

Volume 35 | Issue 3

---

1985

# Ohio begins Public Sector Bargaining: "The Best of Times" Lies ahead

James T. O'Reilly

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

James T. O'Reilly, *Ohio begins Public Sector Bargaining: "The Best of Times" Lies ahead*, 35 Case W. Res. L. Rev. 426 (1985)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol35/iss3/8>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# OHIO BEGINS PUBLIC SECTOR BARGAINING: "THE BEST OF TIMES" LIES AHEAD

*James T. O'Reilly\**

## INTRODUCTION

IT WAS the best of times, it was the worst of times. Ohio's first year of structured collective bargaining for public employees echoed a bit of Charles Dickens. Some participants had great expectations; others observed the great length of the legal process; and still others viewed the year as a tale of two cities, Columbus and Cleveland, which were markedly different in both their labor histories and experiences in the first year under the new regime.

In July 1983, Governor Richard Celeste signed the Ohio Public Employee's Collective Bargaining Act<sup>1</sup> (the "Act") into law.<sup>2</sup> The legislature extended bargaining rights to Ohio public sector employees as a way of dealing with the turmoil resulting from public strikes.<sup>3</sup> Its enactment culminated twelve years of lobbying and sparring in the legislature.<sup>4</sup> For years, individual unions and public employers had bargained with each other amid periodic disruptions, and without state law protections.<sup>5</sup> Now, the Act protects and in-

---

\* Lecturer in Law, University of Cincinnati College of Law. B.A., Boston College (1969); J.D., University of Virginia (1974). The author expresses sincere thanks to the 33 people interviewed for this Article. The interviewees are practitioners whose cases are or have been pending before the SERB in 1984. They include 15 management attorneys, 10 union representatives, 3 neutral mediators and factfinders, and 2 state officials. The views expressed in this Article, except as otherwise attributed in footnotes, are those of the author. The interviewees bear no responsibility for acceptance of such views.

1. OHIO REV. CODE ANN. §§ 4117.01-.23 (Page 1983).

2. Act of July 7, 1983, file 40, 1983 Ohio Legis. Serv. 5-238 (Baldwin) (codified at OHIO REV. CODE ANN. § 4117).

3. See Press Release of Senator Eugene Branstool on S.B. 133 (May 4, 1983) [hereinafter cited as *Branstool Press Release*]; see also J. O'REILLY, OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING § 1.02, at 5-8 (discussing the political history of public sector legislation in Ohio).

4. For a more detailed history of the evolution of the Act, see O'Reilly & Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 892-95 (1983).

5. The courts tolerated permissive bargaining between public employers and the unions. However, they did not grant it full legitimacy. Cf. *Dayton Classroom Teachers Ass'n*

stitutionalizes the bargaining structure.

The Ohio Act is an ambitious charter of public employee rights and powers. As the thirty-ninth state to pass a public sector labor law,<sup>6</sup> Ohio has benefited from the developments in Pennsylvania, Michigan, and other states with older statutes.<sup>7</sup> However, the Act has received significant criticism in its first year. Critics assert that it presents constitutional problems and is not as balanced as the more established laws of other states.<sup>8</sup>

Notwithstanding this criticism, the Act has been in effect for the past year. While gauging its impact before the courts have spoken is a tentative project, this Article examines the first year of the Act and the performance of the three-member State Employment Relations Board<sup>9</sup> (SERB) which administers its provisions. To determine whether SERB has fulfilled the expectations of labor and management, the author interviewed union and management attorneys, employee representatives, mediators, factfinders, and state administrators involved in Ohio public sector labor law and reviewed the decisions of the SERB and its hearing officers.

This Article approaches the first year in several discrete segments: administration, bargaining units, elections, unfair labor practices, and impasse-strike procedures. It then examines the management experiences in Cleveland and Columbus, and ad-

---

v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 130-32, 323 N.E.2d 714, 716-17 (1975) (board of education vested with discretionary authority to enter a collective bargaining agreement with employees). Almost 90% of Ohio school districts had collective bargaining before the 1983 Act. Jadrnak, *Governments Fear Loss of Control, Costs*, Cincinnati Enquirer, Apr. 1, 1984, at B-2, col. 3; telephone interview with John Brant, Ohio School Boards Association (Jan. 31, 1985) [hereinafter cited as *Brant Interview*].

6. See Testimony of James Monroe, Executive Director, Ohio Civil Service Employees Association, Before the Ohio House Commerce and Labor Committee, June 14, 1983.

7. Compare OHIO REV. CODE ANN. §§ 4117.01-23 with PA. STAT. ANN. tit. 43, §§ 1101.101-2301 (Purdon Supp. 1984) and MICH. COMP. LAWS ANN. §§ 423.201-216 (West 1978).

8. White, Kaplan, and Hawkins, *Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1 (1984). The Ohio Act has no severability clause which would preserve the rest of the Act if one section had been struck down. See OHIO REV. CODE ANN. §§ 4117.01-23.

Two constitutional challenges were filed in 1984. In *City of Miamisburg v. SERB*, No. 84-2204 (Montgomery County C.P. 1984), the court refused to issue a temporary restraining order or a preliminary injunction because the city was not harmed. Since then the city won all the issues presented to the factfinder and the case has gone to conciliation. Interview with Loren Braverman, Assistant Attorney General of Ohio, in Columbus (Jan. 11, 1985) [hereinafter cited as *Braverman Interview*]. In the other constitutional case, *City of Kettering v. SERB*, No. 84-1089 (Montgomery County C.P. 1984), the court granted the state's motion for summary judgment. The appeal is pending. *Braverman Interview, supra*.

9. See OHIO REV. CODE ANN. § 4117.02 for the statutory structure and the roles and responsibilities of the SERB.

dresses areas of change which unions and management representatives have identified for the SERB and the state legislature. While difficulties with the implementation of the Act exist, the SERB has performed commendably in its first year.

## I. SERB'S ADMINISTRATION OF THE ACT

States have developed a variety of systems for monitoring and adjudicating public employee bargaining rights. Ohio, a latecomer to the creation of such a state agency, opted for a strong central body similar to the National Labor Relations Board (NLRB), but compromised on both structure and powers, in comparison to those of the federal system.<sup>10</sup> For example, the Ohio legislature did not separate the SERB's prosecutorial and adjudicative functions.<sup>11</sup> This type of separation protects the NLRB against charges of institutional unfairness in its adjudication of disputes.<sup>12</sup> In comparison to the fifty-year old NLRB, the SERB system remains new and rough-edged.

### A. *The Three-Member Board*

The cost-conscious legislature created a three-member Board because it was less costly and easier for quorum purposes than a five-member panel.<sup>13</sup> Moreover, the legislature by requiring diversity of political affiliations and fixing initial terms of varying length, sought to prevent the control of the Board by any single governor.<sup>14</sup>

---

10. Compare OHIO REV. CODE ANN. § 4117.02 with National Labor Relations Act § 3, 29 U.S.C. § 153 (1982). The Ohio Act creates a three-member board, and each member serves a six-year term. OHIO REV. CODE ANN. § 4117.02(A). The Ohio Attorney General acts as legal advisor to the SERB and represents the agency at all legal proceedings. *Id.* § 4117.02(E). However, the Attorney General does not have independent power to determine whether to issue complaints. *See id.*

The National Labor Relations Act (NLRA), on the other hand, creates a five-member Board, each member serves a five-year term. National Labor Relations Act § 3(a), 29 U.S.C. § 153(a). Further, it creates an independent General Counsel who supervises the attorneys and regional offices and has final authority to investigate charges and issue complaints. *Id.* § 3(b), 29 U.S.C. § 153(b).

11. *See* OHIO REV. CODE ANN. § 4117.02.

12. The NLRB separates the function of bringing the complaint and the function of deciding guilt of those against whom the charge is brought. *See* National Labor Relations Act § 3(b),(d), 29 U.S.C. §§ 153(b),(d) (1982), 29 C.F.R. §§ 102.15, .34-.35 (1984); *see also* Nolan & Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47 (1978); Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371 (1958).

13. *See* telephone interview with Dennis Morgan, Counsel of the Communications Workers Union (June 6, 1983).

14. *See* OHIO REV. CODE ANN. § 4117.02(A) (Page 1983). The initial terms were one,

However, within the first year, the reduced size of the Board exacerbated the tension among its members. During the SERB's early months Chairman Theodore Dyke, a Cleveland State University law professor, apparently disagreed with the other Board members and staff on several occasions. Governor Celeste announced that he planned to discharge Dyke under the statutory removal provision for "neglect of duty or malfeasance in office."<sup>15</sup> After the governor appointed a hearing officer for the removal hearing, Dyke resigned.<sup>16</sup> State appellate judge Jack Day replaced him as the Chairman of the SERB. Day, along with Helen Fix, who won reappointment for a second term through 1990, and William Sheehan, whose term runs through 1986, comprise the Board's current membership.<sup>17</sup>

In its first year, the SERB made few tough policy decisions even though its members frequently voted unanimously on issues, reflecting little difference in ideology or approach among themselves.<sup>18</sup> The Board's early rules and its initial hearing officer decisions reflected the influence of other states and the NLRB, along with a mixture of precedents cited. However, the hearing officer decisions cannot be relied upon as precedent.<sup>19</sup> Concerned parties will have to await the Board decisions in the coming year to determine its direction.

### B. Staff and Structure

After establishing separate election and mediation offices,<sup>20</sup> the

---

two, and three years long. After the initial terms, each member holds the position for six years. *Id.*

15. *Id.*

16. Jadrnak, *Panel of 3 to Define Union Law*, Cincinnati Enquirer, Apr. 1, 1984, at B-2, col. 1.

17. *Id.*

18. A review of each Board decision issued in 1984 failed to find any significant issue on which members disagreed. See, e.g., Hamilton County School Dist., 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1549 (Ohio SERB Dec. 12, 1984); City of Cincinnati, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1557 (Ohio SERB Dec. 19, 1984).

19. Telephone interview with Jacquelin Davis, SERB General Counsel (Jan. 25, 1985) [hereinafter cited as *Davis Interview*]. For example, hearing officers in several cases recommended findings of law premised on the decisions of other state labor agencies, but the Ohio SERB concurred in the conclusion but not the rationale of those decisions. Compare Hamilton Dep't of Human Servs., 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1516 (Ohio SERB Dec. 7, 1984) (Hearing Officer's Decision) with Ohio Civil Serv. Employees and Hamilton County Dep't of Human Servs., 2 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB Jan. 23, 1985) (SERB decision approving hearing officer's decision but not his rationale).

20. The mediation office was created by the statute and appointments are not subject to the civil service rules. OHIO REV. CODE ANN. § 4117.02(E) (Page 1983).

Board employed experienced staff members from several other state public employee labor agencies to serve as hearing officers. Further, an experienced private sector labor lawyer was hired as general counsel. These highly qualified professionals saved the system from being overwhelmed by the SERB's crowded agenda.<sup>21</sup>

The Board had severe problems processing paperwork, preparing documents, and filing; the tight statutory deadlines for election and hearing steps compounded the delays and errors in paperwork.<sup>22</sup> Despite these problems the Board did act quickly in emergency situations such as the seventy-two-hour "danger" strike cases.<sup>23</sup>

### C. *Administrative Problems During the First Year*

#### 1. *SERB's Lack of Guidance*

Critics cited the Board's inability to provide clear answers to vexing questions as a major problem. Board decisions are the central precedents by which ambiguities in the Act are interpreted. If the Board has not addressed a particular issue, courts may be reluctant to rule on a topic within the Board's jurisdiction. The court might decide that the issue is not yet ripe for judicial review until the SERB has ruled on the matter. In the first year, formal SERB decisions took longer than anticipated. Any new SERB board, in particular, might slowly resolve cases, and any new administrative agency generally may encounter delays. However, the SERB record was exceptional for its lack of guidance.<sup>24</sup>

---

21. See telephone interview with Timothy Sheeran, Attorney from Squire, Sanders & Dempsey (Jan. 24, 1985) [hereinafter cited as *Sheeran Interview*].

22. Persistent and detailed complaints about paperwork problems with the Board were accompanied by objections to the short statutory time periods such as for handling unfair labor practice charges under § 4117.12(B)(1). See telephone interview with John Coleman, Ohio Municipal League (Jan. 24, 1985) [hereinafter cited as *Coleman Interview*]; letter from Dean E. Denlinger, Attorney with Denlinger, Rosenthal & Greenberg, to James O'Reilly (Feb. 7, 1985) [hereinafter cited as *Denlinger Letter*]; telephone interview with Robin Gerber, Ohio Civil Service Employees Association (OCSEA) (Jan. 23, 1985) [hereinafter cited as *Gerber Interview*]; telephone interview with Phillip Haddad, Attorney (Jan. 22, 1985) [hereinafter cited as *Haddad Interview*]; telephone interview with Ronald Janetzke, American Federation of State, County and Municipal Employees (AFSCME) (Jan. 23, 1985) [hereinafter cited as *Janetzke Interview*]; telephone interview with Richard Loy, Teamsters and member of the Public Employment Advisor and Counseling Effort (PEACE) Commission [hereinafter cited as *Loy Interview*].

