

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

University of Akron Faculty and Professional Association,  
Employee Organization,

and

University of Akron,  
Employer.

CASE NUMBER: 93-REP-10-0210

OPINION

POTTENGER, Vice Chairman:

This representation case comes before the State Employment Relations Board ("SERB") on exception filed by the University of Akron ("Employer") to the Hearing Officer's Recommended Determination issued on February 21, 1995. There are two issues in this case. The first issue is whether it is appropriate to place contract professionals in the Academic Advising, Counseling and Testing, and Developmental Programs in a collective bargaining unit with regular full-time faculty and librarians. The second issue is whether faculty who have elected to take early retirement pursuant to the Employer's Early Retirement Incentive Program ("ERIP") are eligible to vote in any SERB-conducted election which may result from this petition. For the reasons below, we find the contract professionals should be excluded from this bargaining unit and the faculty who have announced their intention to take early retirement are eligible to vote in an election.

The Employer argues in its exceptions two additional points: (1) The showing of interest in this bargaining unit should be re-examined, excluding the contract professionals, to see if the requisite thirty per cent showing of interest exists; and (2) The showing of interest in this bargaining unit should be re-examined, excluding the faculty who have left the Employer since the petition was filed, to see if the requisite thirty per cent showing of interest exists. For the reasons below, we find the showing of interest in this bargaining unit should

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be re-examined, excluding only the contract professionals, to see if the requisite thirty per cent showing of interest exists and if it does exist, we direct that an election be held as soon as administratively feasible.

## I. BACKGROUND

On October 8, 1993, the University of Akron Faculty & Professional Association ("UAFPA") filed with SERB a Petition For Representation Election pursuant to Ohio Revised Code ("O.R.C.") § 4117.07. The UAFPA was seeking a bargaining unit of approximately 700 employees, comprised of all full-time faculty (except faculty at the College of Law), librarians, and certain contract professionals employed by the University of Akron at either its main campus or its Wayne College campus. The Employer opposed not only the inclusion of the contract professionals, but also the inclusion of certain faculty who had announced their intention to retire pursuant to an ERIP.

By directive issued on February 3, 1994, SERB directed this matter to hearing to determine an appropriate bargaining unit. A hearing was conducted on April 15, 1994. On February 21, 1995, the Hearing Officer's Recommended Determination was issued. The Employer filed its exception to the H.O.R.D. on March 6, 1995. The UAFPA filed its response/cross-exception to the Employer's exception.

## II. DISCUSSION

### A. The Appropriateness of the UAFPA's Proposed Unit

The primary issue in this case is whether the UAFPA's proposed bargaining unit is appropriate for collective bargaining purposes. The UAFPA argues the factors enumerated in O.R.C. § 4117.06(B) support the inclusion of certain contract professionals in what is otherwise basically a faculty unit. The Employer argues those same factors justify limiting the unit to only regular faculty.

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O.R.C. § 4117.06(B) provides:

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 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.

O.R.C. § 4117.06(C) provides that SERB "may determine a unit to be the appropriate unit in a particular case, even though some other unit might also be appropriate." A public employer seeking a determination by SERB that a bargaining unit proposed by an employee organization is not an appropriate unit bears the burden of showing by substantial evidence that the proposed unit is not an appropriate unit. *State ex rel. Glass, Molders, Pottery, Plastics & Allied Workers Internatl. Union, Local 333, AFL-CIO, CLC v. State Emp. Relations Bd.* (1994), 70 Ohio St.3d 252, 1994 SERB 4-64.

Evidence regarding the desires of the employees is not compelling here. Certain Employer witnesses testified that they did not want a unit which included contract professionals, and in response, two of the UAFPA's witnesses testified both to a personal desire to be in the unit and to know of others who shared that desire.

The effect of over-fragmentation was not directly addressed, and evidence on this issue was not developed, at hearing. SERB will not make a decision on the possibility of over-fragmentation based on pure conjecture. *In re Northwest Local School Dist Bd of Ed*, SERB 84-007 (10-25-84).

Consideration of the history of collective bargaining is likewise not particularly helpful. Both parties acknowledge there is no history of collective bargaining here.<sup>1</sup>

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<sup>1</sup>The Employer argues, and the UAFPA acknowledges, that these types of professionals do not appear to be included in faculty bargaining units at other Ohio universities. Assuming this is true, however, this fact is not dispositive.

