OPINION NO. 90-111

Syllabus:

1. The clerk of the court of common pleas may engage in collective bargaining with those "employees of the [clerk] of courts who perform a judicial function," as that term is used in R.C. 4117.01(C)(8). (1980 Op. Att'y Gen. No. 80-007, overruled, in part.)

2. The extent to which the clerk of courts' past practices of both labor union recognition and contract negotiations with an employee organization currently representing the clerk's employees affect his current obligations with respect to such bargaining must be determined with reference to sections 4 and 5 (uncodified) of 1983-1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983).

To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your opinion request concerning the authority of the Trumbull County clerk of courts to collectively bargain with employees of the clerk's office. You specifically ask:

1. Does the clerk of court have legal authority to engage in collective bargaining with her employees who perform a judicial function?
2. Is the answer to question number 1 affected by the past practice of both labor union recognition and contract negotiations?
3. What is a judicial function as contemplated with[in] the meaning of [R.C. 4117.01(C)(8)]? Does this term include the clerk of court's functions relating to auto titles?
4. Since some supervisory personnel are also currently members of the labor union with the clerk of courts, does the clerk of courts have the legal ability to designate any of such employees as

> fiduciaries pursuant to [R.C. 124.11] without committing an unfair labor practice?

In order to address your questions, it is first necessary to discuss the operation of R.C. Chapter 4117 which establishes a statutory scheme governing collective bargaining between public employers and public employees. Pursuant to R.C. 4117.03(A), public employees, as that term is defined in R.C. 4117.01(C), have various rights, including the right to "[b]argain collectively[1] 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," R.C. 4117.03(A)(4) (footnote added). At the same time, R.C. 4117.04(B) imposes upon a public employer, as that term is defined in R.C. 4117.01(B), the duty to "bargain collectively with an exclusive representative designated under [R.C. 4117.05] for purposes of [R.C. Chapter 4117]."

As used in R.C. Chapter 4117, the term "public employer," is defined in R.C. 4117.01(B) as meaning:

> the state or any political subdivision of the state located entirely within the state including, without limitation, any...county,... school district, state institution of higher learning, any public or special district, any state agency, authority, commission, or board, or other branch of public employment.

Although the wording of R.C. 4117.01(B) is unclear as to which entity or entities at the county level are public employers, the State Employment Relations Board (hereinafter SERB) has interpreted the phrase "public employer," as defined in R.C. 4117.01(B), as including each individual elected county officer. *In re Franklin County Sheriff*, 1986 SERB 86-007, p.236 (1986). As stated in *Lorain City School District Board of Education v. State Employment Relations Board*, 40 Ohio St. 3d 257, 533 N.E.2d 264 (1988) (syllabus, paragraph two): "Courts must afford due deference to the State Employment Relations Board's interpretation of R.C. Chapter 4117." In applying SERB's interpretation of the term "public employer" to the situation about which you ask, I note that, pursuant to R.C. 2303.01: "There shall be elected quadrennially in each county, a clerk of the court of common pleas...who shall hold said office for a period of four years." It is clear, therefore, that the clerk of the court of common pleas, as an elected county officer, *State ex rel. Young v. Cox*, 90 Ohio St. 219, 107 N.E. 517 (1914), is a "public employer," for purposes of R.C. Chapter 4117.

As mentioned above, R.C. 4117.04(B) imposes a duty upon each public employer to bargain collectively with the employee organization which, in accordance with R.C. 4117.05, has become "the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining," R.C. 4117.05(A). Thus, as a general rule, only persons who fit within the definition

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[1] The term, "to bargain collectively," is defined in R.C. 4117.01(G) as meaning:

> to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. This includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

of a public employee, as set forth in R.C. 4117.01(C), are entitled to representation by an employee organization granted exclusive representative status pursuant to R.C. 4117.05.[2]

R.C. 4117.01(C) defines the term "public employee," in part as follows: "any person holding a position by appointment or employment in the service of a public employer..., *except*:....(8) Employees and officers of the courts, assistants to the attorney general, assistant prosecuting attorneys, and *employees of the clerks of courts who perform a judicial function....*" (Emphasis added.) Thus, although the clerk of courts is a "public employer" for purposes of R.C. Chapter 4117, certain persons employed by the clerk of courts, i.e., those who "perform a judicial function," are not public employees for purposes of that chapter. Accordingly, persons employed by the clerk of courts to perform a "judicial function," as that term is used in R.C. 4117.01(C)(8), are not granted the rights of public employees as set forth in R.C. 4117.03(A).[3]

