

ARBITRATION DECISION NO.:

472

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Industrial Relations

DATE OF ARBITRATION:

October 11, 1991

DATE OF DECISION:

November 1, 1992

GRIEVANT:

Erin Gurwin Kennedy

OCB GRIEVANCE NO.:

18-00-(91-04-03)-0021-01-04

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Linda Fiely,
General Counsel
John Feldmeier,
Arbitration Assistant

FOR THE EMPLOYER:

Michael P. Duco, Advocate
Elliot Fishman,
Second Chair

KEY WORDS:

Removal
Arbitrability
Termination
Bargaining unit
Exempt Employees
Fiduciary Employee

ARTICLES:

Article 1 - Recognition
 §1.01-Exclusive
Representation
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of New Classifications
Article 18 - Layoffs

Article 24 - Discipline

§24.01-Standard

Article 25 - Grievance**Procedure**

§25.01-Process

§25.02-Grievance Steps

§25.03-Arbitration Procedures

FACTS:

The Grievant was employed with the Department of Industrial Relations from November 4, 1985, to April 1, 1991. She was employed as a Legislative Liaison Officer 1 from June 5, 1989, until April 1, 1991.

The State Employee Relations Board decided on December 17, 1985, that the classification of Liaison Officer 1 was properly included in bargaining unit 14. In January 1991 a change in the administration took place, and the new Director of Industrial Relations determined that the Liaison Officer 1 position was vested with fiduciary duties, therefore making the position exempt. The Director subsequently terminated the grievant pursuant to Ohio Revised Code section 124.11(A)(8) and/or Ohio Revised Code 124.11(A)(9). This administrative action was revoked after the Employer discovered that under the prior administration, the position had been placed in the bargaining unit.

The Director then asked the grievant to provide written consent to serve in the unclassified service per Ohio Revised Code 124.11(A)(9). Meanwhile, another person interviewed for her position, which caused the grievant to refuse to fulfill the Director's request. The Director then requested from the Department of Administrative Services and the Office of Collective Bargaining, a determination regarding the grievant's bargaining unit status. They granted the request for a fiduciary exemption. On April 1, 1991, the Director informed the grievant her position was exempt and terminated her employment.

EMPLOYER'S POSITION:

The Employer's determination that the grievant was an unclassified fiduciary employee and not a bargaining unit member made the position an exception to the definition of "public employee" contained in ORC 4117.01(C)(9). The Liaison Officer 1 position was erroneously placed into the bargaining unit without consideration of the fiduciary characteristics surrounding this classification. The Employer cited the test set forth in Rarick v. Board of County Commissioners to determine whether a person holds fiduciary status under ORC 124.11(A)(9), stating that the grievant's position met this test. It also cited Esselburne v. Ohio Department of Agriculture, stating that there was an exception which allowed management to change a classified position to an unclassified position because the position in question has been erroneously determined to be classified.

Since the grievant was terminated after the Employer's determination of fiduciary status, she was no longer legally covered by the Agreement.

The Employer also argued that the Arbitrator does not have the authority to determine whether a fiduciary relationship exists, since this determination is vested in the State Personnel Board of Review (SPBR) and the courts. The grievant never appealed the SPBR's determination, and therefore she is precluded from raising the matter in arbitration.

UNION'S POSITION:

The Employer could not terminate the grievant without following the disciplinary procedures laid out in Articles 18 and 24 of the Agreement. The Employer did not have the authority to designate the grievant's position as one possessing fiduciary responsibilities. The grievant bid for the position, which was clearly posted as a bargaining unit position, and was promoted to this position, not appointed. The exception specified in ORC 4117.01(C)(9) does not create an automatic exception to public employee status. The Employer overstepped its bounds and took over the role of SERB as specified in ORC 4117.06(A), which grants SERB the authority to determine whether or not a position is a bargaining unit position. Even if a fiduciary appointment has been established by the Employer, SERB still has the authority to make unit

determinations in accordance with ORC 4117.06.

The standards in Esselburne do not apply because an error in listing did not take place. The grievant had occupied her position for more than two years prior to her removal from the bargaining unit. In addition, as a consequence of her bargaining unit status, the grievant had the right to challenge the fiduciary determination as well as the termination through the collective bargaining process.

ARBITRATOR'S OPINION:

Since the nature of the dispute deals with the grievant's standing within bargaining unit 14, the statutorily defined unit, the matter is arbitrable.

