

97-010

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Shawnee State Education Association,

Employee Organization,

and

Shawnee State University,

Employer.

CASE NUMBER: 94-REP-03-0050

OPINION

MCGEE, Vice Chairman:

This representation case comes before the State Employment Relations Board ("SERB") on exceptions and cross-exceptions to the Hearing Officer's Recommended Determination filed by the Shawnee State University ("University" or "Employer") and the Shawnee Education Association ("Association") respectively. For the reasons below, we find that SERB has jurisdiction over the University's Petition for Clarification of Bargaining Unit and that all Department Chairperson positions are excluded from the bargaining unit.

I. BACKGROUND¹

¹Finding of Fact Nos. 1-6, 12-14, and 18-30.

The Employer and the Association have a history of collective bargaining that predates the Ohio Public Employees' Collective Bargaining Act as set forth in Ohio Revised Code ("O.R.C.") Chapter 4117. The bargaining unit of employees represented by the Association is a "deemed-certified" bargaining unit pursuant to § 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367.² The scope of the bargaining unit provision in the 1983-1985 contract was as follows: "The bargaining unit shall include all full time contractual faculty members who teach for the college including those members designated as Program Coordinators or Divisional Coordinators but excluding Program Directors." The same language can be found in the scope of the bargaining unit provision in the 1985-1987 contract. In July 1986, Shawnee State Community College became Shawnee State University. Department Chairpersons were first appointed by the Employer after 1984.

In 1984, the Employer offered academic programs in two areas: Arts and Sciences and Technical Programs. In 1984, the Arts and Sciences Area had two Coordinators, David Todt in Math and Sciences and Shannon Kiser in Humanities. In 1984, the Technical Programs Area had seven Program Directors for programs in Allied Health. There were also two Coordinators in the Technical Programs Area, Larry Essman in the Business Area and Ray Irwin in the Engineering Technologies Area. All Program Directors in the Allied Health Area were excluded from the deemed-certified bargaining unit pursuant to the 1983-1985 collective bargaining agreement. In 1984, Program Directors were given the responsibility for the administrative duties related to the specific program they directed, including: evaluation of the faculty, making recommendations for hiring of new faculty, accreditation, preparing written reports, student selection, recruiting and retention, handling student and faculty grievances and problems, and budget control. Their contracts called for limited teaching duties. James Kadel, a Program Director in 1984 in the Dental Hygiene Program, was teaching only two classes while at that time the contract faculty were teaching four to five classes. The Program Directors in 1984 were on twelve-month annual administrative contracts and were given 20 days vacation that were used whenever it was approved by the vice-president, compared to 9-month teaching contracts which have no vacation time. The Program Directors did not have time off during breaks between quarters and were expected to be on campus 40 hours per week year-round.

²Section 4(A) of Am.Sub.S.B. No. 133 provides in part:

Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation [that] the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code.

Before April 1, 1984, each department, with the exception of the Allied Health Technologies Department, had a Divisional Coordinator. Divisional Coordinators were faculty members who agreed to assume limited managerial duties, including overseeing the day-to-day business operations of their department. The Divisional Coordinator's duties before April 1, 1984 included calling and overseeing monthly departmental meetings. These meetings would be used to discuss issues or problems basic to the operation of the department, such as policy development, the curriculum, textbooks, and new courses. They coordinated class offerings and schedules and approved the purchase of all textbooks and instructional materials for the department. They reviewed all curriculum proposals, additions, deletions, and changes related to the division. The Divisional Coordinators assisted with the formulation and implementation of programs for faculty development and performed in-class evaluations of a faculty member. The Divisional Coordinators also coordinated departmental academic advising, including acceptance of majors and fulfillment of degree requirements, recruited students, assessed the need for part-time faculty members, and aided in the hiring, and orientation of part-time faculty members. They also taught classes. The Divisional Coordinators were on nine-month faculty contracts with a separate Coordinator contract, giving them \$333.00 per quarter for the Coordinator duties they performed. They did not work year round. In 1984 there were two Divisional Coordinators in the Technical Programs Area, one in the Business Area and one in the Engineering Technologies Area. In 1984 all Divisional Coordinators were included in the deemed-certified bargaining unit.

When the University's petition was filed in 1994, there were no Division Coordinator positions nor were there Program Director positions. The Department Chairperson positions which currently exist and which were established after 1984 are 12-month contracts working 40 hours a week. The Department Chairpersons have a guaranteed faculty teaching load reduction and have the authority to actually hire and select part-time faculty members.

II. DISCUSSION

The first issue in this case is whether SERB has jurisdiction over the University's Petition for Clarification of Bargaining Unit when the bargaining unit involved is a deemed-certified unit. In light of the Ohio Supreme Court decisions in *Ohio Council 8, AFSCME v. City of Cincinnati*, 64 Ohio St.3d 677, 1994 SERB 4-37(1994) ("*Cincinnati*") and *State ex rel. Brecksville Ed. Assn. v. State Emp. Relations Bd.*, (1996), 74 Ohio St.3d 665, 1996 SERB 4-1 ("*Brecksville*"), SERB has jurisdiction over these petitions.

