

98-007

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Wright State University Chapter of the American Association of University Professors,

Employee Organization,

and

Wright State University,

Employer.

Case No. 97-REP-06-0148

OPINION

GILLMOR, Vice Chairman:

This representation case comes before the State Employment Relations Board ("Board" or "SERB") upon the filing of exceptions and the response to exceptions to the Hearing Officer's Recommended Determination issued on December 17, 1997. For the reasons below, we find that the bargaining unit proposed by the Wright State University Chapter of the American Association of University Professors ("AAUP") in its Petition for Representation Election is an appropriate bargaining unit and in comparison to the unit proposed by the Wright State University is the unit that will better serve the purposes of collective bargaining. Consequently, we direct an election in the unit proposed by the AAUP.

I. BACKGROUND¹

Wright State University ("University") is a comprehensive public university of approximately 16,000 students. It comprises eight colleges with a total of 50 academic departments. It has two campuses. The Dayton campus is located in Fairborn, Ohio, and the Lake campus is located in Celina, Ohio. Regular faculty of the School of Medicine work in two clinics owned by Wright State University (the Frederick A. White Health Center and the Yellow Springs Family Health Center) and in hospital space leased from various institutions.

The faculty comprises the University President and persons who hold the following academic ranks within the University: University Professor, Professor, Associate Professor, Assistant Professor, Instructor, or Lecturer. A member of the University faculty is considered fully affiliated with the University if: (a) the person is under a full-time contract with the University requiring a majority of the member's professional efforts; (b) the contractual obligation to the University has first priority on the person's time and effort; and (c) the person is on a tenure-track or equivalent track requiring University promotion and tenure review, or the person is receiving a majority of his or her full-time salary from the University. Only fully affiliated faculty members are eligible for tenure. At the time of initial appointment, a faculty member beginning a period of probationary service at the University is furnished a written statement indicating the maximum length of such service for tenure, such period not to exceed six years. A grant of tenure is a commitment by the University to a sequence of annual appointments, such sequence being terminable only by resignation, retirement, removal for cause, or financial emergency. Although no tenured contract of employment for more than one year can be made between any member of the faculty and the

¹Findings of Fact ("F.F.") Nos. 3-16 and 21-30.

University, the principle of tenure is observed as an act of good faith on the part of the University. Tenure is granted by the board of trustees upon the recommendation of the University President.

Wright State University's School of Professional Psychology ("SOPP") is a separate school within the University structure. Organized as an independent, professional school within the University, the SOPP employs only nontenured faculty. Approximately 14 are full-time, fully affiliated (core) faculty whom the University proposes to include in the bargaining unit. The SOPP also employs fully affiliated faculty with noncontinuing appointments.

Fully affiliated, core faculty in the SOPP are eligible for an initial three-year contract, followed by a four-year contract, followed by subsequent five-year contracts. Fully affiliated, contract faculty in the SOPP are eligible only for contracts of one year in duration. Faculty members in the SOPP typically teach one course per quarter with the remainder of their workload consisting of clinical supervision. Governing documents of the SOPP set forth applicable criteria with respect to the ranks utilized for SOPP fully affiliated faculty members as well as criteria and procedures applicable to appointments, reappointments and promotions in the SOPP. The same guidelines for faculty rank apply for core and contract faculty. State licensure is an element of eligibility for each rank. The SOPP's Bylaws contain procedures for challenging the nonrenewal of a fully affiliated (nontenured) faculty member's continuing contract. Faculty employed by the SOPP may earn additional income through a practice corporation known as the University Psychological Services Association, Inc. ("UPSA"). UPSA is a for-profit psychological services corporation owned and operated by the faculty of the SOPP. UPSA's governing board consists of all fully affiliated core faculty of the SOPP. UPSA makes an annual "chargeback" payment to the SOP Dean's Discretionary Fund, calculated as a percentage of gross revenues.