SERB must decide whether the unit sought is composed of employees who will share similar collective bargaining objectives, or a so-called "community of interest." The primary factor utilized in determining whether a group of employees is united by a community of interest is a substantial commonality of, or a mutual interest in, wages, hours and working conditions. Other factors include a similarity in job functions, geographic proximity, common supervision, the degree of employee interchange, operational integration and bargaining history.<sup>2</sup> Since a number of the factors used to determine unit appropriateness under O.R.C. § 4117.06 mirror the factors traditionally utilized in assessing community of interest, the community of interest factor figures prominently in the Ohio statutory scheme. Also to be remembered are two policy considerations underlying the statute. A public employer should not be saddled with so many individual units that it cannot effectively govern, and unit size should be consistent with meaningful and effective representation of the employees involved.

There are two broad categories of employees at issue in this case: regular faculty and contract professionals. Regular faculty are teaching personnel appointed to one of the following ranks in ascending order: (1) Instructors, (2) Assistant Professors, (3) Associate Professors, and (4) Professors. Contract professionals are non-teaching professional personnel. Contract professionals may be appointed as "instructional" professional staff, if their responsibilities involve instructional or academic support functions, or as "administrative" professional staff, if their responsibilities are business or administrative in nature. Any contract professional appointed before July 1, 1986 is designated a "Member of the General Faculty" as long as that employee continues in his or her position. Contract professionals do not hold regular faculty rank. By this petition, UAFPA seeks to represent regular faculty and 22 of approximately 285 contract professionals employed by the Employer. Those 22 contract professionals fall into three units: (1) Academic Advisement Center, (2) Counseling & Testing, and (3) Developmental Programs. Those three units generally provide instructional support, and the positions in those units have been designated as "instructional" professional

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<sup>2</sup>*In re Stark County Bd of Mental Retardation & Developmental Disabilities*, SERB 93-018 (12-16-93); *NLRB v. J.C. Penney Co., Inc.*, 559 F.2d 373, 96 LRRM 2391 (5th Cir. 1977); *Purnell's Pride, Inc.*, 252 NLRB No. 18, 105 LRRM 1257 (1980).

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staff. There are other "instructional" professionals employed by the Employer, some of whom are directly involved in the instructional process, who the UAFPA does not seek to represent.<sup>3</sup>

Faculty pursue grievances through a procedure administered by the Faculty Rights and Responsibilities Committee; contract professionals are subject to a separate grievance procedure administered by the Contract Professional Grievance Committee whose authority is more limited in scope. Contract professionals are not eligible to sit on the Faculty Advisory Committee to the Chancellor of the Ohio Board of Regents or to vote for the University of Akron's representative on that committee. The Faculty Handbook consists of the Employer's formal policies and regulations; it has separate sections covering the faculty (Faculty Manual) and the contract professionals (Contract Professional Information).<sup>4</sup>

Faculty, except Instructors, are normally appointed to a nine-month academic year contract and salary. Faculty members are subject to either a five or six year probationary period, depending on the college, after which, if they have not achieved tenure, they are given a terminal contract. Instructors are appointed annually, and may have an indefinite number of annual appointments. Nearly all contract professionals are appointed annually pursuant to Certificates of Appointment. These certificates set forth the contract professional's period of appointment (usually 12 months) and rate of pay, and incorporate by reference other terms and conditions of employment embodied in the Contract Professional Information section of the Faculty Handbook and in the general provisions of the Faculty Manual. Contract professionals may be reappointed indefinitely. Contract professionals and Instructors, as opposed to other regular faculty, are ineligible for tenure. A contract professional may be terminated for cause at any time upon the recommendation of the president and approval by the Board of Trustees. A contract professional or an Instructor may enter the "tenure-track" by becoming an Assistant Professor.<sup>5</sup>

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<sup>3</sup>Findings of Fact ("F.F.") Nos. 1 and 2.

<sup>4</sup>F.F. Nos. 7, 8, 11, and 12.

<sup>5</sup>F.F. Nos. 13, 14, and 15.

The Employer has different notice provisions when non-reappointing contract professionals than when non-reappointing regular faculty. If a faculty member on a probationary contract is given notice that he or she is not to be retained, a multi-step review follows, culminating in a substantive review of the non-retention decision by the Faculty Rights and Responsibilities Committee. If a contract professional is given notice of non-renewal, the review is limited to whether the appropriate procedures were followed to give adequate notice of the non-renewal.

