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INTRODUCTION

DISCUSSING BARGAINING UNITS in public sector labor relations is largely a matter of perspective, or, more specifically, which side of the bargaining table you sit on. I am reminded of the parable of a group of blind men who tried to describe an elephant they had bumped into in the jungle. The blind man who had touched the elephant's trunk said, "It's a kind of snake!" Another had grabbed the animal's massive leg: "No, it's like a tree." Yet another had felt its thin, leathery ear and concluded that the elephant was an exotic plant with massive leaves. A fourth had brushed against its side and decided that it was a mountain. And so it goes with public sector bargaining unit determinations: your view of them depends on your position relative to the beast of collective bargaining and your particular blind spots. For a public employer, the problem is how to coordinate bargaining units so as to have the fewest number of bargaining sessions to attend and agreements to administer, all in the context of the political ramifications of bargaining results; public employees are concerned about effective representation in line with their specific occupational, geographic and political interests; and the general public doesn't really stop to think about the matter much until a strike becomes imminent, hoping in the meantime in a vague sort of way that there will be no intrusion on the continued delivery of public goods and services. Like many other issues in state or local government administration, public sector labor relations becomes a matter of concern to the person on the street when the system breaks down rather than when it works smoothly.

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The efficient functioning of any public sector collective bargaining system depends, however, in part on the rational basis of its underlying structure, and that is where the determination of a bargaining unit plays an important role in developing and maintaining effective labor relations.[1] A bargaining unit is simply a grouping of employees who are required by a unit determination from the state labor relations board to vote together in a union election and, if the union is successful, to bargain as a unit with the employer.[2] Thus, unit determinations shape the negotiations, strikes, impasse resolution schemes, and contract administration problems which follow election and certification of the union. My presentation today will address, first, general bargaining unit dynamics applicable to all public sector unit determinations;[3] second, principles of unit determination established in the Ohio legislation;[4] and third, problems which are likely to arise from that legislation, with some observations on solutions to similar problems which have been adopted in other jurisdictions, in the hope that they may be useful to you here in Ohio as you flesh out the skeletal structure of public sector collective bargaining enacted by the state legislature.[5]

I. THE DYNAMICS OF BARGAINING UNIT DETERMINATIONS

While public sector labor relations differ substantially from private collective bargaining in some important respects, there are a few basic and universal principles of bargaining unit dynamics which cut across the public-private distinction and are a good place to start talking about bargaining units and how to structure them.[6]

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1. *See* OHIO REV. CODE ANN. §§ 4117.05-.06 (Page 1984). Under § 9(b) of the National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-68 (1982)), the National Labor Relations Board is empowered to decide what constitutes an appropriate bargaining unit for purposes of collective bargaining. *See infra* note 30; APPROPRIATE UNITS FOR COLLECTIVE BARGAINING (P. Nash & G. Blake eds. 1979).

2. OHIO REV. CODE ANN. §§ 4117.01-.23 (Page 1984). For articles discussing the Ohio act specifically, see *Student Project: Public Sector Collective Bargaining in Ohio: Before and After Senate Bill No. 133*, 17 AKRON L. REV. 299 (1983) [hereinafter cited as *Student Project*]; Comment, *Public Employee Collective Bargaining Becomes a Matter of Right in Ohio*, 13 CAP. U.L. REV. 219 (1983); White, Kaplan & Hawkins, *Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1 (1984).

3. *See infra* notes 6-34 and accompanying text.

4. *See infra* notes 35-93 and accompanying text.

5. *See infra* notes 94-120 and accompanying text.

6. There are several classic discussions of bargaining unit determinations in public sector collective bargaining. *See* Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 OR. L. REV. 151 (1971); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE

All subsequent consideration of bargaining unit determinations must take into account one initial and essential question: what is the goal of the process of making unit determinations? The answer depends on the perceived consequences. What purposes are served by a unit determination? Why not simply let employees make their own choices about who they want to associate with for representation purposes? Is there such a thing as an optimal unit size? It is important to understand that unit determination decisions may have contradictory implications for the different parties involved in the bargaining process: the employer, the employees, the union, and, in the public sector, the taxpaying public or alternatively, the public interest.[7]

Most obviously and directly, the unit designation determines both the size and strength of the union, which in turn dictate the power structure of bargaining, as well as what issues will be addressed by the union in negotiations. The larger the union, the more bargaining power it generally has, and the more essential the employees in a specific unit are to the employer's ability to accomplish its purposes, the more power their unit has.[8] The interests of

L.J. 1156 (1974); H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES (1971). *See also*, Mack, *Public Sector Collective Bargaining: Diffusion of Managerial Structure and Fragmentation of Bargaining Units*, 2 FLA. ST. U.L. REV. 281 (1974); Comment, *Bargaining Units for State and Local Employees*, 39 MO. L. REV. 187 (1974); Moore & Chiodoni, *Unit Determination Criteria in Public Sector Employment Relations*, 8 J. COLLECTIVE NEGOTIATIONS 235 (1979); Rubin, Hickman, Durkee & Hayford, *Public Sector Unit Determination, Administrative Procedures and Case Law*, Final Report submitted to U.S. Dept. of Labor, Labor-Management Services Administration, May 31, 1978, at 405; *Unit Determination, Recognition, and Representation Elections in Public Agencies, Proceedings of a Conference on Public Sector Labor Management Relations*, 1971 (U. of Cal. Inst. of Indus. Rel. 1972). For experience in specific states, see, NAJITA & TANIMOTO, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING (1981) (Indus. Rel. Center, U. of Hawaii); McHugh, *The Florida Experience in Public Employee Collective Bargaining, 1974-1978: Bellwether for the South*, 6 FLA. ST. U.L. REV. 263, 302-06 (1978); W. NEWHOUSE, PUBLIC SECTOR LABOR RELATIONS LAW IN NEW YORK STATE 256 (1978); Dayal, *Faculty Unionism and Bargaining Unit Attitudes and Perceptions: A Case Study of Central Michigan University*, 33 LABOR L.J. 554 (1982); Comment, *Determination of the Bargaining Unit Under the New Pennsylvania Public Employee Relations Act*, 75 DICKINSON L. REV. 490 (1971). For a recent discussion on bargaining units in the private sector, see Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984); much of the analysis is pertinent to public sector bargaining units as well.

7. Politics plays a powerful role in public sector collective bargaining, and "the public interest" is often recited as a magic incantation by courts and state labor relations boards to justify arguably subjective decisionmaking in cases involving the classic "balancing" of interests. For a discussion of political process in public sector bargaining, see Summers, *supra* note 6.

8. *See* H. WELLINGTON & R. WINTER, *supra* note 6 at 97-98, 104-14. Leslie, *supra* note 6, at 357, refers explicitly to the power to strike, which is often limited or forbidden in the public sector. Public employee bargaining units may derive part of their bargaining

the employees included in any unit will determine what the union wants to bargain with the employer about. Thus, both the number and the occupational composition of employees in the unit are important.[9]

Deciding who is in a particular bargaining unit necessarily also determines who is out of the unit, or, to put it another way, who is excluded from representation.[10] The bargaining unit determination directly affects the ability of various employee groups to have meaningful input into decisions made about the terms of their employment.[11] For some employees, being excluded from one bargaining unit has no real impact; they will simply join forces to form another unit. For other employees, however, exclusion from a particular bargaining unit is tantamount to exclusion from representation altogether. This happens when the excluded employees lack sufficient power to form an effective alternative bargaining unit, either because there are too few of them to constitute an attractive and economically viable unit to affiliate with a larger international union, or because their importance to the organization is minimal.[12]

The unit decision also determines the extent to which special interests or needs of various employee groups are considered and met, and in what context. Large units will be made up of a number of smaller interest groups; as the exclusive bargaining representative

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power from their ability to strike, but the power also derives from other sources, *e.g.*, political influence, ability to affect productivity through influence on employee attitudes about work, ability to force the employer to participate in an impasse resolution scheme such as binding interest arbitration.

9. *See* H. WELLINGTON & R. WINTER, *supra* note 6; Leslie, *supra* note 6. Several empirical studies have attempted to verify this intuitively obvious assertion by measuring the impact of bargaining unit determinations on different aspects of the bargaining relationship, with mixed results. *See* Perry & Angle, *Bargaining Unit Structure and Organizational Outcomes,* 20 INDUS. REL. 47 (1981).

10. Some employees will be excluded from representation altogether because they are not employees covered by the collective bargaining statute. Others will simply be excluded from being represented by a particular union local; they will retain the right to form their own appropriate unit.

