

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

In the Matter of

Mahoning Education Association of Developmental Disabilities, OEA/NEA,

Employee Organization,

and

Mahoning County Board of Mental Retardation and Developmental Disabilities,

Employer.

Case No. 2003-REP-09-0171

DIRECTIVE GRANTING PETITION FOR CLARIFICATION OF BARGAINING UNIT
(OPINION ATTACHED)

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
November 3, 2005.

On September 22, 2003, the Mahoning Education Association of Developmental Disabilities ("Employee Organization") filed a Petition for Clarification of Bargaining Unit pursuant to Ohio Administrative Code Rule 4117-5-01(E)(2), seeking to clarify the existing unit to include the position of Service and Support Administrator. On November 12, 2003, the Mahoning County Board of Mental Retardation and Developmental Disabilities ("Employer") filed a position statement in response to the Employee Organization's position statement filed November 10, 2003. On July 1, 2004, the Employer filed a motion to coordinate and a motion to stay Case No. 2003-ULP-11-0590, a related unfair labor practice case involving the same parties.

On August 5, 2004, after a preliminary investigation, the State Employment Relations Board ("Board") granted the Employer's motion to coordinate, denied the Employer's motion to stay Case No. 2003-ULP-11-0590, directed this case to hearing to determine the bargaining-unit status of the employees in question, and directed the parties to mediation. A hearing was held on October 19, 2004.

On April 12, 2005, a Recommended Determination was issued by the Administrative Law Judge. On April 21, 2005, the Employer filed exceptions to the Recommended Determination. On May 2, 2005, the Employee Organization filed a response to the Employer's exceptions.

After reviewing the record, the Recommended Determination, the Employer's exceptions, the Employee Organization's response to the exceptions, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Recommended Determination, incorporated by reference; grants the Employee Organization's Petition for Clarification of Bargaining Unit; and clarifies the existing deemed-certified bargaining-unit's description to include the position of Service and Support Administrator.

It is so ordered.

DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.

/s/ Carol Nolan Drake
CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen days after the mailing of the State Employment Relations Board's directive.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 16th day of November, 2005.

/s/ Donna J. Glanton
DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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

MAHONING EDUCATION ASSOCIATION :
OF DEVELOPMENTAL DISABILITIES, : **CASE NO. 03-REP-09-0171**
:
Employee Organization, :
:
and : **KAY A. KINGSLEY**
:
MAHONING COUNTY BOARD OF : **Administrative Law Judge**
MENTAL RETARDATION AND :
DEVELOPMENTAL DISABILITIES, :
:
:
Employer. : **RECOMMENDED DETERMINATION**
:

I. INTRODUCTION

On September 22, 2003, the Mahoning Education Association of Developmental Disabilities (“MEADD” or “Union”) filed a Petition for Clarification of Bargaining Unit pursuant to Ohio Administrative Code Rule 4117-5-01(E)(2), seeking to clarify the existing unit to include the position of Service and Support Administrator. On November 12, 2003, the Mahoning County Board of Mental Retardation and Developmental Disabilities (“Employer”) filed a position statement in response to MEADD’s position statement filed November 10, 2003. On July 1, 2004, the Employer filed a motion to coordinate and a motion to stay Case No. 2003-ULP-11-0590, a related unfair labor practice case involving the same parties.

On August 5, 2004, after a preliminary investigation, the State Employment Relations Board (“SERB” or “Board”) granted the Employer’s motion to coordinate, denied the Employer’s motion to stay Case No. 2003-ULP-11-0590, directed this case to hearing to determine the bargaining-unit status of the employees in question, and directed the parties to mediation. A hearing was held on October 19, 2004, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUES

- 1) Does Ohio Revised Code § 5126.15(A)¹ preclude the granting of a petition for clarification to include Service and Support Administrators in a bargaining unit that includes employees who perform non-administrative duties?

¹ All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

- 2) Whether the existing bargaining unit should be clarified to include the position of Service and Support Administrators.

