

[Cite as *Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 2012-Ohio-2364.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                                 |   |                          |
|---------------------------------|---|--------------------------|
| The University of Toledo,       | : |                          |
|                                 | : |                          |
| Appellant-Appellant,            | : |                          |
|                                 | : | No. 11AP-834             |
| v.                              | : | (C.P.C. No. 09CVF-14298) |
|                                 | : |                          |
| Ohio State Employment Relations | : | (ACCELERATED CALENDAR)   |
| Board et al.,                   | : |                          |
|                                 | : |                          |
| Appellees-Appellees.            | : |                          |
|                                 | : |                          |

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D E C I S I O N

Rendered on May 29, 2012

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*Fisher & Phillips LLP, and R. Scot Harvey, for appellant.*

*Michael DeWine, Attorney General, Angela Phelps-White and Michael D. Allen for appellee State Employment Relations Board.*

*Allotta, Farley & Widman Co. LPA, Marilyn L. Widman, Amy L. Zawacki and Elijah D. Baccus, for appellee The American Association of University Professors, University of Toledo Chapter.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Appellant-appellant, The University of Toledo, appeals from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(B)(1) motion to dismiss of appellees-appellees, State Employment Relations Board ("SERB") and The

American Association of University Professors, University of Toledo Chapter ("AAUP-UT"). Appellant assigns a single error:

THE TRIAL COURT ERRED IN GRANTING THE MOTIONS OF THE OHIO STATE EMPLOYMENT RELATIONS BOARD AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNIVERSITY OF TOLEDO CHAPTER (DEFENDANT-APPELLEES) TO DISMISS THE ADMINISTRATIVE APPEAL OF THE UNIVERSITY OF TOLEDO (PLAINTIFF-APPELLANT) PURSUANT TO OHIO CIV. R. 12(B)(1), BECAUSE THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION OVER THE UNIVERSITY'S APPEAL PURSUANT TO O.R.C. §119.12 AND WAS NOT DIVESTED OF THIS JURISDICTION BY O.R.C. §4117.06(A).

Because R.C. 4117.06(A) does not divest the common pleas court of jurisdiction of appellant's appeal from a SERB order clarifying, but not altering or amending, the bargaining unit, we reverse.

### **I. Facts and Procedural History**

{¶ 2} Since 1992, AAUP-UT has been the exclusive representative of the SERB-certified bargaining unit, described to include "tenure and tenure-track faculty," at the University of Toledo. On July 1, 2006, the Medical University of Ohio merged with the University of Toledo. The former Medical University site is now the University of Toledo's Health Science Campus, where the University of Toledo's College of Nursing is now located. As a result of the merger, the College of Nursing includes (1) faculty members that the University of Toledo previously employed who are members of AAUP-UT, and (2) former Medical University faculty, not members of AAUP-UT or any other labor organization.

{¶ 3} In February 2007, AAUP-UT filed a petition for representation election to allow the faculty on the Health Science Campus to elect whether they wanted AAUP-UT's representation. When AAUP-UT learned appellant hired a consulting firm to help it defeat AAUP-UT in the election, AAUP-UT withdrew its petition for representation election. Instead, on December 29, 2008, AAUP-UT filed with SERB a petition for clarification of bargaining unit, pursuant to Ohio Adm.Code 4117-5-01(E)(2). The petition requested that SERB determine whether the seven unrepresented College of Nursing full-time faculty members belonged in the bargaining unit.

{¶ 4} Appellant filed a motion to dismiss the petition for clarification on February 13, 2009, alleging a question about majority representation precluded AAUP-UT's using the clarification process. After the parties fully briefed the motion and an attempt at mediation failed, SERB's Labor Relations Administrator issued a memorandum on September 3, 2009 recommending that SERB deny appellant's motion to dismiss and grant AAUP-UT's petition for clarification.