11. This problem is not limited solely to employees who are excluded from a particular unit. The selected majority representative has a duty of fair representation in contract negotiation and administration which extends to all members of the bargaining unit. *See* OHIO REV. CODE ANN. § 4117.11(B)(6) (Page 1984); 2 C. MORRIS, THE DEVELOPING LABOR LAW 1285-358 (2d ed. 1983). Generally, the principle of majority rule and the realities of accommodating the various interest groups represented by a union mean that the relative size of an interest group in a unit has a direct impact on how strongly the union will push for that group's interests over those of other factions in the unit. The exception to this is where a small group of employees has power which derives from its occupational position rather than from its size.

12. *See infra* notes 104-13 and accompanying text.

of these special interest groups within the larger bargaining unit, the union is charged with deciding what priorities to give to the competing demands of the various groups at the bargaining table.[13] In contrast, smaller bargaining units are usually composed of fewer factions, resulting in more responsive representation by the union.[14] The competing interests of different employee groups still exist. Instead of being channelled and sorted out by the union, however, these competing interests appear on the bargaining table before the employer in the guise of different demands from different unions, and the process of ordering priorities is undertaken with the employer's participation.

In addition to determining the issues to be presented at the bargaining table, whose interests are best represented there, and the relative strength of the union, the unit determination also affects the general peacefulness and effectiveness of the bargaining relationship, depending on a number of factors which are somewhat amorphous and difficult to pin down: the initial relationship between the parties, the lines of communication which are established between the employer and the union, what employee interest groups are included in the bargaining unit, how effective the union is in managing intra-union conflict, and the importance to employees of demands which are not met at the bargaining table, to name a few outstanding examples.[15] One of the most important functions a union serves is as a channel of communication between the employees it represents and the employer. The parties' relationship and their attitude toward each other will color the dialogue between them, in particular the union's effectiveness as emissary to the employees from the employer and vice-versa.

Taking the various consequences of the bargaining unit determination into account, can one say that there is an optimal unit size? Given the variety of employers, employees, occupational skills, fiscal limitations, and public choices about the level and kinds of services to be provided by the government, I suspect probably not, at least as a general rule. Again, the answer also depends to a large

13. The perennial problems associated with determining the extent of the duty of fair representation are similar in the private and public sectors. *See* C. MORRIS, *supra* note 11, 1285-358; Summers, *The Individual's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

14. At least, employees *believe* that the union is more responsive to their needs. Perry & Angle, *supra* note 9.

15. *See* Moore & Chiodoni, *supra* note 6; Haskell, *Centralization or Decentralization of Bargaining Among State Government Employees: An Examination of the Options*, 10 J. COLLECTIVE NEGOTIATIONS 19 (1981); Perry & Angle, *supra* note 9.

extent on your perspective: the employees' interest in bargaining (and thus in bargaining unit determinations) is quite different from the employer's. Furthermore, both of their interests may be different from those of the general public or the union as an entity with institutional interests at least partially separate from those of the employees in a specific workplace. Like Newton's Third Law of Motion, which states that for every action, there is an equal and opposite reaction, internal contradictions and tensions are present in the principles which one can formulate for establishing optimal bargaining units. Any attempt to reconcile these paradoxes will stumble on the competing interests at stake.

Consider first the large bargaining unit. From the employer's perspective, large units are generally preferable for a number of reasons. Initially, the employer wants a unit which is too large for a union to be able to organize effectively. Large bargaining units are more difficult for unions to organize and the odds against the union's winning a representation election are greater. Post-election large units also mean, for the employer, greater coordination of wage demands at the bargaining table, since the union and not the employer is responsible for setting priorities among the interest groups it represents. There is less opportunity for whipsawing among competing bargaining units at the bargaining table, and uniformity of treatment among employees is easier to achieve. The large unit also provides the advantages of simplified contract administration, at least up to a point:[16] small units can present administrative nightmares as an employer struggles to keep up with different negotiating schedules, different sets of representatives to deal with, and different dues checkoff provisions. Another result of larger units is the possibility of improved coordination between collective bargaining and the employer's and legislature's budgeting process.

Large units are not an unmixed blessing for the employer, however. Once a union wins an election in a large unit, the unit has, by virtue of sheer size, considerable bargaining power and greater leverage against the employer at the bargaining table.[17] In addition, the larger the unit, the greater is the possibility of internal strife within the unit, which may lead to protracted and pointless negoti-

16. There seems to be some support for the proposition that there is such a thing as a unit which is too large even from the employer's perspective. Moore, Kruger & Gilmore, *A Triple-Tier Collective Bargaining System for Productivity Improvement in Public Sector Employment Relations*, 9 J. COLLECTIVE NEGOTIATIONS 1 (1980).

17. *Supra* note 8.

ating while the union attempts to please all of its constituents. Finally, the larger the unit, the more entrenched and resistant to change it seems to become.[18] It is likely to be more difficult for the employer to engage in experimentation and innovation with respect to either human resources management or new and different methods of production.[19]

The union, too, generally prefers a large unit to a small one, because the large unit maximizes the union's power in the workplace. A larger unit also permits greater bargaining coordination at the level of the national or international union. Rather than having to deal with several different affiliates at different times, the union can conduct a single set of negotiations and take advantage of economies of scale in the negotiation process. Larger units spread the cost of representation among more employees, thus lowering the unit cost of representation to each employee.

As in the case of the employer, however, large units have their disadvantages for unions as well. One is that the largest possible unit may be one which the union cannot effectively organize. Different departments or groups of employees will have different levels of interest in unionization. If the union opts to seek to represent the largest possible unit, it risks losing the representation election and, along with it, prestige, the resources expended on the campaign, and the opportunity to organize a safer, smaller unit during the election bar period, usually one year.[20] The large unit also presents the union with the hard task of pleasing, or at least placating, a number of employee interest groups with different and often competing concerns. Internal strife and suspicions of breach of duty of fair representation may contribute to employee dissatisfaction and dissension if certain groups feel their interests are being sacrificed for the "greater" good of the group.[21] Finally, at some point a unit

18. Newton's first law of motion states that a body, if left to itself, will maintain its condition, either of rest or of motion, unchanged. This law of momentum and inertia appears also to apply with equal force to collective bargaining relationships. Once a unit has been established and the parties have begun the process of developing a bargaining relationship, the employer as well as the union has an interest in maintaining the status quo rather than investing more time and resources in developing a relationship with a new employee representative.

19. Haskell, *supra* note 15; Moore, Kruger & Gilmore, *supra* note 16. The employer is engaged in the act of producing public services rather than widgets or some other tangible object. The need to experiment with improved methods of production remains the same, however.

20. OHIO REV. CODE ANN. § 4117.07(C)(6) (Page 1984).

21. The recent decision under the NLRA from the United States Supreme Court holding unions jointly liable with employers for damages arising from a breach of the duty of fair

becomes too large to be viable: the costs of administration increase, effective communication between the union and the employees it represents becomes difficult, and the ideal of effective representation becomes too attenuated to retain any meaningful content.

Relatively small units present a different host of advantages and disadvantages. In large units, the individual interests of separate employee factions tend to get lost in the shuffle of reconciling competing claims on the union's representational resources. The smaller the unit, the greater the homogeneity of interests among employees and the better a job the union is likely to be able to do in terms of responding to employee input. The small unit maximizes individual input into bargaining and the entire process of representation. From the perspective of the individual employee, this is desirable. From the union's point of view, smaller units are also easier to organize initially.

Conversely, however, the smaller the unit, the less bargaining power it is likely to have, except where it is comprised of skilled employees essential to the normal operation of the enterprise who have considerable bargaining power as a result of that status. A related problem is that the organizational level at which the employer conducts negotiations is usually comparable to the level of the bargaining unit, and with smaller units, problems with a lack of authority to negotiate a binding agreement may arise on the employer's side of the bargaining table.[22] The tradeoff for employees, then, is between larger and more powerful but less responsive units, or smaller units with more personalized representation but commensurately weaker bargaining strength.

From the employer's perspective, smaller units also have advantages and disadvantages, although whether any particular attribute of a small unit is considered an advantage or a disadvantage may depend on whether you consult a central bargaining authority, like the state Office of Collective Bargaining (OCB), or a department manager. One disadvantage for the central bargaining authority is that uniformity of treatment across occupational lines may be more difficult to achieve with small units. At the same time, department-sized units yield increased benefits from greater flexibility to respond to department-specific issues and from decisionmaking directed at addressing local issues without competition from other

representation will probably result in somewhat closer scrutiny and more careful treatment by unions of employee complaints than in the past. *See* Bowen v. United States Postal Service, 459 U.S. 212 (1983).

