OPINION NO. 86-052

Syllabus:

A board of county commissioners may establish a wage or salary supplement pursuant to R.C. 124.14(F) for employees of a county department of human services who have been placed in an appropriate bargaining unit and who have voted in a representation election to have no representative for collective bargaining purposes.

To: Richard L. Ross, Morgan County Prosecuting Attorney, McConnelsville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 29, 1986

I have before me your request for my opinion regarding interpretation of R.C. 124.14(F), as amended by Am. S.B. 96, 116th Gen. A. (1985) (eff. July 18, 1985), which provides as follows:

> Employees of each county department of human services shall be paid a salary or wage in accordance with the rates set forth in section 124.15 of the Revised Code and progress in their employment pursuant to divisions (E), (F), and (G) of section 124.15 and section 124.181 of the Revised Code. The provisions of section 124.18 of the Revised Code concerning the standard work week also apply to employees of county departments of human services. A board of county commissioners may establish a salary or wage supplement to be paid to employees of the county department of human services of that county in addition to the salary or wage required to be paid to them in accordance with section 124.15 of the Revised Code.
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> The provisions of this division do not apply to employees for whom the state employment relations board establishes appropriate bargaining units pursuant to section 4117.06 of the Revised Code. (Emphasis added.)

You have inquired whether it is permissible for a board of county commissioners to establish a salary or wage supplement to be paid to employees of a county department of human services after an election for representation has been held by such employees in which they voted to have no representative.

In order to respond to your question, it is necessary to review the overall scheme and various provisions of the Public Employees Collective Bargaining Act, R.C. Chapter 4117, which was enacted by 1983 Ohio Laws 140 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983, and in part, April 1, 1984). To some extent the act is patterned after the federal National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U.S.C. §§151-169, which was passed in 1935 and which provides the

majority of nonsupervisory employees of private employers whose operations affect interstate commerce the right to form, join, and participate in labor organizations. 29 U.S.C. §157. See generally State ex rel. Dayton Fraternal Order of Police v. SERB, 22 Ohio St. 3d 1, 4, 488 N.E.2d 181, 184 (1986). R.C. Chapter 4117 is administered by the State Employment Relations Board (SERB). In addition to other specified duties, SERB is directed to determine appropriate bargaining units pursuant to R.C. 4117.06 in order that an employee organization may be chosen by employees in a bargaining unit and certified by SERB as the exclusive employee representative for the bargaining unit. R.C. 4117.05; R.C. 4117.07. See R.C. 4117.01(E) (defining an "exclusive representative" as "the employee organization certified or recognized as an exclusive representative under [R.C. 4117.05]"). A public employer must bargain collectively with an exclusive representative designated under R.C. 4117.05, R.C. 4117.04(B), and must extend to an exclusive representative "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," although such right may be extended. R.C. 4117.04(A).

R.C. 4117.06(A) states in part that SERB "shall decide in each case the unit appropriate for the purposes of collective bargaining. The determination is final and conclusive and not appealable to the court." See R.C. 4117.06(B) (factors SERB must consider in determining the appropriateness of each bargaining unit). Once an appropriate bargaining unit has been designated, the employees in that unit may elect an exclusive representative, R.C. 4117.05; R.C. 4117.07, and SERB must certify the results of the election, R.C. 4117.07. Public employees, however, have the right to refrain from forming, joining, assisting, or participating in an employee organization, R.C. 4117.03(A)(1), and every election for representation must offer employees the opportunity to vote for "no representative," R.C. 4117.07(C)(4).

Your question presents a situation in which an appropriate bargaining unit has been defined by SERB pursuant to R.C. 4117.06, the employees therein have engaged in an election to determine the desirability of representation and have chosen no representative. R.C. 124.14(F) states that a board of county commissioners has no authority to grant salary or wage supplements thereunder "to employees for whom the State Employment Relations Board establishes appropriate bargaining units pursuant to section 4117.06." Under the facts you have presented, SERB has established an appropriate bargaining unit. Thus, the employees in that unit would appear to be ineligible for a salary or wage supplement. However, after examining the purpose for which appropriate bargaining units are formed and the basis for the prohibition against granting employees in a bargaining unit a wage or salary supplement under R.C. 124.14(F), it is my conclusion that once a bargaining unit has voted for "no representative," the unit has no significance for purposes of barring a wage or salary supplement, so that employees in the unit are eligible for the wage or salary supplement.

As discussed above, employees who are determined by SERB to be within an appropriate bargaining unit are eligible to vote in a representation election. 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. See R.C. 4117.04. See also R.C. 4117.08(A) ("[a]ll matters pertaining to wages, hours, or terms and other conditions of employment...are subject to collective bargaining between the public employer and the exclusive representative," except as otherwise provided); R.C. 4117.10(A) ("[a]n 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"). Where employees in a bargaining unit choose no representative, however, the employer has no duty to engage in collective bargaining with regard to the employees in that unit. Since the purpose for which the unit was defined--the selection of an exclusive representative for collective bargaining--ceases to exist when no representative is chosen, the unit loses its legal significance for purposes of those employees in the unit engaging in collective bargaining.[1] Similarly, under these circumstances the appropriate bargaining unit should be considered as having no significance for purposes of barring wage and salary supplements pursuant to R.C. 124.14(F).