SERB, by statute, is vested with the exclusive right to determine the make-up of the bargaining unit. SERB is not only the final authority, but must also decide the propriety of any changes in the bargaining unit after the certification stage. Even if the Employer's action in this instance was proper and beyond reproach, its decision to change the grievant's classification based on a unilateral action contravenes the authority vested in SERB per ORC 4117.06(A).

The fiduciary exception specified in 4117.01(C)(9) is not an automatic exception to the definition of "public employee." SERB has the authority to determine the appropriateness of each bargaining unit. In addition, the application of Esselburne principles to a bargaining unit employee was never properly established by the Employer.

The Employer bypassed SERB's unit determination authority, causing an improper designation of the grievant as a fiduciary. As such, her bargaining unit status was never properly modified. She was a bargaining unit employee, and could only be removed or disciplined pursuant to the Collective Bargaining Agreement.

AWARD:

The grievant is to be reinstated to her former position with back pay and all other benefits restored for the period she was deprived of her position as Liaison Officer 1.

TEXT OF THE OPINION:

**THE STATE OF OHIO
AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
VOLUNTARY LABOR
ARBITRATION PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO,
OHIO DEPARTMENT OF
INDUSTRIAL RELATIONS**

-and-

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO**

GRIEVANT:
Erin (Gurwin) Kennedy

OCB CASE NO.:

18-00-(91-04-03)-0021-01-04

**ARBITRATOR'S OPINION
AND AWARD****ARBITRATOR:**

David M. Pincus

Date:

November 1, 1992

APPEARANCES**For the Employer**

Carol Nolan Drake,
Labor Relations Officer
Larry Smith, Chief
Departmental Legal Counsel
Margaret E. Van Meter,
Legislative Liaison I
Elliot Fishman,
Second Chair
Michael P. Duco,
Advocate

For the Union

Erin (Gurwin) Kennedy,
Grievant
Anissia Goodwin,
Observer
Jim Harris,
CAP Coordinator (UAW)
John Feldmeier,
Arbitration Assistant
Linda Fiely,
General Counsel

INTRODUCTION

This is a proceeding under Article 25 - Grievance Procedure, Sections 25.02 and 25.03 entitled Grievance Steps and Arbitration Procedures of the Agreement between The State of Ohio, Ohio Department of Industrial Relations, hereinafter referred to as the Employer, and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1991 to and including December 31, 1992. (Joint Exhibit 1).

The arbitration hearing was held on October 11, 1991 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit briefs. Both parties indicated they would submit briefs; which included response and reply briefs.

ISSUES

Does the Grievant, Erin (Gurwin) Kennedy, have standing to grieve the disputed matter based on the

substantive nature of the grievance?

Did the Employer violate the Collective Bargaining Agreement (Joint Exhibit 1) when it terminated the Grievant's employment with the Department of Industrial Relations? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

§1.01 - Exclusive Representation

The Employer recognizes the Union as the sole and exclusive bargaining representative in all matters establishing and pertaining to wages, hours, and other terms and conditions of employment for all full and part-time employees in the classification included in the following certifications of the State Employment Relations Board (SERB):

85-RC-04-3287
 85-RC-04-3288
 85-RC-04-3289
 85-RC-04-3290
 85-RC-04-3291
 85-RC-04-3293
 85-RC-04-3483
 85-RC-07-3966

The classifications included in these certifications are listed in Appendices A-H (bargaining units 3, 4, 5, 6, 7, 9, 13 and 14). Any Classifications added to the units shall be added to the appendices as though originally included.

The Employer will not negotiate with any other union or employee organization on matters pertaining to wages, hours and other terms or conditions of employment. Nor shall the Employer permit dues deduction for another organization purporting to represent employees on these matters or negotiate with employees over wages, hours and other terms and conditions of employment.

§1.02 - Inclusion/Exclusion of New Classifications

The Employer will promptly notify the Union of its decision to establish and all new classifications. If a new classification is a successor title to a classification covered by this Agreement with no substantial change in duties, the new classification shall automatically become a part of this Agreement.

If a new classification contains a significant part of the work now done by any classifications in these bargaining units or shares a community of interest with classifications in one of the bargaining units, the union may notify the Employer that it believes the classification should be in the bargaining unit within thirty (30) days of its receipt of the Employer's notice. The parties will then meet within twenty-one (21) days of such notice to review the classification specifications, and if unable to agree as to its inclusion or exclusion, shall submit the question to the SERB for resolution.

