OPINION NO. 87-094

Syllabus:

Where, pursuant to Sub. H.B. 231, 117th Gen. A. (1987) (eff., in part, Oct. 5, 1987), a county designates a separate agency under the direct control of the board of county commissioners as the new child support enforcement agency for the county and such designation results in the transfer to such new agency of persons who were formerly employed by the county department of human services and who were covered by a collective bargaining agreement in their employment with the county department of human services, the newly designated agency, being a continuation of its predecessor for purposes of assuming the functions, powers, duties, and obligations transferred to such agency, is bound by any obligations imposed upon its predecessor by a collective bargaining agreement covering such transferred employees in their previous employment with the county department of human services.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 3, 1987

I have before me your opinion request concerning the new system of child support enforcement established by Sub. H.B. 231, 117th Gen. A. (1987) (eff., in part, Oct. 5, 1987). Pursuant to R.C. 2301.35(A) (eff. until June 6, 1988):

> On or before November 15, 1987, the board of county commissioners in each county shall, by resolution, designate, and enter into a contract with as required under division (D) of this section, one of the following as the child support enforcement agency for the county: the county department of human services, the office of the prosecuting attorney, a bureau within the court of common pleas, or a separate agency under the direct control of the board and administered by an official appointed by the board.

You state that the board of county commissioners in Lucas County plans to designate and contract with a separate agency under the board's direct control as the child support enforcement agency for the county.

Sub. H.B. 231, section 23 (uncodified), provides for the transfer of the powers and duties related to child support enforcement to the newly designated agency and also specifies the terms under which certain county employees performing child support enforcement functions are to be transferred to such new agency. Uncodified section 23 states in pertinent part:

> If a separate agency under the direct control of the board of county commissioners is designated as the child support enforcement agency under [R.C. 2301.35], as amended by this act, each bureau of support that was established by a court of common pleas pursuant to [R.C. 2301.35], as that section existed immediately prior to the effective date of this act, each local Title IV-D agency, and each program for the administration and enforcement of support orders that

> is operated by a prosecuting attorney is hereby abolished on the date on which the newly designated child support enforcement agency is designated under [R.C. 2301.35], as amended by this act.
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> All employees of the bureaus of support, of the local Title IV-D agencies, or of the programs for administration and enforcement of support that are abolished by this act shall be transferred to the child support enforcement agencies that are designated under [R.C. 2301.35], as amended by this act, on the date on which the agency is designated under [R.C. 2301.35], as amended by this act. All of the employees who are transferred pursuant to this section shall retain their respective civil service classifications and status and all vacation time and other benefits earned by employees of the abolished bureau of support, local Title IV-D agency, or program shall be deemed to have been earned by them as employees of the newly designated child support enforcement agency. Any employee who, at the time of transfer, has a temporary or provisional appointment shall be transferred subject to the same right of removal, examination, or termination as though the transfer was not made.

Your letter states that certain persons are presently employed by the Lucas County Department of Human Services and are subject to a current collective bargaining agreement. Upon designation of the child support enforcement agency under the provisions of Sub. H.B. 231, these employees will be transferred to the new agency. You therefore ask whether such employees will, upon transfer, continue to be covered by the collective bargaining agreement currently governing their wages, salaries, and terms and conditions of employment in the Lucas County Department of Human Services.

In order to determine whether the employees transferred to the newly designated child support enforcement agency, which in Lucas County is a separate agency, are subject to the terms of the collective bargaining agreement governing the wages, hours, and terms and conditions of employment in their former employment, it is first necessary to examine the scheme set forth in R.C. Chapter 4117 governing collective bargaining for public employers and public employees.

R.C. 4117.03 sets forth certain rights granted to public employees, see generally R.C. 4117.01(C)(defining the term "public employee"), stating in part:

> (A) Public employees have the right to:
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> (1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in [R.C. Chapter 4117], any employee organization of their own choosing;
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> (2) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;
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> (3) Representation by an employee organization;
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> (4) Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of

> a collective bargaining agreement, and enter into collective bargaining agreements....
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> ....
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> (C) Nothing in [R.C. Chapter 4117] prohibits public employers from electing to engage in collective bargaining, meet and confer, discussions, or any other form of collective negotiations with public employees who are not subject to [R.C. Chapter 4117] pursuant to [R.C. 4117.01(C)].