During their probationary periods, faculty are evaluated annually through a peer review process by other faculty members sitting on Retention, Tenure and Promotion committees. After they have received tenure, faculty either continue to be evaluated by the peer review process, or, in many departments, are evaluated by the Department Head and Dean. Contract professionals are evaluated annually by their respective supervisors using a standard Performance Appraisal Record form. Neither faculty nor contract professionals have any say in the employment decisions affecting the other. There is no formal promotional process for contract professionals akin to that existing for regular, full-time faculty. Faculty vote to choose their department heads; contract professionals have no voice in choosing their supervisors.<sup>6</sup>

Contract professionals on annual appointments accrue 22 days of vacation per year. Faculty receive all academic vacations (i.e., all days classes are not in session) as vacation days. Contract professionals are not entitled to travel budgets. By statute in Ohio, only faculty are entitled to paid sabbatical leave; a contract professional may take an unpaid leave of absence for career development purposes if approved by the Board of Trustees.<sup>7</sup>

The "workload measure" for contract professionals is a 40-hour work week. Work hours for contract professionals are established by their respective supervisors, and are

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<sup>6</sup>F.F. Nos. 18, 19, and 20.

<sup>7</sup>F.F. Nos. 21, 26, and 28.

generally from 8:00 a.m. to 5:00 p.m., Monday through Friday. The "workload measure" for faculty is the teaching, or equivalent, of 24 semester credits per year. Faculty have more flexible work hours than contract professionals, faculty being required only to be on campus for scheduled classes, office hours and certain other specified activities. Faculty set their own office hours.<sup>8</sup>

For the 1993-94 academic year, the salary range for the contract professionals sought here was \$24,189 to \$39,254 on a 12-month basis. The average salary for the contract professionals sought here was \$30,143 on a 12-month basis. For the 1993-94 academic year, the salary range for faculty on the Akron campus was \$28,293 to \$107,406 on a 9-month basis. The average salary for faculty on the Akron campus was \$47,898 on a 9-month basis. The average salary for Instructors on the Akron campus was \$33,651 on a 9-month basis. Salary increases for contract professionals come from a "total salary increase allocation" determined each year by the University's president for the next fiscal year. Individual salary increases are based on performance.<sup>9</sup>

Faculty do not have position descriptions per se. The basic job functions for nonsupervisory faculty are teaching, research and service. While a contract professional's position description might reference research or service, research and public service are not integral elements of a contract professional's employment as contrasted to a faculty member's employment. Two of the contract professionals sought here have teaching duties as part of their job descriptions. The other twenty contract professionals sought here do not have any teaching duties as contract professionals. Certain of the contract professionals sought here are also employed by the University as part-time faculty on supplemental contracts. Teaching done pursuant to these supplemental contracts is not part of a contract professional's regular duties. There are a number of other contract professionals, not sought here, who also teach as part-time faculty. None of the contract professionals sought here work in any of the same

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<sup>8</sup>F.F. No. 29.

<sup>9</sup>F.F. Nos. 31, 32, and 33.

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departments as the full-time faculty sought here.<sup>10</sup>

Most of the evidence and argument presented in this case goes to the community of interest factor and to the related factors of wages, hours, and other working conditions. While there are indisputably similarities between the contract professionals and faculty, there are numerous significant differences. These differences, on balance, militate against including the contract professionals with the faculty.

The Illinois Educational Labor Relations Board ("Illinois Board") faced virtually identical facts in *Board of Regents of State of Illinois*, 2 PERI ¶1069 (IL ELRB 05/30/86). In that case, one of the primary issues before the Illinois Board was whether certain administrative professionals, holding academic support roles, belonged in a faculty unit.<sup>11</sup> The Illinois Board, considering statutory criteria very similar to O.R.C. § 4117.06(B),<sup>12</sup> found the administrative professionals should be excluded from the faculty bargaining unit.

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<sup>10</sup>F.F. Nos. 35, 39, 40, and 42.