Under Ohio law, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by R.C. Chapter 4117, R.C. 4117.11(A)(1), or to interfere with the formation or administration of any employee organization, R.C. 4117.11(A)(2). The NLRA contains analogous provisions, 29 U.S.C. §158(a)(1) and (2).[2] Although decisions of the National Labor Relations Board, which renders decisions interpreting and applying the NLRA, have no binding effect with regard to the construction of R.C. Chapter 4117, it is instructive to review those decisions interpreting NLRA provisions which are analogous to the provisions of R.C. Chapter 4117.

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1 I note that R.C. 4117.07(C)(6) states in part:

> The board [SERB] may not conduct an election under this section in any appropriate bargaining unit within which a board-conducted election was held in the preceding twelve-month period, nor during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative.

Although this language appears to maintain the existence of an appropriate bargaining unit, even where a unit has chosen no representative, for purposes of precluding another election for twelve months, for reasons discussed herein, I do not believe that the designation of an appropriate bargaining unit precludes the granting of a wage and salary supplement under R.C. 124.14(F) for county human services employees who vote for "no representative."

2 29 U.S.C. §158(a)(1) and (2) provide that, "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; [and] to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it...."

It has been held under federal law that an employer commits an unfair labor practice when, during a union's attempt to organize employees, but before selection of a collective bargaining representative, the employer uses individual contracts of employment as part of a plan to defeat unionization or to preclude employees from bargaining collectively or striking. See NLRB v. Adel Clay Products Co., 134 F. 2d 342 (8th Cir. 1943); NLRB v. Superior Tanning Co., 117 F. 2d 881 (7th Cir. 1941), cert. denied, 313 U.S. 559 (1941). Once an exclusive representative has obtained a majority vote from employees within the appropriate unit, the employer cannot negotiate wages or other terms of employment with individual employees in the unit, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. M.A. Harrison Manufacturing Co., Inc., 682 F. 2d 580 (6th Cir. 1982); NLRB v. U.S. Sonics Corp., 312 F. 2d 610 (1st Cir. 1963), nor can he unilaterally grant a wage increase, NLRB v. Sharon Hats, Inc., 289 F. 2d 628 (5th Cir. 1961).

While it is not generally unlawful for an employer to make a unilateral grant of benefits prior to the beginning of union organizational activities, NLRB v. Arthur Winer, Inc., 194 F. 2d 370 (7th Cir. 1952), cert. denied, 344 U.S. 819 (1952), such action constitutes an unfair labor practice when done, while a representation election is pending, for the purpose of inducing employees to vote against representation. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); St. Francis Fed. of Nurses & Health Professionals v. NLRB, 729 F. 2d 844 (D.C. Cir. 1984); A. & A. I. Workers v. NLRB, 392 F. 2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968). An employer violates 29 U.S.C. §158(a)(1) when, during a union's campaign to organize employees, he grants benefits to his employees for the purpose of discouraging union membership. NLRB v. Century Moving & Storage, Inc., 683 F. 2d 1087 (7th Cir. 1982); Macy's Missouri-Kansas Div. v. NLRB, 389 F. 2d 835 (8th Cir. 1968); NLRB v. Dallas Concrete Co., 212 F. 2d 98 (5th Cir. 1954).

Accordingly, it appears that the prohibition in R.C. 124.14(F) against granting a wage supplement to employees after SERB has established an appropriate bargaining unit is intended to guard against a board of county commissioners using a wage supplement as a means of discouraging employees from exercising their rights to choose an exclusive representative and collectively bargain. Thus, I believe that the prohibition in R.C. 124.14(F) applies to employees who have been placed in a bargaining unit but who have not yet voted in a representation election or who have voted and chosen an exclusive bargaining representative. Where an appropriate unit fails, however, to elect an exclusive representative, the employer has no duty to collectively bargain with the employees in that unit. Since the appropriate bargaining unit is determined by SERB for purposes of collective bargaining should an exclusive representative be elected, when no representative is chosen, the purpose for having an appropriate bargaining unit is dissolved. Thus, the county is free to grant employees in that unit a wage supplement without interfering with the collective bargaining process. See generally R.C. 4117.07(C)(6).

I note, as a final matter that it is an axiom of statutory interpretation that statutes must be construed to avoid unreasonable or absurd consequences. R.C. 1.47(C); Canton v. Imperial Bowling Lanes, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968); State ex rel. Cooper v. Savord, 153 Ohio St. 367, 92 N.E.2d 390 (1950). If it were the intention of the General

Assembly to prohibit the establishment of a wage or salary supplement for employees who were included in a bargaining unit which voted for "no representative," it would mean that once an appropriate unit is defined, the county could never institute wage or salary supplements for employees within the unit even though those employees vote against representation. This could result in unreasonable consequences in that employees of a county human services department who have been defined as members of an appropriate bargaining unit but who vote not to select an exclusive representative and enter collective bargaining, and who, thus, are in a similar situation as employees who were never formed into a bargaining unit, would be at a disadvantage in that they may not engage in collective bargaining as a unit for at least one year, see R.C. 4117.07(C)(6); n. 1, supra, nor could they receive a wage or salary supplement under R.C. 124.14(F).

It is, therefore, my opinion, and you are advised, that a board of county commissioners may establish a wage or salary supplement pursuant to R.C. 124.14(F) for employees of a county department of human services who have been placed in an appropriate bargaining unit and who have voted in a representation election to have no representative for collective bargaining purposes.