22. Moore & Chiodoni, *supra* note 6.

interest groups. The employer must also realize, especially at the initial stages of unionization,[23] that once bargaining units are established and negotiating lines drawn, separate unions are loathe to give up their individual negotiating autonomy. Thus it will be very difficult to consolidate units later on. History and expectations are powerful forces in shaping the parties' approach to bargaining unit determinations.

One last consideration about the size of bargaining units relates to the issues of bargaining power mentioned earlier. In the private sector, bargaining power is directly related to strike power. In the public sector, the right to strike is limited,[24] but to the extent that some right to strike is given to public employees, the private sector experience is relevant. A large unit's greater bargaining power is usually directly related to its power to threaten to strike effectively. That power does not derive equally from all employee groups in the unit, however; some groups have relatively little strike power and their inclusion in the bargaining unit does not contribute to its bargaining power. These subgroups of the larger unit could be separated into distinct smaller units. Relatively weak smaller units benefit from being included in a large unit with stronger subgroups which do have strike capability. Stronger units, however, find their bargaining power diluted by being included in a large unit with weaker subgroups because of the difficulty of coordinating different interest groups and different goals. This same problem exists with a number of small units where the employer engages in multiunit bargaining.[25]

In addition to considerations of size, the composition of a bargaining unit is also important. The operative concept behind all bargaining unit determinations is that the employees in a single unit must have an identifiable "community of interest."[26] Unlike most European models of labor relations, in which employees are permitted to join any union they desire without regard to occupational

23. In Ohio, there was de facto organization prior to the enactment of the statute, so it may be inaccurate to say that Ohio public sector employers and unions are at the "initial stages of unionization." The point about unions desiring to retain their individual negotiating autonomy remains valid, however. *See infra*, notes 106-10 and accompanying text.

24. OHIO REV. CODE ANN. § 4117.01(F)(2) (Page 1984).

25. *See* Leslie, *supra* note 6, at 414-18.

26. The phrase "community of interest," which derives from private sector regulation, is not found in the language of the NLRA. Rather it is an administratively developed rule used to ensure that the union is composed of only those employees having similar interests and working conditions. *See, e.g.*, Kalamazoo Paper Box Corp., 136 N.L.R.B. 134 (1962); Olinkraft, Inc., 179 N.L.R.B. 414 (1969); Kennecott Cooper Corp., 176 N.L.R.B. 96 (1969).

affiliation,[27] the unit model developed by the National Labor Relations Act (NLRA) and adopted by virtually every state which has enacted a public sector collective bargaining statute categorizes employees into units of workers with similar bargaining interests: usually according to broad occupational groupings,[28] further refined by similarity in terms and conditions of employment.[29] Under the NLRA, a bargaining unit need not be the *most* appropriate possible unit of any group of employees within a workplace; it must only be *an* appropriate unit.[30]

In the public sector, additional considerations enter into optimal unit determination theory. The most important of these is the recognition that the basic structure of public employment involves essentially a single employer—one state, one city, one school district—pitted against a potentially large number of bargaining units, all competing vigorously for the lion's share of the employer's financial and administrative resources. To protect the employer from its own inability to say "no" to everyone, a number of states have attempted to deal with the problem by banning the sin of "overfragmentation" (also known as "undue unit proliferation"),[31] and sanctioning what are called "wall-to-wall units",[32] which lump employees into a relatively small number of very large "appropriate" units—as many as 40,000-50,000 employees in a unit is not uncommon.[33] This is most frequently seen at the state rather than

27. *See*, Aaron, *Labor Relations Law in the United States from a Comparative Perspective*, 39 WASH. & LEE L. REV. 1197, 1252-53 (1982).

28. For example, production employees versus administrative and clerical workers.

29. For example, the physical plant or geographic location.

30. *See* Morand Brothers Beverage Co., 91 N.L.R.B. 909 (1950).

31. The use of overfragmentation as a criterion in determining the appropriate bargaining units for (at least some) government employees is found in several state public employee bargaining laws. *E.g.*, Alaska, ALASKA STAT. § 23.40.090 (1984); Connecticut, CONN. GEN. STAT. ANN. § 5-275(b)(l)(ii) (1982); Indiana, IND. CODE § 20-7.5-1-10(a)(2)(iii) (1984); Kansas, KAN. STAT. ANN. § 75-4327(e)(5) (Supp. 1983); Maine, ME. REV. STAT. ANN. tit. 26, § 979-E2 (1980); Michigan, MICH. STAT. ANN. § 923.213 (Callaghan 1979); Pennsylvania, 43 PA. CONS. STAT. ANN. § 1101.604(i) (Purdon 1979); Wisconsin, WIS. STAT. ANN. § 111.70(d)(2a) (West 1982). One state, Illinois, has provided for consideration of overfragmentation in bargaining unit determinations but has prohibited the use of this factor as the "sole or predominant" one in determining the appropriateness of a bargaining unit. Ill. PLRA § 9(b), Public Act 83-1012, Laws 1983, effective July 1, 1984.

32. In State of New York, 1 PERB ¶399.85 (1968), the New York Public Employment Relations Board established five *statewide* units composed of various types of government employees in the face of union objections that the employees should be allowed to form or join 25 separate unions.

33. For example, the agreement between the Commonwealth of Pennsylvania and AFSCME covers approximately 60,000 employees. GOV'T EMPL. REL. REP. 81.1401 (BNA 1984). Haskell notes that as of 1981, New York has 10 units covering 160,000 employees and

local level. Clearly, in units of that size, the principle of "community of interest" becomes a mere shadow of its original self. The balance struck initially by the State Employment Relations Board (SERB or Board) in retaining community of interest as a meaningful concept while ensuring administrative feasibility is perhaps the single most important policy decision made on bargaining units by the SERB, as it sets the unit pattern for all subsequent collective bargaining issues.

Regarding the appropriate composition of public sector bargaining units, at least at a state-wide level, a distinction is usually drawn between occupational groupings which cut across departmental lines ("horizontal" units) and departmental groupings which ignore occupational interests in favor of encouraging departmental cohesiveness ("vertical" units). What little research has been done in this area[34] indicates that departmental units are more desirable with respect to productivity, since they permit bargaining with a focus on performance requirements associated with specific departmental objectives. At the same time, departmental bargaining is more flexible and more responsive in accomplishing the government's production goals, and more responsive to employee interests as well. Departmental units are most often the employees' unit of choice; horizontal units are artificial from the employees' point of view—a clerk at the Cincinnati Welfare Department feels a stronger bond with a maintenance worker there than with a clerk at the Columbus Parks and Recreation Department, despite their occupational identity. While some conditions of employment are best handled by centralized bargaining, others are better negotiated locally: work assignments and scheduling, departmental performance standards, and working conditions. From the employer's point of view, however, horizontal units are superior to departmental units for purposes of both negotiating and administering collective bargaining agreements. Furthermore, there is a need for centralized bargaining on some important issues, like pensions and insurance programs. Basic compensation rates and fringe benefits within an occupational category should be similar across departmental lines. Finally, centralized bargaining provides a vehicle for jurisdiction-wide policy discussion and decisionmaking.

New Jersey 11 units encompassing more than 50,000 employees. Haskell, *supra* note 15, at 20.

34. Even the social scientists who research in the field have commented on the lack of empirical data examining the true impact of bargaining unit determinations on collective bargaining. Haskell, *supra* note 15, at 27.

The Ohio SERB has recently authorized twelve statewide, horizontal units pursuant to hearings held late last year. While this may be desirable from the perspective of the new state Office of Collective Bargaining, the OCB should not overlook the desirability of permitting—indeed *encouraging*—local bargaining at the departmental level. In this fashion, the benefits of both horizontal and vertical unit configurations can be realized. The OCB cannot be all things to all bargaining parties. It should recognize that fact of life and permit various departments considerable latitude in participating in the bargaining process. Such a policy is likely to result in more constructive labor relations, as departmental managers feel their interests are being considered and employees see that their natural community of interest, the department level, is not being ignored.

With that review of general principles by way of background, let us turn now to a consideration of the specifics of the Ohio legislation.

