

97-015

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO,

Employee Organization,

and

State of Ohio, Office of the Ohio Public Defender,

Employer.

Case Nos. 96-REP-07-0156 & 96-REP-07-0157

OPINION

POHLER, Chairman:

This representation case comes before the State Employment Relations Board ("Board" or "SERB") upon the filing of exceptions to the Hearing Officer's Recommended Determinations issued on February 26, 1997 and August 7, 1997. For the reasons below, we find that the employees in the positions of Assistant Public Defender 1, 2, 3, and 4 are fiduciary employees and are excluded from the definition of "public employee" in Ohio Revised Code ("O.R.C.") § 4117.01(C).

I. BACKGROUND¹

In 1985, when the State job classifications were originally assigned to bargaining units, the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("OCSEA") filed a petition to represent a bargaining unit comprising professional State employees: State Unit 14. See *AFSCME/OCSEA and State of Ohio*, 85-RC-04-3483. On October 18, 1985, a Hearing

¹Finding of Fact ("F.F.") Nos. 3-6, 8-16, 18, and 21 in the February 26, 1997 Hearing Officer's Recommended Determination ("HORD") and F.F. Nos. 2-22 in the August 7, 1997 HORD.

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Officer's Recommended Determination was issued containing a Statement of the Case, Issues, Stipulations, Findings of Fact, Analysis and Discussion, Conclusions of Law, and a Recommendation that the Board adopt the findings of fact and conclusions of law set forth in the recommended determination and issue an order directing a representation election pursuant to O.R.C. § 4117.07 in the unit described in the conclusions of law. In Stipulation No. 4, the Office of the Ohio Public Defender ("OPD") and OCSEA stipulated that APD 1s and 2s were "fiduciary employees," and were thus properly excluded from State Unit 14. On November 7, 1985, SERB subsequently approved the hearing officer's recommendation and directed that a secret ballot election be conducted in the unit recommended in the Hearing Officer's Recommended Determination; the SERB Order did not adopt and approve the stipulation. OCSEA was elected as the exclusive bargaining representative for State Unit 14.

The OPD represents indigent individuals throughout Ohio who have been charged with criminal offenses as well as inmates in post-trial proceedings. The OPD is divided into three units: Administrative, Death Penalty, and Legal Appeals. The OPD currently employs approximately 150 individuals, approximately sixty of whom are APDs. The OPD utilizes four APD classifications: APD 1, of which there are approximately twenty-nine; APD 2, of which there are approximately ten; APD 3, of which there are approximately eleven; and APD 4, of which there are approximately seven. The APD 1-4s are subordinate to two Senior APD Classifications: Senior APD 1 and Senior APD 2. There are three Senior APD 1s and two Senior APD 2s employed by the OPD. The classifications of APD 1, 2, 3, and 4 existed in 1985. At that time, there were approximately six employees in the APD 1 classification and approximately seven employees in the APD 2 classification.

Although there is now a more formalized layer of supervision for the APD 1s and 2s than there was before Mr. Bodiker became the Ohio Public Defender, the APD 1s and

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2s essentially perform the same duties in 1996 that they did in 1985. In 1985, the duties of an APD 2 consisted primarily of researching legal issues, developing legal strategies, identifying arguments, drafting pleadings, and directly representing clients at trial, appeal, and in post-conviction proceedings. In 1985, the duties of an APD 1 were essentially the same as those of an APD 2, except that, since an APD 1 generally would have less experience, immediate supervisors would work in a closer relationship with APD 1s than they would with APD 2s. The general working hours at the OPD are 8:00 a.m. - 5:00 p.m. The APDs will occasionally work in excess of these hours, either at night or on weekends. The APDs do not need prior approval to work in excess of 40 hours per week. The APDs also have flexibility in how they work their hours. They can use "flex hours."

