

**SERB OPINION 2015-001**

STATE EMPLOYMENT  
RELATIONS BOARD

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

In the Matter of

International Union of Operating Engineers, Local 20,

Employee Organization,

and

City of Hamilton,

Employer.

Case No. 2015-REP-01-0004

**ORDER GRANTING PETITION FOR CLARIFICATION OF BARGAINING UNIT  
(OPINION ATTACHED)**

Before Chair Zimpher and Vice Chair Schmidt: October 29, 2015.

The International Union of Operating Engineers, Local 20 ("Employee Organization" or "Union") is the deemed-certified exclusive representative of a bargaining unit comprised of approximately 67 employees of the City of Hamilton ("Employer" or "City"). The City owns and operates its own municipal electric utility system. Electric generation, transmission, and distribution fall within its Department of Electric.

On January 6, 2015, the Union filed a Petition for Clarification of Bargaining Unit seeking to clarify whether City employees working at the City's Meldahl Hydroelectric Power Plant in the job classification of Meldahl Plant Operator are members of the existing deemed-certified bargaining unit. On January 29, 2015, the Employer filed objections to the petition claiming that the State Employment Relations Board ("SERB" or "the Board") does not have jurisdiction over the employees at the Meldahl Hydroelectric Power Plant, as the plant is physically located in the state of Kentucky. Additionally, the Employer asserts that a Petition for Clarification of Bargaining Unit is not the proper mechanism to address the bargaining-unit status of the employees in question.

On April 16, 2015, SERB directed this case to a hearing to determine jurisdiction and the bargaining-unit status of the employees in question. On May 12, 2015, a procedural order was issued ordering the parties to submit stipulations of fact and legal briefs regarding whether SERB has jurisdiction to determine the bargaining-unit status of the employees working at the City's Meldahl Hydroelectric Power Plant in the job classification of Meldahl Plant Operator and, if so, whether the Board should clarify the

Directive Granting Petition for Clarification of Bargaining Unit  
Case No. 2015-REP-01-0004  
Page 2 of 3

existing deemed-certified bargaining unit's description to include the job classification of Meldahl Plant Operator, thereby including these employees in the existing deemed-certified bargaining unit. The parties timely filed their stipulations of fact and briefs.

On August 17, 2015, Administrative Law Judge Marcie M. Scholl (ALJ) issued a Recommended Determination, recommending the Board find that: **(1)** SERB has jurisdiction to consider the bargaining-unit status of the City employees assigned to the Meldahl Hydroelectric Plant located in the State of Kentucky; **(2)** a Petition for Clarification of Bargaining Unit filed pursuant to O.A.C. § 4117-5-01(E)(2) is the proper mechanism to address the question of whether the Meldahl Plant Operator job classification is properly included in the existing bargaining unit; **(3)** the existing deemed-certified bargaining unit's description properly includes the job position/classification of Meldahl Plant Operator and; **(4)** the employees in the Meldahl Plant Operator job classification working at the Meldahl Hydroelectric Plant should be included in the existing bargaining unit.

On September 8, 2015, the Employer filed Exceptions to the Recommended Determination. On September 18, 2015, the Union filed its Response to Exceptions. Thereafter, the Board reviewed the record.

After reviewing the Recommended Determination, exceptions, response to exceptions, the parties' stipulation of facts and legal briefs, and all other filings contained in the record, the Board adopts the reasoning set forth in the ALJ's Recommended Determination finding that SERB has jurisdiction to consider the bargaining unit status of the employees assigned to the City's Meldahl Hydroelectric Plant and that the existing deemed-certified bargaining unit description properly includes the job position/classification of Meldahl Plant Operator. Accordingly, the Board adopts and incorporates by reference the Findings of Fact, Analysis and Discussion, Conclusions of Law, and Recommendations set forth in the Recommended Determination; grants the Employee Organization's Petition for Clarification of Bargaining Unit; clarifies the existing deemed-certified bargaining unit's description to include the job position/classification of Meldahl Plant Operator; and includes the employees in the Meldahl Plant Operator job classification working at the Meldahl Hydroelectric Plant in the existing bargaining unit in accordance with O.A.C. § 4117-5-01.

IT IS SO ORDERED.

ZIMPHER, Chair; and SCHMIDT, Vice Chair, concur.