III. FINDINGS OF FACT²

1. The Mahoning County Board of Mental Retardation and Developmental Disabilities is a “public employer” within the meaning of § 4117.01(B). (S.)
2. The Mahoning Education Association of Developmental Disabilities, OEA/NEA is the exclusive representative of a bargaining unit of the Employer’s employees, and is an “employee organization” within the meaning of § 4117.01(D). (S.)
3. The Employer and MEADD have been parties to collective bargaining agreements (“CBAs”) since prior to April 1, 1984, the effective date of Chapter 4117, Ohio’s Public Employees’ Collective Bargaining Act. The pertinent CBA between the parties was effective from September 1, 2001 through August 31, 2004. (S.)
4. On August 9, 1990, the parties filed a Joint Petition for Amendment of Certification with the Board in Case No. 90-REP-08-0183. The petition represented that the bargaining unit was deemed certified. On August 30, 1990, the Board approved an Amendment of Certification that referred to MEADD as the “Board-certified” exclusive representative. (S.; Amendment of Certification, Case No. 90-REP-08-0183)
5. On September 24, 2001, the parties filed a Joint Petition for Amendment of Certification with the Board (Case No. 01-REP-09-0231). On October 18, 2001, the Board approved an Amendment of Certification that referred to MEADD as the “Board-certified” exclusive representative. (Amendment of Certification, Case No. 01-REP-09-0231)
6. On July 17, 2003, the Employer posted a vacancy notice for 14 vacancies in a position entitled Service and Support Administrator (“SSA”). The posting contained a statement that the positions were not bargaining-unit positions. (S.)

² All references to the Joint Stipulations of Fact are indicated parenthetically by “S.,” followed by the stipulation number(s). All references to the transcript of hearing are indicated parenthetically by “T.,” followed by the page number(s). All references to the Joint Exhibits in the record are indicated parenthetically by “Jt. Exh.,” followed by the exhibit number(s). References to the record are intended for convenience only and are not intended to suggest that such references are the only support in the record for that related Finding of Fact.

7. The position classifications of Case Manager, Service Coordinator, and Service Coordinator II have, at all times pertinent, been positions within the bargaining unit represented by MEADD. (S.)
8. On September 22, 2003, MEADD filed a Petition for Clarification of Bargaining Unit with SERB. The petition seeks to clarify the bargaining unit by including the SSA positions. (S.)
9. The Employer required those persons holding the positions of Case Manager, Service Coordinator, and Service Coordinator II to bid on the newly created SSA positions to ensure their continued employment. All individuals who worked as Case Managers, Service Coordinators, and Service Coordinator IIs are now working as SSAs. The Case Managers, Service Coordinators, and Service Coordinator IIs are “temporarily reassigned” to SSA positions. (T.16, 26, 50,62, 75)
10. The duties performed by the SSA positions are such that make the holders of the position “public employees” within the meaning of § 4117.01(C). (S.)
11. All of the duties previously performed by Case Managers, Service Coordinators, and Service Coordinators IIs are performed by the SSAs. Some of the duties are performed on an expanded basis. (T. 28, 40, 58, 70, 107-108)
12. The only difference between the duties of the Case Managers, Service Coordinators, and Service Coordinator IIs and the SSAs is that the SSAs no longer handle major unusual incidents. (T. 58)
13. The pertinent CBA between the parties contained a section stating as follows: “if the official classification of any person presently performing all of the duties of any of the classifications referred to is changed, such new official classification shall be included in the bargaining unit.” (T. 30-32; Jt. Exh. 2)
14. The hours of work, days worked per week, work location, and supervisor for the SSA positions are the same as they were for the Case Managers, Service Coordinators, and Service Coordinator II positions. (T. 49, 63, 75-76)