In both 1985 and 1996, the APDs' duties have depended upon what types of cases they are assigned, whether the cases are in federal or state court, and in which OPD unit they are assigned. The APDs can be lead counsel on a death penalty case or sit "second chair." The APDs speak with the media about case-related items when requested; they respond only to questions regarding the facts of the case, not on general office policies. Some supervisors have instructed the APDs to come to them before discussing policy or "global" issues with the media. Although the APDs do not need prior approval for in-state travel, prior approval is required for out-of-state travel and approval can only be granted by Mr. Bodiker or his designee. The APDs have not prepared or provided testimony to the legislature regarding the OPD's office policies or procedures; on one occasion, however, Mr. Bodiker did ask an APD to draft a memo in response to proposed legislation by the Ohio Attorney General's Office.

If the APDs believe a conflict of interest exists in any of their cases they must bring that to their supervisor's attention. The supervisor will then meet with the unit's

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chief counsel — a Senior APD 1 or 2 — and Mr. Bodiker. The APD may be involved in these meetings. But only Mr. Bodiker or his designee can approve the APD notifying the court of the conflict of interest. Previously, the APD could raise a possible conflict of interest directly with the court.

In 1985, Randall Dana was the Ohio Public Defender. Since September 1994, David H. Bodiker has been the Ohio Public Defender. Shortly after Mr. Bodiker became Ohio Public Defender, the office experienced a large influx of cases because of new legislation regarding the filing of post-conviction relief cases, which added to an existing backlog of cases. To ensure that cases were handled in an efficient manner, Mr. Bodiker applied a time-keeping policy for the entire office that decreased the time APDs may spend on individual cases. This policy was already in use in the death penalty section.

To comply with Ohio Department of Administrative Services' policies, Mr. Bodiker began to enforce the office's existing policies regarding hiring expert witnesses, the use of state cars, out-of-state travel, and compensatory time. APDs cannot independently hire experts to assist in the defense of their clients; only Mr. Bodiker or his designee can approve the hiring of experts.

The APDs cannot attend continuing legal education ("CLE") seminars without prior approval of Mr. Bodiker or his designee. In 1985, the APDs could attend free CLE seminars without prior approval. Although there is now a more formal process involved in getting approval to attend free and paid-for CLE seminars than before Mr. Bodiker became the Ohio Public Defender, the APDs still attend approximately the same number of CLE seminars as they used to attend. APDs do not make the determination as to what cases will be accepted into the office, nor do they have the final decision as to which cases they

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will be assigned.

Mr. Bodiker requires a signature line for his name on all pleadings. APDs cannot file any pleadings without the pleading first being reviewed by Mr. Bodiker or his designee. One APD wanted to file an action in response to the Anti-Terrorism Act. After meetings with his supervisor, other OPD supervisors and Mr. Bodiker, Mr. Bodiker did not authorize the APD to file any action. Another APD wanted to file a change of address notice in a particular case and was not permitted to do so at that time. The only change to a pleading has been an adverb in one pleading; however, Mr. Bodiker or his designee could amend any pleading submitted for review. APDs do not have authority to sign Mr. Bodiker's name to pleadings or the name of his designee.

The parties agree that five APD 3s — Cox, Fogle, Silcott, Lunn, and Wamsley — are "supervisors" pursuant to O.R.C. § 4117.01(F) because they have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other public employees, responsibly direct them, adjust their grievances, or effectively recommend such action using independent judgment. The parties also agree that five APD 3s — Lazarro, Townsend, Wetterer, Love, and Consoldane — are not "supervisors" pursuant to O.R.C. § 4117.01(F). The parties do not agree whether APD 3 Jerry McHenry is a supervisor.

Jerry McHenry has worked for the OPD since 1983 and was promoted to APD 3 in 1991. Mr. McHenry represents most of the OPD's clients in criminal cases at the trial level. He works with other lawyers in the office who are less experienced, but have expressed an interest in trial practice. Mr. McHenry serves as lead counsel in these cases. The APDs sit as "second chair" or co-counsel at trial. As the lead counsel, he exercises independent judgment in directing or assigning work for that case to the APDs. Mr. McHenry

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is there to "mentor" the other attorneys. Mr. McHenry reviews, edits, and critiques their work. Both Mr. McHenry and the co-counsel have their names on all pleadings in these cases. He also assists them in developing their trial skills — *e.g.*, cross-examination and direct examination skills, working with evidence, and determining legal issues. Upon Mr. McHenry's request, the APDs are assigned to him for specific cases by Mr. Bodiker or his designee; the cases generally last for six months. After the cases are concluded, the APDs go back to their respective units; Mr. McHenry has no follow-up with the APDs on their other cases after they return to their units. Since 1984, Mr. McHenry has evaluated OPD employees in the classifications of paralegal, law clerk, secretary, and a few APDs. Mr. McHenry would receive the APD's evaluation in his mail box, fill it out, and sign it as the "rater" of the employees.