II. AN ANALYSIS OF THE OHIO ACT

Every state which passes a public sector collective bargaining law determines for itself to what extent its legislation will parallel the National Labor Relations Act (NLRA), the basic model of collective bargaining in the United States. While there are some obvious differences in private and public sector labor relations—right to strike, impasse resolution schemes, and scope of the duty to bargain, to name a few—every state has used the basic structure of the NLRA as the jumping-off point for establishing the right to organize and bargain collectively in the public sector.[35] The Ohio Public

35. Forty states have collective bargaining statutes governing some aspect of collective bargaining for public employees. However, not all of the statutes deal comprehensively with *all* government employees. California, for example, has separate statutes regulating each of the following employee groups: (1) state civil service employees and certain teachers, (2) state noncivil service employees, (3) local government employees and (4) employees of the University of California, Hastings College of Law, and California State University and College. Some of the state statutes (Idaho and Indiana, for example) confer bargaining rights on teachers while others regulate state but not local or municipal workers.

Twenty-four of the 40 states that do have collective bargaining statutes for public employees have provided comprehensive coverage under one statute for all public employees.

The 10 states that do not have collective bargaining statutes are: Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Utah, Virginia, and West Virginia. *See* GOV'T EMPL. REL. REP. REF. MAN. (BNA 1984). Four of these, however, have the functional equivalent of a collective bargaining statute for public employees. Utah has such a statute covering firefighters only. UTAH CODE ANN. § 34-20a-1 (Supp. 1953). Louisiana, North Carolina, and South Carolina have statutes similar to a collective bargaining agreement. *E.g.*, S.C. CODE ANN. § 8-17-310 (Law. Co-op. Supp. 1976).

Employees' Collective Bargaining Act (Act)[36] is no exception, especially with respect to bargaining unit determinations.

There are three usual sources of limitation on how employees may be grouped into a single bargaining unit: the statutory definition of employees covered by the Act, direct statutory regulation of bargaining unit groupings, and the more indirect but equally potent application by the state labor relations board of discretionary statutory standards to be applied in making bargaining unit determinations. Again, the Ohio statute is no exception to this general approach.

First, the statute excludes certain employees from its coverage;[37] that is, they are forbidden from joining any union and engaging in collective bargaining at all. Thus, they may not be included in any bargaining unit. Second, the statute imposes limits on which covered employees may be included within the same bargaining unit;[38] inherent conflicts of interest are perceived to exist when certain types of employees are in the same bargaining unit. The prototypical example of this situation is where guards or other security personnel who would be needed to maintain order in the event of labor unrest are forbidden from being in the same bargaining unit with rank-and-file employees. Third, the statute lists a number of criteria for the SERB to consider in making bargaining unit determinations;[39] these criteria are somewhat subjective in nature and require the SERB to exercise its expert judgment in approving bargaining units submitted by the parties.

A. *Coverage of the Act: The Definition of "Public Employee"*

The definitional exclusions in the Ohio statute are found in an exceptions clause at the end of section 4117.01(C), which defines "public employee." Some of these exclusions are directly patterned on the NLRB: confidential employees are excepted from the Act's coverage,[40] as are management level employees and supervisors.[41] Consistent with private sector interpretations of these definitions,[42]

36. 1983 Ohio Laws 140 (codified at O.R.C. ch. 4117 (Page 1984) (amending O.R.C. ch. 4117 (1953))).

37. OHIO REV. CODE ANN. § 4117.01(C)(1)-(14) (Page 1984).

38. *Id.* § 4117.06(D)(1)-(6).

39. *Id.* § 4117.06(B).

40. Confidential employees are defined in OHIO REV. CODE ANN. § 4117.01(J) (Page 1984).

41. *Id.* § 4117.01(C)(7), (10).

42. *Id.* § 4117.01(J). In the private sector, the NLRB has excluded from bargaining those employees satisfying the Board's so-called "labor-nexus" test. *See* NLRB v. Hendricks

confidential employees are defined as those who have some direct connection in their work to the collective bargaining process. Managerial employees are those who either formulate or implement policy on the employer's behalf.[43] In addition, the Ohio Act includes collective bargaining and personnel administration functions in the definition of a management level employee.[44] The drafters of the legislation also acted to avoid interpretation problems which surfaced in the private sector[45] by specifying that university faculty members would not be considered management level employees solely because of their participation, as individuals, on faculty committees which formulate academic or other institutional policies.[46] Supervisors are not explicitly excluded from bargaining in the NLRA; the prohibition on supervisors organizing was administratively enacted.[47] The Ohio statute, recognizing the universal acceptance of this rule, has specifically forbidden supervisors from organizing and has also incorporated four clarifying provisos: (1) department chairmen in school districts shall not be considered supervisors;[48] (2) only the chief of a police or fire department, or his designated deputy, shall be considered a supervisor;[49] (3) at the uni-

County Rural Elec. Membership Corp., 454 U.S. 170 (1981). The exclusion is limited to employees who, in the ordinary course of performing their jobs, have access to confidential labor-relations information which may be material to the employer's possible bargaining position in subsequent negotiations.

43. *See* OHIO REV. CODE ANN. § 4117.01(K) (Page 1984). Managerial employees are not excluded from coverage under the NLRA by any express language, but rather by an implied exception to the statute. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-90 (1974). The exception for managerial employees is determined by reference to the employee's actual job responsibilities, authority, and relationship to management, rather than his job title. *See id.* at 294.

44. OHIO REV. CODE ANN. § 4117.01(K) (Page 1984).

45. *See, e.g.*, NLRB v. Yeshiva University, 444 U.S. 672 (1980), in which the Court held that full-time faculty members at a large university were all "managerial employees" by virtue of the extent to which the faculty as a group played a role in such matters as hiring decisions, curriculum, and the like.

46. OHIO REV. CODE ANN. § 4117.01(F)(3) (Page 1984). To date, the Supreme Court's reasoning in *Yeshiva* does not appear to have gained widespread acceptance in the public sector. Only two public institution employers, the University of Alaska and Wichita State University, have filed *Yeshiva* claims. In both cases the governing labor relations board refused to extend *Yeshiva* to the public sector. *See* Douglas, *Distinguishing* Yeshiva: *A Troubling Task for the NLRB,* 24 LAB. L.J. 104, 106-07 (1983).

47. Supervisors are excluded from coverage under the NLRA. 29 U.S.C. § 157 (1982). Technically, supervisors are not excluded from *bargaining* under the Wagner Act. In fact, the Act allows a supervisor to become or remain a member of a labor organization. *Id.* § 164(a). However, the employer of that supervisor cannot be compelled to deal with the supervisor as an employee for purposes of collective bargaining.

48. OHIO REV. CODE ANN. § 4117.01(F)(1) (Page 1984).

49. *Id.* § 4117.01(F)(2).

versity faculty level, only heads of departments or divisions shall be considered supervisors;[50] and (4) only certain teachers will be considered supervisors.[51] These clarifying provisos are enacted largely to avoid disputes about the status of professional employees, the ordinary performance of whose jobs often looks very similar to what management or supervisors usually do.[52]

There are other specific exclusions from the statute which are more directly related to the public nature of the employer. Elected officials are excluded from coverage of the Act,[53] as are employees whose principal duties are directly related to either the legislative or executive functions of government (that is, most political appointees).[54] Similarly, employees of county boards of election are excepted from the Act's coverage.[55] Also omitted from the Act's coverage are employees of a public official who act in a fiduciary capacity.[56] What all of these exceptions have in common is a desire to avoid any possible abuse or corruption of the governmental process as a result of unionization. Unionized employees naturally have interests adverse to their employer, which they attempt to resolve through collective bargaining; where that employer is the government, there is great sensitivity to the potential for conflict of interest between the performance of one's duty as a public servant and the desires, demands, or dictates of union membership.

Court employees and certain attorneys are not permitted to organize;[57] police and fire department employees are,[58] but with more

50. *Id.* § 4117.01(F)(3).

51. *Id.* § 4117.01(F)(4)(a), (b).

52. A professional employee is defined in the NLRA at 29 U.S.C. § 152(12) (1982). *Cf.* OHIO REV. CODE ANN. § 4117.01(I) (Page 1984).

Professional employees are permitted to bargain under the NLRA. *See, e.g.*, C.W. Post Center, 189 N.L.R.B. 904 (1971). Employers who oppose the unionization of professionals, however, have attempted to rely on the sometimes imperceptible line separating professional employees, who may belong to a union, from managerial employees, who may not. Because professionals are often engaged in work which is very close to being managerial in nature, the issue then becomes one of deciding whether the employees in question are to be included as professionals or excluded as managers.