One of the initial steps in the collective bargaining process is set forth in R.C. 4117.06 which imposes upon the State Employment Relations Board (SERB) the duty to determine the appropriate unit of employees for the purpose of collective bargaining. In making such determination, SERB must, pursuant to R.C. 4117.06(B):

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

R.C. 4117.06 also specifies certain actions which SERB may not take in determining an appropriate unit. See, e.g., R.C. 4117.06(D)(3) (prohibiting inclusion of members of police or fire department or members of state highway patrol in a unit with other classifications of public employees of the department); R.C. 4117.06(D)(5) (SERB shall not: "[d]esignate as appropriate a bargaining unit that contains employees within the jurisdiction of more than one elected county office holder, unless the county-elected office holder and the board of county commissioners agree to such other designation"). The purpose of designating an appropriate unit is for the selection of an exclusive representative for that unit for collective bargaining purposes. 1986 Op. Att'y Gen. No. 86-052. See generally Heath Educ. Ass'n v. Bell, 23 Ohio Misc. 2d 1, 3, 490 N.E.2d 945, 947 (Licking County Mun. Ct. 1985) ("[i]t is well-recognized that an exclusive bargaining unit can negotiate and bind all employees regardless of whether all of those employees are members of the negotiating unit or not").

Where an exclusive representative of an appropriate bargaining unit is selected, see generally R.C. 4117.05, R.C. 4117.04 imposes upon the public employer certain duties with respect to such exclusive representative. R.C. 4117.04 states in part:

> (A) Public employers shall extend to an exclusive representative designated under [R.C. 4117.05] the right to represent exclusively the employees in the appropriate bargaining unit and the right to unchallenged and exclusive representation for a period of not less than twelve months following the date of certification and thereafter, if the public employer and the employee organization enter into an agreement, for a period of not more than three years from the date of signing the agreement. For the purposes of this section, extensions of agreements shall not be construed to affect the expiration date of the original agreement.

> (B) A public employer shall bargain collectively with an exclusive representative designated under [R.C. 4117.05] for purposes of [R.C. Chapter 4117].

As stated in Op. No. 86-052 at 2-278 through 2-279: "If an exclusive representative is selected, an employer must collectively bargain with the exclusive representative with regard to the terms and conditions of employment of the employees in that unit." (Emphasis added.)

The effect of a written agreement executed by both parties is set forth in R.C. 4117.10 which states in pertinent part:

> (A) An agreement between a public employer and an exclusive representative entered into pursuant to [R.C. Chapter 4117] governs the wages, hours, and terms and conditions of public employment covered by the agreement....
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> ....
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> (C) ...When the matters about which there is agreement are reduced to writing and approved by the employee organization and the legislative body,[1] the agreement is binding upon the legislative body, the employer, and the employee organization and employees covered by the agreement. (Emphasis added.)

Pursuant to R.C. 4117.10(A), the agreement is entered into by the public employer and the exclusive representative. The term "public employer" is defined in R.C. 4117.01(B) as meaning in part, "any political subdivision of the state located entirely within the state including, without limitation, any...county...." Thus, in the situation you present, the county itself, as the public employer, remains party to the agreement entered into with the exclusive representative of those persons employed by the county department of human services prior to being transferred to the newly designated child support enforcement agency for the county. The transfer of those employees of the Lucas County Department of Human Services who are required to be transferred will not change the identity of the public employer, the county, for purposes of R.C. Chapter 4117. Rather, pursuant to Sub. H.B. 231, only the identity of the county appointing authority will change. For purposes of R.C. Chapter 4117, such change in the identity of the appointing authority, that does not result in a combination prohibited by R.C. 4117.06 (D), would merely be one factor, among various others, which SERB could consider if the question of the propriety of the bargaining unit were determined after the transfer occurred. See generally Sub. H.B. 231, section 23 (uncodified) ("[f]or the purpose of the succession to all functions, powers, duties, and obligations of the abolished bureau of support, abolished local Title IV-D agency, or abolished program that are transferred to the newly designated child support enforcement agency, the newly designated child support enforcement agency shall be deemed to be a continuation of the abolished bureau of support, abolished local Title IV-D agency, or abolished program").

Since the collective bargaining agreement continues between the same parties after implementation of Sub. H.B. 231, it appears that your concern is whether such transferred employees

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[1] R.C. 4117.10(B) defines the term "legislative body," as used in R.C. 4117.10, as including, the "board of county commissioners."

remain in the same bargaining unit after their transfer. As set forth above, the scheme established by R.C. Chapter 4117 contemplates that an appropriate bargaining unit and the exclusive representative of such unit will have been determined prior to the execution of a written collective bargaining agreement, as required by R.C. 4117.09(A), between the public employer and the exclusive representative. Under the terms of R.C. 4117.10(C), such agreement becomes binding on the legislative body, the employer, and the employee organization and "employees covered by the agreement" once the matters about which there is agreement have been reduced to writing and approved by the employee organization and the legislative body. Thus, the statutory scheme contemplates that by the time the employer, the legislative body, the exclusive representative and the employees covered by the agreement become bound by the terms of the written agreement, the appropriate unit for collective bargaining purposes will have been determined.