23. OHIO REV. CODE ANN. § 4117.16(A).

24. Interviewees with experience working with public sector labor laws in other states deemed the lack of precedents which limited their abilities to plan strategies under the Ohio Act. See telephone interview with Larry Barty, Attorney from Taft, Stettinius & Hollister [hereinafter cited as *Barty Interview*]; telephone interview with Ronald Macala, Attorney

## 2. *Allocation of Resources and Funds*

Due to its limited resources, the Board had to set priorities.<sup>25</sup> It decided to postpone activity related to unfair labor practices and instead concentrated on elections and unit determination issues.<sup>26</sup> While union leaders understood the resource problems which the Board experienced, they vigorously criticized its order of priorities. They observed that employers' anti-union actions would go unchecked, perhaps eliminating the unions' majority status in the unit, while the unions' unfair labor practices charges awaited SERB action. Since an employer could work against the union during the pre-election period, an unfair labor practice without a prompt remedy could cost the union an expected election victory.<sup>27</sup>

In light of the legislature's insufficient funding of the Board, the decision to delay prioritizing tasks made even more sense. The legislative leaders who control state agency funding eliminated the expected second phase of funds for hiring, which would have brought the SERB staff to approximately seventy from its initial size of thirty-seven.<sup>28</sup> Consequently, the deletion of funds to conduct investigations and process cases meant that the same core group of people who started the Board's operations would have to handle the geometrically growing workload.

With high expectations and large needs for additional resources, the SERB informally sought more funding. But the shift to a Republican Senate in the November 1984 elections came at the worst time for the SERB. Just as the constituencies of employers and employees realized the need for more resources, the promised funding disappeared. Some union observers predicted that only political support for collective bargaining and for the SERB could motivate the legislature to release the additional funds in the coming year.<sup>29</sup> On the whole, employers were likely less concerned about the delays because they perceived inactivity by the SERB as a disadvantage to union organizing efforts.

---

(Jan. 25, 1985) [hereinafter cited as *Macala Interview*]; telephone interview with Robert J. Walter, Attorney (Jan. 28, 1985). Participants speculated that employers would resist more frequently because of the lack of determined bases for agency decisions. *E.g., Barty Interview, supra.*

25. See *Janetzke Interview, supra* note 22; *Gerber Interview, supra* note 22.

26. See, *e.g., Janetzke Interview, supra* note 22.

27. *Id.*

28. *Davis Interview, supra* note 19. The Board plans to ask for additional funding because it has been unable to meet its initial goals because of cuts. *Id.*

29. *Loy Interview, supra* note 22. Mr. Loy expects that the PEACE Commission will recommend better funding of the Act. *Id.*

### 3. *SERB Decisions: Quantity or Quality?*

Whether the SERB should issue more decisions with fewer opinions, or polish its opinions as precedents and issue fewer decisions, was a critical issue in its first year. In many cases on review of hearing officer's decisions, the SERB chose to adopt the result but not the rationale which its hearing officers stated.<sup>30</sup> During the year, unions, employers, and practitioners grew increasingly frustrated with this policy—and the resulting absence of decisions from which precedential rationales could be drawn.<sup>31</sup>

SERB employees, particularly those with labor law experience, received very high grades from the SERB's constituency for hard work and enthusiasm.<sup>32</sup> The hearing officer opinions in particular drew favorable comments.<sup>33</sup> The Board's occasional differences with the content of these opinions may be better resolved in the Board's second and subsequent years as hearing officers discern the guidance of the Board members.

### 4. *Agency Time Restraints*

A recurring criticism of Board administrative practice is the disparity between deadlines that outsiders follow and those that the agency staff observe.<sup>34</sup> The charging parties in unfair labor practice cases objected to the Board's delays, particularly in its investigation and post-hearing opinion processing.<sup>35</sup> Respondents, on the other hand, criticized the stringent time restraints on persons outside the Board while perceiving SERB employees as ignoring their timetables.<sup>36</sup>

### 5. *Stipulations of the Parties*

Critics also questioned the Board's strict posture on stipulations

30. See, e.g., Ohio Civil Serv. Employees and Hamilton County Dep't of Human Servs., 2 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶\_\_ (Ohio SERB Jan. 23, 1985).

31. See *Brant Interview*, *supra* note 5. "We have seen so little real action yet that the Act has not yet made an enormous difference." *Id.* Both labor and management attorneys shared the frustration. *Barty Interview*, *supra* note 24; *Macala Interview*, *supra* note 24.

32. E.g., telephone interview with Marcell Dezarn, Attorney (Jan. 24, 1985); *Sheeran Interview*, *supra* note 21.

33. E.g., *Coleman Interview*, *supra* note 22. Mr. Coleman characterized the hearing officers as "competent, unbiased, impressive, and tough." *Id.*

34. See *Gerber Interview*, *supra* note 22; *Macala Interview*, *supra* note 24; *Sheeran Interview*, *supra* note 21.

35. Unfair labor practice processing delays are "intolerable" from the viewpoint of the charging party. *Janetzke Interview*, *supra* note 22.

36. See, e.g., telephone interview with Larry Moscarella, Counsel for the City of Columbus (Jan. 28, 1985) [hereinafter cited as *Moscarella Interview*].



by the parties.<sup>37</sup> The Board refuses to accept stipulations, for example, of which unit composition is appropriate, when the members feel that the stipulation addresses a conclusion of law.<sup>38</sup> Acceptance of such a stipulation would in essence be a delegation of the Board's power to make binding principles of law.<sup>39</sup> Other labor regulatory agencies, however, accept such stipulations, while the SERB position creates excessive delay with no marginal benefit.<sup>40</sup>

#### 6. *The SERB's Rulemaking Powers*

In its first year, the SERB followed the NLRB's example of relying on adjudication to establish precedents.<sup>41</sup> This process delays needed decisions until the perfect set of facts are presented in a ripe adjudicatory case.<sup>42</sup> By using the rulemaking power delegated to it by the legislature,<sup>43</sup> the SERB could permit an advance expression of the Board's substantive policy powers which would guide the hearing officers in future case adjudications.<sup>44</sup> Waiting for the perfect case produces a sustained period of uncertainty for the affected constituencies.<sup>45</sup>

### III. BARGAINING UNIT DETERMINATION

#### A. *Procedure under the Act*

The building block for representation elections, and indeed for the whole public sector bargaining system, is the identification of an appropriate unit of employees. A unit is that body of employees

37. *Janetzke Interview, supra* note 22.

38. *Davis Interview, supra* note 19.

39. *See id.*

40. *See Janetzke Interview, supra* note 22.

41. *See Davis Interview, supra* note 19. The NLRB consistently declines to make substantive rules other than by adjudicatory procedures. As a result, NLRB precedents change gradually. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974).

42. Waiting for cases to move through the system does offer an opportunity for a better administrative record. *See Davis Interview, supra* note 19.

43. The Board has rulemaking powers under § 4117.02(H)(8) to adopt either substantive or interpretive rules. OHIO REV. CODE ANN. § 4117.02(H)(8) (Page 1983).

44. During the first year, hearing officers had little Ohio precedent and no Board decisions to control their findings of law and statutory interpretations. In two opinions selected at random, hearing officers cited to other jurisdictions including: the federal government (NLRB), Pennsylvania, New Jersey, California, Florida, Iowa, Maine, Oregon, and Nevada. The hearing officers also referred to Ohio court decisions on two procedural issues. *See West Branch Classified Employees Ass'n and Ohio Ass'n of Pub. School Employees*, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1517 (Ohio SERB Dec. 10, 1984) (Hearing Officer's Decision); *City of Columbus*, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1527 (Ohio SERB Dec. 13, 1984) (Hearing Officer's Decision).

45. *See, e.g., Macala Interview, supra* note 24.

identified as a separate entity for purposes of collective bargaining.<sup>46</sup> The Board must first designate the appropriate collective bargaining unit before conducting an election of the exclusive representative.<sup>47</sup> While the SERB's determination is final and not appealable,<sup>48</sup> the Act does limit its power.<sup>49</sup>

Procedurally, the Board receives, but does not initiate, unit determination matters. The prospective collective bargaining representative, whether the state AFSCME or a tiny workers' committee, must petition for election with the SERB or file a request for voluntary recognition<sup>50</sup> with the public employer.

The employer may then object or consent to this suggested bargaining unit. A petition can be processed in about a month, if the employer and union agree on the unit which meets the statutory requirements.<sup>51</sup> However, since the counsel for employers have not been able to hear and interpret the Board's views, the employer has a strong interest in filing an objection and requesting a hearing unless the union and employer's desired unit is a perfect match.<sup>52</sup>

If a voluntary recognition request is filed, the employer who wishes to have a hearing must file a petition for an election.<sup>53</sup> In only a few cases have the union and the employer hotly contested the unit determination question so that the Board has held oral arguments to assist in its designation.<sup>54</sup>

### B. *Overfragmentation in the Public Sector*

In the SERB's first year, hundreds of small local units were voluntarily created. Many of them consisted of less than seven members.<sup>55</sup> Statutory commands led to the fragmentation of groups formerly allied for collective bargaining purposes. For example, the Act requires that police sergeants be separated from patrol officers<sup>56</sup> which led to many three-sergeant or two-sergeant units in small city

---

46. See OHIO REV. CODE ANN. § 4117.06(A)-(C) (Page 1983).

47. *Id.* § 4117.07(A).

48. *Id.*

49. *Id.* § 4117.06(D).

50. *Id.* § 4117.05(A)(1), (2).

51. *Davis Interview*, *supra* note 19.

52. See *Barty Interview*, *supra* note 24.

53. OHIO REV. CODE ANN. § 4117.07(A)(2); this is inconsistent with the employer's desire to have no union. Letter from Michael Hawkins, Attorney with Dinsmore & Shohl (Feb. 13, 1985) [hereinafter cited as *Hawkins Letter*].

54. See *City of Columbus*, No. 84-UR-09-1958 (argued before the Board Jan. 29, 1985).

55. *Davis Interview*, *supra* note 19.

56. OHIO REV. CODE ANN. § 4117.06(D)(6).

police forces.<sup>57</sup> Other states have tried to avoid this overfragmentation in public sector because a multiplicity of tiny units makes it unlikely that collective bargaining can succeed.<sup>58</sup>

While the legislature did not explicitly address the consequences of its specialized unit requirements, the SERB has followed the statute's commands and accepted miniscule units. The unions, however, may be unwilling to service such units as separate bargaining entities.<sup>59</sup> The one-person or three-person units which the SERB has accepted appear to defeat the purpose of collective and concerted action through economically powerful labor strength. The future of the unit fragmentation problem is uncertain. One pragmatic solution would be for the SERB to allow both sides to consent to a unit which did not completely conform to the Act.<sup>60</sup> Unfortunately, the SERB has not adopted this suggestion. It has instead strictly followed the statutory commands even when unions and employers have voluntarily consented to a unit outside the statutory parameters.<sup>61</sup>

### C. *The Statutory Plan and Its Implementation*

Before it could conduct elections, the SERB had to designate the appropriate collective bargaining units.<sup>62</sup> It nearly accomplished that goal in the first year, as many local units were estab-

57. See, e.g., *City of Belpre*, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶1601 (Ohio SERB Jan. 4, 1985).

58. See, e.g., *In re State GERR* (PERB 1968) No. 279, at G-1, G-1 to G-3 (Jan. 13, 1969), *petition to set aside dismissed sub nom. CSEA v. Helsby*, 58 Misc. 2d 745, 296 N.Y.S.2d 246 (Sup. Ct. 1969); Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector Legal and Practical Problems*, 51 OR. L. REV. 152, 163-65, 173-76 (1971); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001, 1010-12 (1969).

59. *Barty Interview*, *supra* note 24.

60. The Board may have to do this type of consolidating if the legislature either refuses or fails to deal with the overfragmentation problem to achieve successful collective bargaining. In NLRB cases, the United States Supreme Court requires that unit determinations be "rationally based on articulated facts and consistent with the Act." This standard could serve as the basis for the SERB's decisions. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980).

61. See, e.g., *Fraternal Order of Police Lodge 127 and Licking County Sheriff*, 2 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶2102 (Ohio SERB Jan. 23, 1985) (the Board unanimously rejected the proposed unit because it violated § 4117.06).

62. See OHIO REV. CODE ANN. § 4117.07(A)(1) (Page 1983). The Act mandates that the SERB conduct a representation election upon receipt of a petition from an employee, employees or someone acting on their behalf if it alleges that 30% of the employees in an appropriate unit want to be represented for collective bargaining purposes. *Id.* The "appropriate unit" language requires the SERB to make a unit determination under § 4117.06 prior to conducting the election. See J. O'REILLY, *supra* note 3, at 156.

lished by early 1985 and the SERB conducted lengthy hearings on state employee structures in late 1984 and early 1985.<sup>63</sup>

Designating units for thousands of state employees could have swamped the Board had it not used the proper administrative tools. Because the statute allows the Board to consolidate proceedings,<sup>64</sup> it was possible (and indeed urgent) for the SERB to consolidate all of the state employee requests into one hearing which consumed many days of testimony and included extensive presentations by the state Office of Collective Bargaining and sixteen employee groups.<sup>65</sup>

Although the hearing included testimony as to which workers would be exempt from the "public employee" definition,<sup>66</sup> the SERB limited its findings to the issue of unit determination.<sup>67</sup> For example, the 1984 hearings decided into which unit the state highway engineers would be classified, and a subsequent session would determine which positions would be classified as supervisory and

63. *Davis Interview, supra* note 19. Most of the unit process backlog was cleared up by the end of 1984. The Board could, by January 1985, handle a routine consent petition for the designation of a union within 30 days. *Id.*

64. OHIO REV. CODE ANN. § 4117.02(H)(3).

65. See Posthearing Brief for the Ohio Office of Collective Bargaining at 4, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_).