{¶ 5} Addressing the motion to dismiss, the administrator determined that because the College of Nursing faculty did not have an exclusive representative, the motion for clarification did not present a representation issue. Resolving the petition for clarification, the administrator noted two significant points: SERB certified the bargaining unit to consist of "all regular, full-time faculty," and the "parties [did] not dispute that the employees in question [were] performing bargaining unit work." (CR. 13.) Accordingly, the administrator concluded that clarifying the unit to include the College of Nursing faculty would "not alter the status quo, but rather maintains it." (CR. 13.) Consistent with the administrator's recommendation, SERB on September 8, 2009 denied the motion to dismiss and granted the petition for clarification, clarifying the bargaining unit to include the seven College of Nursing professors.

{¶ 6} Appellant appealed SERB's decision to the Franklin County Court of Common Pleas on September 23, 2009. SERB responded with a Civ.R. 12(B)(1) motion to dismiss the case for lack of jurisdiction. It contended its determination was not appealable in view of the restrictive language of R.C. 4117.06(A), which states that SERB's decisions on the appropriate bargaining unit are final and not appealable. After the common pleas court granted AAUP-UT's motion to intervene in the case, AAUP-UT filed a similar motion to dismiss the case premised on the provisions of R.C. 4117.06(A). Relying on *Shawnee Edn. Assn. v. State Emp. Relations Bd.*, 139 Ohio App.3d 381 (10th Dist.2000), appellant responded that the jurisdictional bar in R.C. 4117.06(A) did not apply to SERB's directive clarifying the unit.

{¶ 7} After allowing the parties full briefing, the common pleas court issued a decision on August 19, 2011 granting the motions to dismiss. The court relied on *Ohio Council 8, AFSCME v. Mahoning Cty. Dept. of Human Servs.*, 10th Dist. No. 93AP-551 (Apr. 26, 1994) and *Ohio Council 8, AFSCME v. Cincinnati*, 10th Dist. No. 92AP-782

(Feb. 9, 1993) to conclude that R.C. 4117.06(A) applied to the case and divested the court of jurisdiction over the appeal. The court further determined appellant's reliance on *Shawnee* was misplaced, as that case involved a "deemed-certified" bargaining unit, while the bargaining unit at issue was SERB-certified. The court journalized its decision with a judgment entry filed September 2, 2011, ordering the case dismissed with prejudice. Appellant timely appealed.

## **II. Assignment of Error – Common Pleas Court's Jurisdiction**

{¶ 8} Appellant's single assignment of error asserts the common pleas court erred in dismissing appellant's appeal for lack of jurisdiction. The standard for determining a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction is whether the complaint states any cause of action cognizable in the forum. *Crable v. Ohio Dept. of Youth Servs.*, 10th Dist. No. 09AP-191, 2010-Ohio-788, ¶ 8, citing *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77 (1989). An appellate court reviews de novo a common pleas court's dismissal for lack of subject matter jurisdiction. *Id.* at ¶ 8, citing *Meccon, Inc. v. Univ. of Akron*, 182 Ohio App.3d 85, 2009-Ohio-1700 (10th Dist.).

{¶ 9} A court of common pleas has power to review proceedings of administrative agencies and officers only to the extent the law so grants. *Abt v. Ohio Expositions Comm.*, 110 Ohio App.3d 696, 699 (10th Dist.1996), citing Ohio Constitution, Article IV, Section 4. " '[T]he general provisions of R.C. 119.12 govern the appealability of an adjudication order issued by SERB,' except where R.C. Chapter 4117 provides for *specific* procedures to initiate an appeal from a particular adjudication order, or where R.C. Chapter 4117 *specifically* prohibits an appeal from an adjudication order issued by SERB." (Emphasis sic.) *Groveport-Madison Local Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 62 Ohio St.3d 501, 504 (1992), quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 48 Ohio St.3d 45, 46 (1990). *See also* R.C. 4117.02(P).

{¶ 10} R.C. 4117.06(A) provides that SERB "shall decide in each case the unit appropriate for the purposes of collective bargaining. The determination is final and conclusive and not appealable to the court." Through the provisions of R.C. 4117.06(A), "the legislature has deemed SERB to be the appropriate final authority to determine from among a number of competing bargaining units which one is appropriate." *S. Community, Inc. v. State Emp. Relations Bd.*, 38 Ohio St.3d 224, 227 (1988).