The parties did not agree whether the APD 4s were supervisors. The parties stipulated that the testimony of the APD 4 at the hearing was representative of the entire classification of APD 4s. Mr. Vickers has worked for the OPD for approximately 10½ years. He is an APD 4 and is the Post-Conviction Supervisor in the Death Penalty Unit. Mr. Vickers oversees the work of six APDs and two secretaries. He assigns cases to his staff and outside counsel in consultation with Mr. Bodiker and Mr. Meyers, litigates his own cases, and provides consultation to trial and appellate-level attorneys who are handling post-conviction cases. He also consults with Greg Meyers, the OPD's Chief Death Penalty Counsel (a Senior APD 2), regarding administrative matters within his unit. Mr. Vickers does performance evaluations of APDs, secretaries, and paralegals. He is involved with the initial and subsequent interviews of candidates for employment in the Death Penalty Unit. Most of the people he recommended for hire in his unit were ultimately hired. He reviews and edits requests for experts from the APDs assigned to him. When these requests are sent to Mr. Meyers, they go under Mr. Vickers' name, not the APD's name. While Mr. Vickers does not have independent authority to hire, transfer, suspend, lay

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off, recall, promote, discharge, assign or reassign, reward or discipline an employee, he can effectively recommend the hiring of APDs in his Unit and has done so in the past.

On July 31, 1996, OCSEA filed a Petition for Representation Election, assigned Case No. 96-REP-07-0156. On this date OCSEA also filed a Petition for Amendment of Certification, assigned Case No. 96-REP-07-0157. Through these petitions OCSEA sought to represent employees in the classifications of Assistant Public Defender 1, 2, 3, and 4 in the OPD. The OPD filed an objection to the petition to amend on September 3, 1996.

On October 24, 1996, SERB directed this matter to hearing in both cases to determine an appropriate unit and for all other relevant issues. On February 26, 1997, a Hearing Officer's Recommended Determination was issued. Exceptions to the Hearing Officer's Recommended Determination and a response to the exceptions were filed. On May 1, 1997, the Board remanded the case to the Hearings Section. On August 7, 1997, a second Hearing Officer's Recommended Determination was issued. Exceptions to the Hearing Officer's Recommended Determination and a response to the exceptions were filed.

II. DISCUSSION

A. *The 1985 Stipulation Is Not Controlling*

The parties agreed to exclude the APD 1s and 2s as fiduciary employees in 1985. OCSEA asserts that the duties of APD 1s and 2s have significantly changed since the 1985 Stipulation so as to warrant their inclusion in State Unit 14.

In *In re Cincinnati Technical College*, SERB 94-018, at pp. 3-115 - 3-116 (footnote omitted), (10-17-94) ("*Cincinnati Tech*"), SERB considered the degree of deference to give a previously signed consent election agreement in determining whether to add a group

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of employees to a bargaining unit where those employees had been specifically excluded by a prior consent election agreement:

[W]here 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.

The burden of proving a substantial change in the factual underpinnings of the parties' agreement after it has been signed is on the party seeking the change in the bargaining unit.² A change in the person occupying the position of the appointing authority or officeholder is not a factor to consider.

²*Id.* See also *In re State of Ohio, Dept. of Corrections*, SERB 92-009 (6-25-92).

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A review of the record reveals that the burden has been met. The APD 1s and 2s now have less discretion and independence in handling cases. The APD 1s and 2s have time limits on their cases, contributing to less discretion in their work. The APD 1s and 2s have less latitude in performing their duties. They must get approval before assisting in a major case, for travel, to hire expert witnesses, and to attend CLE seminars.