66. Section 4117.01(C)(1)-(14) delineates the exceptions to the definition of public employee. These include:

- (1) Persons holding elective office;
- (2) Employees of the general assembly and employees of any other legislative body of the public employer whose principal duties are directly related to the legislative functions of the body;
- (3) Employees on the staff of the governor or the chief executive of the public employer whose principal duties are directly related to the performance of the executive functions of the governor or the chief executive;
- (4) Persons who are members of the organized militia, while on active duty;
- (5) Employees of the state employment relations board;
- (6) Confidential employees;
- (7) Management level employees;
- (8) Employees and officers of the courts, assistants to the attorney general, assistant prosecuting attorneys, and employees of the clerks of courts who perform a judicial function;
- (9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code;
- (10) Supervisors;
- (11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty per cent of the normal year in the employee's bargaining unit;
- (12) Employees of county boards of election;
- (13) Seasonal and casual employees as determined by the state employment relations board;
- (14) Part-time faculty members of an institution of higher education.

*Id.*

67. See Posthearing Brief for the Ohio Office of Collective Bargaining at 3, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_).

thus be excluded from the public employee definition.<sup>68</sup> Later hearings would focus on the statutory prohibition against merging professionals with a unit of nonprofessional employees.<sup>69</sup>

The state unit determinations did attract attention. Surprisingly, though, the unions largely accepted the state Office of Collective Bargaining proposals for unit compositions.<sup>70</sup> The unions' strategy was a calculated retreat, as they recognized the likelihood that relatively little change would occur once the state presented its formal plan.<sup>71</sup> The union leaders hoped to make some marginal corrections on the state's charted course.<sup>72</sup>

In the absence of SERB decisions, the parties in the state proceeding looked to other states for specific illustrative unit decisions.<sup>73</sup> In Ohio, the SERB seems to prefer the economically rational large unit for groups of workers to the smaller scale, departmental or regional unit.<sup>74</sup> The trend among other states has been toward these "horizontal" employee units, and Ohio seems to have adopted this approach after researching units in other states.<sup>75</sup>

#### D. *The Effect of Statewide Units*

Once the SERB state-employees-unit proceeding concludes in mid-1985, its unit determinations may reflect the influence of the central statewide unions.<sup>76</sup> Such a change would have a profound influence on the closely-knit public sector units which center on a

68. See OHIO REV. CODE ANN. § 4117.01(C)(10).

69. See *id.* § 4117.06(D)(1). This provision is comparable to the restriction in the National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1973).

70. See, e.g., Posthearing Brief of the Ohio State Ass'n of Plumbers & Pipefitters-Ohio State Skilled, Maintenance, & Allied Trades Employees, Local Union 1 at 10-11, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_).

71. See *id.*

72. Telephone interview with Edward Seidler, Director, Ohio Office of Collective Bargaining (Jan. 14, 1984).

73. The state cited decisions from Pennsylvania, Minnesota, and other states in support of its position. Posthearing Brief of Ohio Office of Collective Bargaining at 25-26, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_). See O'REILLY, *supra* note 3, § 4.01, at 23.

74. This support for the larger unit cannot adequately be addressed in one year's results, but appears to be the Board's dominant view in *In re State of Ohio*, and other cases. See, e.g., Toledo Federation of Teachers, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB May 2, 1985).

75. The Office of Collective Bargaining prepared an exhaustive, 150-page compilation of each state's unit formats for public employee collective bargaining. See *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_). This report is part of the record on this consolidated state unit case.

76. Much of the support for the legislation came from the key statewide unions, the American Federation of State, County and Municipal Employees, the Ohio AFL-CIO, the

common local purpose and employer.<sup>77</sup> Historically, Ohio public sector unions did not have support under state law but flourished on a local basis.<sup>78</sup> The establishment of statewide units based on job classifications would spell the end for most local units of state employees.<sup>79</sup> Only those state employees working for purely local entities would be likely to retain regional or local office representation. Local power centers for state employees simply lack the economic force and will not be respected.<sup>80</sup> Conversely, the power centers for local government employees may even shrink under the Act.<sup>81</sup>

### E. *The Political Ramifications*

#### Unit determinations may have significant political consequences

---

Ohio Civil Service Employees Association, the Ohio Federation of Teachers, and the Communications Workers of America. O'Reilly & Gath, *supra* note 4, at 891 n.4.

77. One example would be the 29 units of registered nurses employed by the state at various state institutions. Brief for the Petitioner, the Ohio Nurses Ass'n, at 10, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_).

78. For instance, Cleveland bargained for many years with the 23 unions that represented its employees and 90% of school boards in Ohio had some type of union contract prior to the 1983 Act. *Haddad Interview*, *supra* note 22; *Brant Interview*, *supra* note 5.

79. It was widely anticipated that the state's request for 13 statewide units would ultimately be adopted. See, e.g., *Braverman Interview*, *supra* note 8. The Ohio Office of Collective Bargaining has proposed that the units be "occupationally-related, statewide in scope, as broad as possible while retaining a rational community of interest . . ." Posthearing Brief for the Ohio Office of Collective Bargaining, at 39, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_).

80. Posthearing Brief for the Ohio Office of Collective Bargaining at 22, *In re State of Ohio*, \_\_\_ OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB \_\_\_). The position of the Office of Collective Bargaining is that:

Many individual public employees may believe they have a more meaningful voice and effective representation in a small, vertical unit. Experiences from other states, however, have shown that this belief is without merit. The goal of effective representation can best be achieved when public employees are grouped in broad, horizontal units . . . . The State is a powerful employer . . . . Broad, horizontal units would possess adequate influence and power to persuade the State to make concessions.

*Id.* As this excerpt illustrates, the Ohio Office of Collective Bargaining (OCB) Director Edward Seidler has a uniquely difficult position in relation to the unions. First, the OCB proposes the shape of its future bargaining opponents, then it advocates for stronger structures, and finally bargains against those opponents on behalf of the State. Some of the union opponents want smaller units or differently shaped units so that their institutional strength will continue even if the net strength of the grouping which will oppose the OCB decreases.

81. In some cases the existing public employee units have to be broken down into subunits; for example, the Act excludes sergeants from rank and file police units. OHIO REV. CODE ANN. § 4117.06(D)(6) (Page 1983). This has been a source of administrative trouble for cities, *Moscarella Interview*, *supra* note 36, and of frustration for smaller public bodies. Telephone interview with Paul Berninger, Attorney with Porter & Wright (Feb. 5, 1985) [hereinafter cited as *Berninger Interview*]. But the Board recognized that it must maintain the subdivisions in order to comply with the language of the statute. *Davis Interview*, *supra* note 19.

for the governor and legislature. Governor Celeste led the strong state administrative support for the Act, and he supervises the office which defines state bargaining positions. The governor takes a political risk with unit determinations because some groups of constituents will be displeased with the ultimate determinations and their impact on collective bargaining. One such group, predictably, will be the displaced representatives of state workers already bargaining in micro-units.<sup>82</sup> The unsuccessful campaigning unions whose position suffered because of the SERB activities will comprise another.<sup>83</sup> But by far the largest group will be the taxpayers whose money finances statewide across-the-board increases for such chronically underpaid groups as prison guards.<sup>84</sup> The unit strength of a dozen horizontal statewide units will present a budget-conscious governor with a number of very tough political and financial decisions in dealing with major statewide unions.

By passing the Act, the legislature also has taken on a different labor relations responsibility. At one time, a union's lobbying of the legislature would produce a civil service pay increase. Now the legislature can increase all pay rates by offering higher wage offers in bargaining. However, it may be an unfair labor practice for the legislature to raise some public employees' pay unilaterally and restrain others.<sup>85</sup> Moreover, the legislature will receive the state employee factfinder reports, and must reject any undesired recommendations by a three-fifths vote—which will require bipartisan support—or the raises will be deemed accepted once the union ratifies the recommendations.<sup>86</sup> In the case of prison guards and other safety forces, the factfinding and conciliation process may produce a large settlement award which the legislature must fund.

---

82. The smallest vertical units for a department, institution, or regional office would be refused exclusive representative status when the state OCB proposes, and the SERB establishes, a horizontal statewide unit incorporating those employees.

83. Already friction has developed among the unions that expect to compete for the state workers. In the consolidated state employee unit hearings, Local 1199 of the Ohio Health Care Employees Union, AFSCME, the Communications Workers Council of Public Workers, and several other employee representative groups took mutually inconsistent positions.

84. Prison guards' salaries are likely to increase as a result of the horizontal statewide unit determination. In part, the increase would be the result of the risks and stresses of that position which will be presented to the conciliator should the state refuse to accept an earlier settlement. The prison guards' example illustrates the economic consequences of the conciliation structure for state budget concerns. *Coleman Interview, supra* note 22.

85. No formal SERB interpretation of the coercive effect of separate unit pay increases has been made to date under § 4117.11(A)(1), (3). However, the legislature is viewed as "the employer" under the terms of the statute. See OHIO REV. CODE ANN. § 4117.01(B).

86. *Id.* § 4117.14(C)(6).

#### IV. ELECTION OF UNION REPRESENTATIVES

The central difficulties for conducting public sector employee elections are the predictable set of paperwork chores which begin with posting of notices and end with resolution of the challenged ballots or objections to the election.<sup>87</sup> The SERB received 679 election petitions during 1984, and conducted 103 elections.<sup>88</sup>

##### A. Election Hours Policy

The election participants most often complained about the short period of time actually available for voting, because of the Board's limited-election-hours policy.<sup>89</sup> Board elections were not often held in the morning or late in the evening because of the Board's decision to not pay for its agents to stay overnight.<sup>90</sup> Unions reacted strongly to this policy, asserting that the limited hours in units such as hospitals and police forces would disenfranchise the voting rights of late shift workers.<sup>91</sup> Others concluded that elections for the benefit of workers were scheduled for the convenience of the election officials.<sup>92</sup> Regardless of the reason, the SERB's elections stood in stark contrast to those conducted by the NLRB in the private sector.<sup>93</sup> Consequently, the election process was a source of union dissent.<sup>94</sup> If the funds were available, the Board probably would have longer hours and more staff employees supervising its elections. It may be possible sometime in the next year for the SERB to conduct the elections in the newly recognized state employee units. The legislature also had to amend the Act in 1985 to permit mail ballots because of the wide geographical dispersion of the state employees in units such as the State Highway Patrol.<sup>95</sup> This required amend-

---

87. See *id.* § 4117.07 for the provisions governing the election procedure.

88. Minutes of State Employment Relations Board meeting (Jan. 4, 1985).

89. *E.g.*, Janetzke Interview, *supra* note 22.

90. *Davis Interview*, *supra* note 19. However, if the afternoon election creates significant problems that threaten the integrity of the election process, the SERB will make alternative arrangements. *Id.*; see *Janetzke Interview*, *supra* note 22.

91. *E.g.*, *Janetzke Interview*, *supra* note 22.

92. *E.g.*, telephone interview with Dean E. Denlinger, Attorney with Denlinger, Rosenthal & Greenberg, in Cincinnati (Jan. 28, 1985) [hereinafter cited as *Denlinger Interview*]. *But see Davis Interview*, *supra* note 19 (defending the SERB's afternoon election policy as the consequence of economic limitations).

93. See *Denlinger Letter*, *supra* note 22. The NLRB handles the entire process from petition to election in six to eight weeks. On the other hand, "SERB's procedures seem to involve considerable agency delay, combined with inordinate time pressures on the parties themselves when they are suddenly called upon to act." *Id.*

94. See *id.*; *Janetzke Interview*, *supra* note 22.

95. The Ohio legislature amended the Act in June 1985 to allow the use of mail ballots. OHIO REV. CODE ANN. § 3345.31 (Baldwin 1985) (effective June 3, 1985).



ing the statute because the original Act did not permit mail ballots.<sup>96</sup> Allowing the mail ballots could result in more challenges as to the validity of votes, but it would make it easier for an employee to exercise his or her voting right. Support for the mail balloting alternative, and recognition of the urgency for the decision either to fund additional SERB staff positions or to amend the statute, will probably lead to corrective legislative action.<sup>97</sup>

### B. Authorization Cards

A second concern mentioned by participants was the Act's card-counting provision for unions seeking elections.<sup>98</sup> Employers maintained that the secrecy surrounding collection of employee authorization cards was unnecessary in the public sector.<sup>99</sup> They argued that public jobs were much more secure than those in the private sector. Even if the employer wished to review the cards, anti-union sentiments could not produce reprisals against card-signing employees as might have been the case in some private firms.<sup>100</sup>

### C. Delays and Petitions for Elections

Employers' counsel who had experience with the NLRB criticized two other aspects of the SERB's election process. First, delays extended the election-request process so that at times employer representatives waited months for the SERB to conduct requested elections.<sup>101</sup> Further, the employers' counsel found it unusual that the procedure under the Act for an employer who opposed a union's description of an appropriate unit required it to petition for an election among its employees.<sup>102</sup> This petition procedure seems "rather odd" for an employer who would prefer not to have its employees belong to a labor organization.<sup>103</sup>

---

96. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page 1983).