Wright State University's College of Nursing and Health ("CONH") employs approximately 11 full-time, fully affiliated nontenured faculty and approximately 16 tenured faculty. Nontenured faculty initially are eligible for a one-year contract, followed by two contracts for a period of one year each with subsequent appointments for three years. Tenured CONH faculty are required to possess a doctorate, terminal degree, whereas the nontenured faculty are employed at the Master's degree level. Governing documents of the CONH set forth applicable criteria with respect to the ranks utilized only for the CONH fully affiliated, nontenured faculty members. CONH governing documents set forth criteria and procedures applicable to appointments and promotions in the CONH. Salaries for CONH faculty are not the same for tenured and nontenured faculty. Guidelines for CONH faculty workload provide for an average of 12 credit hours for tenured faculty versus 24 credit/contact hours for nontenure-track faculty.

The Faculty Handbook contains the following statement regarding tenured faculty in the event of abolishment:

If some positions are abolished, it shall become necessary to determine who is best qualified to staff the remaining positions within the affected programs. The appointment of a faculty member with tenure shall not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances in which a serious distortion of the academic program would otherwise result.

The Faculty Handbook contains a procedure for the "Removal and Suspension of Tenured Faculty" that provides in relevant part:

Removal or suspension of a tenured faculty member for just cause shall occur only because of (a) demonstrated incompetence or dishonesty in teaching or scholarship, or (b) substantial and manifest neglect of duty, or (c) personal conduct which substantially impairs the individual's institutional responsibilities, or (d) malicious conduct which directly

obstructs the performance of instructional or scholarly programs authorized or permitted by the university.

The Wright State University School of Medicine ("SOM") employs approximately 90 regular full-time, fully affiliated faculty. Other SOM fully affiliated faculty are categorized as institutional (of which there are approximately 110) and special/auxiliary (of which there are approximately 16). Tenure is not available to SOM faculty. Initial appointments in the SOM are for up to three years, followed by reappointment for four years. Subsequent appointments are for five years. The SOM's Bylaws contain procedures for challenging the nonrenewal of a fully affiliated, nontenured faculty member's continuing contract. The State of Ohio provides a subsidy to the SOM separate from the rest of the University which comprises approximately 45 - 50 percent of the SOM's annual funding. In addition, the SOM maintains a state budget separate from the rest of the University. Through the mechanism of cost allocations, the SOM and the University account for the following: SOM's use of space on campus; administrative, accounting and personnel functions; centralized computer services; drugs furnished to University employees by the SOM pharmacy; lab animal resources; and use of the Fordham Library.

For fiscal year 1997-98, approximately 50 per cent of the aggregate total salaries of regular, full-time, fully affiliated SOM faculty is paid by non-university hospital funding sources. The balance is paid by University subsidy tuition resources. Of the 92 regular, full-time, fully affiliated SOM faculty, 62 have some, or all, of their salaries paid on a "pass-through" basis by hospital funding sources. At least five SOM regular faculty currently have no portion of their base salary funded by the University. Several others have less than 30% of their base salary funded by the University. Matrix faculty are tenured basic science professors with some instructional duties involving medical students; for fiscal year 1997-98, no matrix faculty members are funded by non-university hospitals.

Faculty employed by the SOM may earn additional income through a practice corporation known as the University Medical Services Association ("UMSA"). The basis for the relationship between the University and the UMSA is explained in the parties' contract dated October 15, 1997, as follows:

Whereas, it is essential to the success of the School that it obtain, as permanent, full-time members of its faculty and staff . . . men and women [who] must be recruited in competition with opportunities for financial remuneration elsewhere open to them.

Whereas, the School has determined that it will advance the educational and professional skills of its personnel and maintain and improve the level of clinical proficiency to engage in clinical practice without incurring liability for the School through the development of a faculty-group practice.

On June 23, 1997, the Wright State University Chapter of the American Association of University Professors ("AAUP") filed a Request For Recognition, with substantial evidence of majority support,² seeking to represent the following unit:

INCLUDED: All full-time tenured and tenure-track Faculty employed by Wright State University.