The ultimate responsibility for deciding conflicts of interest in cases is now with the Ohio Public Defender, not the APD 1s and 2s. The number of APD 1s and 2s has grown from 10 or 12 to approximately 39. The OPD's table of organization has changed with its growth, resulting in more levels between the Ohio Public Defender and the APD 1s and 2s. In addition, SERB had not announced a standard for determining whether employees meet the description of a "fiduciary employee" at the time of the parties' stipulation.³

Taking all of these factors together, there has been a substantial change in the factual underpinnings from 1985 to the present. Thus, we find that the "1985 Stipulation" is not controlling.

B. The APDs are Fiduciaries

O.R.C. § 4117.01(C)(9) defines a "fiduciary employee" as "[e]mployees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code." The OPD claims that under O.R.C. § 124.11(A)(9) and Rule 123:1-5-01(B)(2) the APD 1-4s are fiduciary employees, if not to Mr. Bodiker, then to the OPD as a state agency and, therefore, are excluded from the definition of "public employee" in O.R.C. § 4117.01(C).

³It was announced in *In re SERB v. Fulton County Engineer*, SERB 96-008 (6-24-96).

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O.R.C. §124.11(A)(9), as amended, became effective October 25, 1995. A review of this amended section does not reveal any legislative intent to create a separate and new definition of "acts in a fiduciary capacity" for purposes of O.R.C. Chapter 4117.

The standard for fiduciary status is the same, but the statutory amendment has broadened its application from only the agency head to the agency itself.

SERB first addressed what standard to apply to determine if an employee "acts in a fiduciary capacity" in *In re SERB v. Fulton County Engineer*, SERB 96-008 at 3-76 - 3-77 (6-24-96) ("*Fulton County Engineer*") (footnotes and citations omitted), stating:

Unlike "supervisor," "confidential employee," and "management level employee," the words "act in a fiduciary capacity" are not defined in O.R.C. Chapter 4117. Thus, we conclude that the appropriate standard to apply to these words is that standard applied by the Ohio courts in similar cases.

The phrase "act in a fiduciary capacity" indicates that the mere designation of an employee as a fiduciary is insufficient to warrant exclusion from the definition of "public employee." Rather, as with cases involving supervisors, management level employees, and confidential employees, it must be proved that the employee's actual job duties meet the test for finding an employee to be a fiduciary.

* * * In [*State ex re. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68], the [Ohio Supreme Court] opined:

"Cases which have analyzed the nature of the fiduciary relationship exception to classified civil service requirements have invariably characterized the relationship as one of trust and confidence. * * * It is 'more than the ordinary relationship of employer and employee.' * * * and exists where 'special confidence * * * is reposed in the integrity and fidelity of another'[".]"

In *Fulton County Engineer*, SERB held that when determining whether an employee was a fiduciary employee the focus should be on whether the assigned job duties require

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a high degree of trust, confidence, reliance, integrity and fidelity, above and beyond whatever technical competence the position may require. A high degree of discretion in carrying out assigned duties indicates a trust relationship. Analyzing the facts in the present case under the standard in *Fulton County Engineer*, we find that the APD 1-4s act in a fiduciary capacity and, therefore, are excluded from the definition of "public employee" in O.R.C. § 4117.01(C).

The OPD argues that, due to the very nature of their duties, the APDs enjoy a high degree of trust and confidence from Mr. Bodiker in their job performance. O.R.C. § 120.06 empowers the Ohio Public Defender to provide legal representation in certain cases, and O.R.C. § 120.04 authorizes the hiring of assistant state defenders to handle these cases. The APDs represent indigent people who are either charged with crimes or have been convicted and are attempting to obtain post-conviction relief in federal and state proceedings. All APDs are charged with zealously representing their clients to the fullest extent of their abilities within the boundaries of the legal system. If an APD handled a case poorly, it could result in the client being executed or imprisoned for life. While the APDs' fiduciary relationships with the clients are clearly established in each case, it is the APDs' relationship with the individual appointed as the Ohio Public Defender or the Office of the Ohio Public Defender that is the focus of our attention because the accountability imposed by statute for these cases rests with the Ohio Public Defender, not the individual APD.

