on May 11, 1989, certified the AAUP, an employee organization, as the exclusive representative of a bargaining unit of faculty members at CTC. The bargaining unit was defined in a consent election agreement between CTC and AAUP to specifically exclude those employees "with positions created (or to be created in the future) pursuant to the terms of separate, privately-funded arrangements or separate special purpose funding grants (e.g. Perkins funds)." CTC and AAUP were parties to a collective bargaining agreement at the time the petitions in this case were filed and have since negotiated another collective bargaining agreement effective September 7, 1993. The most recent agreement alters no language from the previous agreement that would have a bearing on this matter.[1]

The five individuals at issue herein are employed by CTC and are "public employees" under O.R.C. § 4117.01(C). These individuals are currently excluded from the bargaining unit represented by AAUP. CTC sets salaries for these persons based on a fiscal year beginning on July 1 and ending on June 30 of the following year. CTC also incurs costs for health insurance and other benefits which comprise approximately thirty per cent (30%) of the compensation for such individuals. The work performed and the duties assigned to these five employees are not appreciably different from the work performed by counselors and pre-tech advisors already included in the AAUP bargaining unit.[2]

CTC annually receives funds allocated by the State of Ohio, Department of Education, known as "Perkins funds." These funds are derived from federal funds made available to the State of Ohio pursuant to the terms of the Carl D. Perkins Vocational Educational Act of

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[1]Stipulation (Stip.) Nos. 1-7 and HORD, footnote 2.

[2]Stip. Nos. 8-10; Second set of Stipulations No. 1.

1984. In 1989, when the parties negotiated the bargaining unit for their consent election agreement, the parties ultimately drafted their exclusionary language to reflect a distinction between "hard" and "soft" money employees. "Hard" money employees received their compensation from the relatively predictable source of the College's General Fund. "Soft" money employees received their compensation from separate, privately funded arrangements or special purpose funding grants, such as Perkins funds. The parties agreed to exclude "soft" money employees because their compensation was contingent upon the continuity of the grants, thereby making it difficult for the parties to bargain over these employees' salaries and other forms of compensation.[3]

In 1989 there were four "soft" money (Perkins funds) positions. At the time of the consent election, AAUP believed that these four positions had been created in 1986 and had been funded 100% by Perkins funds, except for fringe benefits and indirect costs associated with the positions. Perkins funds did account for approximately 85% of the salaries and fringe benefits attributable to the four positions in 1989. In March of 1990, a fifth "soft" money position was created with a three-year grant from the Department of Health and Human Services. From 1989 to 1993, the percentage of funding attributable to Perkins funds decreased. From 1993 to 1994, the percentage of money attributable to Perkins funds increased approximately ten per cent (10%). For the 1993-1994 academic school year, the stipulated compensation for the five individuals in question totaled $246,787.00. The amount of Perkins funds available for that same time period was approximately $60,000.00, nearly 24% of the compensation for the five individuals in question.[4]

In June of 1992, after reapplying for continued funding, CTC received notification that the grant that enabled the fifth "soft" money position to be created would not be approved. The college subsequently decided to retain one of the positions originally created with the grant and to eliminate the other. The position retained was then funded partially by Perkins

[3]Stip. No. 13; Finding of Fact (F.F.) No. 2.

[4]Stip. Nos. 12 and 13; F.F. Nos. 3-6.

funds and partially by the CTC's General Fund.[5]

On May 24, 1993, the AAUP filed with the Board an amended Petition for Representation Election, an amended Petition for Amendment of Certification, and an amended Petition for Clarification of Bargaining Unit. The AAUP sought to include, either by accretion or by "opt-in" election, ten employees of CTC known as automotive industry trainers, pre-tech advisors, or counselors. After further discussions, and through stipulation, the AAUP narrowed the number of employees it sought to add to the existing bargaining unit to five, by agreeing not to seek the automotive industry trainers. AAUP argues that since the original Board certification in 1989, circumstances have substantially changed such that these five positions should now be added to the certified unit. CTC opposed all three petitions, arguing that because the Board's certification was premised on a consent election agreement and no relevant change has occurred, there is no justification for altering the parties' prior agreement.

II. ANALYSIS

A. ISSUE TO BE DECIDED

The question before the Board is whether and under what circumstances a bargaining unit agreed upon by the parties in a consent election agreement can be altered over the objections of one of the parties.

O.R.C. § 4117.07 addresses election procedures and states in relevant part:

> (A) When a petition is filed, in accordance with rules prescribed by the state employment relations board:
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> > (1) . . . 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. 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. . . .

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[5]F.F. No. 7.

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Ohio Administrative Code (O.A.C.) Rule 4117-5-03 discusses consent elections and states in relevant part:

> (A) At any time subsequent to the filing of a petition for election or decertification, the parties may enter into and file with the board a consent election agreement. The agreement shall include a waiver of hearing, a description of the unit, the proposed date(s), time(s) and place(s) of the election . . . .
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> (B) If the board approves the consent election agreement, the board shall conduct an election. A consent election shall be conducted in the same manner as an election directed as a result of a hearing . . . .