With the passage of Sub. H.B. 231, however, subsequent to the execution of the written agreement about which you ask, the General Assembly amended the statutory scheme governing child support enforcement, consolidating the functions performed by the various specified entities within the counties into a single child support enforcement agency for each county. The question thus arises as to whether the provisions of Sub. H.B. 231, specifically the designation in Lucas County of a separate agency under the county commissioners' control and the subsequent transfer of certain employees from the Lucas County Department of Human Services to the newly designated agency, operates to remove such employees from the bargaining unit in which they were included as employees of the county department of human services.

Although Sub. H.B. 231 addresses the continuing civil service status of such transferred employees, it is silent as to the effect of this legislation upon the collective bargaining scheme set forth in R.C. Chapter 4117. Further, as stated above, the scheme of R.C. Chapter 4117 contemplates that an appropriate bargaining unit will have been determined by SERB prior to the execution of a collective bargaining agreement governing the wages, hours, and terms and conditions of employment of a group of public employees. R.C. Chapter 4117, therefore, makes no specific provision concerning the effect on the composition of a bargaining unit where, as in the situation you describe, due to a legislative change the powers, duties, and functions of a particular county appointing authority are assumed by a successor agency which also becomes the appointing authority of its predecessor's employees.

In the absence of specific legislation directing the manner in which the collective bargaining status of the transferred employees is to be determined, an examination of the statutory scheme governing bargaining units may be useful in addressing your concerns. R.C. 4117.06(B), concerning SERB's determination of an appropriate bargaining unit, sets forth certain factors which SERB shall consider, among others, in determining the composition of an appropriate bargaining unit. A bargaining unit is generally described as a combination of job "classifications," Akron Educ. Ass'n, 84-UC-10-2130 (SERB June 14, 1985), or as a combination of "job categories," Ohio Nurses Ass'n, 84-UC-10-2214 (SERB May 24, 1985)(using both "job categories" and "job classification" to describe composition of bargaining unit), rather than as a particular group of

employees. Thus, although Sub. H.B. 231 specifically provides for the transfer of "employees" who were in the employ of a predecessor of the newly designated child support enforcement agency, the obvious intent of this provision is to transfer to the new agency the positions held by such employees and, correspondingly, the persons holding those positions. See generally R.C. 124.01(F)(as used in R.C. Chapter 124, the term "employee" means "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing authority") (emphasis added); R.C. 4117.01(C)(for purposes of R.C. Chapter 4117, the term "public employee" is defined, with fourteen specific exceptions, as, "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...") (emphasis added).

Since Sub. H.B. 231 effects the transfer of particular positions to the newly designated child support enforcement agencies, it is necessary to determine whether such transfer of positions affects the composition of the bargaining units in which such positions were placed while part of the county department of human services. A "position" is generally understood to mean, as defined in 1 Ohio Admin. Code 123:1-47-01(A)(58), "the group of job duties intended to be performed by an individual employee as assigned by the appointing authority." Thus, the identity of the appointing authority is relevant in the description of a particular position. In this regard, an examination of uncodified section 23 of Sub. H.B. 231 concerning the nature of the newly designated child support enforcement agencies is useful. Uncodified section 23 states in pertinent part:

> For the purpose of the succession to all functions, powers, duties, and obligations of the abolished bureau of support, abolished local Title IV-D agency, or abolished program that are transferred to the newly designated child support enforcement agency, the newly designated child support enforcement agency shall be deemed to be a continuation of the abolished bureau of support, abolished local Title IV-D agency, or abolished program.
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> ....
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> All business or other matters undertaken or commenced by the abolished bureau of support, the abolished local Title IV-D agency, or the abolished program for administration and enforcement of support pertaining to the functions, powers, duties, and obligations of the abolished bureau of support, local Title IV-D agency, or program that are transferred to the newly designated child support enforcement agency shall be conducted and completed by the child support enforcement agency that is designated pursuant to this act in the same manner and under the same terms and conditions and with the same effect as if conducted by the abolished bureau, abolished agency, or abolished program.
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> All acts, determinations, approvals, and decisions of the abolished bureau of support, abolished local Title IV-D agency, or the abolished program for administration and enforcement of support shall continue in effect as the acts, determinations,

> approvals, and decisions of the newly designated child support enforcement agency.
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> No existing right or remedy of any character shall be lost, impaired, or affected by this act, except to the extent that the newly designated child support enforcement agency administers the rights and remedies instead of the abolished bureau of support, the abolished local Title IV-D agency, or the abolished program for administration and enforcement of support. (Emphasis added.)