{¶ 11} In applying R.C. 4117.06(A), the common pleas court's analysis turned on whether the bargaining unit subject of the motion was deemed-certified or SERB-certified. A deemed-certified bargaining unit "is an employee organization that bargained with an employer on behalf of public employees in a collective bargaining relationship" prior to April 1, 1984, the effective date of the Ohio Public Employees' Collective Bargaining Act ("Act"). *Union of State, Cty. and Municipal Workers of Ohio v. Ohio Council 8, AFSCME, AFL-CIO, Local 1746*, 136 Ohio App.3d 147, 149 (10th Dist.1999). "Thus, rather than being certified by SERB according to the normal certification procedure provided for under the Act, such units were deemed certified by the grandfather clause of Section 4(A) of Am.Sub.S.B. No. 133." *Id.* As the terminology suggests, a SERB-certified unit is one SERB recognized through the procedures provided in the Act after the Act's effective date.

*A. The Parties' Arguments and the Common Pleas Court's Decision*

{¶ 12} The parties tacitly agree that resolution of this appeal hinges on whether the distinction between a deemed-certified bargaining unit and a SERB-certified bargaining unit is significant. Appellant contends the distinction between deemed-certified and SERB-certified bargaining units is a distinction "without a difference and is without legal support." (Appellant's brief, 10.) Appellant thus submits that R.C. 4117.06(A)'s prohibition does not apply to a SERB order clarifying a bargaining unit, whether the bargaining unit is SERB-certified or deemed-certified. SERB and AAUP-UT contend the distinction between deemed-certified and SERB-certified bargaining units is crucial, so that cases concerning deemed-certified units, such as *Shawnee*, are neither persuasive nor instructive in determining the appealability of SERB's decision on a motion to clarify a bargaining unit that is SERB-certified.

{¶ 13} Agreeing with SERB and AAUP-UT, the common pleas court decided that the distinction determines whether SERB's decision on AAUP-UT's motion for clarification is appealable. The common pleas court explained that clarifying a deemed-certified unit does not require SERB to consider unit appropriateness, because SERB did not determine the composition of the bargaining unit in the first instance. As a result, the decision on such motion, as in *Shawnee*, would be appealable. The court concluded, by contrast, that clarifying a SERB-certified unit involved a decision on unit appropriateness,

since SERB originally determined and certified the composition of the bargaining unit and in essence was being asked to look at the issue a second time. The court decided that such a decision, including the one at issue, is not appealable.

*B. Deemed-Certified or SERB-Certified – Its Significance*

{¶ 14} The Supreme Court of Ohio stated in *State ex rel. Brecksville Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 74 Ohio St.3d 665 (1996) that, although deemed-certified units do not undergo the normal certification process, they "are treated as if they had been certified normally." *Id.* at 666, fn.1. *Compare Union of State, Cty. and Municipal Workers of Ohio* (noting that, in a case concerning a petition for representation election filed pursuant to R.C. 4117.07(A), no reason existed to treat deemed-certified and SERB-certified bargaining units differently "[i]n light of the clear statutory intent to protect deemed certified collective bargaining units, and to treat them 'as if they had been certified normally' "). Employers thus are required to engage in bargaining with the exclusive representatives of deemed-certified units " 'as if there had been a SERB-certified election and designation of bargaining agent.' " *Ohio Council 8, AFSCME, AFL-CIO v. Cincinnati*, 69 Ohio St.3d 677, 682 (1994), quoting Drucker, *Collective Bargaining Law in Ohio* (1993) 233-34, Section 5.18(A).

{¶ 15} Accordingly, SERB's and AAUP-UT's attempt to distinguish between a deemed-certified unit and a SERB-certified unit in the context of a motion for clarification fails, since deemed-certified units were " 'grandfathered in,' as if they had undergone the SERB procedure." *Ohio Council 8, AFSCME v. State Emp. Relations Bd.*, 88 Ohio St.3d 460 (2000). Because deemed-certified units are treated as if certified through the SERB procedure, deemed certification alone does not dictate the persuasiveness of the three cases on which SERB and AAUP-UT relied to contend SERB's decision on AAUP-UT's motion for clarification was not appealable.