In NLRB v. Yeshiva, 444 U.S. 672 (1980), the Supreme Court decided that members of the Yeshiva University faculty were managers and denied them coverage under the Act (or, more precisely, the Board-created managerial exclusion). *Yeshiva* has been criticized for failing to appreciate "subtle gradations of authority" which if ignored might lead to the emasculation of Board's policy of including professionals under the Act. *See The Managerial Status of Faculty Members Under the NLRA*, 94 HARV. L. REV. 251, 256-61 (1980).

53. OHIO REV. CODE ANN. § 4117.01(C)(I) (Page 1984).

54. *Id.* § 4117.01(C)(2)-(3).

55. *Id.* § 4117.01(C)(12).

56. *Id.* § 4117.01(C)(9).

57. *Id.* § 4117.01(C)(8).

limited rights than nonpublic safety-related workers have.[59] Specifically, police officers and fire fighters have no right to strike. These limitations are imposed to maintain law and order, including the continued functioning of the judicial system. The importance of ensuring public safety is deemed to outweigh the interest these employees may have in organizing. Rules like these also reflect the political realities of legislative decisionmaking, which include respecting a certain deference toward another branch of government and avoiding unnecessary intrusions on its functioning.[60]

The employment structure in higher education presents unique issues which have been dealt with in the Ohio Act by omitting, from the Act's coverage, students who are employed as graduate teaching assistants, residents and interns, or who hold other part-time jobs,[61] as well as part-time faculty members.[62] The treatment of students parallels the private sector model, although residents and interns have been granted full employee status under public sector bargaining statutes in other jurisdictions.[63] Omitting part-time faculty is simply a recognition that for many adjunct faculty—such as practitioners who teach trial tactics at law schools—teach-

58. *See generally id.* § 4117.01(C) (police and fire employees not excepted from coverage).

59. *Compare id.* § 4117.14(D)(l) (police and fire employees must submit their bargaining proposals to a conciliator) *with* (D)(2) (other employees may strike to gain concessions).

60. Public sector labor relations are rife with instances of wrangling among various branches of government over who is really in charge of interpreting the law. *See, e.g.*, APSCUF v. Commonwealth, 436 A.2d 1386 (Pa. 1981); Commonwealth v. Pa. Labor Relations Bd., 438 A.2d 1061 (Pa. Commw. 1982).

61. OHIO REV. CODE ANN. § 4117.01(C)(ll) (Page 1984).

62. *Id.* § 4116.01(C)(14).

63. In the private sector, the NLRB considers interns and residents to be students and not employees covered by the NLRA. The treatment of residents and interns in the public sector has varied from jurisdiction to jurisdiction with the various state courts and labor relations boards considering a number of factors in deciding whether to include residents and interns in a house staff bargaining unit. Those states that *have* included residents and interns have searched for language in the legislative history that indicates what the legislature intended by enacting a public employee bargaining law. The Nebraska Supreme Court in House Offices Ass'n v. University of Nebraska Medical Center, 198 Neb. 677, 225 N.W.2d 258 (1977), inferred the legislature's intent to include residents and interns from the absence of an express exclusion in the stated purpose of the Act. Another approach used by state labor boards and courts is to examine, often exhaustively, the day-to-day duties of residents and interns and decide whether the residents and interns are "primarily" students or employees. *See* Regents of the Univ. of Michigan v. NERC, 204 N.W.2d 218 (Mich. 1976). Another factor often focused on is whether the employment relationship is "continuous" or whether employment is merely ancillary to furthering the educational goals of the residents and interns. *See* Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center, 92 L.R.R.M. 3410 (1976).

ing is not their primary employment.[64]

There are a few other exemptions from the Act's coverage: seasonal and casual employees;[65] members of the militia while on active duty;[66] and employees of the SERB itself.[67] Again, these exceptions are made in order to avoid conflicts of interest which could damage the proper functioning of government services. By and large, the statutory exclusions from the Act's coverage are unremarkable.

B. *Statutory Limits on Bargaining Unit Composition*

Where employees are not covered by the Act, the Board has no discretion to include them in a particular bargaining unit, since it has no jurisdiction to include them in any unit at all. Similarly, the Board lacks discretion in cases where the statute explicitly prohibits putting certain employees in the same bargaining unit.[68] In looking at the content of the section, again one notices a strong similarity to both private sector precedents and treatment in other jurisdictions which provide collective bargaining rights for public employees.

Section 4117.06(D)(1) specifies that professional and nonprofessional employees shall not be included in a single unit unless a majority of both the professionals and the nonprofessionals, voting separately, opt for inclusion in a "mixed" unit. There is a consensus of opinion that professional and nonprofessional employees have a sufficient divergence of interests in the workplace that it would be inappropriate to group them in a single bargaining unit unless they prefer that structure. The NLRA provides that only professional employees have the right to opt out of a larger nonprofessional unit.[69] In the private sector, professional employees are in the minority in most workplaces, and the Congress which brought professional employees within the Act's coverage was concerned that the interests of this distinct minority could get lost even without a breach of the duty of fair representation in the negotiation and ad-

64. This ignores the problem of individuals who do depend on regular part-time teaching as an important source of income and who have a continuing, long-term employment relationship with the employer despite the part-time nature of their employment.

65. OHIO REV. CODE ANN. § 4117.01(C)(13) (Page 1984).

66. *Id.* § 4117.01(C)(4).

67. *Id.* § 4117.01(C)(5).

68. These limitations are found in *id.* § 4117.06(D). *E.g., id.* § 4117.06(D)(1) (limiting bargaining units from containing both professional and nonprofessional employees); *see infra* notes 69-82 and accompanying text.

69. 29 U.S.C. § 159(b) (1982).

ministration of a collective bargaining agreement.[70] The Ohio statute is slightly different, requiring a majority vote from both the professional and nonprofessional ranks. For public sector employees, that formulation is preferable: the proportion of professional employees is much higher in the public sector, especially in fields like education, so that the situation might be reversed, with nonprofessional employees in danger of losing an effective voice in the representation process. Requiring both professionals and nonprofessionals to opt into a single mixed unit preserves autonomy and maximum effective representation for both groups.[71]

The SERB is also forbidden by statute from combining guards or other security personnel with nonsecurity personnel in the same unit.[72] This prohibition also has its roots in the private sector[73] and has been extended in numerous other jurisdictions for public sector collective bargaining.[74] It was adopted to ensure that the employer could maintain discipline in the workplace, should any labor unrest occur. If guards were included in the same bargaining unit with other employees, the employer would not be able to count on their complete cooperation in keeping order during strike or picketing activity which threatened to disrupt continuing operations.

The Ohio statute also mandates special restrictions on bargaining unit composition in police or fire departments. The first is a prohibition on mixed units of police or fire officers and nonofficers, such as clerks or administrative aides, in the same workplace.[75] This is done not so much in order to guarantee labor peace and the maintenance of discipline during labor unrest as it is to avoid a potentially powerful conflict of interest: nonpolice or fire employees

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70. In the interests of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, [the Taft-Hartley Amendments require] the Board . . . to give greater attention to the special problems of craftsmen and professional employees in the determination of bargaining units.

S. REP. NO. 105, 80th Cong., lst Sess. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 409 (1948).

71. Three other states' public employee bargaining statutes contain provisions requiring express consent of both professionals and nonprofessionals to form a mixed unit: Florida, FLA. STAT. ANN. § 447.307(4)(h) (1981); Iowa, IOWA CODE ANN. § 20.13(4) (West 1982); New Hampshire, N.H. REV. STAT. ANN. § 273-A:8 (II) (1983).

72. OHIO REV. CODE ANN. § 4117.06(D)(2) (Page 1984).

73. 29 U.S.C. § 159(b)(3) (1982).

74. *E.g.*, KAN. STAT. ANN. § 75-4327(f)(2) (1981); PA. CONS. STAT. ANN. tit. 93, § 1101.604(3). (Purdon Supp. 1984). *See* IND. CODE ANN. ch. 20, § 20-7.5-1-2(e) (1984) (excluding employees performing security work from the definition of "school employee" for purposes of collective bargaining).