  
W. CRAIG ZIMPER, CHAIR

Directive Granting Petition for Clarification of Bargaining Unit  
Case No. 2015-REP-01-0004  
Page 3 of 3

### TIME AND METHOD TO PERFECT AN APPEAL

This is a final appealable order. Any party that desires to appeal this order of the State Employment Relations Board shall file a Notice of Appeal setting forth the final order appealed from and the grounds of appeal with the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of the State Employment Relations Board's order. The Notice of Appeal shall also be filed with the State Employment Relations Board, at 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Revised Code Section 119.12.

### CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 20<sup>th</sup> day of October, 2015.

  
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ANGELA PHELPS-WHITE  
LABOR RELATIONS ADMINISTRATOR

**SERB OPINION 2015-001**

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

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 20,

CASE NO. 2015-REP-01-0004

Employee Organization,

MARCIE M. SCHOLL  
Administrative Law Judge

and

CITY OF HAMILTON,

**RECOMMENDED DETERMINATION**

Employer.

**I. INTRODUCTION**

On January 6, 2015, the International Union of Operating Engineers, Local 20 (Union), filed a Petition for Clarification of Bargaining Unit under Ohio Administrative Code (O.A.C.) § 4117-5-01(E)(2),<sup>1</sup> seeking to clarify if City of Hamilton (Employer) employees working at the Meldahl Hydroelectric Power Plant in the classification of Meldahl Plant Operator are members of the bargaining unit. On January 29, 2015, the Employer filed objections claiming the State Employment Relations Board (SERB) does not have jurisdiction over the employees at the Meldahl Hydroelectric Power Plant, as it is physically located in the state of Kentucky. Additionally, Employer asserts the Union should have filed a Petition for Amendment of Certification. On April 16, 2015, SERB directed this case to hearing to determine jurisdiction and the bargaining unit status of the employees in question.

On May 12, 2015, a procedural order was issued ordering the submission of stipulations with regard to the facts of this case as well as briefs on the question of whether or not SERB has jurisdiction to determine the bargaining unit status of the employees in question and, if so, what that bargaining unit status should be. Both parties submitted stipulations and briefs by the June 19, 2015 deadline. This appears to be a case of first impression before the Board.

**II. ISSUES**

1. Does SERB have jurisdiction to determine the bargaining unit status of the employees assigned to the Meldahl Hydroelectric Power Plant?
2. Is a Petition for Clarification of Bargaining Unit the proper mechanism to address the bargaining unit status of the employees at the Meldahl Hydroelectric Power Plant?
3. Are the employees assigned to the Meldahl Hydroelectric Power Plant in the classification of Meldahl Plant Operator part of the existing bargaining unit?

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<sup>1</sup> All references to statutes are to the Ohio Revised Code, Chapter 4117 and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117.

### **III. SPITULATIONS OF THE PARTIES**

1. The City of Hamilton is an Ohio municipal corporation, the county seat of Butler County, and has an approximate population of 62,000.
2. The International Union of Operating Engineers, Local 20 is the deemed-certified exclusive representative of a bargaining unit comprised of approximately 67 City employees.
3. The City owns and operates its own municipal electric utility system.
4. Electric generation, transmission, and distribution fall within its Department of Electric.
5. In 2010, the City and American Municipal Power, Inc. obtained a license issued by the United States Federal Energy Regulatory Commission ("FERC") to develop a new, renewable energy hydroelectric generating facility called the Meldahl Hydroelectric Project ("Meldahl Project" or "Project").
6. The Meldahl Project is located on the southerly side of the Ohio River in Bracken County, Kentucky. The address of the Project is 9505 Mary Ingles Highway, Foster, Kentucky 41043.