*C. The Three Cases*

{¶ 16} The parties urge three cases are critical to deciding whether SERB's directive was a determination as to unit appropriateness pursuant to R.C. 4117.06(A): *Cincinnati*, *Mahoning*, and *Shawnee*.

1. *Ohio Council 8, AFSCME v. Cincinnati*

{¶ 17} In *Cincinnati*, the employer filed five petitions for clarification of the bargaining unit, all pursuant to a former version of Ohio Adm.Code 4117-5-01(F). The petitions requested SERB to remove the job of waterworks guards from the deemed-certified bargaining unit consisting of city of Cincinnati employees, as their inclusion violated R.C. 4117.06(D). SERB agreed and issued a directive ordering the waterworks guards be placed in their own certified bargaining unit.

{¶ 18} On appeal, the common pleas court determined SERB lacked jurisdiction to entertain the motion. The court acknowledged that Ohio Adm.Code 4117-5-01(F) at the time allowed either the employer or the employee organization to file a petition for amendment or clarification of a deemed-certified unit. It concluded, however, that the administrative provision was void because it conflicted with Am.Sub.S.B. No. 133, Section 4(A), which stated that, notwithstanding any other provision in the 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." *Id.*

{¶ 19} On appeal, this court reversed the common pleas court's decision, concluding Ohio Adm.Code 4117-5-01(F) did not conflict with Am.Sub.S.B. No. 133, Section 4(A). With that predicate, this court determined SERB acted properly on the employer's petitions, as "SERB has a duty to decide in each case the unit appropriate for the purposes of collective bargaining as set forth in R.C. 4117.06." *Id.* Noting "R.C. 4117.06(A) states that a determination by SERB as to the appropriateness of a unit for purposes of collective bargaining is final and conclusive and not appealable, this court concluded the common pleas court "had no jurisdiction to review th[e] matter since a right for appeal did not exist." *Id.*

{¶ 20} The Supreme Court of Ohio reversed this court's decision and decided that although Ohio Adm.Code 4117-5-01(F) "authorize[d] adjustments or alterations to deemed certified collective bargaining units absent a challenge by and subsequent certification of a rival employee organization, Section 4(A) forbids it." *Cincinnati*, 69 Ohio St.3d at 684. The court thus concluded "Ohio Adm.Code 4117-5-01(F) [was] in clear conflict with Section 4(A) of Am.Sub.S.B. No. 133 \* \* \* and [was], therefore, invalid. Pursuant to Section 4(A), adjustments or alterations to deemed certified collective

bargaining units are not permitted until challenged by another employee organization." *Id.* at syllabus. Because the Supreme Court concluded SERB lacked jurisdiction to hear the employer's petitions, the court did not address whether the common pleas court lacked jurisdiction pursuant to R.C. 4117.06(A). Accordingly, the Supreme Court's decision in *Cincinnati* lends little to resolving the appealability of SERB's decision on the motion for clarification at issue.

2. *Ohio Council 8, AFSCME v. Mahoning Cty. Dept. of Human Servs.*

{¶ 21} Decided after this court's decision, but before the Supreme Court's decision in *Cincinnati*, *Mahoning* involved a petition to clarify a bargaining unit that an exclusive representative of an employee organization filed with SERB. The petition sought to add Data Security Specialists employed with the Mahoning County Department of Human Services to an existing bargaining unit for purposes of collective bargaining. SERB granted the petition, clarifying the unit to include the requested position. The common pleas court granted SERB's motion to dismiss for lack of jurisdiction an appeal to that court from SERB's decision on the petition.