75. OHIO REV. CODE ANN. § 4117.06(D)(3) (Page 1984).

have a limited right to strike,[76] which police and fire officers do not. Putting the two groups in a single unit could subject police officers or fire fighters to pressure to join in what is otherwise lawful strike activity by their union brethren. The second special restriction on police departments is that officers at the rank of sergeant and above must organize in a separate unit from rank and file employees.[77] The definitional section of the statute which provides that supervisors may not organize also provides that only the chief of a police or fire department, or his designated deputy, shall be deemed a supervisor. These sections together mean that sergeants and lieutenants may organize, but into separate units from the rest of the department. This gives these officers, who actually have quasi-supervisory status, a right to organize and bargain, albeit a limited one, by virtue of the practical fact that very small units, which these sergeant units would be in all but the largest cities in the state, are simply not viable—they are too small to have any real bargaining power relative to the employer and too small to be of real interest as affiliates to national unions like Fraternal Order of Police (FOP) or American Federation of State, County & Municipal Employees (AFSCME).

Further limitations on the SERB's power to designate bargaining units relate to institutions of higher education—no units of more than one such institution and, within any single college or university, no units which might interfere with accreditation standards are allowed;[78] and to employees of elected county officials—no bargaining units containing employees of more than one elected county official are permitted, unless the elected officials and the county board of commissioners agree to a larger unit.[79]

The last nondiscretionary constraint on bargaining unit determinations is a grandfather clause which provides that the Board may not certify (or the employer recognize) a union where there is a contract or memorandum of understanding already in effect between the employer and another employee representative which has been recognized by the employer or has traditionally represented its employees.[80] Thus, where the employer has in the past bargained

76. Certain classes of public employees, primarily police and firefighters, do not have the right to strike. *Id.* § 4117.14(D)(1). Other public employees, those not listed in that section, do have a limited right to strike subject to fact-finding mediation, and 10-day written notice of an intent to strike. *Id.* § 4117(D)(2).

77. *Id.* § 4117.06(D)(6).

78. *Id.* § 4117.06(D)(4).

79. *Id.* § 4117.06(D)(5).

80. *Id.* § 4117.05(B).

with some of its employees, there may be limits on its ability to petition for a larger bargaining unit which would swallow up the original group of workers.[81] Given the extent of de facto bargaining which existed in Ohio prior to the enactment of a de jure right to bargain, this section is potentially a severe limitation on the SERB's ability to shape bargaining units.[82]

C. *Criteria for Discretionary Bargaining Unit Determinations*

While the explicit limitations on bargaining unit composition are numerous, there nonetheless remains after their application a wide variety of possible unit configurations within the entire scope of public employment. It is at this point that the SERB's exercise of its discretion in approving bargaining units becomes critical in shaping the direction of public sector bargaining.

When a union wants to represent some group of Ohio public employees, it must be certified as their exclusive representative in one of two ways, through a Board-conducted election or through voluntary recognition.[83] The election process is initiated when a union or group of employees files a petition with the SERB alleging a thirty percent showing of interest from employees in "an appropriate bargaining unit" and requesting an election.[84] Alternatively, a union may file a request for recognition directly with the employer, if it has support from a majority of employees, again, "in an appropriate unit." Thus, the initial unit configuration is one proposed by the union seeking representational status, rather than by the Board itself. The Board is not necessarily required by the statute to accept passively any bargaining unit as proposed, however. The statute seems to grant the SERB authority to take a more affirmative role in making unit determinations by stating that the SERB "shall decide in each case the unit appropriate for the purposes of collective bargaining."[85] There are also provisions in both

81. *See infra* notes 104-10 and accompanying text.

82. Bargaining prior to the enactment of the statute was apparently more concentrated in certain sectors, such as public education, than others. Figures on the extent of organization and bargaining prior to the statute are not generally available, but it has been estimated that there are approximately 580,000 public employees subject to the statute. If only 10% were bargaining previously, that means 58,000 employees grandfathered out of alternate unit configurations. *See Student Project*, *supra* note 2, at 245.

83. OHIO REV. CODE ANN. § 4117.05(A)(1) (Page 1984) (petition for election); *id.* § 4117.05(A)(2) (voluntary recognition).

84. *Id.* § 4117.07(A)(1). In addition, the employer may initiate an election by a petition "alleging that one or more employee organizations has presented to it a claim to be recognized . . . ." *Id.* § 4117.07(A)(2).

85. *Id.* § 4117.06(A).

the election and recognition sections of the statute for challenges to the proposed bargaining unit.[86] The statute further provides:

> The board shall determine the appropriateness of each bargaining unit and shall consider among other relevant factors: the desires of the employees; the community of interest; wages, hours, and other working conditions of the public employees; the effect of overfragmentation; the efficiency of operations of the public employer; the administrative structure of the public employer; and the history of collective bargaining.[87]

Finally, the statute specifically states that: "The board may determine a unit to be the appropriate unit in a particular case, even though some other unit might also be appropriate,"[88] which gives the Board considerable latitude to approve or disapprove proposed units.

The list of criteria is not unusual, nor is the lack of any guidance in the statute for the Board to follow in applying the listed criteria. What relative weight should be given to each of the six factors? Are any of them more important than the others? The list of criteria is internally inconsistent, taken as a whole: the desires of employees and the history of collective bargaining would suggest small, departmental units; the effect of overfragmentation and the administrative structure of the public employer point to large horizontal units. Other factors to be considered could point in either direction. Wages, hours and other working conditions are related both to occupation and to department-specific conditions. As suggested above,[89] "community of interest" has, in public sector labor relations, become an elastic concept the internal content of which is ambiguous and not particularly helpful in providing guidance for unit determinations. Generally, the unit which the employees perceive as congruent with their community of interest is too small a unit for the employer's administrative convenience. In addition, the standard of operational efficiency itself suggests smaller, departmental units for some purposes and larger, horizontal units for others, namely, contract administration, at least up to a point.[90]

In other jurisdictions, different approaches have been taken to bargaining unit determinations, although the Ohio formulation is most typical. In Hawaii, for example, the statute itself specifies the

86. *Id.* §§ 4117.07, 4117.05(A)(2)(b)(iv).

87. *Id.* § 4117.06(B).

88. *Id.* § 4117.06(C).

89. *See supra* text accompanying notes 6-34.

90. Haskell, *supra* note 15, at 29.

permissible bargaining units.[91] While different states have adopted different standards, there has been a trend toward increasing use of broad, horizontal units.[92] However, even where wall-to-wall units are most firmly entrenched, departmental units nonetheless continue to exist, illustrating the futility of attempting to adopt one type unit to the exclusion of the other. Many state labor relations boards have adopted a balancing test to evaluate the importance of the statutory criteria;[93] this approach promotes both flexibility and considerable discretion on the part of the labor relations board in response to different circumstances in different workplaces.

III. A CRITIQUE OF THE OHIO ACT

Despite the obvious care with which the Ohio legislation has been drafted, there still remain areas of ambiguity and potential trouble, some of which have been touched on above. This last section will address other weaknesses in the statute, especially as they relate to the principles of optimal unit configuration discussed in Part I.[94] There are three specific areas which should be addressed: the role of the SERB in shaping unit determinations;[95] the treatment of "misfit" employees whose employment situations do not fit neatly into any of the categories prescribed by the statute;[96] and the finality of unit determinations made by the Board.[97]

The two main criticisms which I have of the statutory scheme may seem to be contradictory: the statute presents the possibility of both too many units, and too few. In drafting the statute, the Ohio legislature carefully crafted a number of exemptions from coverage and prohibitions on unit configurations, and tied the whole package up with a list of discretionary criteria for the Board to apply in making unit determinations. Looking at the provisions of the statute as a whole, however, one has to ask how effective they will be in accomplishing the unit determination goals espoused by the legislature in the regulatory scheme it has enacted. In making unit determinations, the Board has both discretionary and mandatory standards to apply. The Board's application of its discretionary

91. HAWAII REV. STAT. § 89-6 (Supp. 1982).

92. Haskell, *supra* note 15, at 20.

93. *See, e.g.*, City of Appleton, Wisconsin Employment Relations Commission, Decision No. 7423 (1966); Albert Einstein Medical Center v. Pennsylvania Labor Relations Bd., 30 Pa. Commw. Ct. 613, 374 A.2d 761 (1977).

94. *See supra* notes 6-34 and accompanying text.

95. *See infra* notes 98-103 and accompanying text.

96. *See infra* notes 104-13 and accompanying text.

97. *See infra* notes 114-20 and accompanying text.

standards is what gives rise to the potential for too few units; the mandatory criteria, which permit no deviance from their terms, create the possibility of too many units.