EXCLUDED: All department chairs and heads, all ranks of deans, all ranks of provosts, all ranks of vice-presidents, the president, all other supervisors defined by § 4117.01(F), all Faculty within the Schools of Medicine and Professional Psychology other than those who are tenured or tenure-track, and all other employees not included above.³

²See Ohio Revised Code ("O.R.C.") § 4117.05(A)(2) and Ohio Administrative Code Rule 4117-3-01.

³The parties stipulated at hearing that their use of the term "tenured" encompassed the group of faculty who either already have acquired tenure or are in tenure-eligible positions.

In its Petition for Representation Election filed on July 16, 1997, the University

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INCLUDED: All full-time, fully affiliated tenured and tenure-track faculty of Wright State University, including the Lake Campus and the matrix faculty of the School of Medicine; all full-time, non-tenured, fully affiliated faculty of the School of Professional Psychology and the College of Nursing and Health; and the regular faculty of the School of Medicine who are full-time, fully affiliated faculty.

EXCLUDED: All department chairs and heads, all ranks of deans, all ranks of provosts, all ranks of vice-presidents, the president, all other supervisors defined by § 4117.01(F), voluntary auxiliary and institutional faculty of the School of Medicine and all other employees not specifically included in the bargaining unit.

There are approximately 780 fully affiliated faculty at Wright State University, of whom approximately 400-450 are tenured. The number of faculty the public employer proposes to include in the bargaining unit is 553.

II. DISCUSSION

In *State ex rel Glass, Molders, Pottery, Plastics & Allied Workers v. SERB*, 70 Ohio St.3d 242, 1994 SERB 4-64 (1994) ("*GMPP II*"), the Ohio Supreme Court laid out two different procedural considerations. Where an employer objects to the bargaining unit proposed by an employee organization, the employer has the burden to show by substantial evidence that the objectionable unit is inappropriate.⁴ But where, like in the case at issue, the employer objects to the proposed unit *and* proposes another bargaining unit, "SERB must consider all proposals and, where more than one proposed unit is 'an' appropriate unit, decide which of them shall be deemed 'the' appropriate unit."⁵ Hence, the issue before us, under *GMPP II*, is whether the different bargaining units sought by the AAUP and the University are each an appropriate unit for purposes of collective bargaining under O.R.C. § 4117.06(B) and, if both are appropriate, which unit shall be deemed "the" appropriate unit.

The unit sought by the AAUP includes all tenured and tenure-track faculty at the University. The unit sought by the University incorporates the unit sought by the AAUP and seeks to add some, but not all, faculty who it classifies as "fully affiliated." The University's unit excludes the nontenured instructor and lecturer positions even though they are fully affiliated. In the SOM, the University proposes to include the regular fully

⁴*GMPP II* at Syllabus.

⁵*Id.*

affiliated faculty, but to exclude the institutional (fully affiliated) and special/auxiliary (fully affiliated) faculty. In the SOPP, the University proposes to include the fully affiliated “core” faculty, but to exclude all other fully affiliated faculty.

When determining the appropriateness of a bargaining unit under O.R.C. § 4117.06(B), the Board has to consider the desires of the employees; the employees’ community of interest; wages, hours, and other working conditions; 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. Neither of the proposed units creates an over-fragmentation problem, as each adds one bargaining unit to the existing structure. Thus, both proposed units are equal on this factor. The record does not support a finding that either of these bargaining units will be more detrimental than the other to the efficiency of operations or that the administrative structure of the public employer merits one unit over the other.