### **IV. FINDINGS OF FACT<sup>2</sup>**

1. The City is a "public employer" within the meaning of O.R.C. § 4117.01(B). (E. Br. p. 3)
2. The IUOE is an "employee organization" within the meaning of O.R.C. § 4117.01(D). (E. Br. p. 3)
3. IUOE bargaining unit members are "public employees" as defined by O.R.C. § 4117.01(C). (E. Br. p. 3)
4. The City of Hamilton ("City") and the Union are parties to a collective bargaining agreement, which terminated on August 31, 2013. Despite negotiations for a successor agreement and participating in fact-finding, no new agreement was reached. Therefore, the parties are operating under the terms and conditions of the expired agreement. (Er. Br. p. 1)

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<sup>2</sup> References to the Employer's Exhibits in the record are indicated parenthetically by "Er. Ex.," followed by the exhibit letter. A reference to the Employer's Brief in the record is indicated by "Er. Br.," followed by the page number. References to the Employee's Attachments in the record are indicated parenthetically by "E. Attach.," followed by the attachment number. References to Employee's Brief in the record are indicated parenthetically by "E. Br.," followed by the page number. References to the exhibits and attachments in the Findings of Fact are for convenience only and do not suggest that such references are the sole support in the record for that related finding of fact.

SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 3 of 10

5. Both prior and subsequent to becoming the deemed certified exclusive representative of a bargaining unit of public employees of the City of Hamilton, IUOE Local 20 bargaining unit members continuously have performed the duties of hydroelectric plant operators (under varying classification descriptions) for the City of Hamilton within its self-owned and operated municipal electric utility system. (E. Br. p. 1)
6. The duties of the Meldahl Plant Operators are, excepting perhaps the operation of more modern equipment, virtually identical to those of bargaining unit members classified as Plant Utility Worker, who have operated hydroelectric plants for the City in the State of Ohio for decades. (E. Br. p. 2)
7. The City's electric generating facilities include the Third Street Power Plant (coal and natural gas) located in Hamilton, Ohio; the Ford Canal Hydroelectric Plant located adjacent to the Third Street Power Plant in Hamilton, Ohio; the Greenup Hydroelectric Power Plant located on the Ohio River in Franklin Furnace, Ohio; and most recently, the Meldahl Hydroelectric Plant located on the Ohio River in Foster, Kentucky. (E. Br. pp. 3-4)
8. The Department of Electric includes several bargaining unit positions, including Plant Utility Worker and Hydroelectric Operator, both of which are identified in the parties' labor agreement. (E. Br. p. 4)
9. The current Plant Utility Worker classification is derived from 2 former classifications: Hydro[electric] Operator, and Auto[matic] Equipment Operator I. (E. Br. p. 4)
10. On or about May 31, 1979, the duties of those 2 former classifications were merged into a single classification of Power Plant Utility Worker. (E. Br. p. 4)
11. The Power Plant Utility Worker Classification is reflected in the City's 1983 Classification and Compensation Plan. (E. Br. p. 4)
12. At the time Local 20 was deemed certified, the classification of Power Plant Utility Worker (comprised in part of the duties of the former classification of Hydro[electric] Operator) was and remained in the bargaining unit. (E. Br. p. 4)
13. The current classification of Plant Utility Worker constitutes the formerly titled Power Plant Utility Worker classification. (E. Br. p. 4)
14. Plant Utility Workers are employed at the City's Third Street Power Plant and adjacent Ford Canal Hydroelectric Plant. Their duties include the operation, inspection, maintenance, monitoring, and recording of the various systems comprising the Ford Canal Hydroelectric Plant, and those duties have and continue to be performed by IUOE Local 20 bargaining unit members. (E. Br. pp. 4-5)
15. The City acquired the Greenup Hydroelectric Plant in or about 1988. At the time of acquisition, the City and Local 20 executed a Memorandum of Agreement recognizing hydroelectric

SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 4 of 10

operators at the Greenup Hydroelectric Plant as included in the bargaining unit, and amended their collective bargaining agreement accordingly. The classification of Hydroelectric Operator was established. The duties of Hydroelectric Operators (Greenup) were and continue to be performed by IUOE Local 20 bargaining unit members. (E. Br. p. 5)