97. See letter from Ohio State Senator Eugene Branstool to James T. O'Reilly (Feb. 11, 1985) (discussing effects of the Act).

98. See OHIO REV. CODE ANN. § 4117.07(A)(2). The statute grants authority to the SERB to compel employers to recognize an employee representative if it finds that a "free and untrammelled election" cannot be held due to the employer's unfair labor practices. *Id.* This power is similar to that granted to the NLRB. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 599-600 (1969).

99. *E.g.*, *Denlinger Interview*, *supra* note 92.

100. *Id.* The primary reason for increased job security among public employees is the civil service system and its safeguards. *Id.*

101. *E.g.*, *Denlinger Letter*, *supra* note 22. *But cf.* *Barty Interview*, *supra* note 24 (stating that employers could stipulate to have more elections as a way to reduce the delay).

102. See OHIO REV. CODE ANN. § 4117.05(A)(2)(a).

103. *Hawkins Letter*, *supra* note 53.

## V. UNFAIR LABOR PRACTICES

### A. SERB Policy Decisions in the First Year

A labor regulatory agency not only referees elections but also polices the participants' conduct. Newly created agencies, like the SERB, rarely have been able to meet expected levels of enforcement during their first year. Even when a law is as highly publicized as the Ohio Act was, employers and unions need time to alter their conduct to conform to the new legal constraints. The Ohio Act defines sixteen types of unfair labor practices.<sup>104</sup> While individual instances of "unfair" conduct may never be completely eliminated, *patterns* of conduct may become less unfair as employers and unions recognize legislated action or omission requirements.

After receiving only about half the funding it expected, the SERB was forced to prioritize its first year goals.<sup>105</sup> It decided that the outcome of elections and unit determinations would have a longer-lasting effect on Ohio public sector labor relations than would the transient hostilities resulting from unfair labor practices.<sup>106</sup> Consequently, the SERB disposed of only a few of the 288 unfair labor practice charges filed in 1984.<sup>107</sup> However, alternative methods existed to resolve unfair labor practice charges. For instance, the charges could be dismissed under a no-reprisal settlement,<sup>108</sup> or they could be mooted by a mutually agreed-upon bargaining contract.<sup>109</sup> With these options available, the SERB chose to postpone any action concerning most unfair labor practices, while still recognizing the importance of rapid adjudication of such charges.<sup>110</sup>

---

104. See OHIO REV. CODE ANN. § 4117.11(A)(1)-(B)(8).

105. See *supra* notes 25-29.

106. *Id.*

107. See *Davis Interview, supra* note 19. By contrast, in 1984 there were 668 unfair labor practice charges filed in NLRB Region 9 which covers the Southern and Central portions of Ohio. In NLRB Region 8, Cleveland, the normal turnover is 30 days for unfair labor practice charges. *Macala Interview, supra* note 24.

108. The first major strike under the new Act resulted in a no-reprisal settlement. In the Washington Local School District strike, which involved 459 teachers in the Toledo area, each side filed at least four unfair labor practice complaints, but each was settled and dismissed. Telephone interview with Dr. Kenneth Bishop, Superintendent of Washington Local School District, Toledo (Feb. 1, 1985) [hereinafter cited as *Bishop Interview*].

109. The mooted of charges is especially likely where the basis for the unfair labor practice charge was refusal to bargain and this refusal subsequently was cured by the parties' agreement to negotiate the matter. For an example, see *City of Cincinnati, No. 84-UR-07-1535 (Jan. 24, 1985)* (order dismissing complaint).

110. *Davis Interview, supra* note 19.

## B. *Adjudication of Unfair Labor Practices: Differences Between the SERB and the NLRB*

When drafting administrative solutions for labor disputes, Ohio looked for guidance to the NLRB's method of adjudicating unfair labor practices.<sup>111</sup> However, any practitioner who comes into the Ohio system expecting a miniature version of the NLRB will be disappointed. The two systems operate differently, and the precedents from one will not produce the same results in the other context.<sup>112</sup>

### 1. *The Separation of Powers*

One significant difference between the NLRB and the SERB is the separation of functions and the assignment of roles within each agency.<sup>113</sup> The NLRB has separated the roles of prosecutor, judge, and jury.<sup>114</sup> The NLRB conducts a separate adjudicatory procedure, which is similar to a court hearing, where advocates present arguments of fact and policy. In simplest terms, the independent General Counsel<sup>115</sup> through its regional offices investigates charges received and then selects cases for prosecution and dismisses others.<sup>116</sup> The General Counsel then prepares for and presents these cases in the adjudicatory hearing before an administrative law judge and later, if necessary, may appeal to the NLRB members.<sup>117</sup>

The Ohio system, in contrast, has a unified prosecutorial and adjudicatory procedure.<sup>118</sup> The Act currently provides for an Executive Director but makes no mention of a General Counsel.<sup>119</sup> However, the SERB members did create such a position.<sup>120</sup> But several observers asserted that the lack of separation of roles could raise a question of prejudgment when the SERB's decision to inves-

---

111. Compare OHIO REV. CODE ANN. § 4117.12 with National Labor Relations Act § 10, 29 U.S.C. § 160 (1982).

112. NLRB precedents should not be used in state public sector practice if statutes are not parallel or if the relationship is unclear. See Comment, *Public Employee Strikes: Legalization Through the Elimination of Remedies*, 72 CALIF. L. REV. 629, 653 (1984).

113. See *supra* notes 10-12 and accompanying text.

114. See 29 U.S.C. § 153(b), (d) (1982).

115. See 29 U.S.C. § 153(d).

116. 29 C.F.R. §§ 101.4-.5, .8 (1984).

117. 29 C.F.R. §§ 101.10, .12 (1984).

118. OHIO REV. CODE ANN. § 4117.02.

119. See *id.*

120. General Counsel Jacquelin Davis functions as legal advisor to the Board but does not control the attorneys who present cases before the Board nor defend the Board in court. *Davis Interview*, *supra* note 19. Those attorneys report to Assistant Attorney General Loren Braverman. *Braverman Interview*, *supra* note 8.

tigate a case and the ultimate unfair labor practice order, are both determined by the same members.<sup>121</sup> The only separation of roles presently required by the Act forbids a Board member or employee from acting as appellate authority for his or her own initial decision in a case.<sup>122</sup>

Whether the Ohio legislature reconsiders this separation of powers issue is likely to depend upon a judicial determination as to whether the existing unitary charge and decision process offends due process. If the courts hold that it is violative of due process, then predictably the General Counsel position will become a stronger independent entity.

## 2. *Funding Differences*

A second distinction between the NLRB and the SERB is that the NLRB's funding allows it to allocate manpower and financial resources to stress points. On the other hand, Ohio's SERB may not be fully funded for several years.<sup>123</sup> Consequently, its ability to respond to stress points throughout the state will continue to be limited. While the SERB staff has had some success in reducing the backlog of its initial priorities such as voluntary recognition elections,<sup>124</sup> the stress points will arrive each year, and place a case volume stress upon a structure which has no additional "slack" in its resources.<sup>125</sup>

## 3. *Differences in the Unfair Labor Practice Laws*

The Ohio statute includes the "continuation, modification, or deletion of an existing provision of a collective bargaining agree-

---

121. *Macala Interview*, *supra* note 24. Union counsel are sensitive to the need for legislative reform to make the SERB procedure more like that of the NLRB. *Id.* Management counsel contend that the SERB must implement a rule prohibiting ex parte contacts on the merits of an adjudication, such as would be required by federal law under 5 U.S.C. § 557(d) (1982), because a pattern of ex parte contacts would weaken the Board's ability to sustain its adjudicative conclusions. *Denlinger Letter*, *supra* note 22.

122. OHIO REV. CODE ANN. § 4117.02(G). This section is limited to the appeal of a specific hearing and it would need to be expanded to cover the issuance of a complaint.

123. The Board's funding was a frequent subject of criticism by those interviewed, particularly on the union side, who regard funding limits as a political problem for the collective bargaining system. *See, e.g., Loy Interview*, *supra* note 22. Repeated promises to increase funding of the SERB after the election and then after January 1, 1985 have not been kept. *Janetzke Interview*, *supra* note 22.

124. *Davis Interview*, *supra* note 19. The backlog is down to approximately a 30-day wait in uncontested voluntary recognition cases. *Id.*

125. *Id.* General Counsel Jacquelin Davis anticipates that teacher contract negotiations in August and September and safety force negotiations in December will be annual stress points. *Id.*

ment" as a mandatory subject of bargaining.<sup>126</sup> A potential conflict between this clause and the Act's management rights provision<sup>127</sup> develops when an employer allows a putative management rights issue to be written into the agreement. Management counsel are concerned that once the issue is included, the employer will be forced to bargain over a wider range of related issues thus diminishing the scope of management rights.<sup>128</sup> Consequently, they have urged that this language be removed from the statute.<sup>129</sup> Further, the National Labor Relations Act includes an express "free speech" clause<sup>130</sup> while the Ohio Act does not.<sup>131</sup> The NLRB can measure coercive employer pressures in the industrial workplace against a well developed body of case law<sup>132</sup> while the SERB will have to establish its own standards without the benefit of precedents. Ohio's omission of the free speech exception may become a sore point for management. Predictable violations of the state would include: politically-charged attacks on unions by elected officials, hostile comments of part-time citizen board members not yet experienced in structured labor relations, and paramilitary pronouncements by officials in the police and fire services. While the SERB may hold employers to the NLRB standards for coercive speech and activities, that prospect worries the employer advocates who work with employers such as local school boards, whose members are less sophisticated and not as aware of the impact of their statements as private employers are. In any event, these problems will take time to resolve—as the SERB develops guidelines and precedents from which public sector employers can learn.

---

126. OHIO REV. CODE ANN. § 4117.08(A).

127. *See id.*

128. *See, e.g., Denlinger Letter, supra* note 22. Mr. Denlinger poses the example of a public employer including a provision requiring power steering on all garbage trucks in the collective bargaining agreement. At the time of the next negotiations for a new contract, the employer might find itself required to bargain over a wide variety of truck equipment issues. As a result, employers will not include some provisions "simply out of fear that the provision could be carried to extremes in negotiating the next contract." *Id.*; *see also Coleman Inter-view, supra* note 22 (describing the procedures during negotiations so that management rights are not included in the collective bargaining agreement by waiver).

129. *E.g., Denlinger Letter, supra* note 22.

130. 29 U.S.C. § 158(c) (1982). National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1982) states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

131. *See* OHIO REV. CODE ANN. § 4117.11. The Ohio SERB retains the power to create an equitable exception to match the federal statutory provision. *See id.*

132. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 375 (1969); *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951).

#### 4. *Experience and Established Procedures*

A final difference is the experience and stability of the NLRB as contrasted with the year-old organization of the SERB. One practical consequence of the NLRB's longevity and experience is that it wins the great majority of its cases reviewed by the appellate courts.<sup>133</sup> Moreover, the well established internal procedures of the NLRB influence the substance of its decisions. Remedies, opportunities for advantage, and the probability of sustaining a charge may be influenced by these established federal procedures as well.

After only a year of operation the SERB is less predictable and arguably more expensive than the NLRB. Critics warn that the Ohio unfair labor practices area could become an experimental ground for unions, employers and their representatives to test new bargaining attacks.<sup>134</sup> Because the SERB does not conduct field hearings on unfair labor practice charges,<sup>135</sup> the process is expensive for both the charging party and the respondent.<sup>136</sup> Due to the impact of the economic and political realities on the SERB enforcement procedure, as well as the newness of the system itself, the area of public sector unfair labor practices remains unsettled and subject to criticism and change.<sup>137</sup>

### VI. IMPASSES AND STRIKES

The Ohio Act provides for the resolution of bargaining disputes between the union representative and the public employer through

---

133. E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 95 (3d ed. 1980).

134. *E.g., Coleman Interview, supra* note 22. The unfair labor practice law in municipal cases was "a toy with both sides experimenting with it." *Id.*

135. *Janetzke Interview, supra* note 22. Because of its insufficient financial resources and manpower, SERB has limited its unfair labor practice activity. *See supra* notes 25-28 and accompanying text.

136. *Janetzke Interview, supra* note 22. Union and management attorneys complained about the transaction costs of unfair labor practice hearings in Columbus. *See, e.g., id.; Denlinger Interview, supra* note 92. Because the SERB does not send hearing officers to Toledo, for example, but instead schedules prehearing conferences and hearings at early hours in Columbus, parties must bring witnesses to Columbus overnight and incur the incidental costs in order to establish the case. *Janetzke Interview, supra* note 92.

