

Bargaining Unit Exemptions

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BARGAINING UNIT EXEMPTIONS

Exemption Quick Guide

Confidential Employees	Employee works in personnel department, and deals with information used by employer in collective bargaining OR; Employee has a close and continuing relationship with officials participating in collective bargaining for the employer
Management Level Employees	Employee formulates policy, responsibly directs implementation of policy, has a major role in personnel administration, or participates in collective bargaining for the employer
Fiduciary Employees	Employee appointed pursuant to 124.11 and has a high degree of trust and confidence necessary for his or her job
Supervisory Employees	Employee has authority to do at least one of the following and uses independent judgment in carrying out that function: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action

Exemptions Defined and Explained

“Public employees” as defined in Ohio Revised Code § 4117.01(C) are guaranteed certain rights including the right to join, assist, or participate in a union and engage in collective bargaining. Those employees who are not “public employees” under the statutory definition are not guaranteed any rights under 4117. Therefore, an employer has no obligation to engage in collective bargaining with those employees who do not fit the definition of public employee. However, the burden of establishing an exclusion from a bargaining unit under 4117.01 rests upon the party seeking the exclusion. *In re Franklin Local School District Bd. of Ed.*, SERB 84-

008, rev'd on other grounds, Franklin Co. Ct. C.P. (4-30-87). Additionally, SERB has stated that the exclusions set forth in Chapter 4117 must be narrowly construed to facilitate employees rights to organize and bargain collectively. *In re University of Cincinnati*, SERB 86-023 (6-5-86).

The relevant portion of R.C. 4117.01 under which disputes arise is as follows:

“(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 parties are employees of a public employer, except:

- (6) **Confidential** employees;
- (7) **Management** level employees;

- (9) employees of a public official who act in a **fiduciary** capacity, appointed pursuant to section 124.11 of the Revised Code;
- (10) **Supervisors**[.]” (emphasis added).

The Code provides the following definitions for Supervisors, Confidential employees, and Management level employees:

“(F) ‘Supervisor’ means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment...

(K) ‘Confidential employee’ means any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

(L) ‘Management level employee’ means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiate agreements, or have a major role in personnel administration...”

Each of the four exceptions above has been further examined in SERB opinions. A more detailed analysis of each exemption is discussed below.

Confidential Employees

The confidential employee exception has been read very narrowly by SERB. R.C. 4117.01(K) provides that an employee is exempt from collective bargaining in two circumstances. The first circumstance is where the employee (1) works in the **personnel offices** of the employer, **and** (2) **deals with information** used by the employer in collective bargaining. If the only personnel information to which an employee has access is public information, then the employee probably cannot be excluded as confidential. *In re Mahoning County Dept. of Human Services*, SERB-HO 1992-BD-016. The employee must have access to such information as bargaining proposals or the background information used to formulate those proposals. Access to such documents as personnel files or confidential medical information will not necessarily exclude an employee from the bargaining unit. *Taft Broadcasting Co.*, 226 NLRB No. 87, 94 LRRM 1089 (1976).

In the alternative, an employee may be a confidential employee where he or she has a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer. SERB has interpreted the phrase “directly participating in collective bargaining on behalf of the employer” to exclude only those employees participating in collective bargaining negotiations, and not those employees who merely administrate a collective bargaining agreement. *In re University of Cincinnati*, SERB 86-023. (Those who merely administrate a collective bargaining agreement may be excluded from the bargaining unit as management level employees.) For these reasons, few employees will fit the definition for confidential employees.

Management Level Employees

R.C. 4117.01(L) defines the management level employee exemption from collective bargaining, but does not give much guidance in making the determination. SERB first clarified the definition in 1985 when it stated that exemption applies to high-level management officials and their assistants. *In re City of Gahanna*, SERB 85-052 (9-30-85). Since then, SERB has adopted the National Labor Relation Board's ("NLRB") interpretation of the managerial exemption. The following passage from the NLRB case of *General Dynamics Corp.*, 87 LRRM 1705, is instructive:

“The Board has defined managerial employees as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. It is clear from the legislative history of the Taft-Hartly Act of 1947 and prior and subsequent Board and court decisions that managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.”

SERB has elaborated on this standard by stating that a management level employee must possess and exercise a level of authority and independent judgment such that he or she can affect the organization's purposes or affect how the organization achieves its mission. An employee possesses these characteristics where the employee individually decides between different options in pursuit of the organization's mission, or participates in the process that results in such decisions. *In re Univ. of Cincinnati*, SERB 98-003 (2-26-98). For example, SERB has held that a police officer qualified as a management level employee because he formulated policy and had a major role in personnel administration. *In re City of Wilmington*, SERB 94-007 (4-27-94).

However, the definition is narrow and few employees will meet the standard for the exemption.

Fiduciary Employees

In order to meet the fiduciary exemption, an employee must be appointed pursuant to R.C. 124.11 and act in a fiduciary capacity. The mere designation of an employee as fiduciary will not qualify an employee as exempt. Therefore, the employer must consider the employee's job duties and responsibilities in determining whether he or she is a fiduciary.

