

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Fraternal Order of Police, Ohio Labor Council, Inc.,  
Employee Organization,

and

District 1199, Service Employees International Union, AFL-CIO,  
Employee Organization,

and

State of Ohio,  
Employer.

Case Number: 94-REP-02-0035

OPINION

POHLER, CHAIRMAN:

This representation case comes before the State Employment Relations Board ("SERB" or "Board") on exceptions filed by the Fraternal Order of Police, Ohio Labor Council, Inc. ("FOP") and the State of Ohio ("Employer" or "State") to the Hearing Officer's Recommended Determination issued on December 29, 1994. There are two issues in this case. The first issue is where a petition is filed to sever a group of employees from a bargaining unit, what standard should SERB apply in determining whether such severance is appropriate. The second issue is whether the standard for severing the group of employees has been met in the present case. For the reasons below, we announce the standard to be applied and find the standard has not been met under the present facts.

I. BACKGROUND

The FOP is the Board-certified exclusive representative of State Bargaining Unit Number 2 ("Unit #2"), comprised of certain employees of the State. District 1199, Service Employees International Union, AFL-CIO ("District 1199") is the Board-certified exclusive representative

of State Bargaining Unit Number 12 ("Unit #12"), also consisting of certain employees of the State.

On February 22, 1994, the FOP filed a Petition for Representation Election seeking to sever 384 employees from Unit #12 and then transfer those employees to Unit #2 via a Board-conducted election. The classifications at issue were Parole Officer 1, Parole Officer 2, Parole Officer 3, and Parole Service Coordinators ("Parole Officers"). The petition was supported by a showing of interest demonstrating that at least 30 percent of the Parole Officers wished to be represented by the FOP. The Parole Officers comprise 18.4 percent of the 2,084 employees in Unit #12.

On March 31, 1994, SERB directed this case to hearing on five issues.<sup>1</sup> The hearing officer directed that the hearing be bifurcated and that the only issues to be litigated at first were the standard for severing a portion of a unit from the existing Board-certified bargaining unit and whether such standard has been met.<sup>2</sup> An evidentiary hearing to determine this issue was conducted on May 23, 25, and 26, 1994.

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<sup>1</sup>SERB sent this matter to a hearing to determine the following: (1) if and when it is appropriate to carve a portion of a unit from an existing Board-certified bargaining unit for purposes of an election; (2) whether or not the FOP's instant proposal to carve satisfies this standard; (3) whether or not it is appropriate, pursuant to Ohio Revised Code ("O.R.C.") § 4117.06(D)(2), to combine the Parole Officers with the employees in Unit #2 into a single bargaining unit; (4) whether or not a separate unit for the Parole Officers is appropriate, or if the outcome of any potential election should be limited to the Parole Officers' continued inclusion in Unit #12 or inclusion in Unit #2; and (5) all other relevant issues.

<sup>2</sup>For the purposes of this Opinion, variations of the words "sever" and "carve" are used interchangeably to describe the removal of employees from an existing bargaining unit, as contemplated herein. Variations of the word "transfer" are used to describe the placement of those same employees into a different bargaining unit, again as contemplated herein.

## II. DISCUSSION

- A. O.R.C. Chapter 4117 does not prohibit SERB from establishing a standard limiting the circumstances upon which a severance may take place.

The FOP argued that filing a petition to sever a group of employees from an existing bargaining unit is not different from filing a petition in an original unit determination case and, hence, there is no reason or authority for SERB to establish a separate standard for severance situations. Accordingly, where a petition for severing is filed, SERB should utilize the same analysis as in an original unit determination, i.e., the factors in O.R.C. § 4117.06(B), and decide which unit is more appropriate, the existing one or the post-severing one. Consistent with this position, the FOP objects to any standard using "changes" as a factor since "changes" is not one of the factors mentioned in O.R.C. § 4117.06(B).

O.R.C. § 4117.06(B) states:

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).

The list of factors in O.R.C. § 4117.06(B) is not exclusive, and the absence of the word "changes" from the list is not dispositive. More important, while the factors in the above section are applicable in the determination of whether a certain mixture of employees is appropriate, they are not determinative when contemplating a change in an existing bargaining unit. As we stated in *In re Cincinnati Technical College*, SERB 94-018, at pg. 3-116 (10-17-94):

[A] particular combination of employees may constitute an appropriate mixture under O.R.C. § 4117.06 . . . 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 . . . 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 is, whether it should be allowed under the specific circumstances. (emphasis added).