137. Attorneys, administrators, and representatives have made suggestions based on their experiences with the SERB. These include first, elimination of prehearing conferences in Columbus, a frequent step taken by the SERB which received few endorsements from participants, *Denlinger Letter, supra* note 22; second, advance notice before the complaint is issued so that parties have more than 10 days notice, *e.g. Braverman Interview, supra* note 8; telephone interview with Maureen Pero, Dayton Assistant Attorney (Jan. 29, 1985); third, field hearings in places other than Columbus, *id.*; *Hawkins Letter, supra* note 53; and fourth, more liberal continuances for preparation, *see, e.g., Janetzke Interview, supra* note 22.

its mediation, factfinding, and conciliation procedures.<sup>138</sup> However, critics, ranging from the strongest management advocate to the Teamsters' public sector labor relations expert, have declared that the impasse provisions are ill-conceived, and their time frames are too short.<sup>139</sup> Consequently, practitioners have had difficulty meeting the statutory deadlines.<sup>140</sup> At least one observer speculated that the legislature may have purposefully made the impasse procedures cumbersome as a way to force more voluntary settlements.<sup>141</sup>

The legislature constructed a rigid timetable,<sup>142</sup> and the SERB has only a ministerial role offering lists of factfinders and conciliators and appointing those selected by the parties.<sup>143</sup> This rigid structure often leads to mediation before the parties and some mediators feel it is necessary.<sup>144</sup> Some parties must begin factfinding procedures before they have a chance to bargain about the substantive issues.<sup>145</sup> Observers believe that these problems have adversely affected the parties' desire to reach a bargaining solution.<sup>146</sup>

### A. Bargaining Deadlines

One criticism of the Act is that its time period for negotiating new contracts<sup>147</sup> ignores existing bargaining patterns and is much too short.<sup>148</sup> Both union<sup>149</sup> and management<sup>150</sup> participants complain about the other's delays, but they are unified in their dislike

---

138. OHIO REV. CODE ANN. § 4117.14 (Page 1983).

139. *Moscarella Interview*, *supra* note 36; *Loy Interview*, *supra* note 22.

140. *E.g.*, *Sheeran Interview*, *supra* note 21.

141. *Coleman Interview*, *supra* note 22.

142. OHIO REV. CODE ANN. § 4117.14(C), (D), (G).

143. *See id.* § 4117.14(C)(3), (D)(1).

144. Interview with Frank Flynn, Attorney with Clemans, Nelson & Associates (Jan. 24, 1985) [hereinafter cited as *Flynn Interview*]. The three "neutrals" interviewed indicated that as a result of the short timetables, parties have been poorly prepared and presented too many issues at the factfinding hearing. *See* telephone interview with Joseph Crowe, Federal Mediation & Conciliation Service (Jan. 28, 1985) [hereinafter cited as *Crowe Interview*]; telephone interview with John Murphy, Mediator (Feb. 4, 1985) [hereinafter cited as *Murphy Interview*]; telephone interview with Frank Keenan, Mediator (Feb. 11, 1985) [hereinafter cited as *Keenan Interview*].

145. *E.g.*, *Coleman Interview*, *supra* note 22.

146. *See Denlinger Interview*, *supra* note 92.

147. OHIO REV. CODE ANN. § 4117.14(B)(2).

148. *See, e.g.*, *Berninger Interview*, *supra* note 81. The time frames established by the legislature were contrary to the experiences of those involved in bargaining and negotiating agreements. As a result, the parties have ignored these time frames. *Id.*

149. *E.g.*, *Janetzke Interview*, *supra* note 22. Delays at the impasse stage helped the employer push a pay increase back for an entire year because of the special delaying clause for pay increases in § 4117.14(G)(11). *Id.*

for the statutory schedule.<sup>151</sup> SERB personnel also cited the impasse provisions as those most in need of reform.<sup>152</sup>

### B. *Bargaining Issue Burdens*

A related problem is the large number of issues that parties take to factfinding hearings.<sup>153</sup> Part of the difficulty is due to many bargainers' inexperience with this relatively new procedure.<sup>154</sup> Parties should resort to this procedure to help resolve difficult issues after the others are settled. In Ohio, though, bargainers have clogged the agenda with these less difficult issues.<sup>155</sup> At present, the SERB and the parties share the factfinding costs equally.<sup>156</sup> As one possible solution, amending the Act to shift all costs to the parties may encourage them to reduce the number of issues prior to factfinding.

### C. *Mediator Selection*

The mediation services under the Act were another source of trouble during the first year. While the statute provided for the SERB to hire state mediators,<sup>157</sup> the legislature failed to allocate funds to hire and deploy them.<sup>158</sup> The SERB opted to use the Federal Mediation and Conciliation Service (FMCS), which, unfortunately, had its own procedures and timetables.<sup>159</sup> When the FMCS met with the SERB in 1984, it informed the Board that it would use its own procedures, timetables, and methods, not those of the Ohio legislation.<sup>160</sup> The Board thus eliminated the funding problem by using federal mediators but had to compromise the strict interpretation of the statute's provisions.<sup>161</sup>

### D. *The Factfinding Process*

Under the Act, the factfinding procedure could be a full-dress

---

150. *E.g.*, *Berninger Interview*, *supra* note 81; *Coleman Interview*, *supra* note 22; *Denlinger Interview*, *supra* note 92.

151. *See, e.g.*, *Janetzke Interview*, *supra* note 22; *Denlinger Interview*, *supra* note 92.

152. *See Day, Report From Serbia*, 35 CASE W. RES. L. REV. 353 (1985).

153. *See, e.g.*, *Keenan Interview*, *supra* note 144.

154. *Crowe Interview*, *supra* note 144.

155. *See, e.g., id.*

156. OHIO REV. CODE ANN. § 4117.14(C)(5).

157. *Id.* § 4117.02(E).

158. *See Davis Interview*, *supra* note 19 and text accompanying *supra* note 28.

159. *See Crowe Interview*, *supra* note 144.

160. *Id.*

161. *See, e.g., id.* The mediations are not being held on the rigid statutory timetable prescribed in § 4117.14 because that was unacceptable to the FMCS mediators. *Id.*



administrative adjudication by a panel of three experts.<sup>162</sup> However, in practice it is a brief discussion of competing issues by the parties after which the factfinder offers a resolution.<sup>163</sup>

### 1. *Duplication of Effort*

Participants have criticized the use of factfinders, and then, conciliators to resolve safety force disputes because the statutory two-step procedure results in the duplication of efforts.<sup>164</sup> The factfinder's recommendations are not final. Under the Act, the proper legislative body and the public employee organization can reject his recommendations.<sup>165</sup> However, the statute is unclear as to the consequences when parties, other than safety forces, reject the factfinder's report.<sup>166</sup> In contrast, the statute makes the factfinder's report one of the major considerations for the conciliator at a final safety force determination.<sup>167</sup>

One possible resolution would be to combine the factfinding and conciliation functions and make the conciliator's role more flexible.<sup>168</sup> Currently, the factfinder is not limited by the parties' offers; instead, he is free to choose a middle ground, based upon information obtained from the parties.<sup>169</sup> His recommendation is then subject to rejection, and in the special case of safety forces, if it is rejected, the conciliator must choose *either* the employer *or* the union outcome.<sup>170</sup> If the factfinding and conciliation functions were

162. OHIO REV. CODE ANN. § 4117.14(C)(3), (4), (5).

163. For example, a union's statements in the factfinding of City of Piqua, \_\_\_ OHIO PUBLIC EMPLOYEE REP. (LAB. REL. PRESS) ¶ \_\_\_ (Ohio SERB April 23, 1985), immediately followed the city's statements and were alternative explanations of the same criteria for favorable findings. The parties accepted the factfinder's decision, which was issued after hearing both parties' arguments. *Id.*

The factfinding process has been recommended for deletion from the Act as "expensive and unnecessary" by the firefighters' union. Testimony of S. Loeffler, Int'l Ass'n of Fire Fighters, before the PEACE Commission hearing on the SERB (April 18, 1985).

164. *Coleman Interview*, *supra* note 22.

165. OHIO REV. CODE ANN. § 4117.14(C)(6).

166. *Coleman Interview*, *supra* note 22; *see* OHIO REV. CODE ANN. § 4117.14(C)(6), (D)(2). The employer does not know what its obligations are, after one or both sides rejects the factfinder recommendations. Absent an imminent strike notice or a duty to go to conciliation, the statute is unclear whether the employer and union must continue to bargain. *See id.* § 4117.14(D)(2), (E).

167. *See* OHIO REV. CODE ANN. § 4117.14(G)(6). A factfinder's recommendations can significantly influence the conciliator's decision. *Coleman Interview*, *supra* note 22. Further, it can spoil efforts to reach a negotiated compromise settlement. *Denlinger Interview*, *supra* note 92.

168. *Coleman Interview*, *supra* note 22.

169. *See* OHIO REV. CODE ANN. § 4117.14(C)(4)(e), (5).

170. *Id.* § 4117.14(D)(1), (G)(7).

combined, the conciliator's role would have to be redefined to include the freedom in decisionmaking that the statute grants to the factfinder.

Unifying these functions without increasing the flexibility of the conciliator's decisionmaking would limit his role to selecting one or the other of the two competing contract points, rather than allowing the conciliator to arbitrate the dispute. The rigidity of that process would be undesirable since it conflicts with the basic goal of promoting labor peace and harmony in the workplace.<sup>171</sup>

## 2. Frustration of the Bargaining Process

Despite the legislature's expectation that factfinding would encourage resolution of disputes, factfinding and conciliation may have contributed to parties' unwillingness to negotiate.<sup>172</sup> During the first year, a party's satisfaction of having the factfinder agree with its position was replaced by frustration when the other side rejected the recommendations.<sup>173</sup> In fact, the degree to which the factfinder agrees with one side's proposal may make it that much more difficult to win the acceptance of the other party.<sup>174</sup> In at least one case, the parties continued bargaining while the factfinder was working, but when the factfinder released his report to comply with the statutory time period, one party took the matter out of settlement negotiations in view of the favorable factfinder's report.<sup>175</sup> Given the time constraints imposed by the Act, the factfinding process may disrupt the normal conclusion of negotiations.<sup>176</sup>

## 3. Training and Selection of Factfinders

Participants during the first year have criticized the SERB's se-

---

171. See *Branstool Press Release*, *supra* note 3 and accompanying text.

172. See, e.g., *Janetzke Interview*, *supra* note 22.

173. *Bishop Interview*, *supra* note 108. School Superintendent Kenneth Bishop described the "mental high" of having a favorable factfinder report, and the dismaying rejection by the union which preceded a 17-day strike. *Id.*

174. See, e.g., *id.* In a polarized situation such as when teachers are threatening a strike, a neutral party's decision which favors the adversary may be rejected and may inspire more objections. See *id.*

175. *Denlinger Interview*, *supra* note 92.

176. See *id.*; *Crowe Interview*, *supra* note 144; *Flynn Interview*, *supra* note 144. Some factfinders and mediators believe that the factfinding hearing comes too early in the process and thus leaves too many issues open, which would ordinarily have been settled by the negotiation process. As a result, the pragmatic factfinder becomes a mediator first, and then switches into the role of selecting among the proposed settlement issues of the parties. See *Crowe Interview*, *supra* note 144; *Keenan Interview*, *supra* note 144; *Murphy Interview*, *supra* note 144.

lection and training of factfinders.<sup>177</sup> Specifically, they had insufficient training in public finance, an important decisional factor, and were not familiar with the Act.<sup>178</sup> Moreover, the SERB pay scale was less than that available to private arbitrators in commercial cases. The training and pay increases as well as any structural changes are unlikely if the SERB would have to bear the costs. Until the legislature provides more funding, the SERB's budget, which pays for fifty percent of the factfinding process,<sup>179</sup> limits the agency's ability to implement changes.<sup>180</sup>

#### 4. *Alternate Methods for Dispute Resolution*

While the Act permits parties to use alternate methods of dispute resolution,<sup>181</sup> the SERB has not yet decided which methods are proper for resolution of safety force disputes. If the Board intends to pre-qualify contractual alternatives which comply with the Act's goal of initiating action between parties, it must articulate the specific requirements that an alternative system must meet. The Board expressed confusion regarding the legislative intent for alternative dispute systems,<sup>182</sup> but the courts are having difficulty dealing with the legal status of appropriate alternative systems. In one case, *City of Columbus v. SERB*,<sup>183</sup> the court held that the alternative system must include "procedures that lead to a final resolution of the dispute."<sup>184</sup> Whether such a system ultimately will replace the statutory impasse process remains an open question.

## VII. TALES OF TWO CITIES

The experiences of Cleveland and Columbus offer contrasts in the municipal bargaining issues of the next decade.

### A. *Cleveland*

In Cleveland, twenty-three unions represent the city's work force. After decades of bargaining between the city and the unions,

---

177. *E.g.*, *Denlinger Interview*, *supra* note 92; *Gerber Interview*, *supra* note 22; *Haddad Interview*, *supra* note 22.

178. *E.g.*, *Gerber Interview*, *supra* note 22.

179. OHIO REV. CODE ANN. § 4117.14(C)(5) (Page 1983).

180. *See supra* notes 25-30 and accompanying text.

181. OHIO REV. CODE ANN. § 4117.14(E).

182. *City of Columbus*, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 1527 (Ohio SERB Dec. 13, 1984) (Hearing Officer's Decision).