16. The City established a classified service description for the position of Meldahl Plant Operator. In 2014, the City filled 8 vacancies in the Meldahl Plant Operator classification; 2 vacancies were filled by the transfer of Hydroelectric Operators from the Greenup Hydroelectric Plant, and 6 were filled with new hires. Subsequently, 1 of the new hires transferred to the Greenup Hydroelectric Plant, but quit before assuming the position. Two vacancies currently exist in the Meldahl Plant Operator classification. (E. Br. p. 5)
17. Meldahl Plant Operators are employed in the classified service of the City of Hamilton. They receive their paychecks from the City of Hamilton, and participate in OPERS. They are subject to the City's employment policies and procedures, and subject to the City's Civil Service Commission. The City already has acknowledged to the Board that it hires and employs the Meldahl Plant Operators. (E. Br. p. 6)
18. Kentucky has no comparable Public Employees' Collective Bargaining Act purporting to define "public employee" or "public employer." (E. Br. p. 10)
19. Kentucky law requires all out-of-state employers performing work in Kentucky to carry a separate insurance policy through an approved carrier in accordance with Kentucky's Workers' Compensation Act. (E. Br. pp. 10-11)

## V. ANALYSIS AND DISCUSSION

### I. SERB Jurisdiction

The first question presented is whether SERB has jurisdiction over employees assigned to the Meldahl Hydroelectric Power Plant since their work location is located outside of Ohio? Section 4117.01(B), defines "public employer" in relevant part as:

(B) "Public employer" means the state or any political subdivision of the state located entirely within the state, including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census[.] . . . "Public employer" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

There is no dispute as to whether or not the City is located entirely within the State of Ohio and that it has a population of approximately 62,000 residents. In this case, these two criteria are all that is required for the City to meet the definition of a public employer.

Section 4117.01(C) defines a "public employee" in pertinent part as:

SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 5 of 10

(C) "Public employee" means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer[.]

The employees in question are not under the jurisdiction of the NLRB nor do they meet any of the seventeen exceptions listed in § 4117.01(C). The City proffers that because the employees are assigned to a work site in another state, they are outside the jurisdiction of SERB. Nowhere in the definition of "public employee" does it speak to any geographic limitations on an employee's work site. The Union points to *State ex rel. Natalina Food Co. v. Ohio Civil Rights Com'n*, 55 Ohio St.3d 98 (1990) as controlling in this case. The Ohio Civil Rights Commission (OCRC) had the authority to hear a claim of discrimination brought by an employee of an Ohio company that lived and worked in West Virginia. *Id.* at 100. The company, Natalina, was unable to cite any "statutory or constitutional authority that definitively prevents the OCRC from exercising jurisdiction over the claim of a nonresident employee who works outside Ohio for an Ohio employer." *Id.* Just as in *Natalina*, there is no statutory or constitutional authority preventing SERB from exercising jurisdiction over the employees at the Meldahl Hydroelectric Plant.

The City points to § 4117.02(J) as evidence the jurisdiction of SERB is limited to those assigned to work sites in the State of Ohio. This reading is to misunderstand the context of the statute. The statute is speaking to the physical office or meeting location of the Board and not the employees it has jurisdiction over. Section 4117.02(J) reads in full:

**(J) The principal office of the state employment relations board is in Columbus, but it may meet and exercise any or all of its powers at any other place within the state. The state employment relations board may, by one or more of its employees, or any agents or agencies it designates, conduct in any part of this state any proceeding, hearing, investigation, inquiry, or election necessary to the performance of its functions; provided, that no person so designated may later sit in determination of an appeal of the decision of that cause or matter. (emphasis added).**

Additionally, the City uses § 4117.02(K)(5) to attempt to show the Board does not have jurisdiction over the employees in the Meldahl Plant Operator classification. This reading also misunderstands the context of the statute. This section speaks to some of the many services SERB must provide. Collecting information relating to conditions of employment does not imply geographical limits. Simply because this section states "public employees throughout the state," it does not imply employees assigned to work sites outside of the State of Ohio are excluded. Section 4117.02(K)(5) reads in full:

**(K) In addition to the powers and functions provided in other sections of this chapter, the state employment relations board shall do all of the following:**



SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 6 of 10

(5) Make studies and analyses of, and act as a clearinghouse of information relating to, conditions of employment of public employees throughout the state and request assistance, services, and data from any public employee organization, public employer, or governmental unit. Public employee organizations, public employers, and governmental units shall provide such assistance, services, and data as will enable the state employment relations board to carry out its functions and powers.