Chapter 4117 does not define "fiduciary capacity", but SERB has adopted the analysis used by the State Personnel Board of Review and the Ohio courts in determining fiduciary status under R.C. 124.11(A)(9). That section states as follows:

"(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter.

(9) The deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relationship to that agency . . .

SERB first analyzed the fiduciary exemption by looking at the statute's plain meaning and Ohio court cases on the definition of fiduciary. *In re SERB v. Fulton County Engineer*, SERB 96-008 (citing to *In re Termination of Employment*, 40 Ohio St. 2d 107 (1974); *Rarick v. Bd. of County Comm'rs.*, 63 Ohio St. 2d 34 (1980); *State ex rel. Charlton v. Corrigan*, 36 Ohio St. 3d 68 (1988)). In particular, SERB adopted the following passage from *Corrigan* as a reference:

"Cases which have analyzed the nature of the fiduciary relationship exception to classified civil service requirements have invariably characterized the relationship as one of trust and confidence. See, e.g., *In re Termination of Employment*, 40 Ohio St. 2d 107 (1974); *Yarosh v. Becane*, supra [63 Ohio St. 2d 7]; *Rarick v. Bd. of County Commr's*, 63 Ohio St. 2d 34 (1980). It is 'more than the ordinary relationship of employer and employee.' *In re Termination of Employment*, supra, at 114; and exists where 'special confidence ... is reposed in the integrity and fidelity of another,' *Id.* at 115, citing 5 BOGERT, TRUSTEES, 119-132; see also *Yarosh v. Becane*, supra at 11."¹

¹ SERB also noted that an employee who accepts a promotion knowing it to be as a fiduciary employee may be estopped from later denying fiduciary status. SERB stated, however, that the employee in this case could not be estopped because he was never told he was a fiduciary. Additionally, SERB stated that the cases in which estoppel is found are those in which the employee receives a benefit from the designation. The employee in this case did not receive a benefit.

SERB determined that the focus is whether the assigned job duties require a **high degree of trust, confidence, reliance, integrity, and fidelity**. These characteristics must be above and beyond whatever technical competence the position may require and the employee must possess a high degree of discretion in performing his or her duties. SERB will also look to whether the employee acted in good faith on behalf of the employer, and not merely because of legal obligations. For example, the Franklin County Court of Common Pleas has determined that the Assistant Public Defenders for the State of Ohio are not fiduciaries because they exercise individualized discretion on behalf of their clients, **not** on behalf of their employer. *Ohio Civil Service Employees Ass'n, AFSCME Local 11 v. SERB*, 2001 SERB 4-1 (CP, Franklin, 1-16-01).

Supervisory Employees

R.C. 4117.01(F) lists several duties that will exempt an employee as a supervisory employee. SERB has held that an employee must have the authority to perform one or more of the functions listed in that section, must actually exercise that authority, and use independent judgment in doing so. *In re Mahoning County Dept. of Human Services*, SERB 92-006, (emphasis in original). In proving the supervisory status of an employee, the employer must demonstrate the following:

“First, the evidence must show the employee at issue has the authority to perform one or more of the supervisory functions listed in O.R.C 4117.01(F), which may be evidenced by the employee’s job description. Second, the employee must actually exercise this authority, which may be illustrated by specific incidents in which the employee performed the relevant function. Third, the exercise of this function cannot be routine and clerical, but must involve independent judgment.”

Whether or not an employee is a supervisor is a question of fact under this test and will be determined on a case-by-case basis. *In re Lucas County Recorder’s Office*, SERB 85-061.

A key factor in the analysis is whether the employee at issue actually exercises his or her supervisory authority. In some cases, employees have lost their status as supervisors over time because they failed to exercise that authority. For example, SERB found that the duties of State Highway Patrol Sergeants were routine and clerical and not supervisory in function. *In re Office of Collective Bargaining*, SERB 89-016. For this reason, employers should verify that employee supervisors exercise the authority required to maintain the exemption.

PROCESS FOR EXEMPTING POSITIONS FROM THE BARGAINING UNIT

The unilateral removal of work from a bargaining unit constitutes an unfair labor practice under R.C. 4117.11(A)(1) and (A)(5). *In re Ohio Board of Tax Appeals*, SERB HO 1994-HO-005 (3-3-94). Once SERB has certified the composition of a bargaining unit, the parties can only lawfully change that unit by filing an Amendment to Certification Petition or a Unit Clarification Petition. *In re Office of Collective Bargaining*, SERB 91-008. Therefore, agencies must follow an established procedure for exempting positions from the bargaining unit. This procedure is as follows:

1. The agency shall send a written request for exemption to the Deputy Director or Legal Counsel for the Office of Collective Bargaining.
 - a. Such a request should include a detailed statement of the rationale behind the exemption, the current position description of the person, and any other documents which would support the exemption.
 1. The position must be one that is currently filled as SERB will not make a determination on a vacant position.
 - b. An exemption file shall be created for the request.
2. Upon reviewing such request, OCB may ask the agency for additional information if necessary.
3. After review of the agency's request for exemption has been completed, OCB may follow either of the two following routes:
 - a. If a valid basis for the exemption exists OCB will proceed with seeking an exemption.
 - b. If OCB believes that no valid basis exists for the exemption, then OCB will communicate with the agency and explain the reasoning behind its conclusion.
 1. If the agency disputes the determination made by this office, the agency should contact OCB in writing.