Thus, the O.R.C. § 4117.06(B) analysis is a key to the determination of an appropriate mixture. Where Board-certified units already exist and changes in the unit structures are petitioned for, a threshold question of whether such change is warranted must be determined separately from the appropriateness of the new petitioned-for mixture.

**B. O.R.C. Chapter 4117 does not prohibit severing from Board-certified units.**

Both District 1199 and OCSEA, in its *amicus curiae* brief, argued that under no circumstances does O.R.C. Chapter 4117 permit the carving of a group of employees from an existing Board-certified unit. This claim is based upon an interpretation of O.R.C. § 4117.07(A)(1), which states:

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

(1) By an employee or group of employees, or any individual or employee organization acting in their behalf, alleging that at least thirty percent of the employees in an appropriate unit wish to be represented for collective bargaining by an exclusive representative, or asserting that the designated exclusive representative is no longer the representative of the majority of employees in the unit, 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; . . . (emphasis added).

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Both District 1199 and OCSEA interpret this section to mean that displacement of an incumbent employee organization in a Board-certified unit can be achieved only in the entire unit and not in a piecemeal fashion. They conclude there is no authority in the statute to make *any* representational changes in an existing bargaining unit short of changing the representation of the whole unit. Accordingly, the FOP's petition, which requests the change of representation only for a part of Unit #12, should be dismissed.

Such a narrow and technical interpretation of the statute is not in accordance with O.R.C. § 4117.22, which calls for liberal construction of the statute to promote orderly and constructive relationships between public employers and their employees. There must be a mechanism whereby a change in bargaining units can take place when circumstances so dictate. Under the proposed strict interpretation, a minority group of employees in a large unit may never be able to leave the unit even if the group's needs are not adequately addressed by the unit's exclusive representative. Such results are not acceptable and clearly do not promote constructive labor relations.

**C. The proper standard for severing a group of employees from an existing Board-certified unit.**

Since O.R.C. Chapter 4117 does not prohibit establishing a standard for severing a portion of an existing Board-certified unit, the question is whether a special standard is necessary and, if it is, what it should be. Before the enactment of O.R.C. Chapter 4117, the Ohio courts recognized that changes in bargaining representation, by whatever means, are justified only when the existing representation is clearly and convincingly foreign to the public employees' interests. *Civil Service Personnel Assn. v. Akron* (1976), 48 Ohio St.2d 25. This standard applied only to the issue of whether distinct bargaining units existed. *Assn. of Cuyahoga Cty. Teachers of the Trainable Retarded v. Cuyahoga Cty. Bd. of Mental Retardation* (1983), 6 Ohio St.3d 190.

In a case involving a petition by the Public Employees of Ohio, Local 450, to sever a group of employees from an existing unit, SERB held:

In the absence of proof that the structure of the historic unit has inadequately served the interest of the Employer and Employees, and in the light of over two decades of bargaining history, one must conclude that a constructive and stable relationship has fostered between the Respondent and the Intervenor. It surely must require more to disturb such a relationship than a petition to break up the historic unit to satisfy the desires of a small portion of employees who wish to change exclusive representatives.

*In re University of Cincinnati*, SERB 85-054, at pg.181 (10-15-85).

There is nearly universal agreement that determining an appropriate bargaining unit in an original action is vastly different from disturbing an existing bargaining unit that has been functioning for some years.<sup>3</sup> While the former calls for consideration of community of interest and other factors of the kind referenced in O.R.C. § 4117.06(B), the latter calls for a demonstration of extraordinary circumstances in order to overcome a presumption that the existing unit is appropriate. The policy of protecting existing bargaining units is rooted in the realization that labor relationships are as complicated and fragile as all other human relationships. Consequently, stability and predictability are keys to their success. Preserving well-functioning Board-certified units promotes orderly and constructive relationships between public employers and their employees and allows SERB to comply with the mandate of O.R.C. § 4117.22. The statute must be construed to promote such relationships.