Thus, when a petition for election is filed under O.R.C. § 4117.07 and the Board finds that there is a reasonable cause to believe that a question of representation exists, a hearing must be held. The hearing process can be a lengthy procedure which consumes the parties' time and resources. Due process rights necessitate a hearing in certain situations. However, where the parties resolve their differences, they may choose to waive the hearing and move for speedy elections. Consent election agreements are the tools by which parties waive the hearings, demonstrate the resolution of their disputes, which usually focus upon the unit structure, and proceed to an election. The integrity of consent election agreements should be strongly protected inasmuch as their function is a tremendously important one in promoting orderly and constructive labor relations.

In most cases, the process of signing a consent election agreement involves negotiations on the description of the bargaining unit. The bargaining unit description is the most important item and the key issue in consent election agreements. Thus, at least in regard to the description of the bargaining unit, a signed consent election agreement is entered into by the parties after considerable thought and a substantial amount of give and take.

B. COMPETING POLICIES

The answer to the question before us can be found by maintaining parity between two

important but competing policies. We look first to the policy that the structure of bargaining units should not be unchangeable. In *In re State of Ohio Dept. of Corrections*, SERB 92-009 (6-25-92) the Board reiterated its position stated in *In re State of Ohio*, SERB 87-030 (12-17-87) and said:

> As we have recently stressed, the ability to change the structure of bargaining units is extremely important. Public employers must be able to respond to never-ending changes in government structure where old classifications are abolished and new ones created, and where there is always a need to accrete into units to carve from existing units or to combine two units into one. The specific structure of a bargaining unit cannot be etched in stone.

Thus, the Board is cognizant that some flexibility in the structure of bargaining units is essential and that changes in bargaining units are inevitable and necessary.

Adhering to the letter of an agreement, which is the cornerstone of constructive labor relations, stands on the other side of this match. Good faith negotiations mandate that agreements be kept. Moreover, the integrity of the consent election process is at stake if parties are not forced to stick to their deal. Lack of trust in consent election agreements will cause both employers and unions to spend a considerable amount of time and money in litigating the structure of every bargaining unit. As a result, the employees' right to choose whether to be represented or not will be greatly impaired.

To summarize, some flexibility in changing bargaining unit structures is necessary, especially in the public sector where classifications are created, modified and abolished regularly. At the same time it is essential to the consent election process to ensure that parties who negotiate and sign an agreement will not be allowed to renege on their agreement.

C. STANDARD TO APPLY

Weighing these competing policies as well as the equities involved, we establish the following standard: where parties negotiate and sign a consent election agreement with

specific exclusions, the Board will allow a change in the specific terms over the objections of one party only (1) when a substantial change occurred in the factual underpinnings of the parties' agreement after the signing of the agreement or (2) when traditional equity considerations exist which would relieve a party from a contract term, e.g., in situations of fraud and initial mistake of fact.[6]

Before applying this standard to the case at hand, a few words are warranted in regard to the application of *In re Columbus Bd of Ed*, SERB 86-051 (12-11-86) to the situation at issue here, which was raised by both parties. The eight factors listed in *Columbus Bd of Ed* to be considered in determining whether an accretion should be permitted do not differ significantly from the factors listed in O.R.C. § 4117.06 to be considered in determining whether a petitioned-for unit is an appropriate unit. The factors in O.R.C. § 4117.06, as well as in *Columbus Bd of Ed*, are criteria to ensure that an appropriate unit is created. However, the appropriateness criteria constitute just one limited area for unit determinations. A particular combination of employees may constitute an appropriate mixture under O.R.C. § 4117.06 and *Columbus Bd of Ed*, but that does not automatically mean that creation of a new unit is warranted. The Board still must examine a variety of other factors, including, but not limited to, the following: if some of those employees are already included in another unit, if there is a contract bar, if the petition filed is defective, or if adding to or carving from a deemed-certified unit is involved. Thus, while determining the kind of mixture appropriate under O.R.C. § 4117.06 and *Columbus Bd of Ed* is no doubt a key issue in the determination of bargaining units, it is not the only issue to examine. When an existing unit was negotiated and agreed upon in a consent election agreement, a threshold issue to be examined before determining the appropriateness of the new petitioned-for mixture is whether the requested change in the bargaining unit is a clear violation of the language of the agreement and, if it

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[6]*In re State of Ohio Dept. of Corrections*, SERB 92-009 (6-25-92); *East Hartford Bd of Ed*, NPER 3-07-12013 (Connecticut State Bd of Labor Relations, 1981); *City of St. Augustine*, NPER 4-10-13157 (Florida PERC, 1982); *City of Brockton*, NPER 2-22-11051 (Mass. LRC, 1980); *State of Illinois (Depts. of Transportation and Central Management Services*, PER 1-2011 (1985); *Barnegat Township Board of Education*, 1115029 PER (New Jersey Edition) 2/27/84.

is, whether it should be allowed under the specific circumstances.