IV. ANALYSIS AND DISCUSSION

The Union filed a Petition for Clarification of Bargaining Unit to have the position of Service and Support Administrator included in the existing bargaining unit. The purpose of a clarification petition is to determine whether a particular employee or group of employees is included in or excluded from an existing bargaining unit based upon the unit description and the duties performed by the employees in question. Rule 4117-5-01(E)(2). See, e.g., In re Ohio State Troopers Assn, SERB 2000-003 (3-27-00); In re Shawnee State Univ, SERB 97-010 (6-30-97), aff'd in part, rev'd in part sub nom. Shawnee Ed Assn v SERB,

1999 SERB 4-16 (CP, Franklin, 9-27-99), aff'd 2000 SERB 4-33 (10th Dist Ct App, Franklin, 11-16-00) ("Shawnee").

Unit clarification does not alter the status quo, but rather maintains it. In re Ohio Council 8, AFSCME, SERB 95-021 (12-29-95). Because of this fact, the 10th District Court of Appeals in Shawnee Ed Assn v SERB, 2000 SERB 4-33 (10th Dist Ct App, Franklin, 11-16-00), distinguished a unilateral petition to change or alter a deemed-certified unit (i.e., a Petition for Amendment of Certification), which is prohibited, from a unilateral Petition for Clarification of Bargaining Unit, which is allowed. The court found that neither Ohio Council 8, AFSCME v. Cincinnati, 64 Ohio St.3d 677, 1994 SERB 4-37 (1994) ("OC8 & Cincinnati") nor State ex rel Brecksville Ed Assn v SERB, 74 Ohio St.3d 665, 1996 SERB 4-1 (1996) dealt with petitions for clarification and as such, did not preclude unilateral petitions for clarification. Therefore, based upon the rationale in Shawnee Ed Assn, MEADD' s unilateral petition for clarification in this case is appropriately before SERB.

The positions of Case Manager, Service Coordinator and Service Coordinator II have always been positions within the MEADD bargaining unit. Effective June 6, 2001, the Ohio General Assembly enacted § 5126.15, which provides in part at division (A) as follows: "Individuals employed or under contract as Service and Support Administrators shall not be in the same collective bargaining unit as employees who perform duties that are not administrative." Section 4117.06, which provides that SERB has the final right to designate a unit appropriate for bargaining and which prohibits the Board from finding units of a particular configuration to be an appropriate unit, was not amended.

In July 2003, the Employer posted the position of SSA. The Employer required those persons holding the positions of Case Manager, Service Coordinator, and Service Coordinator II to bid on the SSA positions to maintain their employment. Persons holding the positions of Case Manager, Service Coordinator, and Service Coordinator II now hold the SSA positions.

A. The bargaining unit is deemed certified.

A threshold question posed by the Employer is whether the originally deemed-certified unit, which on two occasions has been amended by joint petitions for amendment of certification and subsequent SERB approval, remains a deemed-certified unit or became a Board-certified unit by virtue of the two approvals of joint petitions to amend. A joint Petition for Amendment of Certification was filed with SERB on August 9, 1990. The box on the form was checked indicating that the unit was deemed-certified. This petition sought to amend the unit to add the position of physical therapist. The Amendment of Certification issued by SERB on August 30, 1990, referred to the unit as being Board certified.

A joint Petition for Amendment of Certification to add the positions of LPN, Service Coordinator II, and Dispatch Secretary to the existing unit was filed on September 24, 2001. The box checked on the joint petition form indicated that the unit was "board certified."

The Board-certified designation was repeated in the Board's Amendment of Certification issued on October 18, 2001.

The Employer cites no authority for any of the following: that the box checked on a petition controls the status of a bargaining unit, that a joint petition to amend a deemed-certified bargaining unit subsequently results in a Board-certified unit when that change is not an issue in dispute before the Board, and that the reference to a "board-certified" unit in an Amendment of Certification issued after a joint petition to amend a deemed-certified unit is anything other than a clerical error or, at worst, "dicta." The Employer has presented no authority to support the proposition that a deemed-certified unit loses its deemed-certified status once a joint petition to amend that deemed-certified unit has been approved by SERB, such as occurred in the instant case in 1990 and 2001.