In its brief, the City points to the requirement it must comply with the laws of Kentucky. This requirement imposed by Kentucky, on out of state employers does not excuse the City from also complying with applicable Ohio law. In referencing the City's requirement to comply with the Kentucky Worker's Compensation Act and carry workers' compensation insurance on their employees in Kentucky, it fails to disclose those employees have the ability to file a claim under the City's Ohio policy or the Kentucky policy. "Revised Code Section 4123.54 states: 'If any employee ... [is] awarded workers' compensation benefits ... under the laws of another state, the amount awarded ..., whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee ... by the bureau.' *Turner v. Admr.*, 2003-Ohio-2405, ¶ 16 (2nd Dist. Miami). There is no conflicting Kentucky law with the Ohio Public Employees' Collective Bargaining Act. Even if such a law existed, the employees are under the control of the City and thus the jurisdiction of SERB.

The City points to language the Union wanted in the successor CBA as evidence the Union recognized SERB's lack of jurisdiction over the employees working at Meldahl. However, the proposed language states in part, "... should the Employer decide to retain current non-unit staff in such new facility . . ." It is not contested the City acquired a new facility; the new facility did not come with employees. The City hired six new employees and transferred two from the Greenup Hydroelectric Plant. Even if this language survived in the CBA, it would not apply to the current situation.

Meldahl Plant Operators are employed in the classified service of the City, receive their paychecks from the City, and contribute to the Ohio Public Employees Retirement System. Additionally, the City hires the employees, subject to the employment policies and procedures of the City, and subject to the City's Civil Service Commission. The Hydroelectric Operator, Plant Utility Worker, and Meldahl Plant Operator classification descriptions, all report to a supervisor. All of this evidence taken together leans heavily in the direction of the City having exclusive "right to control" over the terms and conditions of the employees work.

The Supreme Court of Ohio in *City of Hamilton v. SERB*, 70 OS(3d) 210, 1994 SERB 4-60 (1994) stated "[w]hether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created. See, also, *Natl. Transp. Serv., Inc.* (1979), 240 N.L.R.B. 565, where it was stated that under the National Labor Relations Act the 'right to control' test

SERB OPINION 2015-001  
 Case No. 2015-REP-01-0004  
 Page 7 of 10

contemplates 'whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.' *Id.* at 565"

The jurisdiction of SERB over matters arising out of § 4117 is well established. "The State Employment Relations Board has exclusive jurisdiction to decide matters committed to it under RC Ch 4117[.]" *The State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. Court of Common Pleas of Franklin County et al.*, 1996 WL 34403630, at \*1. "General Assembly has entrusted State Employment Relations Board (SERB) with responsibility of administering Ohio Public Employees' Collective Bargaining Act and has bestowed upon it the special function of applying the statute's provisions to the complexities of Ohio's industrial life; in so doing, it has delegated to SERB the authority to make certain policy decisions, and judicial review is limited to whether SERB's policy is unreasonable or in conflict with the explicit language." *Union of State, Cty. & Mun. Workers of Ohio v. Ohio Council 8, AFSCME, AFL-CIO, Local 1746*, 136 Ohio App.3d 147, 736 N.E.2d 55 (10th Dist.1999).

There are no statutory or constitutional exclusions of public employees employed by an Ohio public employer, but assigned to a work site in another state. Even though the employer must comply with some laws of Kentucky, it is not exempt from Ohio laws that may or may not overlap with Kentucky law. Using the "right to control" test, the employees working at the Meldahl Hydroelectric Plant are exclusively under the control of the City. Therefore, SERB has jurisdiction over the Meldahl Plant Operators.

## 2. Petition for Clarification of Bargaining Unit

The second issue to be addressed is whether the Petition for Clarification of Bargaining Unit is the proper mechanism for deciding if employees assigned to the Meldahl Hydroelectric Power Plant in the classification of Meldahl Plant Operator are members of the bargaining unit. The City contends the Union improperly filed a Petition for Clarification of Bargaining Unit when it should have filed a Petition for Amendment of Certification. O.A.C. § 4117-5-01(E)(1)(2) defines the differences between a Petition for Amendment of Certification and a Petition for Clarification of Bargaining Unit. O.A.C. § 4417-5-01(F) speaks to limitations on a Petition for Amendment of Certification submitted by a deemed certified bargaining unit. O.A.C. § 4417-5-01(G) states that the number of employees being added to a bargaining unit by a Petition for Amendment of Certification must be substantially smaller than the number of employees in the existing unit.