D. APPLICATION OF THE STANDARD

The parties in this case negotiated and signed a consent election agreement with the following unit description:

> Included: All instructional personnel, counselors and admissions personnel listed under the Degree Based Faculty Salary Schedule except as excluded by the following paragraph.
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> Excluded: All other personnel, and any personnel listed on the Degree-Based Faculty Schedule <u>with positions created (or to be created in the future) pursuant to the terms of separate privately funded arrangements or separate special purpose funding grants (e.g., "Perkins funds").</u> Such presently existing positions include D.E.Learn. Spec. (SP. Grant), Instructor (Special AS), Fac. Adv. Counselor-DE, Counselor (SP. Grant), Co-op Coordinator/Advisor. A total of nine incumbents currently hold these positions out of a total of 140 employees included in the bargaining unit.

(Emphasis added).

This unit was certified by the Board. Both the specific language of the unit description as well as the prior copies of consent election agreements signed by the parties with attached stipulations show that the parties' intention was to exclude Perkins funds positions from the bargaining unit. The exclusion of Perkins funds positions from the bargaining unit was understood and was agreed upon by the parties. Hence, since no fraud or initial mistake of fact is involved, there is no reason to relieve the employee organization from the agreement to exclude the Perkins funds positions from the unit under the second part of the standard. The question left to determine is whether a substantial change occurred in the factual underpinnings of the parties' agreement after its signing which may justify the inclusion of the five Perkins funds positions in the bargaining unit even though the consent election agreement specifically excludes such employees.

At the time the consent election agreement was negotiated and signed in 1989, Perkins funds accounted for approximately 85% of the salaries and fringe benefits attributable to the four existing positions. In 1990, a fifth "soft" money position was created. From 1989 to 1993, the percentage of funding attributable to Perkins funds first decreased and later increased. For the 1993-1994 academic school year, the amount of Perkins funds available was approximately 24% of the compensation for the five positions in question. We do not find that the change from 85% contribution to 24% is a substantial change in the factual underpinnings of the parties' agreement to warrant ignoring an agreed term in the consent election agreement. The parties' apparent intention was to exclude "soft" money positions because of the insecure and unstable nature of these sources of money. The fluctuation in the amount of "soft" money is as much a problem as the amount of money itself. The factual underpinning of the parties' agreement was a recognized difference in funding sources, one, more stable and controlled by CTC from the general fund, and the other, more insecure and not under the CTC's control from "special grants". The factual underpinning of the agreement in this case was not the specific amount of contribution from the Perkins funds but the existing difference in the funding sources. Hence, while the amount in contribution from the special funds has clearly changed, the factual underpinnings of the parties' agreement have not changed. The excluded employees are still funded by Perkins funds as was the case when the parties entered the consent election agreement. The instability of "soft" money by the nature of its source and its unpredictable fluctuation is still an existing factor as it was at the time of the signing of the consent election agreement. Thus, we believe that in the case before us, no substantial change occurred in the factual underpinnings of the parties' agreement.

Since no substantial change occurred in the factual underpinnings of the parties' consent election agreement nor was there any claim of fraud or mistake, the consent election agreement negotiated and signed by the parties should stand intact. The parties of course

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may modify the unit by agreement and then present it to the Board for approval.[7] It is important to point out that the standard set in this decision deals only with those consent election agreements where the petitioned-for change involves exclusions which are very specific either in regard to a certain type of position or to a condition or situation specified in the agreement.

III. CONCLUSION

The question presented in this matter is whether and under what circumstances a bargaining unit agreed upon by the parties in a consent election agreement can be altered over the objections of one of the parties. The parity between flexibility and stability in the structure of bargaining units must be maintained while protecting the integrity of the consent election process. In order to achieve this purpose, we announce the standard to be followed: where parties negotiate and sign a consent election agreement with specific exclusions, the Board will allow a change in the specific terms of a consent election agreement over the objections of one party only (1) when a substantial change occurred in the factual underpinnings of the parties' agreement after the signing of the agreement or (2) when traditional equity considerations exist which would relieve a party from a contract term, e.g., in situations of fraud and initial mistake of fact. We find in the case before us that no substantial change occurred in the factual underpinnings of the parties' agreement nor was there a claim of fraud or mistake. Hence, the bargaining unit defined in the consent election agreement negotiated and signed by the parties should remain intact and the petitions filed by the AAUP are dismissed.

POHLER, Chairman, and POTTENGER, Vice Chairman, concur.

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[7]This ruling does not prohibit the employees at issue from exercising any statutory right they may have under O.R.C. Chapter 4117 to be represented by the AAUP in a separate unit.

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