SERB stated in *Fulton County Engineer* that a high degree of discretion in carrying out assigned duties may indicate the presence of a fiduciary relationship. The Ohio Public Defender has entrusted the APDs with significant discretion and independent judgment to carry out these functions. The APDs independently formulate the legal strategy and arguments for their cases. They independently determine what, if any, legal

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research to conduct. They independently determine when to schedule meetings with their clients and what legal advice to give. The APDs have substantial autonomy when going to court on behalf of the Ohio Public Defender. They draft pleadings, motions, and briefs for their cases. They have unilaterally filed documents that moved a case from state to federal court and stayed the execution of a client. They frequently speak to the press on behalf of the OPD about particular cases. They determine whether to contact law professors and legal scholars regarding their cases. The APDs can take overnight trips within the state without prior approval. They exercise substantial flexibility with their work hours, routinely working in excess of 40 hours per week without prior approval. Some APDs have even met with foreign officials on behalf of the OPD.

OCSEA asserts that the APDs do not have a high degree of discretion because some of the current policies require Mr. Bodiker's or his designee's approval, *e.g.*, to travel out of state, to send an OPD Investigator out of state to work on an APD's case, to hire experts, to attend CLE Seminars, and to sign pleadings. In addition, the APDs cannot independently approach the court about a potential conflict of interest issue in a case.

If the APD believes a conflict exists, it must be brought to the supervisor's attention, who will then confer with the Unit Chief and Mr. Bodiker. Only Mr. Bodiker or his designee can decide whether the APD should notify the court that a conflict exists and request the court appoint outside counsel to the case.

Some of the policies OCSEA points to were in effect in 1985 and were not changed when Mr. Bodiker became the Ohio Public Defender. Pleadings were reviewed and edited in 1985 and the present. CLE seminars requiring payment were always subject to prior approval, as were policies on hiring expert witnesses, use of state cars, out-of-state travel, and compensatory time. While these policies may represent a change in the OPD's operations, some of the changes are mandated by outside interests — *e.g.*, the Ohio

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Department of Administrative Services. Further, none of these changes substantially restrict the APDs' ability to perform their duties. The change in the way cases with a conflict of interest were referred to outside attorneys involved an internal administrative change, not a substantial change in the job duties of the APD 1s and 2s.⁴

In addition, the individual APD is responsible, as a licensed attorney, to accumulate the requisite number of CLE hours to continue meeting the standards to practice law.

The OPD has met its burden of proof that the APD 1-4s "act in a fiduciary capacity" since the record shows that they enjoy a high degree of trust through the independence and discretion given by the OPD. Thus, the APDs are to be excluded from the definition of "public employee" in O.R.C. § 4117.01(C).

C. The APD 4s are Supervisors

Although we find that all of the APDs "act in a fiduciary capacity," we will still determine the supervisory status of the APD 4s. To be a "supervisor," one must meet the definition contained in O.R.C. § 4117.01(F), which states in relevant part:

"Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment[.]

Those individuals found to be supervisors within the meaning of the above definition are not considered "public employees" pursuant to O.R.C. § 4117.01(C)(10), and the public

⁴The "conflict of interest" that the parties discussed goes to the Ohio Public Defender, not the individual APD. If the individual APD has a conflict of interest, the individual still must report the conflict of interest under the Code of Professional Responsibility.

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employer cannot be compelled to bargain with them. Supervisory issues are a question of fact in each case, and such status must therefore be determined on a case-by-case basis.⁵ The burden of establishing an exclusion from a bargaining unit under O.R.C. § 4117.01 rests upon the party seeking it.⁶

In *In re Mahoning County Dept. of Human Services*, SERB 92-006, at p. 3-19, (6-5-92) ("*Mahoning*"), SERB articulated a new standard for determining supervisor status:

Accordingly this Board rules that henceforth an individual will be excluded from a bargaining unit, pursuant to O.R.C. Sec. 4117.01(F), so long as the record contains substantial evidence that the employee has the authority to perform *one or more* of the functions listed in that section, actually exercises that authority and uses independent judgment in doing so. (footnotes omitted, emphasis in original).

⁵ *In re Lucas County Recorder's Officer*, SERB 85-061 (11-27-85).

⁶ *Fulton County Engineer, supra*; *In re Franklin Local School District Bd of Ed*, SERB 84-008 (11-8-84).