{¶ 22} On appeal to this court, the employee organization argued "that the finality of SERB decisions under R.C. 4117.06(A)" applies "only to initial unit appropriateness determination, and not to subsequently-raised questions of eligibility." *Id.* Citing to this court's holding regarding R.C. 4117.06(A) in *Cincinnati*, we decided that *Mahoning* "similarly involve[d] the inclusion of employees in a preexisting bargaining unit," so that R.C. 4117.06(A) prohibited the common pleas court from exercising jurisdiction over the matter. *Id.*

3. *Shawnee Edn. Assn. v. State Emp. Relations Bd.*

{¶ 23} In *Shawnee*, the employer filed a unilateral petition for clarification of the bargaining unit, described to include "full-service faculty members." *Shawnee State Univ. v. State Emp. Relations Bd.*, 110 Ohio App.3d 1, 2 (10th Dist.1996). The collective bargaining agreement in place prior to the Act, when the employee organization gained deemed-certified status, defined the bargaining unit to " 'include all full time contractual faculty members \* \* \* including those members designated as Program Coordinators or Division Coordinators but excluding Program Directors.' " *Shawnee Edn. Assn.* at 388,

quoting *Shawnee Edn. Assn. v. State Emp. Relations Bd.*, Franklin C.P. No. 97CVF07-6875 (Sept. 23, 1999).

{¶ 24} In 1986, "the position of department chairperson was created and both the program director and divisional coordinator positions were eliminated." *Id.* Subsequent collective bargaining agreements between the employer and employee organization defined the bargaining unit to include department chairs, prompting the university to file its petition for clarification. *Id.* at 388-89. "[T]he task for SERB was to determine whether the duties performed by those occupying the position of chairperson at the time the petition was filed, 1994, were substantially similar to the duties performed by the division coordinators in 1984." *Id.* at 389. If so, the chairpersons were to be included in the unit; if, however, the chairpersons were more similar to the program directors, the chairpersons were to be excluded from the unit. *Id.*

{¶ 25} SERB issued a directive ordering the department chairpersons excluded from the bargaining unit. *Id.* at 383. The common pleas court affirmed in part and reversed in part, concluding the Allied Health department chairpersons should be excluded from the unit, but the department chairpersons in the Arts and Sciences and the Business and Engineering Technologies departments should be included in the unit. *Id.* Shawnee State University appealed from the common pleas court's decision and Shawnee Education Association filed a cross-appeal, questioning SERB's jurisdiction to entertain the unilateral petition for clarification. *Id.*

{¶ 26} Distinguishing the Supreme Court's decisions in *Cincinnati* and *Brecksville*, this court concluded SERB had jurisdiction to decide the petition for clarification. *Shawnee* at 386; compare *Brecksville* at syllabus (concluding SERB had jurisdiction to consider a jointly filed petition requesting SERB to amend the composition of a deemed-certified bargaining unit). This court determined neither *Cincinnati* nor *Brecksville* precluded Shawnee State University's unilateral petition for clarification, as "both [*Cincinnati* and *Brecksville*] involved changes or alterations to the unit, which should be distinguished from a petition for clarification." *Shawnee Edn. Assn.* at 387.

{¶ 27} This court further determined the common pleas court had jurisdiction pursuant to R.C. 119.12 to review SERB's decision. *Id.* at 390-91. Addressing R.C. 4117.06(A), we concluded the statute was directed to decisions "designating or certifying

the appropriate unit for the purpose of collective bargaining." *Id.* at 391. By contrast, the appeal to the common pleas court in *Shawnee* did not concern "unit designation," as the unit was "deemed certified because it existed prior to the passage of the Act. Unit designation or certification [was] not at issue in th[e] case." *Id.* Accordingly, we decided R.C. 4117.06(A) did not preclude review of SERB's decision in the common pleas court. Moreover, reviewing the merits, this court concluded the common pleas court correctly determined, based on the job functions of the department chairs, that the Allied Health department chairs should be excluded from the unit, but the Arts and Sciences and Technical Program department chairs should be included in the unit.

*D. Clarification of Unit v. Amendment of Unit*

{¶ 28} The three cases, coupled with the noted Supreme Court cases, illustrate that the significant distinction is not in whether the bargaining unit at issue is deemed-certified or SERB-certified. Rather, their applicability resides in the purpose of the motions filed in relation to the existing bargaining units of each case.