* * *

(Joint Exhibit 1, Pgs. 1-2)

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of

Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

* * *

(Joint Exhibit 1, Pg. 37)

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievant(s) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

* * *

(Joint Exhibit 1, Pg. 40)

§25.03 - Arbitration Procedures

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

* * *

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

* * *

(Joint Exhibit 1, Pgs. 42-43)

STIPULATED FACTS

1. Erin Gurwin, Grievant, now known as Kennedy, was employed with the Department of Industrial Relations from November 4, 1985 to April 1, 1991.
2. Grievant was employed as an Assistant Legislative Liaison Officer from November 4, 1985 to June 5, 1989.
3. Grievant was employed as a Legislative Liaison Officer 1 from June 5, 1989 to April 1, 1991.
4. Grievant was the sole Legislative Liaison Officer with the Department of Industrial Relations from June 5, 1989 to April 1, 1991.
5. The Grievant had dues deducted while she was a Legislative Liaison Officer 1.
6. There are unclassified employees in the bargaining unit represented by OCSEA but the Parties cannot indicate whether or not these unclassified employees hold fiduciary status.

(Joint Exhibit 31)

CASE HISTORY

The facts surrounding the disputed matters are, for the most part, not in dispute. Erin (Gurwin) Kennedy, the Grievant, was initially hired by the Department of Industrial Relations, the Employer, on November 4, 1985. She was employed in this capacity until June 5, 1989 when she was employed as a Legislative Liaison Officer 1. The Grievant held this position until April 1, 1991 when she was terminated.

It is interesting to note the State Employment Relations Board (SERB) decided on December 17, 1985 that the classifications of Assistant Liaison Officer and Liaison Officer 1 were properly included in Unit 14 of the bargaining unit (Joint Exhibit 12). At the time of unit certification, Tony Fabiano, an exempt employee and a Liaison Officer 2, served as the Grievant's supervisor.

Jim Harris served as the Director at the time of certification. Fabiano resigned from his position on February 24, 1989. Harris testified Fabiano's resignation caused him to re-structure the legislative functional area because he was displeased with the reporting relationship. Often times, Fabiano would unilaterally modify the Employer's policy regarding certain pieces of legislation. As a consequence, the Liaison Officer 2 classification was classified "downward" to a Liaison Officer 1, which was an unclassified position in the bargaining unit.

On or about May 11, 1989, the employer posted the vacancy in question (Joint Exhibit 9). The record indicates the Grievant bid on a position after seeing it posted. She was awarded (Joint Exhibit 10) the position and accepted it in writing on June 9, 1989 (Joint Exhibit 10). At this point in time she was the sole Liaison Officer within the department; she reported directly to the Director. Some of the job duties included: act as a liaison between department and departmental representatives and officials, legislative representatives and the general public; explains the objectives of existing and proposed department programs and policies and coordinates all legislative activities (Joint Exhibit 9).

On January 14, 1991, a change in administration took place. A republican governor took office and subsequently appointed John P. Stozich as the Director of Industrial Relations. After evaluating the organizational structure, Stozich determined that the Liaison Officer 1 position was reporting directly to him as the sole Liaison Officer. He moreover, determined the position in question was actually vested with fiduciary qualities. On February 19, 1991, the Grievant was formally terminated from her position as a Legislative Liaison because she was viewed as exempt from the classified service pursuant to RC 124.11 (A)(8) and/or RC 124.11 (A)(9). This administrative action, however, was subsequently revoked after the Employer discovered the prior administration had placed the position in the bargaining unit.

On March 12, 1991, the Employer initiated another strategy in an attempt to change the Grievant's classification status. The Director asked the Grievant whether she would provide written consent to serve in the unclassified service per RC 124.11 (A)(9). She was, moreover, told that she would serve at the pleasure of the Director (Joint Exhibit 14). It appears that Ron Stevenson, a Staff Representative, interviewed which caused the Grievant's refusal.

Director Stozich, on March 13, 1991, initiated a request with the Department of Administrative Services and the Office of Collective Bargaining for a determination regarding the Grievant's position and her bargaining unit exempt status (Joint Exhibit 15). On March 21, 1991, Donald F. Wilson responded to Director Stozich's request. He noted:

" . . . We have reviewed and acknowledge your request for a fiduciary exemption for position control number 470, Liaison 1, is pursuant to 124.11 (A)(9) under the Ohio Revised Code . . . "

(Joint Exhibit 16)

The determination specified above caused Director Stozich to render two (2) related administrative decisions; both matters were administered on April 1, 1991. The Grievant was initially advised that the Employer had determined that pursuant to Section 124.11 (A)(9) of the Ohio Code that her position as a Liaison Officer 1 was changed from classified to unclassified because her position was ". . . one which acts in a fiduciary capacity to the Director of Industrial Relations". The Employer, moreover, determined that

pursuant to Chapter 4117 of the Ohio Revised Code, and the Parties' Collective Bargaining Agreement (Joint Exhibit 1), the position in question was exempt from the bargaining unit pursuant to ORC 4117.01 (C)(9) (Joint Exhibit 17).