From the foregoing portions of uncodified section 23 it is clear that the newly designated child support enforcement agencies are to be a continuation of their predecessors for all purposes related to the functions, powers, duties, and obligations transferred to such new agencies.

In the situation you describe, for purposes of collective bargaining, the identity of the public employer, the county, remains the same after designation of the new county child support enforcement agency, although the identity of the appointing authority may have changed. Despite such change of identity, however, the new appointing authority, the newly designated child support enforcement agency, is a continuation of its predecessor and possesses all of its predecessor's powers, duties, and obligations. Thus, although Sub. H.B. 231 has not expressly provided for the assumption of the collective bargaining obligations of its predecessor by the newly designated child support enforcement agencies, it is evident that the General Assembly intended that, to the extent possible under R.C. Chapter 4117, the new agencies would assume, as part of the obligations of their predecessors, any collective bargaining obligations imposed by agreement upon their predecessors. Further, although the description of the position transferred to the new agency may change with regard to the identity of the appointing authority, such name change in itself appears to be of no consequence to the continuation of the bargaining unit. I must conclude, therefore, that the transferred employees remain covered by the bargaining agreement by which they were bound in their employment with the Lucas County Department of Human Services.[2]

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[2] I note, however, that pursuant to R.C. 4117.02(H)(8), SERB has a duty to "[a]dopt, amend, and rescind rules and procedures and exercise other powers appropriate to carry out this chapter." Accordingly, in [1986-1987 Monthly Record] Ohio Admin. Code 4117-5-01 at 1299, SERB has adopted a procedure for amendment or clarification of an existing bargaining unit as follows:

> (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:
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> (1) For amendment of certification, to alter the composition of the unit by adding, deleting, or changing terminology in the unit description;
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> (2) For clarification of a unit, to determine whether a particular employee or group of employees is included or excluded from the

It is, therefore, my opinion, and you are hereby advised that, where, pursuant to Sub. H.B. 231, 117th Gen. A. (1987) (eff., in part, Oct. 5, 1987), a county designates a separate agency under the direct control of the board of county commissioners as the new child support enforcement agency for the county and such designation results in the transfer to such new agency of persons who were formerly employed by the county department of human services and who were covered by a collective bargaining agreement in their employment with the county department of human services, the newly designated agency, being a continuation of its predecessor for purposes of assuming the functions, powers, duties, and obligations transferred to such agency, is bound by any obligations imposed upon its predecessor by a collective bargaining agreement covering such transferred employees in their previous employment with the county department of human services.

> unit based upon the existing unit description and the duties of the employees in question.
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> (F) For a unit that has not been approved by the board through the procedures of division (A) of section 4117.05 or 4117.07 of the Revised Code, a petition for unit clarification or amendment of a deemed certified unit may be filed only during the period of one hundred twenty days to ninety days before the expiration date of the collective bargaining agreement, after expiration of the collective bargaining agreement, or at any other time if the petition is submitted by mutual request of the parties. Unless the petition for amendment or clarification of such a unit is submitted by mutual request, the board will consider clarification or amendment only if the petition alleges that the unit contains a combination of employees prohibited by division (D) of section 4117.06 of the Revised Code.

Thus, SERB has provided a mechanism whereby either the public employer or the exclusive representative may, in the absence of a question of majority representation, petition SERB for amendment of certification or for clarification of a unit. I note, however, that the procedure established in rule 4117-5-01(E)-(F) is stated merely in permissive terms and does not require that such procedure be initiated upon the occurrence of any particular event. Since SERB's determination of what constitutes an appropriate bargaining unit is a complex factual determination, see generally R.C. 4117.06; OAPSE, 1 O.P.E.R. ¶1260 ("an appropriate unit determination requires a finding based on a totality of relevant facts and these may vary in implications and from case to case"), whether or not such employees would be placed in the same bargaining unit if the propriety of the bargaining unit were determined after their transfer to the new child support enforcement agency is a matter which I cannot predict.