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Since the supervisory status of these positions had not previously been determined through stipulation or litigation, these employees need only perform one or more of the functions listed in O.R.C. § 4117.01(F) to be found to be supervisors. Under the *Mahoning* test, the APD 4s are "supervisors" as defined in O.R.C. § 4117.01(F). The testimony regarding the duties of Mr. Vickers as representative of the APD 4s shows that the APD 4s are involved in the initial and subsequent interviews of candidates for employment within their units, and effectively recommend hiring decisions. According to Mr. Vickers, with one possible exception, "for all of the other members [of his section] I recommended at some level or other that they be hired and they were hired." Mr. Vickers assigns work to his staff. He also conducts performance evaluations of APDs, secretaries, and paralegals. As such, the OPD has satisfied the test in *Mahoning*.

D. APD 3 McHenry Is A Supervisor

¹Transcript ("T."), pages 52-53.

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Although we find that all of the APDs "act in a fiduciary capacity," we will still determine the supervisory status of APD 3 Jerry McHenry.⁸ Mr. McHenry is the lead counsel in most of the trial level criminal cases assigned to the OPD. Upon Mr. McHenry's request, the APDs are assigned to him for specific cases by Mr. Bodiker or his designee. The APDs may sit as "second chair" or co-counsel at trial. Mr. McHenry reviews, edits, and critiques their work. Both Mr. McHenry and the co-counsel have their names on all pleadings in these cases. He also assists them in developing their trial skills. Mr. McHenry has evaluated OPD employees in his division in the classifications of paralegal, law clerk and secretary; he has also performed evaluations of some APDs. Mr. McHenry signs as the "rater" for the employees.⁹

⁸The status of all other APD 3s was stipulated by the parties at hearing. (F.F. 8-9 in the August 7, 1997 HORD).

⁹F.F. Nos. 10-11 in the August 7, 1997 HORD; T. 495-507, 514-521, and 524-527.

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Mr. McHenry meets the criteria of the *Mahoning* standard and is a supervisor because he “responsibly directs” public employees and “effectively recommends” the assignment or direction of public employees. First, as lead counsel he effectively recommends the assignment of the APDs. When he has a case in which co-counsel is needed, Mr. McHenry has a second attorney assigned through Mr. Bodiker or his designee; Mr. McHenry effectively recommends who is assigned on a particular case. These assignments generally last six months. Second, as lead counsel, he assigns work to the APDs using his independent judgment. Third, he conducts employee performance evaluations. Performance evaluations, whether for a probationary period or an annual review, are one vehicle for a supervisor to “responsibly direct” or to “effectively recommend” such direction.¹⁰ Performance evaluations are used for two primary purposes. First, performance evaluations are used to evaluate the employee’s job performance during the previous review period. It is through this tool that an employer can objectively judge and advise employees as to how they carried out their duties looking back over this period and identify areas needing improvement. Second, the performance evaluation carries with it a “performance action plan” that will direct the employee’s performance looking forward to the next review period. It is through this aspect of the performance evaluation that the employer communicates what is expected of the employee during that period and what the employee must do to improve the level of performance in order to be rated at a higher level. Since Jerry McHenry performs this function for the paralegal, law clerk, and secretary, as well as some APDs, he meets the requirements for a “supervisor” under the *Mahoning* standard.

III. CONCLUSION

¹⁰Performance evaluations can also be used to reward or promote employees; since that is not the issue in this case, we need not determine whether the performance evaluations are used for that purpose.

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For the reasons below, we find that the employees in the positions of Assistant Public Defender 1, 2, 3, and 4 are fiduciary employees and, consequently, are excluded from the definition of "public employee" in O.R.C. § 4117.01(C). We also find that the Assistant Public Defender 4s and Assistant Public Defender 3 Jerry McHenry are also excluded from the definition of "public employee" because they are supervisors pursuant to O.R.C. § 4117.01(F). As a result of these findings, it is not necessary to reach the issues relating to the appropriate bargaining unit for the employees and whether an accretion would be appropriate. Therefore, the Petition for Representation Election and the Petition for Amendment of Certification filed by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO are hereby dismissed.

McGee, Vice Chairman, concurs in the foregoing opinion; Mason, Board Member, dissents in a separate opinion.