Almost simultaneously, Director Stozich terminated the Grievant's employment with the Department. This termination was based on her exempt status from the classified service pursuant to RC 124.11 (A)(8) and/or 124.11 (A)(9). The Grievant was asked to surrender her property belonging to the State of Ohio, and remove her personal possessions from the premises immediately (Joint Exhibit 18).

On April 3, 1991, the Grievant contested the termination. The grievance contained the following pertinent particulars:

“. . . On April 1, 1991, (the) employee was removed from her position as a Liaison Officer 1. There was no just cause . . . “

(Joint Exhibit 2)

In terms of a proposed remedy, the Grievant asked to be reinstated to the position of Liaison Officer 1 and to be made whole.

A Level III Hearing was held on May 7, 1991. Carol Nolan Drake, a Labor Relations Officer, rendered a finding on May 22, 1991 (Joint Exhibit 2). She ruled in favor of the Employer by determining the Grievant acted in a fiduciary capacity. As such, the Grievant removed herself from the definition of "public employee" contained in ORC Section 4117. Drake also found the Grievant to be exempt from the classified service pursuant to ORC Section 124.11 (A)(8) and/or 124.11 (A)(9). Exempt status precluded membership in the bargaining unit. The Grievant's job status, therefore, caused the non-applicability of just cause rights under the Collective Bargaining Agreement (Joint Exhibit 1).

The Parties' Positions

The Position of the Employer

It is the position of the Employer that the removal of the Grievant was proper as a consequence of a number of statutory requirements and related case law. As such, the Employer's determination that the Grievant was an unclassified fiduciary and not a bargaining unit member made the position in question a per se exception to the definition of "public employer" contained in ORC 4117.01 (C)(9). Since the Grievant was terminated after the determination by the Employer, she no longer was legally covered by the just cause and other discipline related provisions contained in the Collective Bargaining Agreement (Joint Exhibit 1). The abrogation of these rights causes the disputed matter to be substantially non-arbitrable, and therefore, outside the scope of this Arbitrator's authority. The reasoning in support of these various arguments follows in the subsequent sections of this review.

The Employer referenced ORC 4117.01 (C)(9) for the proposition that per se employees holding a fiduciary capacity are exempted from the designation of "public employee". The Grievant, moreover, was exempted by as legitimate action initiated by the Director in accordance with ORC 124.11 (A)(9). The court in Esselburne^[1] recognized an exception which allows a change in a classified position to an unclassified position, when the position in question has been erroneously listed as classified. An erroneous designation exists when an employee holds a fiduciary relationship to a principal Executive Officer.

The Employer claimed Director Stozich corrected an error initiated by the previous administration. The composition of Unit 14 was determined by SERB in December of 1985 (Joint Exhibit 12). During this time period, the Liaison Officer 1 position did not exist at the Department of Industrial Relations. As such, SERB would not have placed the position in the bargaining unit. The position, itself, was created by former Director Harris, after Fabiano resigned from his position as a Liaison Officer 2. As a consequence of the resignation, Harris "reclassified" the Liaison Officer 2 position to the Liaison Officer 1 position. This decision perpetuated the error in question. The Liaison Officer 1 position was, therefore, erroneously placed into the bargaining

unit without consideration of the fiduciary characteristics surrounding the Liaison Officer 1 position. Director Stozich merely corrected this error by removing the position from the classified service per the requirements of ORC Section 124.11 (A)(9) and the Esselburn^[2] exception.

The employer referenced a two (2) pronged test established in Rarick^[3] for determining whether a person holds fiduciary status pursuant to 124.11 (A)(9). The first prong requires an examination of all duties, both assigned and performed, of the position in question. The second prong requires a determination whether the disputed duties require personal qualities of a highly subjective nature, or are such that the appointing authority cannot be expected to delegate the duties of that position to the average employee possessing any required technical knowledge and knowledge of what is expected of him.

The Employer maintained the record strongly established a fiduciary relationship existed based upon the duties assigned and performed by the Grievant. She acted as the sole Liaison Officer within the Department from June 5, 1989 until April 1. As such, she reported directly to the Director in his capacity as the principal Executive Officer. The Grievant also serviced as the Director's sole agent at the legislature.