<sup>11</sup>Those administrative professionals included an Academic Advisor, an Academic Advisement Coordinator, an Admissions Counselor, certain student counselors, a Counseling and Student Development Counseling Psychologist, a Counseling and Student Development Clinical Psychologist, Learning Center Faculty Assistants, and numerous coordinators, including a Special Projects Peer Tutoring Coordinator and a Coordinator of Career Services and Placement. The duties performed by Learning Center Faculty Assistants appear functionally equivalent to duties performed by contract professionals in Developmental Programs. Learning Center (lab) Faculty Assistants' duties include providing specialized writing and reading assistance to students, and conducting workshops in study skills.

<sup>12</sup>Section 7(a) of the Illinois Educational Labor Relations Act provides:

In determining the appropriateness of a unit, the Board shall decide in each case, in order to ensure public employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as historical pattern of recognition, community of interest, including employee skills and functions, degree of functional integration, interchangeability and contact among employees; common supervision, wages, hours and other working conditions of the employees involved, and the desires of the employees.

The factors the Illinois Board relied upon in making its determination read like a recitation of the facts of this case. The Illinois Board wrote:

Basic differences exist between the terms and conditions of employment of the Board of Regents' faculty and administrative professional employees when the two groups are considered as a whole. Administrative professional employees, who do not also hold faculty rank, are not eligible for tenure. They work on an annually renewable contract. Administrative professionals are generally not subject to peer review, but are evaluated by their superior and on a different basis than are faculty. Faculty members and administrative professionals are represented by different councils or senates for the purpose of university governance. While administrative professionals work a forty-hour week with a specific starting and ending time each day, faculty are generally required to teach a certain number of credit hours and to keep commensurate office hours. Salary ranges for administrative professionals are generally lower than those of faculty and are determined through a different process. Administrative professionals are generally not interchangeable with faculty. In general, faculty members have nine-month contracts while administrative professionals have twelve-month contracts. Administrative professionals, unlike most faculty, accrue vacation time. Administrative professionals are subject to a separate grievance procedure. . . . Although there may be some overlap between the job duties of some administrative professional employees and faculty members, the overall job duties of the positions are quite different. *Id.* at 2 PERI ¶1069, pg. VII-197.

Given these differences, the Illinois Board concluded the "partial similarities" which existed were insufficient to establish a community of interest between the two groups as a whole.<sup>13</sup> Other public sector jurisdictions have ruled similarly.

The Michigan Court of Appeals has held that the Michigan Employment Relations Commission ("Michigan ERC") erred when it included academic advisors and counselors at Eastern Michigan University in a unit otherwise comprised of teaching faculty and librarians

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<sup>13</sup>The Illinois Board's position was subsequently reaffirmed in *Southern Illinois University Board of Trustees*, 5 PERI ¶1197 (IL ELRB 9/30/88). See also, *Board of Community College District No. 524*, 2 PERI ¶1104 (IL ELRB 08/20/86). Consistent with its reluctance to initially create a bargaining unit consisting of both administrative professionals and faculty, and for similar reasons, the Illinois Board has also refused to allow a merger of a previously existing faculty bargaining unit with a previously existing professional/technical bargaining unit. *Black Hawk College*, 9 PERI ¶1045 (IL ELRB 01/28/93).

with faculty rank. *Board of Regents of Eastern Michigan University v. Eastern Michigan University Chapter American Association of University Professors*, 84 LRRM 2079 (1973). The Court, recognizing the objective under Michigan law is the largest possible unit consistent with a community of interest, found the Michigan ERC's conclusion as to appropriate bargaining unit was irreconcilable with its explicit agreement with its trial examiner's findings of fact. The trial examiner had found the counselors and advisors had "duties . . . more dissimilar than similar to the duties and working conditions of the teaching faculty," and their duties were "clearly auxiliary to classroom teaching and these employees do not share to the same extent the policymaking type of functions accorded to the teaching faculty." *Id.* at 2079-2080. The Court concluded the Michigan ERC's reliance on the "synergistic efforts aimed at the education of university students" to include the disputed categories in the bargaining units was "much too general to support the requirement of community of interest for bargaining purposes." *Id.* at 2080.