Both *Cincinnati* and *Brecksville* involved changes or alterations to deemed-certified units. *Cincinnati* involved splitting a deemed-certified bargaining unit into two units over the objections of the exclusive bargaining representative; *Brecksville* involved adding a

group of employees who had always been outside of the bargaining unit into the deemed-certified unit by mutual consent of all parties. While the two cases were different in many details as well as in outcome, the key problem in both cases, *vis-a-vis* the deemed-certified unit, was the same, *i.e.*, when can a *change* in a deemed-certified unit be allowed. In *Cincinnati*, where the exclusive representative opposed the change, the Ohio Supreme Court did not allow the change. In *Brecksville*, where the parties jointly requested the change, the Court allowed the change recognizing that unit structure needs some flexibility.

The case at issue is a unit clarification case where *no change* in the bargaining unit is involved and where the question is whether certain classifications created after 1984, are substantially the same as other classifications which were included in the deemed-certified unit in 1984. The purpose for the clarification petition is to determine whether a particular employee or group of employees is included or excluded from the unit based upon the unit description and the duties of the employees in question. "Unit clarification does not alter the status quo, but rather maintains it."³ Such disputes, whether a new classification involves job duties done by employees in the bargaining unit and thus should be included in the unit, do not raise questions of changing a deemed-certified unit; hence, neither *Cincinnati* nor *Brecksville* deny SERB's jurisdiction. Moreover, for the sake of promoting orderly and constructive relationships among all public employers and their employees, such disputes need have a forum where they can be easily and quickly resolved. SERB is obviously this forum and, accordingly, SERB has jurisdiction to resolve unit clarification issues regarding deemed-certified units, whether individually or jointly filed, because these petitions do not involve changes in such units.

Having found that SERB has jurisdiction to review this petition, we now turn to the merits of the unit clarification petition: whether the Department Chairpersons are included in or excluded from the bargaining unit. Before 1984 there were no Department Chairperson positions. There were Division Coordinators, who were included in the bargaining unit, and Program Directors, who were excluded from the bargaining unit. When Shawnee State Community College became Shawnee State University, its structure evolved and its size increased substantially. As a result, Department Chairperson positions were created. These positions replaced both Divisional Coordinator positions as well as Program Directors.

The University argues that Department Chairperson positions are substantially similar to the old Program Director positions and substantially different from the Divisional Coordinator positions; thus, these positions should follow the path of the old Program Directors,

³ *In re Ohio Council 8, AFSCME*, SERB 95-021, pg. 3-143 (12-29-95).

which were excluded from the bargaining unit in 1984. The Association argues that the Department Chairperson positions are substantially similar to the old Divisional Coordinator positions, which in 1984 were included in the bargaining unit, and, as such, should continue in the bargaining unit. The record shows that both Divisional Coordinators and Program Directors in 1984, and Department Chairs now are involved in decisions with respect to courses, curriculum, personnel, and other matters of academic policy. But these similarities are not very significant since in a university setting faculty members participate in decisions with respect to such subjects. The General Assembly recognized this unique facet of institutions of higher learning in O.R.C. § 4117.01(F)(3), which gives guidance in understanding the unique character of university settings:

With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy.

The legislature recognized that in a university setting the participation in decisions on courses, curriculum, personnel issues, and other decisions in which the academic world is involved does not separate the administrators from the faculty members.

To determine whether Department Chairpersons are included in or excluded from the bargaining unit, we must compare the new Department Chairperson positions to the old positions of the Coordinators and the Directors, focusing on the indicia of administrators, rather than of faculty. The record shows that the Divisional Coordinators were doing some in-class visits to evaluate other faculty members, but none of the Coordinators actually signed any formal evaluation forms. Department Chairpersons have the responsibility of conducting and signing evaluation forms for faculty. Another indicator of being a member of the administration rather than of the faculty, is the twelve-month work schedule. While different institutions of higher education may differ in scheduling, at this institution the faculty works nine-month schedules while the administrators work twelve-month schedules. It is significant that the Department Chairpersons work twelve-month schedules as did the Program Directors in 1984, while the Coordinators worked nine-month schedules; the difference in the schedules reflects a difference in substantial responsibilities. In this context, the testimony of Professor David Todt is quite revealing. Explaining why his involvement as a Divisional Coordinator in hiring new faculty was minimal Professor Todt said the following: "It seems that the hiring for new faculty occurred in the summer and I was on a nine-month contract. So I was generally not available in the summer when that was done."⁴ The Coordinators did not hold and were not expected to hold the same responsibilities as administrators, as the Program Directors in the past and as the Department Chairpersons in the present. The Divisional Coordinators, unlike the then

⁴Transcript, p. 31.

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Program Directors and the current Department Chairpersons, were never administrators, but were first and foremost faculty members who assisted the Vice-President with some administrative tasks for a \$333 supplemental contract.

In summary, the record shows that the old Divisional Coordinators while helping with various administrative assignments were not administrators and did not have a year-round contract. The record further shows that the old Program Directors were administrators and held year-round responsibilities of administrators. Comparing these two positions to the current Department Chairperson positions demonstrates that the new Department Chairpersons are more like Program Directors than Divisional Coordinators. Since the old Program Directors were never included in the bargaining unit, the Department Chairperson positions are excluded from the deemed-certified unit.

III. CONCLUSION

For the reasons above, we find that SERB has jurisdiction over the University's Petition for Clarification of Bargaining Unit. The University's petition for clarification is granted and all Department Chairperson positions in Shawnee State University are not included in the deemed-certified bargaining unit of employees represented by the Shawnee State Education Association.

Pohler, Chairman, concurs; Mason, Board Member, concurs in part and dissents in part in a separate opinion.