In the absence of any duty imposed upon the clerk of courts to bargain collectively with respect to those employees who perform a judicial function, you ask whether the clerk may, if he so chooses, elect to bargain collectively with a representative of such employees. This question was addressed by my predecessor in 1980 Op. Att'y Gen. No. 80-007, issued prior to the enactment of R.C. Chapter 4117 in 1983-1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983). Op. No. 80-007 concludes that the clerk of the court of common pleas, among others, may negotiate collective bargaining agreements with his employees, subject to certain limitations, including the requirement that the contract be negotiated jointly with, or ratified by, the board of county commissioners.

The powers of public employers to engage in collective bargaining, however, must now be examined in light of the enactment of R.C. Chapter 4117 and the judicial decisions interpreting that chapter. In *State ex rel. Ohio Council 8, AFSCME v. Spellacy*, 17 Ohio St. 3d 112, 478 N.E.2d 229 (1985), the court stated in the syllabus:

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2 In enacting R.C. Chapter 4117 in 1983-1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983) (uncodified section 4), the General Assembly provided certain exceptions to the scheme set forth in that chapter for those employee organizations already recognized by the public employer through a written contract or otherwise, as will be discussed later.

3 R.C. 4117.03 states 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 Chapter 4117. of the Revised Code, 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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> (5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment. (Emphasis added.)

> Prior to the enactment of the Public Employees Collective Bargaining Act, R.C. 4117.01 *et seq.*, officers of a court of common pleas had no authority to enter into collective bargaining agreements with employees of the court. Subsequent to the enactment of the collective bargaining Act, the determination to recognize collective bargaining within the courts became a matter of judicial discretion.

The dispute in *Spellacy* arose out of the following situation. For over twenty years, the general division of the court of common pleas of Cuyahoga County had entered into a series of agreements with two employee organizations concerning the terms and conditions of employment of certain court personnel. The agreements were entitled Statements of Policy, the last of which became effective on February 1, 1980, and expired on January 31, 1983. Acting on behalf of the court in entering into the final agreement were the administrative judge of the court and the court administrator. After agreeing to extend the 1980–1983 agreement, the court notified the employee organizations on February 28, 1984, that the agreement was terminated. The employee organizations, claiming that a new agreement had been reached on March 29, 1983, filed a suit in mandamus to compel the administrative judge and the court administrator to sign and honor the new statement of policy. The court denied the existence of a new agreement, maintaining that all negotiations had terminated on February 28, 1984.

In considering whether the writ of mandamus should issue, the *Spellacy* court found that the employee organizations had failed to demonstrate that the administrative judge and the court administrator were under a clear legal duty to enter into a collective bargaining agreement. The court set forth the following analysis:

> During the course of negotiations commencing November 22, 1982, the respondents [administrative judge and court administrator] lacked the authority to collectively bargain with court employees. *Malone v. Court of Common Pleas* (1976), 45 Ohio St.2d 245 [74 O.O.2d 413]. Cf. *F.O.P. v. Dayton* (1978), 60 Ohio App. 2d 259 [14 O.O.3d 238]; *American Federation of Employees v. Polta* (1977), 59 Ohio App. 2d 283 [13 O.O.3d 284]. All statements of policy entered into prior to this time were merely statements of understanding between the relators [employee organizations] and the respondents.
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> In the period between the expiration of the statement of policy ending on January 31, 1983, and the breakdown in negotiations on February 28, 1984, the Ohio General Assembly enacted the Public Employees Collective Bargaining Act which extended collective bargaining rights to public employees. Officers and employees of the courts were specifically excluded from the purview of this legislation, however, *unless the court, as employer, expressly elected to engage in collective bargaining.*[2] R.C. 4117.01(C)(8) and 4117.03(C). Thus, the decision to recognize collective bargaining is strictly a matter of judicial discretion. R.C. 2731.03 states that:
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> "The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, *but it cannot control judicial discretion.*" (Emphasis added.)
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> ....

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> [2] R.C. 4117.03(C) states:
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> "Nothing in Chapter 4117. of the Revised Code 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 Chapter 4117. of the Revised Code pursuant to division (C) of section 4117.01 of the Revised Code."