It makes no sense to suggest that an employee organization would lose its deemed-certified status by making a joint, agreed-upon request to add certain newly created positions to the bargaining unit. If an employee organization would lose its deemed-certified status by so doing, unions would be reluctant to agree to amend the composition of deemed-certified bargaining units. The resulting inflexibility would be contrary to the aim of Ohio's collective bargaining law to encourage orderly and cooperative resolution of disputes. A union should not have to choose between retaining its deemed-certified status (i.e., its protection against unilateral attack by an employer) and working cooperatively with an employer to add positions to a bargaining unit that both employer and union agree should be bargaining-unit positions. Furthermore, it is undisputed that there has been no challenge to MEADD's deemed-certified status by another employee organization. Therefore, the unit remains deemed certified.

B. A deemed-certified bargaining unit cannot be altered by application of § 5126.15(A).

Section 4(A) of Am.Sub.S.B. No. 133, effective April 1, 1984 (140 Ohio Laws, Part I, 367), states in part: "Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative." Section (B) states: "Any employee organization otherwise recognized by the public employer without a written contract, agreement, or memorandum of understanding shall continue to be recognized until challenged as provided in this act, and the Board has certified an exclusive representative."

The instant case deals with a unit that was deemed-certified under Sections 4(A) and 4(B) of Am.Sub.S.B. No. 133. Exclusive collective bargaining relationships that arose before April 1, 1984, are "deemed certified" under Sections 4(A) and 4(B) of Am.Sub.S.B.

No. 133, and neither the employer nor the Board has the power to grant or withhold recognition to the exclusive representative in such cases since the exclusive representative is already certified by the law itself. In re City of Bedford Heights, SERB 87-016 (7-24-87). Section 4(A) of Am.Sub.S.B. No. 133 essentially “grandfathers in” bargaining relationships in existence as of the effective date of Chapter 4117. These units are to be treated as if there had been a post-Act, Board-conducted and Board-certified election and the Board’s designation of a bargaining agent.

Section 4(A) states that an employee organization’s deemed-certified status continues “until challenged by another employee organization.” The composition of the unit and the exclusive bargaining relationship are protected from interference until the union negotiates it away, another union successfully challenges, or SERB alters the composition after a joint petition. State ex rel Brecksville Ed Assn v. SERB (1996), 74 Ohio St.3d 665, 1996-Ohio-310, 1996 SERB 4-1. It follows that a deemed-certified unit is also free from change by the legislature unless the legislature approaches such change by modifying SERB’s jurisdictional enabling legislation.

The Employer argues that § 5126.15 (A) controls the Board’s resolution of the petition in this case. By its terms Section 5126.15(A) excludes SSAs from a bargaining unit that also contains employees who perform duties that are not administrative. Section 5126.15(A) is a legislative attempt to define the composition of a bargaining unit. Unit determination can be made only in two ways, through the collective bargaining grievance procedure, Ohio Council 8, Am. Fedn. of State, Cty. and Mun. Emp., AFL-CIO v. State Emp. Relations Bd. (2000), 88 Ohio St.3d 460, 2000-Ohio-370, 2000 SERB 4-13, or by SERB’s original, exclusive jurisdiction to do so under § 4117.06. Ohio Council 8, AFSCME v. City of Bucyrus, 1994 SERB 4-41 (10th Dist Ct App, Franklin, 6-16-94); Shawnee Ed Assn v. SERB, 2000 SERB 4-33(10th Dist Ct App, Franklin, 11-16-00).