The duties specified in the relevant position description (Joint Exhibit 6) established the fiduciary relationship nexus. A Liaison Officer 1 represents the Department by explaining the objectives of existing and proposed Department programs and policies. He/she also develops departmental positions on proposed legislation and responds to sensitive inquiries regarding Departmental objectives and supportive operations.

Testimony provided by Margaret Van Meter, the current holder of the position in question, the Grievant and former Director Harris established a fiduciary relationship. Van Meter noted she responded to legislative inquiries without consulting with the Director. She also advises the Director regarding critical policy matters and takes positions for the Department regarding changes in legislation without consulting with the Director.

The Grievant's testimony supported Van Meter's characterization of the situation. She claimed she acted as the Director's conduit to the legislature and responded to sensitive inquiries. Under cross examination she hesitated when asked if she could represent the new administration's views to the legislature. The Grievant also stated she should "be shot" if she answered a legislature inquiry improperly.

Former Director Harris' testimony did nothing but further bolster the Employers' fiduciary allegations. He admitted the Grievant acted as a conduit with the legislature, had discretion to deal with legislative inquiries, and properly represented his position in a trustful way. Even though the Grievant was not accorded the discretion to provide policy input, Harris admitted this option was readily available to any Director.

The Employer emphasized the duties of a Liaison Officer require personal qualities of a subjective nature that cannot be delegated to the average employee possessing any required technical knowledge, and a knowledge of what is expected of her. Responding to legislative inquiries requires subjective qualities. Also, a new administration holding divergent views from the prior administration, has to have trustworthy employees involved in legislative matters. The Grievant's hesitancy regarding her ability to represent the new administration's views underscored the legitimacy of Director Stozich's lack of trust. The Employer asserted that setting policy and having signature authority do not necessarily establish a fiduciary relationship.

The Employer challenged the notion that the Grievant was not appointed pursuant to ORC 124.11. This argument is flawed because it fails to consider the Esselburn^[4] exception.

In the opinion of the Employer, this Arbitrator does not have the authority to determine whether a fiduciary relationship exists. Such determinations are vested in the State Personal Board of Review (SPBR) and the Courts. Since the Grievant never appealed the fiduciary determination with SPBR, she is precluded from raising the matter in the present forum. Again, without standing under the Collective Bargaining Agreement (Joint Exhibit 1) because of the ORC 4117.01(C)(9) exception, the Arbitrator has no jurisdiction to review the fiduciary determination.

The Employer opined that SERB opinion 91-008^[5] is not applicable to the present dispute. An employer can unilaterally remove an employee from a bargaining unit with SERB's approval. There is no need to petition SERB once a position has been excluded per the exception in ORC 4117.01(C)(9). Also, SERB's opinion is not applicable because the exemption of a single fiduciary position was never considered.

Various estoppel and political arguments were rebutted by the Employer. Reference was made to

Section 25.03 and its restriction on an Arbitrator's authority to the specifics contained in the Collective Bargaining Agreement (Joint Exhibit 1). As such, arguments based on quasi-contractual matters or Civil Rights violations do not fall within an arbitrator's jurisdiction.

Candidate Voinovich's letter dated October 20, 1990 (Joint Exhibit 23) does not provide a basis for a detrimental reliance or estoppel cause of action. The Union failed to establish that she relied on the letter to her detriment. Nothing in the record even indicates the Grievant received the letter. Even if she did rely on the letter to her detriment, the reliance was unreasonable. Any reasonable person would have understood that a candidate cannot legally bind a state via a quasi-contractual arrangement.

With respect to the second estoppel argument, the Employer is not precluded from treating the Grievant as if she was a fiduciary employee pursuant to ORC 124.11 (A)(9). The mere fact that her expectations concerning contractual protection were based on the Employer's actions cannot overcome the Esselburne^[6] requirements. Also, the Employer must have a method to correct an employee's fiduciary status. Without the ability to correct such errors; government would become less efficient. A principal Executive Officer must have the utmost trust in an individual enjoying fiduciary status.

The Union's first Amendment argument was viewed as unsupported. A cause of action under Rutan^[7] requires one to establish that he/she was adversely impacted as a consequence of political affiliation. Nothing in the record supports the notion that the Grievant was terminated because of her affiliation in the Democratic party. The mere fact that Van Meter is the daughter of an influential Republican does not, itself, provide support for an adverse impact argument. Also there may be circumstances where political affiliation may be necessary for the efficient realization of certain duties. A liaison position may, therefore, be viewed as a legitimate exception to the standard specified in Rutan^[8].