The California Public Employment Relations Board ("California PERB") established four bargaining units for the California State University and Colleges (CSUC): Unit 1-Physicians, Unit 2-Health Care Support, Unit 3-Faculty, and Unit 4-Academic Support. *State of California*, 5 PERC ¶12120 (CA PERB 09/22/81). The California PERB had to consider many of the same statutory criteria that SERB is bound to consider, including: (1) the internal and occupational community of interest among the employees,<sup>14</sup> (2) the relationship of the unit to the organizational patterns of the employer, (3) the effect of the proposed unit on efficient operations of the employer and on the objective of providing employees with the right to effective representation, and (4) the fragmentation of employee groups or any proliferation of units. The Faculty Unit included all instructional faculty, tenured and non-tenured, including coaches and librarians. The Academic Support Unit included employees occupying a variety of jobs in programs providing a multitude of student services including career placement, psychological counseling, testing, and admissions. The union urged that all professional

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<sup>14</sup>This includes the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which employees have common skills, working conditions, job duties or similar educational or training requirements, and common supervision.

employees of CSUC be placed into a single unit, noting certain of the "academic support" employees share working conditions with faculty. The California PERB rejected this argument, stating:

Although SAO ["Student Affairs Officers"] teach courses on an intermittent basis, are eligible to serve on the academic senate, occasionally serve on graduate students' thesis committees, and have received research grants from the university, these factors do not persuade us to discount the strong community of interest all academic support personnel have among themselves as demonstrated by the common goals of their occupations. What teaching functions the SAO perform are strictly voluntary and incidental to the primary purpose of their job." *Id.* at 5 PERC ¶12120, pg. 572.

SERB has not previously addressed this factual scenario. The UAFPA cites four NLRB decisions to support the proposition that contract professionals should be included in a faculty bargaining unit as closely allied professionals.<sup>15</sup> For several reasons, these cases are not determinative in this case. First and foremost, the cases cited generally turn on whether the non-faculty employees meet the statutory criteria for "professional employee" under Section 2(12) of the Labor Management Relations Act of 1947 ("LMRA"). In the case at hand, the Employer has not contested the contract professionals' "professional status" under O.R.C. § 4117.01(I). Second, O.R.C. Chapter 4117 essentially accords public institution faculty a special status not accorded private institution faculty by incorporating provisions unique to faculty. Specifically, O.R.C. Chapter 4117, unlike the LMRA, recognizes the unique status of faculty in special rules pertaining to supervisory and managerial status in O.R.C. § 4117.01(F)(3) and (K), and by excluding part-time faculty from the definition of "public employee" in O.R.C. § 4117.01(C)(14). Third, even when read in the light most favorable to the UAFPA, two of the cases cited only support its position in part. For example, in *Long Island University*, the NLRB included guidance counselors with faculty in a unit of professionals, but excluded admissions counselors and academic counselors, reasoning that

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<sup>15</sup>*Long Island University*, 189 NLRB No. 109, 77 LRRM 1001 (1971) (guidance counselors included); *Manhattan College*, 195 NLRB No. 23, 79 LRRM 1253 (1972) (librarians and non-teaching athletic coaches included); *New York University*, 205 NLRB No. 16, 83 LRRM 1549 (1973) (librarians included); *Northeastern University*, 218 NLRB No. 40, 89 LRRM 1862 (1975) (counselors at counseling and testing center included).

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admissions counselors and academic counselors, who knew about curriculum and services, are not required to possess knowledge of the advanced type and are not performing the intellectual and varied tasks sufficiently related to a discipline or field of science to render them "professional" employees. Similarly, in *Northeastern University*, the NLRB included counselors at the university's counseling and testing center in a "professional" bargaining unit of faculty, but excluded academic administrators and academic counselors, finding specifically that the latter did not share a sufficient community of interest with teaching faculty.

Efficiency of operations and administrative structure are interrelated. The Employer maintains that separating the contract professionals sought here from the larger "organizational subcategories" to which they belong would ultimately subject them to different working conditions than their peers and potentially lead to morale problems. The Employer also maintains that because current working conditions are so disparate, it would essentially be required to bargain over two separate packages within one unit or to create additional layers of organizational complexity. The UAFPA counters that the Employer raised no problems which could not be solved by additional planning and budgeting. While it is probably true that the Employer could, if forced, alter funding formulas and/or make other administrative changes, the UAFPA's argument misses the mark. While SERB has noted an employer's "convenience" is not a statutorily enumerated factor, O.R.C. Chapter 4117 does not require an employer to totally reconfigure its operations to accommodate any unit proposed by an employee organization. The Employer has clearly demonstrated a strong and historic division between the broad categories of contract professionals and faculty, as evidenced by separate reporting lines, different salary structures, and so forth. Thus, these two factors weigh toward finding the UAFPA's proposed unit inappropriate.