A. *The Role and Attitude of the Board: Discretionary Standards of Unit Determination*

The statute as drafted is quite comparable to many other state public sector bargaining laws.[98] It provides a certain amount of guidance to the SERB and to the parties about what constitutes an acceptable bargaining unit, yet it is ambiguous enough to permit the SERB to exercise its judgment in many cases. This places a heavy burden on the SERB; one key to the successful operation of the statute is the role which the Board chooses to play in making unit determinations. Through the flexible language of the discretionary unit determination criteria listed in the statute, the Board has the choice of adopting an activist stance in the formative stages of a representation campaign or of electing a more passive, responsive posture. While there is nothing inherently wrong with the Board's merely accepting whatever units are proposed to it, it is absolutely clear that such an approach, geared as it is primarily to the desires of employees and their potential representatives, will almost surely result in a larger number of units than the state legislature had in mind when it included the overfragmentation criterion in the statute.[99] The more active the Board is in supervising unit determinations, the less likely it is that overfragmentation will occur.

At the same time, the Board must adopt a truly neutral posture if it is to achieve a healthy balance between the various unit determination criteria specified in the statute. No one factor listed is designated as more important than any other, so it would be inappropriate to place more emphasis on, say, overfragmentation than on history of bargaining, community of interest, or any of the other

98. Although the same general themes appear throughout the various public sector collective bargaining statutes, there are a number of variations on those themes, deriving principally from different viewpoints about the extent to which public employees should be granted collective bargaining rights similar to those enjoyed by private sector employees. In many respects, the public sector collective bargaining scene is like an experimental laboratory of industrial relations, whose diverse approaches to regulating collective bargaining range from more "liberal" statutes which most closely approximate the NLRA, *e.g.*, PA. STAT. ANN. tit. 34, §§ 213.1, 213.3 (Purdon 1984), to much more "conservative" laws which preserve a maximum of governmental control over the process of bargaining, *e.g.*, N.J. STAT. ANN. §§ 34:13B-2,-3 (West 1984), with an array of alternatives in between (with Ohio toward the Pennsylvania end of the spectrum and New York leaning more toward the New Jersey approach).

99. Perry & Angle, *supra* note 9, at 48.

enumerated standards. The Board should be concerned about unit proliferation, but not to the point of ignoring traditional criteria of unit determination. The purpose of enacting a public sector collective bargaining statute is, after all, to give employees a more active voice in determining their working conditions, which is best accomplished by effective representation focused on the specialized needs of the group of employees included in the bargaining unit. The purpose of the statute is not to force employees into artificial categories which ignore occupational, departmental, geographical, or other affinities to ease the employer's transition into an era of collective bargaining. Given the attention unit proliferation has received over the years, the Board must be aware of its dangers. But the pendulum can swing too far. Since the SERB itself is a government agency-cum-employer,[100] there may be a dangerous tendency to identify too strongly and too sympathetically with other employers who seek inappropriately broad bargaining units. The Board's willingness to adopt an assertive posture in the recent statewide bargaining unit determinations is a good sign, but that willingness to require broad units must be tempered with a recognition of the limitations of unit size. There is such a thing as a unit which is too broad; the question is whether the SERB will recognize such a behemoth when it sees one. The statute cautions against *overfragmentation*, not any fragmentation at all.

One approach the Board could—and arguably should—adopt would be to encourage the development of a two-tiered bargaining structure, under which issues of broad concern were determined at the state or citywide level, as appropriate, and issues more directly related to the specific workplace would be negotiated at the "local" level of the affected department or agency. Such an approach combines the benefits of centralized bargaining with the refinement and attention to specific employee concerns which only bargaining at a lower level can provide. It would require much more coordination on the part of both employers and unions than unitary bargaining, but the benefits to both sides are considerable and are the stuff of which labor-management dreams are made: greater productivity for the employer and a satisfying perception of increased self-determination in the workplace by employees.[101]

Another area where the Board should not shrink from exercising its authority is where the unit proposed by both the employer

100. Albeit one whose own employees are forbidden by law to unionize. *See* OHIO REV. CODE ANN. § 4117.01(C)(5) (Page 1984).

101. *See* Perry & Angle, *supra* note 9, at 47-50.

and employee representative is an illegal or otherwise utterly inappropriate one. If the parties are happy with a particular formulation, why not let it be, you may ask. Is it not the purpose of the statute to encourage labor-management cooperation? Why not let the parties determine their own unit if there are no objections from anyone?

There are two responses to this argument. The first is that the SERB is entrusted with the responsibility of enforcing the statute as enacted. Presumably the legislature had good reason for exempting certain employees from the coverage of the Act and for prohibiting certain combinations of employees in the same bargaining unit. It is simply inappropriate for the SERB to allow an employer and union to evade the express terms of the statute voluntarily; the Board's role is to facilitate collective bargaining between public employers and their employees, but equally it is to guard the public interest in appropriate unit determinations. The public may ultimately suffer from interruptions in the provision of public services as a result of improper unit certifications. Employees who are unfamiliar with the certification procedures may also require the Board's intervention to protect their right to object.

Second, while a particular unit configuration may present no real problems in an individual case, the Board risks establishing a harmful precedent when it permits an inappropriate unit to be certified. Some unit determinations, like the recent statewide bargaining units, are established by a procedure much like rulemaking, but most units will be approved on an individual case-by-case basis.[102] Although the Board's unit determinations are supposedly nonreviewable,[103] it will nonetheless undermine its own authority and prestige if it permits even the appearance of subjective or nonprincipled decisionmaking, which would surely happen if it allowed the parties unfettered license in constructing their own units.

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102. *Cf. In re* Florida, PUB. EMPLOYEE BARGAINING REP. (CCH) (Fla. PERC June 17, 1976), *reprinted in* H. EDWARDS, R. CLARK, JR. & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 184 (1979) (Since the Florida PERC was part-time and unit determinations under the Florida statute required much time and because of the difficulty in providing PERC decisions to all affected parties, the PERC considered it "expeditious, economical, and administratively feasible" for the State of Florida to determine the general type and kind of units appropriate under their state employees collective bargaining act).

103. OHIO REV. CODE ANN. § 4117.06(A) (Page 1984); *see infra* notes 115-20 and accompanying text.

B. *Grandfathers, Orphans, and Stepchildren: Mandatory Limitations on Unit Configuration*

While the Board's application of its discretionary criteria could lead to too few units, so too, the number and types of statutorily-mandated restrictions could lead to other problems: too many units, the effective denial to some employees of their statutory right to organize and bargain collectively, and a patchwork of centralized and decentralized units. While this result may be inevitable in some cases because of the mandatory application of the terms of the statute, in others the Board may be able to exercise discretion in such a way as to minimize these adverse effects.

The first problem area is the grandfather clause in the statute, which permits—indeed, requires—continued recognition of existing bargaining units.[104] This has the advantage of providing continuity. Most existing units, however, will have been established on departmental lines, not on the more centralized occupational lines suggested by the overfragmentation criterion in the statute.[105] The existing vertical unit may cut across several more appropriate occupational units. If left in place, the existing unit would have to be carved out of a more desirable broader unit and dealt with separately by the employer, requiring coordination between units to accomplish uniformity of treatment and making it difficult to achieve the administrative goals which underly the centralized unit approach. Given the number of existing bargaining relationships in place at the time the Ohio statute became effective, this problem could be serious, depending on what possible solutions the statute offers.

There appears to be no direct way for either an employer or the SERB to challenge such a unit configuration, even at the end of the existing collective bargaining agreement.[106] Section 4117.07 provides for employers to initiate an election only in response to a request for recognition from one or more unions. In this case, where the union has already been recognized, there is no petition which the employer can file.[107] The SERB has no independent authority to initiate alternate bargaining unit proceedings; it can act only in response to an appropriate petition from an employee or group of

104. OHIO REV. CODE ANN. § 4117.05(B) (Page 1984).

105. *See id.* § 4117.06(B).

106. *See id.* § 4117.07(B)(6).

107. *See id.* § 4117.07(A). This is one area in which the Ohio statute is somewhat odd, in that there appears to be no way in which an employer can initiate a decertification petition. *Cf.* PA. STAT. ANN. tit. 43 § 1101.607(ii) (Purdon 1983).

employees, an employee representative, or an employer.[108] The only opportunity for redefining the bargaining unit is at the end of any existing contract, when an employee or rival union may file a petition for election (essentially a decertification election) on the basis that the certified union has lost its status as majority representative of the employees.[109]

If there is no provision for unit redefinition in the statute, as appears to be the case, then reshaping of units can occur only as a result of voluntary negotiations between the employer and the existing representative. In practical and political terms, that is most likely to happen when the existing union perceives some gain to be made by redefining the unit—control over a larger unit, for example, or defining out of the unit a particularly fractious minority group of employees. There may be a role for the SERB to play here, encouraging and facilitating such negotiations where they are appropriate. The SERB can also use its influence to guide the parties to multi-unit bargaining, which is explicitly approved in the statute,[110] and which is one way of minimizing the adverse effects of unit fragmentation. Otherwise, the problem of intersecting vertical and horizontal units is likely to cause problems for some time yet to come.