Another constitutionally based argument was raised by the Union dealing with the due process clause in the 14th Amendment of the United States Constitution. The Employer asserted that the Loudermill^[9] standards were inapplicable because the Grievant was not deprived of any significant property interest. The Collective Bargaining Agreement (Joint Exhibit 1), ORC 4117.01 (C)(9) and ORC 124.34 do not confer the Grievant with a property interest. As such, the Grievant was not entitled to a pre-termination hearing because her classified status was erroneous.

The Position of the Union

It is the position of the Union that the Employer could not terminate the Grievant without following the disciplinary procedures negotiated by the Parties. As a bargaining unit employee, the Grievant could not be terminated unless it was properly authorized by provisions set forth in Article 24 and Article 18 of the Collective Bargaining Agreement (Joint Exhibit 1).

The Union asserted the Employer did not have the authority to designate the Grievant as one possessing fiduciary responsibilities while she enjoyed bargaining unit status. The application of ORC 4117.01 (C)(9), in this instance, was thought to be inappropriate. The Grievant was never appointed to a bargaining unit position after engaging in a contractually initiated bidding process. The vacancy posting clearly indicated the Grievant was covered under the Collective Bargaining Agreement (Joint Exhibit 1). As such, the Grievant was promoted to the bargaining unit position, and was not appointed.

The Union emphasized that the exception specified in ORC 4117.01 (C)(9) is not a per se exception to public employee status. Nothing in the statute supports such a determination. A unilateral removal of this sort frustrates the very purpose of the statute.

It also abrogates the role of SERB as specified in ORC 4117.06 (A). This provision provides SERB with the authority to determine the unit appropriate for the purposes of collective bargaining. The bargaining unit in question was established by SERB and included Liaison Officers (Joint Exhibit 12). The duties in the Liaison Officer 1's position description are also described in the classification specification.

The Employer cannot unilaterally manipulate the certified bargaining unit without SERB's prior review. This proposition was reinforced in OCSEA/AFSCME and UFCW and OCB^[10]. SERB asserted that it alone

determines the appropriateness of a bargaining unit; any modifications to a bargaining unit must, therefore, be approved by SERB. All unilateral actions initiated prior to proper review are rendered ineffectual; the status quo must be retained and all associated rights continue. Even if a fiduciary appointment has been established by the Employer, SERB still has the authority to make unit determinations in accordance with ORC 4117.06.

Two (2) contract provisions were referenced dealing with unit determination consequences. Section 1.01 deals with the Union's exclusive representation of bargaining units specified in a series of SERB classifications certified by SERB. Unit 14 is included in the list. Section 1.02 discusses the inclusion and exclusion of new classifications. The Parties never anticipated the unilateral removal of a current classification as evidenced by this provision. It allows the automatic inclusion of a new classification if it is a successor title to an existing classification with no substantial change in duties.

The Union offered a series of arguments in the alternative dealing with the Grievant's civil service projections.

The application of the Esselburne^[11] guidelines was contested by the Union; they were thought to be inapplicable. Even though the case was decided after the advent of collective bargaining, the case only dealt with the classified/unclassified issue. It did not address the bargaining unit issue; a fatal distinguishing item from the Employer's perspective.

The Union claimed the standards in Esselburne^[12] were not established by the Employer. An error in listing did not take place. The Grievant occupied her position for approximately two (2) years prior to the declassification attempt. Harris' testimony also establishes the appointing authorities specific intent in modifying Fabiano's former duties. The newly established Liaison Officer 1 position was to have less authority, autonomy and discretion. The position was unequivocally downgraded, placed in the bargaining unit and designated as classified.

In terms of the duties performed by the Grievant, a fiduciary relationship can only be established by analyzing the duties actually performed. Both the Grievant and Harris testified she performed ministered functions which required minimal qualifications, training or discretion. As such, Van Meter's testimony regarding her actual activities must be discounted.

The classification specification (Joint Exhibit 29) for the position of Liaison Officer 1 was developed at the time of certification it served as the basis for the Position Description for the Liaison Officer 1 position held by the Grievant. As such, SERB determined these duties to be within the community of interest reflected in the certified bargaining unit.

The new administration had every right to place greater responsibility and discretion in its legislative personnel. But, it had to hire someone in an appropriate position such as a Liaison Officer 2. By replacing the Grievant with another unclassified employee, the Employer improperly displaced the Grievant. The Grievant had established tenure as a consequence of her collective bargaining status.