The University argued that the AAUP’s proposed unit will be detrimental to the employer’s efficiency of operation since a tenured/nontenured faculty paradigm would create redundant parallel structures for administration of faculty activities, welfare, and load assessment that, in turn, would require additional administrative work, new personnel, new administrative systems, and new administrative procedures. The burden the University anticipates, if it occurs, is due to a bargaining unit/non-bargaining unit division regardless of the composition of the bargaining unit. The possibility for different sets of policies pertaining to the terms and conditions of employment for faculty — one for those who may be represented by the AAUP and one for those excluded from the bargaining unit — is inherent in the creation of *any* unit that does not include *all* faculty.

No history of collective bargaining exists as to the faculty. None of the faculty are currently represented by any employee organization, and no employee

organization, other than the AAUP, currently seeks recognition. Thus, both units are equally satisfactory under this factor.⁶

The desires of the employees are evidenced by the fact that the AAUP's petition was supported by the appropriate substantial evidence.⁷ In *In re Northwest Local School District Bd. of Ed.*, SERB 84-007 (10-25-84), at p. 11, we held:

Treating the "desires of employees" factor as the equivalent of "extent of organization", that factor is not determinative *per se*, but an element for consideration[.] * * * Thus, the confinement of the representation claim to employees falling within transportation and the related categories linked with a showing of interest in a unit composed only of bus drivers and mechanics is a measure of the appropriateness of the unit petitioner seeks. But it is not a singular and final measure.

Thus, although it is not controlling, this factor weighs in favor of AAUP's bargaining unit.

⁶*In re Northwest Local School District Bd. of Ed.*, SERB 84-007 (10-25-84); *General Motors Corp.*, 64 NLRB 688, 17 L.R.R.M. 130 (1945); *Hamburg Knitting Mills Co.*, 239 NLRB 1231, 100 L.R.R.M. 1237 (1979); *Renzetti's Market, Inc.*, 238 NLRB 174, 99 L.R.R.M. 1189 (1978).

⁷See, e.g., *In re St. Mary's City School Dist. Bd. of Ed.*, SERB 95-007 (4-21-95).

The key factor in the case at issue — and where we believe the most important difference lies between the two proposed bargaining units — is the community of interest, including the wages, hours, and other working conditions. The primary criterion 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.⁸ Other criteria include a similarity in job functions, geographic proximity, common supervision, the degree of employee interchange, operational integration, and bargaining history.⁹

⁸We have already found that community of interest is interrelated with the employees' wages, hours, and working conditions. *Id.*

⁹See, e.g., *NLRB v. J.C. Penney Co., Inc.*, 559 F.2d 373, 96 L.R.R.M. 2391 (5th Cir. 1977); *Purnell's Pride, Inc.*, 252 NLRB 110, 105 L.R.R.M. 1257 (1980); *Wisconsin Federation of Teachers*, 1 NPER 51-10095 (WI WERC 1979); *County of Allegheny*, 2 NPER 40-11031 (PA Comm Pl. 1979).

In regard to the unit proposed by the AAUP, a tenure/nontenure distinction has been the basis for other Board-certified bargaining units as appropriate units for a university.¹⁰ There is a strong cohesiveness among tenured faculty and also among nontenured faculty that we cannot find in the mixed group. From the day faculty members are hired, they are treated differently on the basis of whether they are tenure-track or nontenured-track. Upon initial employment with the University, the faculty member is placed in either a tenure-eligible or nontenured position. If placed in a tenure-eligible position, the employee begins a period of probationary service and is provided with a written statement indicating the maximum length of service for tenure, such period not to exceed six years. A grant of tenure results in a commitment by the University to a sequence of annual appointments, such sequence being terminable only by resignation, retirement, removal for cause, or financial emergency. Thus, tenured faculty have substantial job security compared to nontenured faculty. Tenure-track faculty not achieving tenure within the specified maximum period are terminated.¹¹ However, once having achieved tenured status, the University's Faculty Handbook sets forth a procedure specifically applicable only to tenured faculty in cases of removal. A "just cause" standard is applied by a hearing board upon which nontenured faculty are not permitted to serve.¹² Significant procedural protections are afforded tenured faculty, including: written notice of the charges, disqualifications for cause and peremptory challenges to hearing board members, specific time frames for processing the case at its various stages, representation by counsel with the right to present and cross-examine witnesses, and a "clear and convincing evidence" burden of proof that

¹⁰Both Kent State University and the University of Toledo have Board-certified bargaining units divided according to those who are tenured and tenure-track versus those who are not. The only example we could find where medical school faculty were included in the same bargaining unit with regular tenured faculty is the University of Cincinnati, which is a deemed-certified unit.