As SERB has previously stated, unit structure is not etched in stone and changes in units are inevitable and necessary. *In re State of Ohio*, SERB 87-030 (12-17-87); *In re State*

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<sup>3</sup>See, e.g., *Jefferson Tp. Bd. of Ed.*, P.E.R.C. No. 61, NJPER Supp. 248 (¶61 1971); *Deer Park USFD*, 22 PERB ¶ 3014 (NY PERB, 1989); *State of New York* (Long Island Park, Recreation and Historical Preservation Comm'n), 22 PERB ¶ 3043 (NY PERB, 1989); *State of New York*, 21 PERB ¶ 3050 (NY PERB, 1988); *Shaler Township*, 20 PPER ¶ 20004 (Final Order, Pa. LRB, 1988); and *In re Rule 38D-17.023(1)(e)*, 16 FPER ¶ 21212 (Fla. PERB, 1990).

*of Ohio Dept of Corrections, SERB 92-009 (6-25-92); In re Cincinnati Technical College, supra.* Changes in legislation occur, changes in classifications and job duties take place, changes in an employer's operations or administrative structure occur, and a unit that was perfectly appropriate at inception might turn into an inappropriate or unworkable unit infested with conflicts of interests or neglected members. Thus, we are adopting the following standard to allow for the severance of a group of employees from an existing bargaining unit when changes are necessary while we protect the stability of existing bargaining units:

Where a petition for election is filed to sever a group of employees from an existing bargaining unit, the Board will allow such severance only if the petitioner proves that:

1. Since the establishment of the existing unit, substantial changes have taken place in the classifications, job duties, working conditions, or other circumstances of the petitioned-for employees making the existing unit inappropriate or unworkable; or
2. Since the establishment of the existing unit, substantial changes in circumstances have taken place showing the existence of a conflict of interest between the petitioned-for employees and other employees in the unit making the existing representation inadequate; or
3. Since the establishment of the existing unit, substantial changes have taken place in the employer's operations or administrative structure making the existing unit inappropriate or unworkable; or
4. The history of collective bargaining in the existing unit shows inadequate representation of the petitioned-for employees and disparity in the quality of representation provided to them as distinguished from that provided to the other employees in the unit.

If the petitioner meets one of the foregoing standards for severance, SERB must still determine whether the petitioned-for unit is appropriate under O.R.C. § 4117.06.

- D. The standard for severing a group of employees from the existing bargaining unit has not been met in this case.

Unit #12 was established and approved by the Board, along with thirteen other state units, in 1985 after a hearing. *In re State of Ohio*, SERB 85-009 (3-27-85). Unit #12 was created as a unit of social services professionals. District 1199 was elected as the exclusive bargaining representative of Unit #12. District 1199 has represented the employees in this unit ever since and has negotiated all collective bargaining agreements for this unit.

Many discussions took place on the record herein about whether the parole officers are more "law enforcement type" or more "social worker type" employees. This extensive discussion is not relevant to the case at issue since the severance standard depends on whether the existing unit is appropriate or workable. Specifically, the focus is whether District 1199 adequately represents the parole officers and whether changes occurred in the duties and working conditions of the parole officers since the establishment of Unit #12 to make the unit inappropriate or unworkable as it is currently described.

Ohio is not the only state where Parole Officers are in a state unit with social services professionals. For example, in Illinois, the Corrections Parole Agent I, II, and III classifications are in the RC-62-OCB unit with the Health Planning Specialist I and II; Human Relations Representative; Mental Health Specialist I, II, III, and Trainee; Nutritionist I; Social Worker I; and Substance Abuse Specialist I, II, and III classifications.<sup>4</sup>

Under the first prong of the standard stated above, there is nothing in the record to meet the necessary burden of proof that any substantial changes occurred in the job duties, working conditions or in the general circumstances of the Parole Officers since the establishment of Unit #12 to render Unit #12 inappropriate or unworkable. The change most

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<sup>4</sup>*State of Illinois, Department of Central Management Services*, Case No. S-RC-94-68, III. St. Labor Relations Bd. (1994).

often discussed was the change in the character of criminals to a harder and more dangerous type. Thus, the Parole Officers' work now is alleged to be more dangerous than before. However, the issue is whether Unit #12 is inappropriate or unworkable and whether the Parole Officers' interests are being adequately addressed by District 1199. There is nothing in the record to support a negative finding.