2. Upon receipt of such letter, OCB will arrange for the Attorney General's office to review the request for exemption in order to determine whether they concur with OCB's analysis.
4. If the exemption appears valid, OCB will draft a letter requesting that the union review the agency's request. The union will take a short period of time to review the request, and will either concur or dissent with the exemption.
5. Once the union responds, OCB takes the following action:
 - a. If the union **concurs**, OCB prepares a joint Petition for Amendment of Certification to be filed with SERB. OCB sends this Petition to the union for signature, then files with SERB.
 - b. If the union does **not concur**, OCB will contact the agency to reevaluate the importance of exempting the position. If the agency decides to litigate the issue, OCB will prepare a unilateral Petition for Amendment of Certification and file with SERB.
6. The parties must then wait for SERB to take action on the petition.
 - a. SERB almost always approves joint petitions without review.
 - b. Because a dispute exists on unilateral petitions, SERB will generally set the matter for a hearing.
 1. Upon the matter being set for hearing, OCB Legal Counsel will request representation from the Attorney General's office, and will assist as necessary in the processing of the matter.

NOTE: While the agency is waiting for a SERB determination, the employee will continue to be a part of the bargaining unit, and should be treated no differently than other bargaining unit employees.

2. The agency will be actively involved in the preparation and presentation of the case to SERB. Often, agency personnel will have to appear as witnesses in the case to testify to the job duties of the positions at issue.
3. Once SERB makes its decision, OCB or the Attorney General's Office will notify the agency of the decision.

NOTE: SERB's bargaining unit determinations are generally final and not appealable to a court.

PROCESS FOR RETURNING AN EXEMPTED POSITION TO BARGAINING UNIT

Once SERB has certified the composition of a bargaining unit, the parties can only lawfully change that unit by filing an Amendment to Certification Petition or a Unit Clarification Petition. *In re Office of Collective Bargaining*, SERB 91-008. Therefore, agencies must follow an established procedure for returning exempted positions to the bargaining unit. This procedure is as follows:

1. The agency shall send a written request to the Deputy Director or Legal Counsel for the Office of Collective Bargaining.
 - a. Such a request should include a detailed statement of the rationale behind the return, the current position description of the person, and any other documents which would support the return.
 1. The position must be one that is currently filled as SERB will not make a determination on a vacant position.
 - b. An return file shall be created for the request.
2. Upon reviewing such request, OCB may ask the agency for additional information if necessary.
3. After review of the agency's request for return has been completed, OCB may follow either of the two following routes:
 - a. If a valid basis for the return exists OCB will proceed with seeking the return.
 - b. If OCB believes that no valid basis exists for the return, then OCB will communicate with the agency and explain the reasoning behind its conclusion.
 1. If the agency disputes the determination made by this office, the agency should contact OCB in writing.
 2. Upon receipt of such letter, OCB will arrange for the Attorney General's office to review the request for return in order to determine whether they concur with OCB's analysis.

4. If the return appears valid, OCB will draft a letter requesting that the union review the agency's request. The union will take a short period of time to review the request, and will either concur or dissent with the return.
5. Once the union responds, OCB takes the following action:
 - a. If the union **concur**s, OCB prepares a joint Petition for Amendment of Certification to be filed with SERB. OCB sends this Petition to the union for signature, then files with SERB.
 - b. If the union does **not concur**, OCB will contact the agency to reevaluate the importance of returning the position. If the agency decides to litigate the issue, OCB will prepare a unilateral Petition for Amendment of Certification and file with SERB.
6. The parties must then wait for SERB to take action on the petition.
 - a. SERB almost always approves joint petitions without review.
 - b. Because a dispute exists on unilateral petitions, SERB will generally set the matter for a hearing.
 1. Upon the matter being set for hearing, OCB Legal Counsel will request representation from the Attorney General's office, and will assist as necessary in the processing of the matter.

NOTE: While the agency is waiting for a SERB determination, the employee will continue to be exempted from the bargaining unit, and should be treated no differently than other exempt employees.

2. The agency will be actively involved in the preparation and presentation of the case to SERB. Often, agency personnel will have to appear as witnesses in the case to testify to the job duties of the positions at issue.
3. Once SERB makes its decision, OCB or the Attorney General's Office will notify the agency of the decision.

NOTE: SERB's bargaining unit determinations are generally final and not appealable to a court.