183. No. 85CV-02-797 (Franklin County C.P. 1985).

184. *Id.* at 21.

negotiations are a "well-oiled machine."<sup>185</sup> While the Ohio Act has had little impact on negotiations to date, city management is concerned that the new system encourages unions to litigate, but does not provide enough training for factfinders.<sup>186</sup>

A principal question for Cleveland is section 4117.08(C) which excludes management rights as a mandatory subject of collective bargaining, but seems to require the employer to bargain over any continuation, modification, or deletion of a management rights issue included in the agreement.<sup>187</sup> The city's concern is whether once it waives its management rights exclusion as to a particular issue, this waiver is irrevocable.<sup>188</sup> Further, political officials with the power to waive the Act's permissive reservation of rights may cause serious problems for the administration of a city labor policy.<sup>189</sup> Finally, when cities or counties bring in outside attorneys to conduct their negotiations, they should be cautious about allowing these attorneys to bargain on management rights issues because they may unintentionally waive the city's future rights to exclude a management issue from mandatory bargaining.<sup>190</sup>

### B. Columbus

Since Columbus has engaged in collective bargaining since 1975, it had little difficulty establishing units.<sup>191</sup> However, Columbus has an alternative dispute resolution system leading to mediation in its safety force contracts which may prove problematic. This system did not satisfy the SERB, which wants safety force dispute systems to lead to mandatory contract formation.<sup>192</sup> Columbus took the Board to court,<sup>193</sup> on judicial review the Common Pleas Court

---

185. *Haddad Interview, supra* note 22.

186. *See id.*

187. *See* OHIO REV. CODE ANN. § 4117.08(C). *See supra* notes 126-29 and accompanying text for a discussion of this contradiction in the management rights clause.

188. *See Haddad Interview, supra* note 22; *see also Denlinger Interview, supra* note 22 (expressing a general management concern to bargaining about certain management rights issues or fear that, in the future, the provision will be pushed to the extremes in the next contract negotiations).

189. *See Haddad Interview, supra* note 22. Politicians could promise to waive their permissive management rights or give the union a large pay increase in return for the union's endorsement. The potential for these abuses of the law creates a need for more checks and balances in the system. *Id.*

190. *Id.*

191. *Moscarella Interview, supra* note 36.

192. *See* City of Columbus, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 1527 (Ohio SERB Dec. 13, 1984) (Hearing Officer's Decision).

193. *City of Columbus v. SERB*, No. 85CV-02-797, slip op. at 1 (Franklin County C.P. 1985).

agreed with the Board that a final resolution, not merely mediation, must come from the alternative system.<sup>194</sup> Delay was Columbus' major concern because the months of delay in unfair labor practice cases leave an unresolved issue which can be a "stumbling block to problem solving in the future."<sup>195</sup> The SERB's delays in other administrative matters, such as its analysis of the contracts, remain a concern.<sup>196</sup>

## VIII. AREAS OF NEEDED CHANGE

### A. *Suggested Procedural Amendments*

The consensus among those interviewed was that substantive changes in the Act are unlikely in the foreseeable future.<sup>197</sup> This consensus reflected the desire to work out administrative problems before revising the Act, and the recognition that the Republican majority in the state senate would make legislative amendments a risky proposition for supporters of collective bargaining. As one union attorney explained, unions could lose more than they would gain from changing the Act.<sup>198</sup>

Although the legislature is unlikely to adopt substantive changes, there are suggested procedural amendments which have broad political support. The change most widely supported by all sides is the relaxation of the timetable for bargaining impasses.<sup>199</sup> Time limits in the 1983 legislation are too short, and appear to have had a negative impact on settlements which ordinarily would be resolved through hard bargaining.<sup>200</sup>

Clarification by the legislature of the unit determination process

---

194. *Id.* at 21.

195. *Moscarella Interview, supra* note 36.

196. *See Haddad Interview, supra* note 22; *Janetzke Interview, supra* note 22; telephone interview with Thomas Payne, Attorney for the City of Dayton (Feb. 1, 1985); telephone interview with L. Wolke, Attorney for the City of Urbana (Jan. 23, 1985); telephone interview with Maureen Pero, Assistant Attorney for the City of Dayton (Jan. 29, 1985); telephone interview with John Krumholtz, Assistant Prosecutor for Montgomery County (Jan. 24, 1985).

197. *See, e.g.,* telephone interview with John Krumholtz, Assistant Prosecutor for Montgomery County (Jan. 24, 1985). Some attribute this to the political climate in the state legislature. *See, e.g., id.* At least one observer attributes it to a good start by the Board: "SERB really put muscle onto the bare bones of the statute with amazing speed." Telephone interview with Mary Jo Corona, Attorney, Dayton (Jan. 24, 1985).

198. Telephone interview with Donald Mooney, Attorney, Cincinnati (Jan. 29, 1985).

199. *See supra* notes 138-46 and accompanying text.

200. *Denlinger Interview, supra* note 92. The impasse procedures "are simply too hasty and can involve too important an issue to be handled so cavalierly. They almost tempt the parties to proceed without serious negotiations and this has happened in several regrettable cases." *Denlinger Letter, supra* note 22.

is another procedural change that the parties support.<sup>201</sup> The unit determination process inexorably grinds the smallest offices into multiple units. This unit fragmentation costs both the union and the employer much more money, as they must deal with one- or two-person units. Most of the interviewees agreed that unions would find it difficult and undesirable to represent these microunits, while management would have a paperwork and administrative overhead burden well beyond the benefits of such a unit differentiation.<sup>202</sup> The legislature should amend the Act to recognize the unit cohesion of employees in small public offices<sup>203</sup> and permit a waiver of otherwise impermissible unit joinders, upon good cause determined by the SERB. This revision would allow units with fewer than ten members to merge with other units within the SERB's discretion.

Another procedural refinement may be the designation or accreditation of advocates who practice before the SERB and its hearing officers. The advocates' understanding of the Act is crucial to their ability to represent their clients' best interests and provide the hearing officers with enough facts to correctly decide the issues.<sup>204</sup> The hearing officer cannot make the case on the merits for the party when the advocate misunderstands the Act or fails to cover a necessary jurisdictional feature.<sup>205</sup> To remedy this type of situation the SERB is likely to implement a continuing education program built upon its rules, requiring understanding of the Act as a prerequisite to practice before it.<sup>206</sup>

A related area in need of clarification is the roles and duties of mediators, factfinders, and conciliators in the Ohio Act's impasse procedures. The contract negotiations between the Athens firefighters and the city exemplify some of the problems that result from the confusion of roles. The city and the firefighters were unable to

---

201. See, e.g., *Barty Interview*, *supra* note 24.

202. See, e.g., *Barty Interview*, *supra* note 24; *Coleman Interview*, *supra* note 22.

203. See, e.g., *Barty Interview*, *supra* note 24. Over-fragmentation may create problems for labor peace. If a unit of two maintenance workers were to go on strike, then it may be possible for the rest of the employees who are members of a separate unit in a city or county office to conduct a sympathy strike. Such an action runs counter to the purposes of the Act. See *id.*

204. See *Hawkins Letter*, *supra* note 53. Some decisions and first hand experience indicate that some attorneys are not well versed in the procedures and substantive provisions of the Act. *Id.*

205. *Id.* Practice at hearings by unprepared nonlawyers makes for a bad case and puts too much of the onus on the hearing officers who "must make their decisions on the basis of only what limited evidence has been presented to them." *Id.*

206. See OHIO ADMIN. CODE, § 4117-1-12 (1984).

reach an agreement, and in compliance with the Act's final offer settlement procedure,<sup>207</sup> the parties submitted the case to a conciliator.<sup>208</sup> However, the conciliator chose to mediate rather than select either one of the "last best offers."<sup>209</sup> His decision created a dilemma for the city. The council had approved a final bargaining offer, and the city attorneys were prepared to argue for that position, but they were then expected to move from that position during mediation.<sup>210</sup> Thus, the introduction of mediation changed the nature of the proceeding and required a more flexible approach and strategy than the city had expected.<sup>211</sup>

Conciliators have statutory authority to mediate as a matter of discretion,<sup>212</sup> and the SERB encourages them to "mediate issues to the extent possible, whether before, during or after the hearing."<sup>213</sup> According to the SERB Director of Mediation, "[T]here is a need for . . . flexibility[;] . . . it's a part of the experimentation of the first year under [the] Act."<sup>214</sup> The SERB Bureau of Mediation believes that advantages far exceed disadvantages when the conciliator urges the parties to settle issues.<sup>215</sup> Mediation helps reduce the number of issues that need to be decided and promotes contracts on which both sides agree. For instance, during the bargaining between Cincinnati and the firefighters, the conciliator, through mediation, reduced the number of open issues from eighteen to three.<sup>216</sup> The risk involved for both employers and employees is the likelihood of change in their final bargaining positions. While change may promote more long-term goals such as labor peace, the parties may feel compelled to move for fear of prejudicing their position on any issues the conciliator-mediator has to decide.<sup>217</sup>

---

207. OHIO REV. CODE ANN. § 4117.14(D)(1) (Page 1983).

208. Telephone interview with Gary Hunter, Law Director, City of Athens (Feb. 25, 1985) [hereinafter cited as *Hunter Interview*]. Under the statute, the conciliator must select between the parties' offers for each disputed issue. OHIO REV. CODE ANN. § 4117.14(G)(7) (Page 1983).

209. *Hunter Interview*, *supra* note 208.

210. *Id.*

211. *See id.*

212. *See* OHIO REV. CODE ANN. § 4117.14(G)(7) (Page 1983).

213. Telephone interview with G. Thomas Worley, SERB Director of Mediation (Feb. 27, 1985) [hereinafter cited as *Worley Interview*].

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

## B. *Judicial Intervention*

The first fully-litigated constitutional challenge to the Act's authority concerned municipal home rule.<sup>218</sup> In an extensive discussion, in the first detailed opinion to deal with the question, the court rejected the home-rule constitutional argument.<sup>219</sup>

Several other issues may be decided by the courts in the next year. One involves a procedural ambiguity concerning judicial review. The Act does not make clear whether a decision not to issue a complaint in an unfair labor practice charge can be appealed.<sup>220</sup> Further, it does not provide for *any* review of the SERB's unit determinations.<sup>221</sup> In both cases, a judicial remedy is likely to be created once the courts have developed case precedents.<sup>222</sup>

Another issue, the separation of functions within the SERB may come before the Ohio courts on a state due process challenge before the legislature amends the statute to change the SERB's current combination of prosecutorial and judicial roles. Separation of functions, a necessary aspect of NLRB operations and a dominant theme in federal adjudications, is a sound public policy. The merger of roles impedes a perception of agency neutrality and fairness especially on highly charged issues. The legislature should consider amending the Act to provide for a separation of the prosecutorial and judicial roles and thus guaranteeing that no one person will investigate or prosecute a case and then preside over it in any adjudicative hearing. One possible procedure would be for the field agents to report to an independent General Counsel, who then makes a probable cause finding after examining the field report

---

218. See *City of Miamisburg v. SERB*, No. 84-2204 (Montgomery County C.P. 1984).

219. See *id.*

220. See OHIO REV. CODE ANN. § 4117.1(D) (Page 1983). This section states that "a person aggrieved" by the SERB's final order granting or denying the requested relief may appeal. *Id.* The SERB's position is that the refusal to issue a complaint is not appealable. *Davis Interview, supra* note 19. However, it may be that the legislature intended the SERB's inaction to be appealable under § 119.12. *Macala Interview, supra* note 24. Section 119.12 states in part that, "[a]ny party adversely affected by any order of an agency issued pursuant to any . . . adjudication [other than those denying admissions to examinations or denying issuance for renewal of licenses] may appeal to the court of common pleas . . ." *Id.*

221. OHIO REV. CODE ANN. § 4117.06(A) (Page 1983). This provision expressly authorizes the SERB to determine the appropriate collective bargaining unit, and that such determinations are final and not appealable to any court. *Id.*

222. The SERB's broad authority to determine when to issue complaints and what is an appropriate bargaining unit absent some judicial review, might be regarded as too strong of a power delegation for constitutional conservatives. However, too much interference by the courts with the SERB's authorized powers is likely to call into question the merits of activism in the courts.



and considering the rules and precedents of the SERB.<sup>223</sup>

The amendment of the statute would not result in any additional costs to the state because the SERB used its discretion to establish the advisory General Counsel position when it first began operation.<sup>224</sup> Shifting the issuance of the complaint to a statutory independent General Counsel would leave most policy decisions to the three SERB board members. They also would make the ultimate findings on those unfair labor practice complaints brought before them when the General Counsel believes that "probable cause" exists.<sup>225</sup> The separation of agency functions thus offers a number of important benefits including: an independent assessment of charges, another source of prosecutorial discretion, and a sound defense against the inevitable due process challenge.<sup>226</sup> None of these benefits exist under the current Board system.

An independent General Counsel within the SERB also would take on the prosecutorial responsibility of the Attorney General's office,<sup>227</sup> which intended to represent both sides in conflicts between the state employers and the SERB.<sup>228</sup> Adjusting the legal positions, as well as the authority, will, as a pragmatic matter, require a meeting of the minds between the legislators, the SERB, and the Attorney General.