As to the second prong of the standard, there is nothing in the record to show the existence of conflicting interests between the Parole Officers and other employees in Unit #12, whether substantial changes have occurred or not.

Under the third prong of the standard, the record does not support a finding that substantial changes have taken place in the employer's operations or administrative structure. The Employer announced its lack of intention to put on any evidence to show that it has any administrative problems with Unit #12 or that Unit #12 is not functioning properly. (T. 39). Moreover, the Employer's witness, the Department of Administrative Services' Deputy Director, Office of Collective Bargaining, testified: "I'm not saying that anything warrants severance of this particular unit." (T. 225). The only problem raised by the Employer concerning Unit #12 as it exists now had to do with the bargaining process. In negotiating with District 1199 the safety issues for the Parole Officers, like bulletproof vests, communication systems and transporting felons, the Employer was faced with a duplicative bargaining problem because the Employer was also negotiating safety issues at the same time with the FOP in another set of contract negotiations.

This duplication does not rise to the level of an issue that should be considered in a severance context. All State unit negotiations involve some duplication. All contracts include issues of wages, hours, and common conditions of employment, and the contracts vary on these issues. Even in regard to safety issues, the record shows that the Parole Officers negotiated differently regarding bullet proof vests, communication systems, and felon transfers than the law enforcement people in the FOP's Unit #2. As to bulletproof vests, for

example, the difference is due to the wishes of the Parole Officers, who would rather have to share these vests and do without individual ones than have to wear them all the time like police officers do. Moreover, both District 1199 and OCSEA represent classifications other than Parole Officers that have in their collective bargaining agreements provisions regarding safety issues, e.g., Correction Officers, Prison Psychologists and Social Workers in the Department of Youth Services, Division of Parole. The concentration focused on the Parole Officers in this case does not seem meritorious.

In addition, the Department of Rehabilitation and Correction, which includes the Parole Officers, already administers four collective bargaining agreements, none of which are with the FOP. If the Parole Officers are severed from Unit #12, transferring them to the FOP's Unit #2 may add another contract with another exclusive representative for the Department of Rehabilitation and Correction to administer. This is hardly an improvement in the efficiency of operation of the public employer. Finally, the record shows the negotiations with District 1199 were brief, and the contract was agreed upon in a speedy fashion in spite of the so-called "duplication problem." Thus, the third prong of the standard has not been met.

Under the fourth prong of the standard, although the Parole Officers are 18.4 percent of the existing bargaining unit, the record shows they have been adequately represented by District 1199. The Parole Officers' safety issues had a prominent place among the issues pursued by District 1199 during its contract negotiations for Unit #12 (which was negotiated together with Unit #11, also represented by District 1199). The Parole Officers have had representatives on the negotiating team in each of the contract negotiations since 1986. The record is absent of any demonstration that the Parole Officers are treated in any way differently from any other members of Unit #12 as far as grievances are concerned; specific Parole Officers' grievances were discussed on the record where the union took the Parole Officers' grievances all the way to arbitration. The main complaint regarding grievances is the length of time involved in resolving grievances. However, there is no evidence showing that

District 1199 was processing Parole Officers' grievances differently from any other employees' grievances.

To summarize, there are occasions where severance may be appropriate. Under the facts in this case, the above-stated standard has not been met. Hence, the existing Board-certified Unit #12 should not be disturbed, and the FOP's petition should be dismissed.

### III. CONCLUSION

As we have previously stated, unit structure is not etched in stone and changes in units are inevitable and necessary. We see the need to adopt a standard to allow changes when changes are necessary and, at the same time, to protect the stability of existing Board-certified bargaining units. Consequently, we adopt the standard set forth herein for all severance cases. If a petitioner meets one of the foregoing standards for severance, SERB must still determine whether the petitioned-for unit is appropriate under O.R.C. § 4117.06 before allowing the severance of employees to take place.

The foregoing standard, as applied to the Fraternal Order of Police's petition to sever the Parole Officers from Unit #12, and to subsequently transfer them into Unit #2, has not been met. Severance of the Parole Officers from Unit #12 is not appropriate in this case. Therefore, the Petition for Representation Election, filed by the FOP on February 22, 1994, is dismissed without prejudice.

Pottenger, Vice Chairman, and Mason, Board Member, concur.