17 Ohio St. 3d at 114–15, 478 N.E. 2d at 231–32. (Emphasis added; footnote omitted.)

The extent to which the decision in *Spellacy* affects the authority of public entities, other than a court of common pleas, to engage in collective bargaining outside of R.C. Chapter 4117 is unclear. As stated in the syllabus of *Spellacy*, prior to the enactment of R.C. Chapter 4117, officers of courts of common pleas were without authority to enter into collective bargaining agreements with court employees. In its discussion of the changes effected by the enactment of R.C. Chapter 4117, the Court in *Spellacy* relies on R.C. 4117.01(C)(8), which excludes court employees, among others, from the scope of R.C. Chapter 4117, and R.C. 4117.03(C), as set forth in the above quotation, as conferring upon the court the requisite authority to elect to engage in collective bargaining with court employees.

With respect to the situation about which you specifically ask, I note first that a clerk of courts is, as discussed above, a public employer, and the clerk's employees who perform a judicial function are excluded from the purview of R.C. Chapter 4117 by virtue of R.C. 4117.01(C)(8). I must conclude, therefore, that the clerk of courts is not required to engage in collective bargaining with those of his employees who perform a judicial function, but based upon *Spellacy*, may do so. In this regard, I hereby overrule Op. No. 80-007 to the extent that it is inconsistent with R.C. Chapter 4117 and the uncodified portions of Am. Sub. S.B. 133, as discussed below.

Your second question asks whether the answer to the first question is affected by the clerk's past practices of labor union recognition and contract negotiations. As indicated in note 2, *supra*, uncodified section 4 of Am. Sub. S.B. 133 directly addressed the affect of certain practices occurring prior to the enactment of Am. Sub. S.B. 133 upon the scheme established by R.C. Chapter 4117, stating in part:

> (A) Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code.[4] Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative.
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> (B) Any employee organization otherwise recognized by the public employer without a written contract, agreement, or memorandum of understanding shall continue to be recognized until challenged as provided in this act, and the Board has certified an exclusive representative.
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> ....
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> (D) Nonexclusive recognition previously granted through an agreement or memorandum of understanding shall not preclude the Board from: (1) determining an appropriate unit, (2) if necessary, removing classifications from a bargaining unit under an existing nonexclusive contract, agreement or memorandum of understanding, and (3) holding a recognition-certification election to determine an exclusive representative for all such employees deemed part of the appropriate unit. (Footnote added.)

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[4] R.C. 4117.05(B), as enacted in Am. Sub. S.B. 133, placed a restriction on the recognition or certification of an employee organization where, on the effective date of the act, there was a different employee organization recognized, through written agreement or otherwise, as the exclusive representative of all employees of a unit. The time limitation set forth in R.C. 4117.05(B) read as follows: "this restriction does not apply to that period of time covered by any agreement which exceeds three years. For the purposes of this section, extensions of agreements do not affect the expiration of the original agreement."

Further provision for prior practices was made in uncodified section 5, stating:

> Any written contract, agreement, or memorandum of understanding in effect on April 1, 1983 or entered into between January 1, 1983 and March 31, 1984 between a public employer and an employee organization shall be deemed valid for its term, except as provided in division (D) of Section 4 of this act.

Thus, in the situation about which you ask, past recognition of an employee organization by the clerk of courts may limit the entity with whom the clerk may now collectively bargain, as set forth in uncodified section 4. *See University of Cincinnati v. State Employment Relations Bd.*, 42 Ohio App. 3d 78, 536 N.E.2d 408 (Hamilton County 1988) (syllabus) ("[a] public-employer hospital has a duty to recognize a bargaining unit composed, in part, of supervisory and management-level nurses, notwithstanding the fact that such nurses are not otherwise protected under the Public Employees' Collective Bargaining Act, when the hospital has included the nurses in a line of collective-bargaining agreements negotiated over a time span embracing the effective date of the Act, and when the bargaining unit's representative has not been challenged by another employee organization"). *See generally* 1987 Op. Att'y Gen. No. 87-095 at 2-616 through 2-617, n. 2 (discussing the voluntary procedure by which the public employer or the exclusive representative may petition SERB for amendment of certification or for clarification of a bargaining unit). Further, pursuant to uncodified section 5 of Am. Sub. S.B. 133, should there remain in effect a written agreement entered into prior to April 1, 1983, or entered into between January 1, 1983, and March 1, 1984, between the clerk and an employee organization, it remains valid for its term, except as provided in uncodified section 4(D).

Your third question asks what constitutes a judicial function for purposes of R.C. 4117.01(C)(8). Since this question is currently at issue in pending litigation, however, I must decline to render advice on this matter. 1972 Op. Att'y Gen. No. 72-097 (syllabus, paragraph two).