## IX. THE SECOND YEAR AND BEYOND

The SERB's second and subsequent years will be easier as the caseload becomes more predictable. The initial tidal wave crested in mid-1984, and after the second wave of state employee union fil-

---

223. This would correspond to the role of the General Counsel under the NLRA, 29 U.S.C. § 153(e) (1982).

224. See *supra* note 120 and accompanying text. Presumably the only administrative cost would be the shifting of personnel and overhead from the Attorney General's budget for prosecuting SERB unfair labor practice cases, to the SERB budget. As it is, the SERB's transaction costs are severely understated because its budget does not carry the costs of the attorneys who handle its unfair labor practice proceedings and court defenses. See *Braverman Interview, supra* note 8.

225. See OHIO REV. CODE ANN. § 4117.12(B)(2), (3) (Page 1983). No shift of decisional authority would be made, and the SERB would have more time to decide the important cases because of the negotiation and settlement which the free-standing General Counsel position could accomplish.

226. See *Macala Interview, supra* note 24. Due process challenges have been predicted because of the close connection of prosecutorial and adjudicative powers. *Id.*

227. The legislature authorized the Attorney General as the SERB's legal representative in "all legal proceedings." OHIO REV. CODE ANN. § 4117.02(E) (Page 1983).

228. The Attorney General planned to represent both sides in certain cases because of the division of labors in that office. *Braverman Interview, supra* note 8.

ings in 1985<sup>229</sup> the SERB will have a better understanding of its normal caseload. Formal change will come, if at all, from a study of the Board by the statutory study commission (PEACE).<sup>230</sup>

An important priority for the second year will be the development of guidance for employers and unions. Some of the troubles which the affected constituencies noted during the SERB's first year came from its lack of guidance. The affected communities cannot read the minds of the SERB board members. They need to see precedents established by SERB decisions.<sup>231</sup> In its first year, the SERB's view was that it would take on none of the issues until each arrived, relevant and ripe in an adjudicated record prepared by the hearing officer.<sup>232</sup> That approach to creation of case law serves a long-term need, but it presupposes that adjudicatory decisions are the sole means by which the SERB should act.

The lack of guidance seemed to deepen confusion about the Act's ambiguities. Guidance would seem to mean more to unions than to employers, because according to those interviewed the employers could rest and then wait for the Board to decide matters, while the union's initial strength could be sapped by months of inactivity pending a contested decision.<sup>233</sup> The accompanying frustration need not have been as deep, and need not have covered as many issues, because the SERB has the option to adopt interpretive rules under Ohio's Administrative Procedure Act.<sup>234</sup>

During its first year, the SERB issued procedural rules and a few procedural General Orders.<sup>235</sup> In the future, it should use rulemaking more vigorously as a means for communicating its message to the affected unions and employers.<sup>236</sup> In retrospect, the SERB could have offered guidance on ambiguous provisions of the

---

229. Under § 4117.07(A)(1), state employee groups can file for elections after the unit determination under § 4117.06 is completed. OHIO REV. CODE ANN. § 4117.07(A)(1) (Page 1983).

230. The Public Employment Advisor and Counseling Effort Commission (PEACE) was created under § 7 of Senate Bill 133, 1983 Ohio Legis. Serv. 5-237 (Baldwin). Seven members were to be appointed from representatives of "public employers, employee organizations and the general public." *Id.* § 7(A)(6). Its purpose is to study and make recommendations to the legislature concerning the implementation of the Act. *Id.* § 7(B)(3).

231. *Moscarella Interview*, *supra* note 36; *Macala Interview*, *supra* note 24.

232. *Davis Interview*, *supra* note 19.

233. *See, e.g., Janetzke Interview*, *supra* note 22.

234. OHIO REV. CODE ANN. § 119.03 (Page 1983).

235. OHIO ADMIN. CODE §§ 4117-1-1 - 4117-1-25 (1984).

236. It is impossible to predict the outcome of the tension between the desire for clear-cut precedential cases and the need for urgent guidance, but rulemaking offers a shortcut to the SERB.

Act by issuing interpretive rules which would be subject to change upon later examination of the cases.<sup>237</sup>

In the future, the Board should view itself as being multidimensional, not simply an adjudicator but also a maker of regulations for the guidance of the public sector labor law community.

## X. CONCLUSION

When the cheering stops and celebrations of newly enacted laws fade into the past, the remaining task will be large. For some administrative agencies, the self-made claim of success comes early and often, notwithstanding a stack of unanswered problems. Ohio was fortunate to have a modest SERB board to confront the task of creating public sector labor peace.

The State Employment Relations Board has set moderate goals, recognizing its shortfall of funds and the huge tasks assigned to it. Its delays and shortcomings are significant weaknesses, but the SERB cannot control its budgetary problems, and its evolution of powers should not be judged on its work alone.

If quality work comes into the SERB from well argued management and labor positions, the quality work coming out will set a fast pace. The "jury" of thirty-three participants interviewed for this study gave the SERB high grades for decisional personnel, moderate scores for procedures, and low marks for delays, election processes, and impasse procedure timing. Those grades can be expected to improve when, in 1985, a body of SERB case law and practices finally takes shape.

---

237. Presumably the SERB would issue the general rule and then adjudicate the specific factual settings that came within the broad scope of the rule.

# A SEPARATE PEACE: RECOMMENDATIONS UPON REVIEW OF THE SERB'S FIRST YEAR\*

*James T. O'Reilly\*\**

IT WAS A few years ago, during the unpopular Vietnam War, that Hollywood brought us the dramatic movie "A Separate Peace." The concept of the dramatist was that people in the midst of great governmental conflicts could declare peace for themselves. I believe it was Senator George Aiken who expressed the same frustration with the same war and said, "Let's declare victory in this war and get out of it."

Our colloquium today deals with the State Employment Relations Board's (SERB) first year, and my speech focuses in particular upon the Board's unit determinations and elections processes. When I was writing my book about the new Public Employees' Collective Bargaining Act (Act)<sup>1</sup> in 1983, and again in 1985 when I conducted thirty-three interviews for this presentation, I heard a number of people express hope that labor peace would come to Ohio's public sector employment.

Well, I am pleased to announce that the war of labor relations in Ohio is quieter today, but it is still on. This war is more popular than Vietnam, has fewer people missing in action, and has cost much less. I was drafted out of law school into the infantry, so I have some sympathy with city councils and school board members as well as the union stewards who find their production of public services altered by the new system. But as with Vietnam, there are many people who question basic operating assumptions which the legislature, and its creation, the Board, have used.

My message today is that the Ohio Legislature declared the out-

---

\* Mr. O'Reilly gave the following speech at the Labor Law Colloquium on April 1, 1985 held at Case Western Reserve University School of Law, Cleveland, Ohio.

\*\* Lecturer in Law, University of Cincinnati College of Law. B.A., Boston College (1969); J.D., University of Virginia (1974).

1. OHIO REV. CODE ANN. §§ 4117.01-23 (Page 1984).

come of many conflicts under the law, awarding what I would call a "Separate Peace" for specific unions and specific cities even before the SERB could become involved. There were some major issues settled before the members of the Board first considered the potential for joining this new and daring group. Separate peace negotiations which did not involve the people assigned to fight the day to day war tend to make for further conflict. Yes, there is a more peaceful form of combat today, but no, we cannot stand here and declare the Act a victory.

I want to commend Case Western Reserve Law School for airing different views in today's forum. I have read each Board decision, each hearing officer recommendation, and all the handful of court cases to date. To add some legal realism to that case-method approach, I interviewed thirty-three people directly affected by the Act on all sides of the issues. What follows is my personal call for legislative and administrative solutions to address the Board's first year problems, as seen by its constituents.

### I. UNIT DETERMINATION ISSUES

Professor Sharpe asked that I discuss unit determinations and elections. Derek Bok, the renowned labor law scholar who is now president of Harvard University, said in a 1983 article that:

[M]ore than half the work of the National Labor Relations Board is devoted to defining the proper employee unit in which to hold elections and forcing an intricate body of rules governing the electioneering behavior of unions and employers. Unit determinations often consist of fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is served.<sup>2</sup>

Bok then noted that the cost of a Harvard unit determination for clerical workers at the medical school had been over one hundred thousand dollars, and "[e]ven a rich country cannot afford to spend such sums on issues of this kind."<sup>3</sup>

Can a rich country, or an individual rust-belt state with severe tax base problems, spend such sums on building public sector labor law principles? I prefer to put it this way: Can Ohio afford *not* to innovate in its labor relations system? I think not!

---

2. Bok, *President's Report for 1981-82*, reprinted as Bok, *A Flawed System*, 55 N.Y. St. B.J. 8, 10 (Oct. 1983).

3. *Id.*

## II. THE BOARD'S FUTURE DEPENDS ON RESOURCES

A vital fact of the first year of the State Employment Relations Board is the money that was not there. One of the factors which held the Board's budget to about fifty percent of the promised funding was a fear among smaller cities that the Board would impact them with tremendous new costs for unit disputes, election proceedings, bargaining, unfair practice hearings, grievances, and conciliations.<sup>4</sup> It was interesting to interview some of those people affected by the Act who had a perspective on the political reality. Those who would talk freely off the record reflected concern that the new Act would cost Ohio employers inordinate amounts of money. None of us know the cumulative transaction costs yet.

I have a sense, perhaps an inchoate or undefined conclusion, that the Board itself shares in the cumulative lack of information about costs and results. But the second year certainly will not open with brighter financial prospects. The Board, undercut in its first year by a disappointing budget given it by the state controlling board, heads into the most dangerous battle of its young life as the state employee elections loom ahead. None of us knows what the costs of state employee elections and related disputes will be. The parties may be surprisingly cooperative, or the cumulative cost may be as Bok has suggested: too much even for a rich country (or a poor state) to afford.

More importantly, none of us knows whether the Board can deal effectively with the huge workload which comes in its second year with the state employee unit maintenance functions, once units are set and elections are held. Will the money be there for multi-site unfair labor practice hearings? What will the prison guards conciliation produce, and at what costs? The Board will be just one of the sources of solutions and of costs, more important than the state's general departments which propose outcomes, but surely less "final" a source than the courts of appeals and the Ohio Supreme Court.

## III. PROCESS AND BACKLOGS

The primary issue in the survey interviews was delay.<sup>5</sup> Many

---

4. Jadrnak, *Government Fears Loss of Control, Costs*, Cinn. Enquirer, Apr. 1, 1984, at B-2, col. 3.

5. *E.g.*, Telephone interview with Ronald Janetzke, AFSCME (Jan. 23, 1985) [hereinafter cited as *Janetzke Interview*]; Telephone interview with John Coleman, Ohio Municipal League (Jan. 24, 1985).

participants commented that backlogs should have been dealt with by the application of more resources, though most acknowledged that the shortfall was the result of legislative failings.<sup>6</sup> In the worst case, the city of Athens went through a voluntary consent recognition process, then went through mediation, factfinding, and conciliation before receiving a belated notice from the Board that the voluntary unit for which the settlement had been reached, was being rejected and two separate units created.<sup>7</sup>

Delay, fed by resource shortages, has been addressed by the exceptional efforts of Ken Barrett,<sup>8</sup> Jackie Davis,<sup>9</sup> and the SERB's staff professionals, but there is still too long a pipeline and too little guidance. The candor of those interviewed was refreshing; one said he didn't think the unit offered was so bad, but in the absence of any guidance from the Board, the best way to protect his city was to object to the unit and see what the Board decided as its precedents.<sup>10</sup>

Delay was a secondary problem, in some respects. The legislature exhibited a curious willingness to sign separate peace agreements with many different factions as the legislation rolled through the Senate and House. Ironically, the bill won on a straight party line vote in one house and almost a party line vote in the other, so one would think few compromises were necessary. But faculty members disagreed with the Supreme Court decision in *NLRB v. Yeshiva*,<sup>11</sup> and they won legislative reversal.<sup>12</sup> The city of Dayton did not like units with police supervisors, so they were carved completely out of the Act.<sup>13</sup> Municipalities with 2,000 people had been excluded but after some late horse trading, a 5,000 figure appeared which status can be changed only once every ten years regardless of growth or decline in population.<sup>14</sup> Country courthouse politics, a Byzantine world in Ohio political history, won a reprieve from employee rights through some innocuous words with the result of major exclusions from employee rights. Historians can assert that

---

6. E.g., *Janetzke Interview*, *supra* note 5.

7. See City of Athens, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 1154 (Ohio SERB Sept. 7, 1984).

8. Executive Director, SERB.

9. General Counsel, SERB.

10. Telephone interview with Lawrence Barty, Taft Stettinius & Hollister (Feb. 4, 1985) [hereinafter cited as *Barty Interview*].

11. 444 U.S. 672 (1980).

12. See OHIO REV. CODE ANN. § 4117.01(F)(3) (Page 1984).

13. See *id.* § 4117.01(F)(2).

14. See *id.* § 4117.01(B).

none of these bargains needed to be made; that Ohio Governor Celeste had the majority needed for the bill; and that unit determinations would be easier without the ad hoc exclusions. But we are realists first and historians second; I am sure that political reasons can be found to justify each one of the exclusions.