"The touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment, to warrant their inclusion in a single unit to choose a bargaining agent." *Uyeda v. Brooks*, 365 F.2d 326, 329, 62 LRRM 2831, 2833 (6th Cir. 1966). On balance, the statutory factors of employee desires, bargaining history, and the effect of over-fragmentation do not weigh either for or against the petitioned-for unit, while the statutory factors of community of interest, wages, hours and

other terms and conditions of employment, administrative structure and efficiency of operations all weigh against approving the proposed unit. There is no apparent reason to segregate these 22 contract professionals from approximately 285 similarly situated colleagues and to place them in a bargaining unit with employees who are not similarly situated. Given the numerous, fundamental differences between the contract professionals and the faculty, the UAFFPA's apparently arbitrary selection and placement of these employees can not be approved.

**B. The ERIP Faculty**

The Employer argues that a unit including the ERIP faculty is inappropriate. The Employer cites the irrevocable nature of the early retirement decision, the waiver of continued employment or reemployment rights, and the mandate of O.R.C. § 4117.10(A) that retirement laws for public employees prevail over conflicting collective bargaining provisions as reasons for exclusion. The Employer's argument is not persuasive.

While an argument can be made that this issue is moot since the 44 employees at issue retired as of June 30, 1994, the Employer's ERIP has two additional retirement "windows," the next being from July 1, 1995 through June 30, 1996.<sup>16</sup> Thus, if SERB does not decide this issue on the merits, it becomes "capable of repetition, yet evading review." Second, the Employer characterizes this issue as a bargaining unit issue when it should, more

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<sup>16</sup>The Employer established an Early Retirement Incentive Plan effective through June 30, 1998. The program is available to eligible employees who elect to retire through STRS or SERS from July 1, 1993 through June 30 1994; July 1, 1995 through June 30, 1996; and July 1, 1997 through June 30, 1998. If an employee is declared eligible to participate in the plan, the employee's Declaration of Intent to Participate is irrevocable. No employee who has elected to retire under the ERIP program is eligible for the University's "Limited Teaching for Full-Time Teaching Faculty who Retire" or "Part-time Employment for Full-Time Non-Teaching Personnel who Retire" opportunities. However, in cases of clear and demonstrated need, participants in the ERIP program may be employed on a part-time basis not to exceed permissible limits of the STRS or SERS systems. Until their retirement becomes effective, faculty electing early retirement continue to work under the same conditions, and are governed by the same policies, that apply generally to faculty. (F.F. No. 44).

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appropriately, be viewed as an election eligibility issue.

The NLRB and other jurisdictions have consistently held that an employee with an expectation of retirement or termination of employment, who is otherwise properly included in a bargaining unit, is eligible to vote until the date employment has actually terminated. In *NLRB v. Res-Care, Inc., dba Hillview Health Care Center*, 113 LRRM 2336 (7th Cir. 1983), the Seventh Circuit Court of Appeals enforced an NLRB decision which had allowed a nurse to vote in a representation election, even though she had notified her employer that she intended to resign a few days after the election and even though her last day of actual work had been three days before the election. Citing the NLRB's "unvarying policy" that even an employee with a fixed intention of quitting immediately after voting may vote, the Court explained:

There is a rapid turnover of workers in many American companies, and if it were a litigable question whether each worker casting a vote in a union election was likely still to be employed when the union sat down to bargain with the employer the regulation of union campaigns would be greatly complicated. . . . The truth is that many people who vote in elections do not have a great stake or interest in the outcome; but nothing in the National Labor Relations Act requires the Board to insist that the franchise in union elections . . . be limited to those who do. *Id.* at 2343.<sup>17</sup>

In the higher education setting, the NLRB has adhered to its rule that employees otherwise eligible to vote do not become ineligible due to expected retirement or termination of employment. Rejecting employers' arguments that it should develop a rule peculiar to the academic setting, the NLRB has held that faculty who have tendered resignations and faculty on "terminal contracts" remain eligible to vote, both because they continue to share a community of interest with their colleagues, and because they continue to have an interest in the terms and conditions of their employment prior to their effective termination of

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<sup>17</sup>See also *Whiting Corp.*, 99 NLRB No. 117, 30 LRRM 1046 (1952); *Radio Free Europe*, 262 NLRB No. 63, 110 LRRM 1330 (1982).

employment.<sup>18</sup>

While SERB has never formally addressed this issue, we take administrative notice of the fact that employees with an expectation of retirement or termination have voted in elections under SERB's jurisdiction.