Your final question asks: "Since some supervisory personnel are also currently members of the labor union with the clerk of courts, does the clerk of courts have the legal ability to designate any of such employees as fiduciaries pursuant to [R.C. 124.11] without committing an unfair labor practice?" R.C. 4117.11(A) sets forth the various activities which constitute unfair labor practices when carried out by a public employer, its agents, or representatives. R.C. 4117.11 states in pertinent part:

> (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
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> (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [R.C. Chapter 4117] or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;
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> ....
>
> (5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to [R.C. Chapter 4117]....

In *Lorain City School District Board of Education v. SERB, supra*, the court considered an issue similar to that about which you ask. In that case, the employer board of education restructured its health care program and reassigned duties previously performed by nurses within a bargaining unit to health aides outside the bargaining unit. The board of education refused to bargain with the exclusive representative of the bargaining unit over the changes made in the operation of the health care program. SERB found the employer's failure to bargain over the change to constitute a violation of R.C. 4117.11(A)(1) and (A)(5). On appeal, the common pleas court affirmed SERB's order. The court of appeals then reversed the trial court, finding the reassignment of work previously performed by bargaining unit nurses to nonbargaining unit health aides not to be a mandatory subject of bargaining, since such a matter fell within the scope of management rights, about

which a public employer need not bargain under R.C. 4117.08(C). On appeal, the Supreme Court considered the scope of the obligation to collectively bargain under R.C. 4117.08, and stated that, "if a public employer intends to implement a decision which 'affects' wages, hours, terms and conditions of employment of a bargaining unit, then the employer must bargain on the issue. This is so even if the question is reserved for managerial discretion." 40 Ohio St. 3d at 261, 533 N.E.2d at 268. The court then concluded that, "[t]he elimination of bargaining unit work comes within the meaning of 'terms and conditions of employment.'" 40 Ohio St. 3d at 262, 533 N.E.2d at 268-69.

In the situation about which you ask, I understand that the employer seeks to designate as fiduciary employees certain employees who are currently in the bargaining unit. Pursuant to R.C. 4117.01(C)(9), however, "[e]mployees of a public official who act in a fiduciary capacity, appointed pursuant to [R.C. 124.11]" are excluded from the definition of "public employee," for purposes of R.C. Chapter 4117. If the redesignation you propose operates to remove work from the bargaining unit, such activity would appear to fall within the rule, announced in *Lorain City School District Board of Education v. SERB, supra,* that such activity is a mandatory subject of bargaining under R.C. 4117.08. Accordingly, the employer's failure to bargain over such a subject may constitute a violation of R.C. 4117.11(A)(1) and (A)(5), as concluded in *Lorain City School District Board of Education.*

I caution, however, as stated in *Lorain City School District Board of Education v. SERB*:

> [A] determination of whether a public employer's unilateral action "affect[s] wages, hours, terms and conditions of employment" within the meaning of R.C. 4117.08(C)[5] is generally a factual question which will vary depending upon the employer, employees and the circumstances of the case. Such disputes are properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and public employers. (Footnote added.)

40 Ohio St. 3d at 260, 533 N.E.2d at 266. Thus, a determination as to whether a particular action by a public employer constitutes an unfair labor practice is not simply a question of law, but may depend, in part, on the circumstances involved. For example, in the situation about which you ask, the answer may depend, in part, on the extent to which uncodified sections 4 and 5 of Am. Sub. S.B. 133 are applicable. As Attorney General, I am unable to make findings of fact or to interpret provisions of a particular contract or agreement. *See* 1986 Op. Att'y Gen. No. 86-039; 1983 Op. Att'y Gen. No. 83-087. Thus, I cannot make a determination as to whether the specific activity about which you ask would constitute a violation of R.C. 4117.11.

It is, therefore, my opinion, and you are hereby advised, that:

1. The clerk of the court of common pleas may engage in collective bargaining with those "employees of the [clerk] of courts who perform a judicial function," as that term is used in R.C. 4117.01(C)(8). (1980 Op. Att'y Gen. No. 80-007, overruled, in part.)

2. The extent to which the clerk of courts' past practices of both labor union recognition and contract negotiations with an employee organization currently representing the clerk's

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5 R.C. 4117.08(C) sets forth those matters about which a public employer need not bargain collectively.

employees affect his current obligations with respect to such bargaining must be determined with reference to sections 4 and 5 (uncodified) of 1983–1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983).