As a consequence of her bargaining unit status, the Grievant has the right to challenge the fiduciary determination as well as the termination via the collective bargaining process. A challenge is, therefore, not necessarily within the jurisdiction of SPBR. In fact, ORC 4117.10 (A) specifies the grievance procedure as the appropriate process to be used to address disputes akin to the one presently under arbitral review.

The Union alleged Ohio Administrative Code Rule 123:1-5-08 was violated by the Employer. Since the Liaison Officer 1 position became unclassified resulting in the Grievant's displacement, she should have been treated as if her position was abolished. As such, the layoff rules specified in Ohio Administrative Code Rule 123:1-41 should have been followed. If these rules would have been legitimately applied, the Grievant would have had available all the rights specified in the Collective Bargaining Agreement (Joint Exhibit 1) and the law.

The Union argued the Employer was estopped from asserting that the Grievant was an exempt employee in an unclassified position. This proposition was based on the representations made to the Grievant. She was told she would be performing bargaining unit work. She relied on these representations to her detriment. She left a bargaining unit position and acted as a bargaining unit person for approximately two (2) years without realizing the benefits associated with an exempt, unclassified position.

The Employer is further estopped from unilaterally removing the Grievant based on certain expectations, and associated reliance raised by a letter (Joint Exhibit 23) mailed to her by the Governor during the course of the last campaign. This letter led the Grievant to believe that her bargaining unit status would be honored, and positive performance would result in continued employment.

These various estoppel principles have been applied by Arbitrators in resolving contractual disputes between the Parties. Estoppel principles do not contravene the Agreement (Joint Exhibit 1) but prevent a circumvention of the Agreement (Joint Exhibit 1).

The Union emphasized the Grievant's rights under the Agreement (Joint Exhibit 1) were circumvented based upon political affiliation. She was removed as a consequence of a political appointment system. As such, the Grievant was discriminated against based upon her political affiliation; a clear First Amendment violation.

The Union opined the Employer's unilateral action resulted in a due process violation of the 14th amendment of the U.S. Constitution. The Loudermill^[13] guidelines were referenced for the proposition that the Grievant's bargaining unit status creates a property interest in her State employment, which cannot be seized without due process. Here, the Grievant's due process rights were violated because she was unilaterally terminated without the benefits accorded to her in the Collective Bargaining Agreement (Joint Exhibit 1).

The Arbitrator's Opinion and Award

Based on the evidence and testimony introduced at the hearing, a full review of the record and pertinent contract provision, the disputed matter is substantively arbitrable. As such, the Grievant does have standing to grieve the disputed matter based on the substantive nature of the grievance. Also, the Employer did violate the Collective Bargaining Agreement (Joint Exhibit 1) when it terminated the Grievant's employment. The arbitrability and the termination issues are somewhat related in this particular instance; the reasoning follows below.

The substantive nature of the dispute is properly before the Arbitrator. Section 1.01 recognized the Union as the sole and exclusive bargaining representative of a number of classifications included in a series of SERB certifications. These certifications also clearly indicate that Grievant's position of Liaison Officer 1 was included in the bargaining unit (Joint Exhibit 12 and 29) as certified by SERB. Since the nature of the dispute deals with the Grievant's standing within Unit 14, the statutorily defined unit, the matter is arbitrable.

A different ruling would cause this Arbitrator to be in violation of Article 25.03. This provision prohibits this Arbitrator from subtracting from or modifying any of the terms of this Agreement (Joint Exhibit 1). Failure to consider the disputed matter would clearly subtract or modify the terms of this Agreement (Joint Exhibit 1). The claim made by the Union is on its face governed by Section 1.01. Neither the arbitration clause nor any other provisions preclude a substantive analysis of the disputed matter.

ORC 4117.06 (A) provides in pertinent part:

"The State Employment Relations Board shall decide in each case the unit appropriate for the purposes of collective bargaining."

As such, SERB, by statute, is vested with the exclusive right to determine the make-up of the bargaining unit. In QCSEA and UFCW and OCB^[14] SERB noted:

"Moreover, even after a unit is determined a change can be made when needed by utilizing petitions for unit clarification or amendment of certification."

This means SERB is the ultimate arbitrator and decision-maker where bargaining units are involved. SERB is not only the final authority regarding unit determinations, but must also decide the propriety of any

changes in the bargaining unit after the certification stage.