SERB does not have jurisdiction over the composition of deemed-certified bargaining units. An attempt to exercise jurisdiction was found to be invalid in OC8 & Cincinnati. In that case, an administrative rule of SERB gave the employer the right to challenge a deemed-certified unit when the enabling legislation restricted the challenge to a rival employee organization. The Court held that the administrative rule “is in clear conflict with Section 4(A) of Am. Sub. SB No. 133 and is, therefore, invalid.” Section 5126.15(A) attempts to compromise the authority of SERB to determine the composition of a bargaining unit under § 4117.06. Section 5126.15 does not place any restrictions or limits on Sections 4(A) and (B) of Am.Sub.S.B. No. 133. Consequently, § 5126.15 cannot preclude SERB from granting a petition to clarify that the existing bargaining unit includes the SSAs because § 5126.15 does not apply to the composition of deemed-certified bargaining units.

C. Article 1, §1.021 of the parties' collective bargaining agreement provides that the position of SSA shall be included in the bargaining unit.

Parties have the ability to resolve bargaining-unit composition issues via their own collective bargaining agreements. Ohio Council 8, Am. Fedn. of State, Cty. and Mun. Emp., AFL-CIO v. State Emp. Relations Bd., supra, involved a collective bargaining agreement between a deemed-certified bargaining unit and the Employer. The parties' CBA called for employees in newly created, non-supervisory positions to become part of the bargaining unit if the position was generally similar to a position already in the bargaining unit. The CBA also contained a grievance procedure that culminated in arbitration. The grievance procedure was initiated, and the arbitrator resolved the dispute. Even in a deemed-certified unit, the Court found the collective bargaining agreement's grievance procedure to be an appropriate vehicle to resolve bargaining-unit composition issues.

The same analysis is applicable here. Similar language exists in the MEADD and Employer's CBA effective from September 1, 2001 through August 31, 2004. Section 1.021 of the CBA provides as follows: "If the official classification of any person presently performing all of the duties of any of the classifications referred to is changed, such new official classification shall be included in the bargaining unit." Thus, the parties anticipated bargaining-unit composition issues and provided for resolution thereof in their CBA.

D. The rules of statutory construction do not mandate that § 5126.15 prevail.

The Employer also cites the rules of statutory construction contained in §§ 1.51 and 1.52 as support for the proposition that § 5126.15 prevails over Chapter 4117. Section 1.52(A) provides as follows: "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails." Section 1.51 provides as follows:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

These rules of statutory construction do not dictate a contrary result. Section 1.51 is on point. Under that statute, if a general provision conflicts with a special or local provision, the two provisions shall be construed, if possible, so that effect is given to both. In looking at §§ 4117.06 and 5126.15 of the Ohio Revised Code and the uncodified law in Sections 4(A) and (B) of Am.Sub.S.B. No. 133, effect can be given to all of these provisions by applying the uncodified law provisions to deemed-certified bargaining units and

§§ 4117.06 and 5126.15 to Board-certified units. How the latter two statutory provisions may affect Board-certified units is not an issue in this case. Since the statutes are reconcilable, § 1.52 does not apply.

E. The existing unit should be clarified to include the position of Service and Support Administrator.

What is critical in this case is that the duties performed by Case Managers, Service Coordinators and Service Coordinator IIs – and now by SSAs – have always been duties performed by the deemed-certified bargaining-unit. The position names have changed, but the duties have not. Section 5126.15(A) does not preclude the clarification petition, which does not alter or amend the existing bargaining-unit's composition. Therefore, the Petition for Clarification of Bargaining Unit should be granted to include the position of SSA within the existing deemed-certified bargaining unit.

V. CONCLUSIONS OF LAW

1. The Mahoning County Board of Retardation and Developmental Disabilities is a “public employer” as defined by § 4117.01(B).
2. The Mahoning Education Association of Developmental Disabilities is an “employee organization” as defined by § 4117.01(D) and is the deemed-certified exclusive representative of a bargaining unit of the Employer's employees.
3. The existing deemed-certified bargaining unit should be clarified to include the position of Service and Support Administrator.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board issue a directive granting the Petition for Clarification of Bargaining Unit and clarifying the bargaining-unit's description accordingly.