(E) In the absence of a question of majority representation, a petition for clarification of an existing bargaining unit or a petition for amendment of certification may be filed by the exclusive representative or by the employer. The purposes of such petitions are:

(1) For amendment of certification, to alter the composition of the unit by adding, deleting, or changing terminology in the unit description;

SERB OPINION 2015-001  
 Case No. 2015-REP-01-0004  
 Page 8 of 10

**(2) For clarification of a unit, to determine whether a particular employee or group of employees is included or excluded from the unit based upon the existing unit description and the duties of the employees in question. (emphasis added).**

(F) For a unit that is deemed certified pursuant to division (A) of section 4 of Amended Substitute Senate Bill 133 of the 115th General Assembly, **a petition for unit clarification or amendment may be filed at any time.** Unless a petition for amendment of such a unit is submitted by mutual request, the board will not consider amendment unless the petition is filed by the deemed-certified employee organization and is not opposed by the employer. (emphasis added).

(G) When a petition to amend certification seeks the addition of a group of employees to the existing unit, such addition may be permitted only if the number of employees to be added is substantially smaller than the number of employees in the existing unit.

It is of no small consequence the job duties of all three of these classifications are substantially similar. O.A.C. § 411.17-5-01(E)(2) hinges on whether or not a particular employee, or in this case, group of employees, is included or excluded from the unit on the existing unit description and the duties of the employees in question. *See, In re Ohio State Troopers Assn*, SERB 2000-003 (3-27-00). SERB has “jurisdiction to consider petitions to clarify a ‘deemed certified’ bargaining unit; this jurisdiction is exclusive.” *Ohio Council 8 v. State Emp. Relations Bd.*, 9th Dist. Summit No. 18829, 1998 WL 668265, \*4 (Sept. 30, 1998) sub nom. *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO v. State Emp. Relations Bd.*, 88 Ohio St.3d 460, 2000-Ohio-370, 727 N.E.2d 912 (2000).

SERB held clarification of a bargaining unit “is basically a ruling by SERB that a position is covered by the existing unit description’s wording. Clarification may involve a change in the membership of the unit, not a change in the nature or description of the work. In other words, an employee may be added by ‘clarification’ into the unit if her duties are similar to the duties of the employees already in the unit.” *In re Greene County Career Center Classified Employees Assn*, SERB 2006-006 (6-28-06). *See, also In re Pickaway Cty. Human Servs. Dept.*, SERB No. 95-015 (Sept. 29, 1995). Based on the comparison of the three job classifications in question, no change to bargaining unit duties or responsibilities will occur. There is strong support for this as evidenced by the City transferring two current bargaining unit members to the Meldahl Hydroelectric Plant. The City contends that since the current agreement under Article I, Section I, does not list the Meldahl Plant Operator classification, SERB should exclude it. More compelling is the group of positions specifically excluded. The current agreement “excludes all office employees, electricians, supervisors and others having the power or authority to hire, fire or impose discipline or effectively to recommend such action.” The Meldahl Plant Operator classification duties and responsibilities do not fall within any of the specifically excluded groups listed.

SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 9 of 10

Clarification will change the names on the roster of the bargaining-unit, but the work is substantially similar to those employees already covered by the collective bargaining agreement. There are no new job classifications with dissimilar duties from those already in existence attempting to be injected into the existing bargaining unit. "As used in OAC 4 117-5-01 and OAC 4117-5-02, 'amendment' of the certification of a bargaining unit is a 'redesigning' with new bounds for membership; 'clarification' of a unit, on the other hand, involves a factual inquiry as to 'whether a particular job description brought the job within or outside the boundaries of an included or excluded job category.'" *In re University of Cincinnati (University Hospital)*, SERB 85-022 (5-24-85).

The City is concerned the addition of those in the Meldahl Plant Operator classification will upset the status quo of the unit. However, by adding names of employees, two of which are already members of the bargaining unit and performing substantially similar duties, SERB is not interfering with the status quo. "When bargaining units are amended, there is greater potential for interference with the status quo of the unit than when a unit is clarified [.] \* \* \* [U]nit clarification does not alter the status quo, but rather maintains it." *Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 2012-Ohio-2364, 971 N.E.2d 448, 456, ¶ 29 (10th Dist.). (quoting *In re Ohio Council 8, AFSCME*, SERB No. 95-021 (Dec. 29, 1995)). The issue of the Union having deemed-certified status is moot. Since the inclusion of the Meldahl Plant Operator class will not alter the status quo or the content of the work being performed by employees in the bargaining unit, the petition for clarification is proper.