¹¹See Joint Exhibit ("Jt. Exh.") 1 at pp. 19-20.

¹²F.F. No. 12.

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the charges against the faculty member are true.¹³

¹³See Transcript page ("T.") 150; Jt. Exh. 1 at pp. 23-24; and Jt. Exh. 24.

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In the event of job abolishment, the Faculty Handbook provides that the appointment of a faculty member with tenure shall not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances in which a serious distortion of the academic program otherwise would result.¹⁴ Tenured faculty members have completely different expectations for continuing employment, and a very different level of job security, from nontenured faculty members. Expectations for continuing employment is an important element of community of interest in this case.

Moreover, the wage structures of the tenured faculty and the majority of the faculty in the SOM are very different as well. The majority of the clinical faculty's earnings are significantly greater and derived from different sources than their tenured colleagues. Unlike the tenured faculty, the SOM faculty receive substantial compensation from sources outside the University. For example, for fiscal year 1997-98, approximately 50% of the aggregate total salaries of regular, full-time, fully affiliated SOM faculty is paid by non-university hospital funding sources. Of the 92 regular, full-time, fully affiliated SOM faculty, 62 have some, or all, of their salaries paid on a "pass-through" basis by hospital funding sources. At least five SOM regular faculty currently have no portion of their base salaries funded by the University.¹⁵ Likewise, faculty employed by the SOPP may, and do, earn additional income through their practice corporation, UPSA. And finally, with respect to wages, the record reveals

¹⁴F.F. No. 11.

¹⁵This raises the question as to whether such individuals even meet the University's definition of "fully affiliated." The University Faculty Constitution and Bylaws requires that "the person is under full-time contract with the university requiring a majority of the member's professional efforts * * * [and that] the contractual obligation to the university has first call on the person's time and effort." (F.F. No. 9). The Provost testified that "fully affiliated" status requires that the faculty member be paid "substantially" by the University. (T. 84). Contrast this with the University's position — unsupported by evidence — that UMSA is "a separate entity." (T. 202).

dissimilarities between the salaries of tenured and nontenured CONH faculty.

Tenure is *a* factor, but not *the* factor, in determining appropriateness of a bargaining unit due to its effect on the key issues of job security, expectations of continuing employment, and the sources and size of earnings. Under the facts presented, the AAUP has made a convincing argument in favor of its proposed unit.

Furthermore, the rationale behind the structure of the unit the University proposed is not clear. Some full-time fully affiliated faculty are included, while others are not. Hence, based on a case-by-case analysis, comparing the two proposed units before us, the AAUP's proposed bargaining unit describes a distinct, cohesive group, but the University creates a non-distinct mixture of extremely diverse, if not conflicting, interests. Even with these unexplained inconsistencies, the unit proposed by the University may be an appropriate unit. But the University has not adequately demonstrated why its proposed unit should be "the" appropriate unit under *GMPP II*. Consequently, we find that the appropriate unit for bargaining under these facts is the AAUP's proposed unit.

III. CONCLUSION

For the reasons above, we find that the bargaining unit proposed by the Wright State University Chapter of the American Association of University Professors is the appropriate unit for purposes of collective bargaining, pursuant to O.R.C. § 4117.06(B), rather than the bargaining unit proposed by the Wright State University. Pursuant to O.R.C. § 4117.07, we direct a representation election to be conducted in the AAUP's proposed bargaining unit.

Pohler, Chairman, and Mason, Board Member, concur.

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