Even if the Employer's action in this instance was proper and beyond reproach, its decision to change the Grievant's classification status based on a unilateral action flies in the face of the authority vested in SERB per ORC 4117.06 (A). The Grievant's termination, more specifically, should have been preceded by the statutorily defined protocols. The Employer should have petitioned SERB to determine whether a community of interest exists or whether the appropriate unit requires the exclusion of the Liaison Officer 1 position. In matters of this type when dealing with questions of fact, SERB has been authorized with exclusive jurisdiction.

The fiduciary exception specified in 4117.01 (C)(9) is not a per se exception to the definition of "public employee". Obviously, a fiduciary determination may play a critical role in any finding under ORC 4117.06 (A). A finding in the employee's favor would preclude an analysis of SERB pertaining to the propriety of the appropriate unit when dealing with any of the specified exceptions. This would result in an unanticipated outcome which frustrates legislative intent regarding SERB's authority as specified in 4117.06 (A) and (B). SERB has the authority to determine the appropriateness of each bargaining unit; nothing in the statute precludes an evaluation of units which may be composed of excluded employees.

A review of some case law dealing with exclusions also indicates that SERB has allowed some of these excluded employees participation in bargaining units^[15]. As such, there does not appear to be any statutory basis for such a conclusion. Also, the Employer never provided any logic to it per se argument other than referencing, ORC 124.11. The statutory link between ORC 124.11 (A)(9) and 4117.01 (C)(9) was never properly established to support the per se argument.

The Employer's ORC 124.11 (A)(9) argument was weakened by a number of uncertainties in the record. The Employer applied ORC 124 based upon the exclusion contained in ORC 4117.01 (C)(9). Yet, the latter provision implies fiduciaries appointed pursuant to Section 124.11 will be excluded. The record, however, failed to clarify whether the Grievant was appointed via this mechanism, or whether this mechanism is inappropriate.

Esselburne^[16] was referenced by the Employer for the proposition that classified positions may be changed to unclassified positions, when the position has been erroneously listed as classified because the employee serves as a fiduciary. If one assumes that this proposition is accurate, it does not account for its emphasis. The Parties, themselves, in a stipulation agreed that there are unclassified employees in the bargaining unit, some of which may enjoy fiduciary status. These admissions further render the Employer's unilateral action as suspect. Also, the applicability of the Esselburne^[17] principles to a bargaining unit setting was never properly established.

In my judgment, by-passing SERB's unit determination authority caused an improper designation of the Grievant as a fiduciary. As such, her bargaining unit status was never properly modified at the time of the termination. She was a bargaining unit employee. Since the Grievant retained her bargaining unit status, she could only be removed and/or disciplined pursuant to the provisions of the Collective Bargaining Agreement (Joint Exhibit 1); especially Article 24.01 which requires that "Disciplinary action shall not be imposed upon an employee except for just cause." Nothing on the record indicates any disciplinary underpinning for the termination. The termination was administered based upon an interpretation surrounding fiduciary status. Within this context, the Employer did violate the Collective Bargaining Agreement when it terminated the Grievant's employment without proper cause.

Award

The Grievant did have standing to grieve the disputed matter. The Employer did violate the Collective Bargaining Agreement when it terminated the Grievant's employment. As such, the Grievant is to be reinstated to her former position with backpay and all other benefits restored for the period she was deprived of her position as Liaison Officer 1. It should be understood if at some later date SERB determines that the Grievant does enjoy unclassified-fiduciary status then she may no longer be covered by the Collective Bargaining Agreement (Joint Exhibit 1).

Dr. David M. Pincus
Arbitrator

November 1, 1992

[1] Esselburne v. Ohio Department of Agriculture Et. Al, 504 N.E. 2d 434 (Ohio App. 1985).

[2] Id.

[3] Rarick v. Bd. Of County Commrs. (1980) 63 Ohio St. 2d. 34.

[4] Supra Note 1.

[5] Ohio Civil Service Employees Association/AFSCME, AFL-CIO and United Food and Commercial Workers and State of Ohio, Office of Collective Bargaining, SERB Opinion 91-008, Case Number: 89-REP-11-0235 (1991).

[6] Supra Note 1.

[7] Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990).

[8] Supra Note 8.

[9] Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985).

[10] Supra Note 5.

[11] Supra Note 1.

[12] Id.

[13] Supra Note 9.

[14] Supra Note 5 at 1.

[15] In re Dublin SERB 86-034 (9-10-86); In re Canton SERB 85-04 (4-2-85).

[16] Supra Note 1.

[17] Id.