{¶ 29} "A unit clarification is essentially a ruling by SERB that a position is already covered by the wording of the existing unit description." *In re Pickaway Cty. Human Servs. Dept.*, SERB No. 95-015 (Sept. 29, 1995). "Clarification may involve a change in the roster of bargaining-unit members, but does not involve any substantial change in the content of the unit in terms of what work is being performed by employees in the bargaining unit." *Id.* On the other hand, "[w]hen bargaining units are amended, there is greater potential for interference with the status quo of the unit than when a unit is clarified[.] \* \* \* [U]nit clarification does not alter the status quo, but rather maintains it." *In re Ohio Council 8, AFSCME*, SERB No. 95-021 (Dec. 29, 1995).

{¶ 30} Indeed, SERB's rules recognize a distinction between altering the bargaining unit description and clarifying whether an employee fits within the existing occupations included in a bargaining unit. According to SERB's Ohio Adm.Code 4117-5-01(E), a petition for amendment of certification seeks to "alter the composition of the unit by adding, deleting, or changing terminology in the unit description." Ohio Adm.Code 4117-5-01(E)(1). *See OCSEA, AFSCME Local 11, AFL-CIO v. State Emp. Relations Bd.*, 10th Dist. No. 98AP-337 (Oct. 27, 1998) (involving a petition for amendment of certification that sought to add the classification of assistant public defender to the

bargaining unit). By contrast, under SERB's Ohio Adm.Code 4117-5-01(E)(2), a petition for clarification of the bargaining unit seeks to "determine whether a particular employee or group of employees is included or excluded from the unit based upon the existing unit description and the duties of the employees in question." *See also* Ohio Adm.Code. 4117-5-01(F) (providing for petitions for unit clarification or amendment of deemed-certified units, subject to certain restrictions).

{¶ 31} Although styled as a petition for clarification, the petition in *Cincinnati* sought to remove an entire job classification, waterworks guards, from the bargaining unit. The petition thus sought to re-analyze unit appropriateness by re-examining the occupations or jobs appropriately included in the bargaining unit. In *Mahoning*, the petition, though again styled as one for clarification, sought to add an entire job classification, Data Security Specialists, to the existing bargaining unit. It, too, thus sought to have SERB re-examine the bargaining unit and its appropriateness by seeking to include other jobs in the bargaining unit.

{¶ 32} By contrast, the petition to clarify in *Shawnee* did not seek to alter or amend the SERB description of the existing bargaining unit as including "full service faculty members." *Shawnee State Univ.* at 2. Rather, it asked SERB to determine whether the newly-created department chairpersons fit within the existing descriptions of jobs and occupations in the existing unit. The petition argued the chairpersons did, since they were more similar to the program director position existing in the 1983-1985 collective bargaining agreement. *Shawnee Edn. Assn.* at 388.

{¶ 33} In the final analysis, the purpose of the motion determines whether SERB's decision is appealable to the common pleas court. AAUP-UT's petition for clarification, filed pursuant to Ohio Adm.Code 4117-5-01(E)(2), did not seek to alter or amend the description of the bargaining unit by adding or deleting an entire job classification. Rather, the petition asked SERB to determine whether the duties and responsibilities of the College of Nursing faculty members fell within the bargaining unit's existing description of occupations and therefore should be included within the unit. SERB's clarification that the College of Nursing faculty members belonged within the unit thus was not a determination regarding bargaining unit appropriateness under R.C. 4117.06(A), but a determination that the appropriate bargaining unit, comprised of

tenured and tenured-track faculty members, included the College of Nursing faculty members. Accordingly, R.C. 4117.06(A) does not divest the common pleas court of jurisdiction over appellant's appeal.

{¶ 34} Appellant's single assignment of error is sustained.

### **III. Disposition**

{¶ 35} Having sustained appellant's single assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas dismissing the case for lack of jurisdiction and remand this matter to the court to exercise its jurisdiction and determine the merits of the appeal.

*Judgment reversed  
and cause remanded.*

CONNOR and DORRIAN, JJ., concur.

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