A study of overfragmentation of unit structure in other states could take much more time than we have available this afternoon. Suffice to note that one-person units are officially in place in Ohio;<sup>15</sup> that unions and employers alike are dissatisfied with the way sheriffs' offices of twenty-five people can now be broken into four or five units;<sup>16</sup> that the smaller the unit, the higher the loaded per member cost of providing bargaining services;<sup>17</sup> and that the Act gives the union full discretion to choose not to serve a small unit within a represented office.<sup>18</sup>

Let me suggest that the war of unit determinations need not have been so hard for the Board in its first year. The wars of adjudication ahead need not be so difficult or costly. The Board can use its powerful weapon of *rulemaking*, which is now gathering dust in the Ohio Revised Code.<sup>19</sup> Consequently, it can reject the high transaction costs of micro-decisionmaking and instead move toward macro-policymaking. The Board, using its powers to adopt regulations, can resolve the top administrative problem which all sides had during its first year—guidance on substantive policy. Also it can pass the responsibility back to the legislature to concur in Board policies on sensitive questions of unfinished legislative business.

Rulemaking has an important role to play in public sector bargaining controls. Rulemaking reduces the cost per transaction of settling recurring policy issues. It creates a fixed transaction cost for policy determination, saving local and state government, unions, and workers money they would otherwise have to spend for individual dispute resolution of policy issues. Adjudication procedures are great for "who shot John" questions, but not for the great mass of policy issues which will come before the Board in its first few years. There is no effective equivalent to rulemaking for that purpose.

---

15. Fraternal Order of Police, No. 84-VR-05-0941 (Ohio SERB Dec. 5, 1984) (certification issued).

16. See, e.g., *Barty Interview*, *supra* note 10.

17. See, e.g., Telephone interview with Paul Berninger, Porter, Wright, Morris & Arthur (Feb. 5, 1985).

18. See, e.g., *id.*; see also OHIO REV. CODE ANN. § 4117.05 (Page 1984).

19. OHIO REV. CODE ANN. § 4117.02(H)(8) (Page 1984).



From the Board's viewpoint, rulemaking is the unknown, the terra incognita of policy formation. However, the genius of legislators in passing the buck to an agency can be matched by reading chapter 119 of the Ohio Revised Code. The agency drafts a proposed rule, such as a policy which fills a gap in the unit powers of section 4117.06 and then sends it to the legislature. If the rule addresses a political question, the arrival of the rule stirs up the forces of political compromise, and the legislators either fix the law or accept the rule. In the meantime, the Board faces the people who want to bring comments, statistics, tables and charts, and it prudently listens and decides. Again, this is a power the Board has sitting on the closet shelf. Why has rulemaking not been used?

Microdecisions about specific units have been made, and people with slightly different units have been puzzled. Viewed from the outside, the Board declines to rule on questions until the right factual case comes before it. It is blessed with three gifted members, but none of them have extensive experience with the rulemaking powers of modern administrative agencies. Consequently, it defers necessary policy decisions because the "right" adjudicatory setting has not yet arisen. That is a legitimate strategy for a one-dimensional task; a judge will decide no case before it is ripe, just as Paul Masson will sell no wine before its time. But there is another dimension to policy development.

The Board should be asking the legislative branch either to confirm its rulemaking policy choices or to supply the money to do more of the adjudicatory tasks needed to resolve a dozen or a hundred naggingly similar cases. Practitioners from all sides scratch their heads in frustration at the lack of guidance from above. Why not rulemaking?

One answer may be the illusion that rulemaking will not work because the National Labor Relations Board (NLRB) has not used its rulemaking power. However, rulemaking did not become respectable until long after the NLRB members had learned a lesson in coalition building. The consensus of the NLRB's majority among its five quasi-judges can be a frustrating defeat for the policy dissenters. But the dissenters know that someday they will have the majority votes through a new appointment or a change in presidents, and then, *voilà*, federal labor policy will be different. My experience working for a former chairman of the NLRB educated me to the shortcomings of the concept that a prudent and enduring policy will be built upon the number of votes in this month's coalition.

By the time rulemaking became a respectable first-line activity for federal agencies in the 1960's, the NLRB had been making its policy by the same system of coalitions for thirty years, and adjudicated approaches to unit determinations had become what Bok called "fine-spun, even contradictory principles."<sup>20</sup>

Let us look critically at why prospective rulemaking makes more sense for Ohio's Board than it might for the NLRB. Of course, there is a continuity among employers here which is lacking in the private sector. The historical break with the past policy is a live issue here. While few of today's practitioners remember labor relations before 1935, many more topics have been ruled on by the legislative committees than is the case for the NLRB. Let us take the NLRB and the SERB and, using unit determinations as a context, examine why rulemaking is superior to a policy of following the adjudications-only model of the NLRB.

First, SERB has specifically declared its independence of the federal NLRB's decisions. In *Cleveland City Board of Education*,<sup>21</sup> Chairman Day, speaking for the Board, criticized the federal labor agency for an "undulating course of doctrine [which] suggests the possibility of alternative persuasions or, at least, a choice."<sup>22</sup> On a few occasions, Board hearing officers have held the NLRB decisions to be presumptively or actually controlling, and the Board has not been receptive to those individual decisions, adopting the hearing officers' findings but not their rationales.<sup>23</sup>

The second principle is that the legislature considered a junior model NLRB but chose not to accept it.<sup>24</sup> A five member board with an independent general counsel, and a great deal of structural independence, was included in the 1975 and 1977 bills. The power of the Board was reduced from all sides during the 1983 legislative session, losing unit determination options as discussed above, but most significantly it lost two of the five members and the independent role of the Board for prosecuting its own cases.<sup>25</sup> The 1983 structural changes reduced any similarity to a federal model, and they do not incorporate the NLRB separation of powers principle

---

20. See *supra* note 2.

21. *Cleveland City Board of Educ.*, 2 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 2182 (Ohio SERB Feb. 15, 1985).

22. *Id.*

23. *Ohio Civil Service Employees' Ass'n and Hamilton County Dep't of Human Servs.*, 2 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 2086 (Ohio SERB Jan. 16, 1985) (resolution accepting the hearing officer's recommendation but not his rationale).

24. J. O'REILLY, OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING § 2.01 (1984).

25. *Id.*; see also OHIO REV. CODE ANN. § 4117.02(A), (E) (Page 1984).

under which one entity charges the violation and a separate entity decides the merits. Merger of the two roles in the three Board members weakens the insulation which the Board would otherwise enjoy from constitutional due process challenges.

Third, the NLRB has matured so that its well-oiled field machinery contrasts sharply with the SERB. Reductions of NLRB funding are vigorously opposed by an established constituency. The SERB budget enjoys no such grassroots support. Consequently, the SERB was a sitting duck when the budget shortfalls of February, 1984 cut the Board's funding in half. The Board was told that it could not expect the level of funding which its members considered essential. The NLRB has not suffered the indignities which the new SERB endured because the NLRB has political protection supplied by the labor movement. Ohio teamsters have begun to notice the political side of the funding aspects; SERB's budget cuts were noted in a number of my interviews with union people as a sore point.<sup>26</sup> Any funding increases may be too little and come too late in 1986.

Fourth, adjudication as a means to set central policy is not cost efficient. The NLRB has two regional offices in the state, with the Cincinnati office disposing of more unfair labor practice cases than the SERB has faced in its first year. Most cases are settled because the guidance has been in place for so long. The transaction costs to the private sector respondents are predictable; government shares in the costs by routinely sending its investigators out to the site and assigning its administrative law judges to conduct a hearing in a nearby location. Central policy can be determined on a basis comparable to the Supreme Court's selection of cases for certiorari.

SERB has no money for this well-oiled adjudicatory selection process. It shifts the transaction costs largely to the unions and to the public employer in the form of travel costs to Columbus and the number of cases contested simply because no precedent exists on which to base nonhearing settlements. As transaction costs rise for unit determinations, unfair practice charges, and conciliations, the levels of frustration rise. Frustration comes when the union in Portsmouth or Toledo has to pay five witnesses and a lawyer and an administrator to travel to a Columbus hotel on Sunday night in order to attend a nine o'clock hearing the next morning on an unfair labor practice charge.<sup>27</sup> Frustration breeds reexamination of the

---

26. See, e.g., *Janetzke Interview*, *supra* note 5.

27. See *id.*

Board and the Act, when delays and postponements make for multiple trips to Columbus.

Dean Ernest Gellhorn<sup>28</sup> used to teach about economically rational behavior for lawyers and their clients. The lawyers frequently commented about the amount of time spent appearing before the Board hearing officers in Columbus;<sup>29</sup> in economic terms, the utility of Board procedures attendant upon hearings in one city, Columbus, is very much in doubt. Prehearing conferences are scheduled in person and in virtually every case, though the Board could either adopt the federal Social Security precedent of telephone conference calls for prehearing arrangements, or try again for regional office funding in at least four cities around the state to which parties can travel more easily.

The transaction costs of using adjudication fall on the parties, not on the governmental agency which determines the frequency, nature and content of the hearings under its statutory authority. As a result, the Board deferral of policy issues generates more transactions and more costs. It is difficult to criticize the Board since I have defended it so often with colleagues; but the criticism of transaction costs spent on policy determination is a fact of life for the Ohio taxpayer and the Ohio union member. Those who were brilliant could foresee these transaction costs of the war ahead, and they struck their separate peace in the legislative committees before the Act was adopted.

#### IV. WHAT RULES ARE RIGHT?

Having criticized the Board, I now have to offer a constructive remedy. What rules would the Board want to adopt to reach its goals? One would permit joint units of strike-eligible and strike-barred employees in offices smaller than twenty employees, for example, fire department civilian clerks with firefighters in small departments and jail janitors with jail guards in sheriffs' departments. Another rule would presume that the single-employee unit was so economically irrational that it could not have been intended by the legislature. Yet another might declare a statute of repose that the Board would not challenge a unit after sixty days from the date of filing of the voluntary consent statement by the two parties to a unit determination. Finally, the Board might rule that multiple units which heretofore included sergeants and police officers together

---

28. Dean, Case Western Reserve University School of Law, Cleveland, Ohio.

29. See *Janetzke Interview*, *supra* note 5.

could be validly bargained for, and settled in conciliation for, the two units in tandem. This latter suggestion recognizes the reality that delicately balanced pay scales for police officers, their supervisors, and their counterparts in firefighting often are designed together as one coherent arrangement.

There is some procedural tinkering to be done by rulemaking as well. Establishing telephone conference calls for prehearing conferences, declaring a fixed penalty for union withdrawal of election petitions, defining substantial evidence in card-counting situations, and relaxing the tight impasse deadlines by establishing an easy presumption for waiver of the deadlines upon consent are all possible changes that would enhance the Ohio system.

Topics beyond unit determinations lend themselves even more strongly to rulemaking principles. The issues which are presumed to be bargainable—the fair share fee issues, the religious criteria for exemption from dues, the union governance issues, and a number of the unfair practice charge issues—all could cut off repetitive debate with a set of guidelines adopted in rulemaking. If guidance is wanted, and most of those interviewed asked for better and clearer guidance, then the rule drafting process offers a superior public forum.

## V. FORCING LEGISLATORS' ATTENTION

The genius of using chapter 119 rulemaking is that the Board need not act in a vacuum, as it would in most adjudicatory situations. Decide a case by hearings and testimony and the legislature will pay virtually no attention unless and until courts reviewed the precedent, *if* the courts are called upon to do so. But decide the same principle, put it in a rule, and the legislature *must* respond when the rule sits before the legislature for its mandatory veto-eligible period. If the legislature really disagrees with the pragmatic interpretation adopted by the rulemaking board, then the legislators must voice their objections in a defined period of time. They cannot claim that policy “got away from the legislature’s intent” as readily as they might with adjudication.

If the Board could not use its rulemaking power, why is it there? There are gaps in the law, well recognized in recent opinions such as that of *City of Columbus*<sup>30</sup> which decried the lack of legislative

---

30. *City of Columbus*, 1 OHIO PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 1527 (Ohio SERB Dec. 13, 1984).

direction on alternative dispute resolution systems.<sup>31</sup> Why not fill the interstices actively and thoughtfully in a public process and by doing so force acceptance or amendment by the legislature?

If a lawyer rejects such rulemaking options and insists that the legislature alone can make the decision to fill the interstices of the law, I respond that the consequence of such a policy is to redraft the law into one hundred pages and try to anticipate a three-month amendment debate each year. Sometimes, and perhaps on labor issues in particular, we as law teachers have failed to explain the role of the administrative body (or perhaps that complaining person has failed to heed the experience of federal and other state systems as sources of his or her own learning about the law). It is the agency, like SERB, which interprets and implements, fills the gaps, and then defends its choices before the courts and legislative committees.

## VI. CONCLUSION

We have a good Board and an arsenal of useful powers, often constrained by the powerful factions which declared a separate peace in the drafting process. One unused weapon, substantive and procedural rulemaking, needs to be reconsidered.

It is easy to raise objections of several kinds to any list of proposed rules. It will be even easier to object to defined outcomes when the state employee cases begin. These issues could be disposed of by advance rulemaking which establishes a set of defined criteria or principles, prospectively, and with an opportunity for legislators to object.

It is not today's mission to determine *which* substantive rule fits *which* Board need, but I want to stimulate the Board to see its second dimension, rulemaking. If we go into the second year with the benefit of that second dimension, the more predictable, more reasoned Board policies of the second dimension will give us predictability of action under the State Employment Relations Act. And who knows? If we ever have predictability, stability and rational action, we could all declare victory and go home!

---

31. *Id.*