The grandfather clause in the statute is not the only one which presents unit determination problems. Several other clauses also yield anomalous results when measured against the dual goals of the statute, employee choice and administrative convenience for the employer. Specifically, certain employees who are permitted by the Act to organize and bargain collectively may find themselves shut out of effective representation rights by mandatory unit configurations which separate them from the majority of their fellow workers. As one example, consider the case of non-officer employees in police and fire departments, such as clerks, secretaries, and maintenance employees. By law, they are not permitted to be included in the same unit as the officers.[111] In smaller departments, there may only be a handful of such employees, who are unable to form an effective employee organization and are essentially denied a right to

108. OHIO REV. CODE ANN. § 4117.07(A) (Page 1984).

109. *Id.* § 4117.07(A)(l). Presumably the language permitting the filing of a decertification petition by "any individual . . . acting in [the employees'] behalf" could be used to permit an employer to file such a petition, but since the statute does not specifically include the employer, such an interpretation would seem to be inconsistent with the legislative intent.

110. *Id.* § 4117.06(D)(6).

111. *Id.* § 4117.06(D)(3).

organize, even though the officers with whom they work may be unionized. The same could happen in police departments with the sergeant and lieutenant units permitted by the statute.[112] Although the statute prohibits these employees being placed in the same bargaining unit with officers, there is nothing to prevent the employer from voluntarily recognizing a sort of mini-unit and engaging in coordinated bargaining with all employees; indeed, the statute states, in section 4117.03(C) that: "Nothing . . . prohibits public employers from electing to engage in collective bargaining, meet and confer, discussions, or any other form of collective negotiations with public employees who are not subject to [the Act]."[113] Thus, the employer who is concerned about fragmentation arising as a result of mandated unit separations in the statute can effectively avoid the problem through voluntary recognition and negotiations, including even some employees who have no explicit statutory right to unionize.

C. *Finality of Unit Determinations*

Section 4117.06(A) provides that the Board's unit determination in any case "is final and conclusive and not appealable to the court."[114] This appears to be the end, but is it? And is such a rule appropriate in all cases? The theory underlying rules like this is that the representation process should not be delayed by appeals which employers may file precisely for that purpose and not because there is any real dispute about the appropriate unit; delay is one of the most effective tactics an employer can use to fight a unionization campaign in the workplace.[115] Thus, in both the private sector and in many public sector collective bargaining statutes, unit determinations are nonappealable.[116] An alternate rationale to the delay argument is that there is no final decision of the Board to appeal until

112. *Id.* § 4117.06(D)(6).

113. *Id.* § 4117.03(C).

114. *Id.* § 4117.06(A).

115. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795-1803 (1983).

116. For an example of a nonappealable bargaining unit determination in the public sector, see Lincoln County Mem. Hosp. v. Missouri State Bd. of Mediation, 549 S.W.2d 665 (Mo. Ct. App. 1977). In the leading private sector case, American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940), the United States Supreme Court, recognizing the possibility of the employer using the appeal of a unit determination as a dilatory tactic, held that Congress did not intend for such determinations to be final reviewable orders of the board. In Baire v. Greyhound Corp., 376 U.S. 473 (1964), the Court specified that appeal of unit certification should be limited to extraordinary circumstances where the board has clearly acted in excess of its statutory powers.

a union has been certified: in the union election, the employees may opt to remain nonunionized, and the whole issue becomes moot. It would be a waste of public resources, the argument runs, to review unit determinations until after the election.[117] As any student of labor law knows, however, nonappealability is partly a fiction: an employer who is unhappy with a unit determination—or one who simply wishes to frustrate the union campaign—can refuse to bargain with the union after it has been certified. This forces the union to file an unfair labor practice charge, which results in the issuance of a bargaining order. The employer can challenge the unit determination during a subsequent appeal of the bargaining order to a reviewing court.[118]

The motivation behind the nonappealability statutes—to avoid delay and conserve public resources—is admirable, but the approach is somewhat misguided, because it fails to account for two distinct types of challenges to the unit determination. While it is true that some employers may attempt to use the unit determination process as a means of foiling unionization, unit determinations also affect the ability of interested unions to conduct effective organization campaigns. The inclusion or exclusion of certain employees may mean that a particular union will be unable to muster the requisite showing of interest to appear on the election ballot or will lose majority support because the Board has ordered a larger unit or different mix of employees in the unit than that which the union originally proposed. The indirect route to challenge unit determinations is usually only available to the disaffected employer, and not to unions whose right to participate in the election may have been effectively foreclosed by the Board's unit determination.[119] Argua-

117. *See Lincoln County Mem. Hosp.*, 549 S.W.2d at 669.

118. At this point in the organization-negotiation process, the union has been certified and there is nothing more that the employer can do to prevent unionization short of appealing the propriety of each of the preceding steps, including the showing of interest, the bargaining unit determination, the union's conduct during the election campaign, and the issuance of an *interlocutory* order, there is nothing to preclude the review of the correctness of the unit determination when the parties are making final use of the machinery of the Board.

119. In Civil Serv. Employees Ass'n v. Helsby, 31 A.D.2d 325, 297 N.Y.S.2d 813, *aff'd per curiam*, 24 N.Y.2d 993, 250 N.E.2d 230, 302 N.Y.S.2d 822 (1969) [hereinafter *CSEA*], the Appellate Division of the New York Supreme Court held that to prevent the effective foreclosure of the employees' bargaining rights under the applicable New York statute, immediate review of the bargaining unit determination by the Public Employment Relations Board (PERB) was appropriate in the absence of a clear statutory prohibition. *Id.* at 329, 297 N.Y.S.2d at 817. The court reasoned that under the facts of *CSEA*, the possibility of delay was greater if the PERB's unit determinations were later found *on appeal* to be inappropriate, since this would necessitate the inefficient and expensive process of redetermining the appropriate units and holding another set of elections. *Id.* Since the Board's decision was a final

bly, it is these alternative unions that have been left out in the cold which have the best claim to appealing the unit determination. Since their rights have been finally determined as a result of the unit decision, it seems unfair to penalize them with a rule originally designed to counteract employer resistance to unionization.

In some jurisdictions, most notably New York, this anomalous situation has been dealt with by permitting affected public sector unions but not employers to appeal unit determinations, sometimes in a special expedited procedure.[120] And there does not seem to have been an adverse effect on unionization in those states which have adopted such a policy. Because the prohibition in Ohio is written into the statute, it is unlikely that the SERB can properly adopt a more lenient approach to the finality of its unit determinations. The best solution would be an amendment to the statute, but until that happens, the Board must remain sensitive to the implications of its unit decisions—not just on whether the employees will be able to exercise free choice in deciding whether to be unionized, but also on which unions will appear on the ballot.

IV. CONCLUSION

As should be clear by now, there is, in my opinion, no single optimum unit size; rather, there are a number of considerations which must be taken into account in determining appropriate bargaining unit configurations in specific circumstances. Even after a year's experience with the law, public employers and employees in Ohio, as well as the SERB itself, still stand at the beginning of their journey toward collective bargaining in government employment. The statute itself is well-conceived and well-drafted; it provides all the tools necessary for the parties to develop sophisticated bargaining relationships. Whether they will actually do so remains to be seen. Bargaining unit determinations will be one of the first tests for everyone involved in the unionization process. The statewide units recently formulated indicate a positive and cooperative attitude on the part of employers and employee representatives, as well as an assertive stance by the State Employment Relations Board. To con-

rejection of the bargaining unit proposed by the state committee, the court held that this constituted final, reviewable action. *Id.* at 330, 297 N.Y.S.2d at 818.

120. The New York Supreme Court in *CSEA* followed the *general* federal rule that unit determinations are not appealable but went on to hold that in extraordinary circumstances review of the unit determination might be obtained. *Id.* in those extraordinary circumstances the policy of avoiding delay is effectuated by allowing review just as that same policy is effectuated in most other cases by *postponing* review until a later time.

tinue the development process, however, the parties must remain sensitive to the more subtle implications of bargaining unit determinations, especially the delicate balance which must be drawn between employee choice and employer convenience, to ensure that public employees will be able to exercise their right to bargaining consonant with the efficient provision of government services.