Until these "ERIP faculty" actually retire, they continue to work under the same terms and conditions of employment as do other faculty members. There is no reason on this record for SERB to depart from the universally-accepted approach that, where an employee is clearly employed on the election date, no further inquiry will be made into the expectation of future employment. There being no other basis for exclusion, we find that the "ERIP faculty," if any exist at the time of a SERB-conducted election, shall be permitted to vote.

**C. The Bargaining Unit Description**

Neither the UAFPA's petitioned-for unit, which includes certain contract professionals, nor the Employer's alternative proposed unit, which excludes ERIP faculty, is appropriate. Thus, we direct an election in the unit proposed by the Employer, deleting the reference to the ERIP faculty in the exclusions, as follows:

**INCLUDED:**

All full-time faculty at the Akron and Wayne College campuses of the University of Akron, including librarians holding faculty rank.

**EXCLUDED:**

President; Vice Presidents; Deans; Assistant Deans and Associate Deans of Colleges; Assistants to the President and Vice Presidents; Division Chairs and Department Heads and School Directors; Adjunct, part-time, temporary, visiting and research faculty; contract professional employees; faculty whose primary appointment is in the University of Akron School of Law;

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<sup>18</sup>*Manhattan College, supra; New York University, supra; Fordham University, 214 NLRB No. 137, 87 LRRM 1643 (1974).*

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supervisory employees; and all other employees of the University.

**D. Re-examination of the Showing of Interest**

O.R.C. § 4117.07 provides in part:

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

(1) By any . . . employee organization . . . alleging that at least thirty per cent of the employees in an appropriate unit wish to be represented for collective bargaining by an exclusive representative, . . . the board shall investigate the petition . . .

The Employer asserts SERB should administratively conduct a re-examination of the sufficiency of the UAFPA's showing of interest since the initial investigation of the sufficiency was of a unit which was determined to not be appropriate. This action would parallel that of the NLRB which allows for re-examinations if a different unit than the one petitioned-for is ultimately found to be appropriate. The Employer also asserts SERB should not include any cards signed by individuals who have since left their employment with the University of Akron. This number would include those faculty who retired on or before June 30, 1994.

While the UAFPA generally challenges the Employer's exception, it also suggests that if SERB does conduct a re-examination, it should only exclude the contract professionals and any cards signed by them. The UAFPA contends the faculty who have since left the university since the filing of the petition should have no bearing on the re-examination.

Since the bargaining unit which we have found to be appropriate has not yet been investigated for the requisite showing of interest, we agree with the Employer that it should be re-examined. As to the individuals who left their positions with the Employer since the petition was filed, this is an election eligibility issue and not a bargaining unit issue. Consequently, we agree with the UAFPA that the re-examination must exclude only the contract professionals, and the cards they signed, as of the date of the filing of the petition.

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Focusing on the filing date is consistent with SERB practice and policy based upon our interpretation of O.R.C. § 4117.07(A)(1) and O.A.C. Chapter 4117-5.

### III. CONCLUSION

For the above reasons, we:

- (1) adopt the Stipulations, Findings of Fact, and Conclusions of Law in the Hearing Officer's Recommended Determination;
- (2) find the contract professionals should be excluded from this bargaining unit;
- (3) find the faculty who have announced their intention to take early retirement are eligible to vote in an election;
- (4) find the following unit to be appropriate:

**INCLUDED:**

All full-time faculty at the Akron and Wayne College campuses of the University of Akron, including librarians holding faculty rank.

**EXCLUDED:**

President; Vice Presidents; Deans; Associate Deans and Associate Deans of Colleges; Assistants to the President and Vice Presidents; Division Chairs and Department Heads and School Directors; Adjunct, part-time, temporary, visiting and research faculty; contract professional employees; faculty whose primary appointment is in the University of Akron School of Law; supervisory employees; and all other employees of the University.

- (5) find the showing of interest in this bargaining unit should be re-examined, excluding only the contract professionals, to see if the requisite thirty per cent showing of interest exists; and, if the requisite showing of interest exists,
- (6) direct that an election in the bargaining unit described in paragraph (4) above is to be held as soon as administratively feasible.

POHLER, Chairman, and MASON, Board Member, concur.