### 3. Meldahl Plant Operator Representation

The third question to address is whether the employees assigned to the Meldahl Hydroelectric Power Plant in the position of Meldahl Plant Operator are part of the existing bargaining unit. This case involves the classifications of Meldahl Plant Operator, Hydroelectric Operator, and Plant Utility Worker. Plant Utility Workers operate the Ford Canal Hydroelectric Plant, Hydroelectric Operators are assigned to the Greenup Hydroelectric Plant, and Meldahl Plant Operators are assigned to the Meldahl Hydroelectric Plant. Having completed an in depth assessment of the job duties performed by these three classifications, it is not difficult to see they are substantially similar. The differences exist merely in class title, the order in which duties are arranged, and the verbiage used. Additionally, two current bargaining unit members in the class of Hydroelectric Operators from the Greenup Hydroelectric Plant transferred to fill two of the original vacancies at the Meldahl Hydroelectric Plant.

While the title listed on the classification descriptions are different, the duties are essentially the same. The City asserts that the duties amongst the three classifications are "distinctly different," but offers no evidence as to how they substantially differ. "The burden of establishing an exclusion from a bargaining unit under § 4117.01 rests upon the party seeking it." *In re State Employment Relations Board, Complainant Fulton County Engineer, Respondent*, 1996 WL 34403588, at \*17.

In *Toledo*, as in this case, the Union is asking SERB to look at the duties and responsibilities of the classification in question. *Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 2012-Ohio-2364, 971 N.E.2d 448, 457, ¶ 33 (10th Dist.). The College of Nursing faculty

SERB OPINION 2015-001  
Case No. 2015-REP-01-0004  
Page 10 of 10

members in *Toledo* fell within tenured and tenure-track faculty. *Id.* “AAUP–UT’s petition for clarification, filed pursuant to Ohio Adm. Code 4117–5–01(E)(2), did not seek to alter or amend the description of the bargaining unit by adding or deleting an entire job classification. Rather, **the petition asked SERB to determine whether the duties and responsibilities of the College of Nursing faculty members fell within the bargaining unit’s existing description of occupations and therefore should be included within the unit.** SERB’s clarification that the College of Nursing faculty members belonged within the unit thus was not a determination regarding bargaining unit appropriateness under R.C. 4117.06(A), but a determination that the appropriate bargaining unit, comprised of tenured and tenure-track faculty members, included the College of Nursing faculty members.” *Id.* (emphasis added). While Meldahl Plant Operator is not specifically listed in the collective bargaining agreement, it is consistent with the holding in *Toledo* they be allowed to join the existing bargaining unit based on duties and responsibilities. By adding the Meldahl Plant Operator classification to the bargaining unit, SERB is not adding an entire job classification. The difference between Meldahl Plant Operator and those classifications already in the bargaining unit are in name only. The duties and responsibilities remain the same, regardless of the class title. Based on the findings of fact, the City failed to meet its burden establishing why the Meldahl Plant Operator classification should be excluded from the existing bargaining unit.

#### **VI. CONCLUSIONS OF LAW**

1. SERB has jurisdiction over City of Hamilton employees in the Meldahl Plant Operator classification working at the Meldahl Hydroelectric Plant in the State of Kentucky under § 4117.
2. A Petition for Clarification of Bargaining Unit is the proper mechanism to address the question of whether employees in the Meldahl Plant Operator classification working at the Meldahl Hydroelectric Plant can be included in the existing bargaining unit in accordance with O.A.C. § 4117-5-01(E)(2).
3. Employees in the Meldahl Plant Operator classification working at the Meldahl Hydroelectric Plant should be included in the existing bargaining unit in accordance with O.A.C. § 4117-5-01(E)(2).

#### **VII. RECOMMENDATIONS**

It is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board admit those employees in the Meldahl Plant Operator classification working at the Meldahl Hydroelectric Plant into the existing bargaining unit in accordance with O.A.C. § 4117-5-01(E)(2).