



BARGAINING UNITS: CONSOLIDATION, SEVERANCE, AND ADDITIONS

Bargaining units have been a fact of life in New Jersey school districts since the 1968 enactment of the Public Employment Relations Act. However, the composition of many districts' bargaining units has not remained static. Rather, in numerous instances, employees, unions and, sometimes, boards of education have sought to modify their district's existing bargaining organization. In some districts, existing bargaining units have been consolidated and in others certain positions have been severed from, or added to, established bargaining units. While the restructuring of districts' bargaining organization occurs frequently throughout the state, a request to change a well-established and familiar arrangement can be unsettling to a board of education. Understanding the procedures involved in changing a bargaining unit,¹ a board's options, as well as the implications of the change can assist board members and their administrators to assess the need for change and to respond effectively.

First, however, it is important to define the term "bargaining unit." A bargaining unit is the collection of your employees who are covered by a particular collective bargaining contract. It is usually described in Article I, the recognition clause of each contract in your district. Note that the bargaining unit is not the same as the union, because there may be employees who are covered by the contract who have chosen not to join the union. Such employees are bound by the terms of the contract, but have no voice in union affairs, including ratification of the tentative agreement.

Likewise, an employee who joins the union does not automatically become a member of the unit. A group of secretaries who join the teachers' "association," for example, have no rights under the existing teachers' contract, because they aren't in the bargaining unit defined in the recognition clause of the agreement.

Consolidation

Consolidation of bargaining units occurs when two or more existing bargaining units, which have separate contracts and may or may not be affiliated with the same

state union, are merged into the same unit and thereafter have the same union representing them and are under the same contract. In recent years, there has been a marked trend to consolidate existing bargaining units. Districts' small support staff units have been merged into one larger unit of noncertificated staff or support staff unit(s) have been consolidated with the teachers' unit.

Consolidation usually occurs as a result of a union request. Usually the union representing the largest existing bargaining unit will ask the board to recognize it as the bargaining representative, or agent, for the employees in the other units. This request will generally be accompanied by some sort of proof (such as petitions or individual authorization cards) that these employees want to be in a merged unit represented by that union. If the bargaining units were previously represented by other unions, the request will frequently include a letter from the officers of those organizations stating that they do not contest the move to consolidate. In addition, if the consolidation involves a merger of a unit of professional employees with nonprofessional employees, the union will present evidence that the professional unit, in accordance with the requirements of *N.J.S.A. 34:13A-6(d)*, has agreed to include nonprofessional employees in the unit.

Faced with a request that is supported by a majority in each unit, a board has a choice. It may choose to grant voluntary recognition to the union as the majority representative for the consolidated bargaining unit and thereafter bargain with the union for a single contract covering all of the employees from the merged units. Alternatively, the board may refuse to do so and, under those circumstances, the union may file a petition with the Public Employment Relations Commission (PERC).

Voluntary Recognition Procedures To be given validity and recognition by PERC, a board's voluntary recognition must meet certain guidelines. First, the board must have a good faith belief that the union has been selected by a majority of the employees in each bargaining unit; boards' review of authorization cards or petitions should establish the desire of a majority of the affected employees. If the board is satisfied with the showing of interest, it is then required to post a notice of its intent to grant voluntary

¹ For a more detailed discussion of bargaining units and representation procedures, see the NJSBA publication *The Public Employment Relations Law*. Also see "Analyzing a Recognition Clause" in the Selected Contract Clauses section of *The Negotiations Advisor*.

recognition. The notice must be posted for 10 days and must also be sent to any union that has, within the last year, expressed its interest in representing the unit(s) in question. Voluntary recognition may not be granted if, within the 10 day period, another union notifies the board of its claim to represent the unit or files a petition with PERC. In the absence of notice from a competing union, a board can put its voluntary recognition in writing, including a specific definition of the bargaining unit.

When boards follow these procedures, their voluntary recognition will be deemed by PERC to constitute a “recognition bar” to any other election within the unit for a one year period. This can be important to assure unit stability and to avoid frequent changes in unit composition but will not be granted if the board does not follow the procedures delineated in *N.J.A.C. 19:11-3.1(b)*.²

Boards must keep in mind, however, that they do not have a legal obligation to grant voluntary recognition to any union seeking to represent a new group of employees. If the board does not grant voluntary recognition, the union can pursue its goal to consolidate bargaining units by initiating PERC’s representation procedures and requesting an election for employees to choose a union in the expanded unit.

PERC’s Procedures: The filing of a petition triggers the Commission’s review of the request to consolidate bargaining units. The merger of the units before PERC is not automatic. PERC will review the petition to be sure that at least 30% of the employees in each unit to be merged into the proposed unit desire this union to represent them.

It will also check to see that the petition is filed on time. A petition for consolidation of units can only be timely between September 1 and October 15 of the last year of the affected contracts or upon the expiration of the contracts. This “bar” to unit reorganization serves to avoid disruption in the parties’ bargaining relationship during contract administration. PERC will dismiss as untimely a consolidation petition which is filed at any other time.

PERC may also consider the parties’ bargaining history. If one of the affected union opposes the merger, and can show that there has been a successful bargaining relationship under the present unit structure, PERC may not permit a consolidation of units.³ Generally, however, PERC has held that an established “community of interest” is the most important factor in determining the appropriate bargaining unit. In a school setting, PERC has held that all school employees share a “community

of interest”; thus, in accordance with its policy to avoid a proliferation of bargaining units, PERC has generally permitted mergers of school employee units when the petitions have been procedurally correct.⁴

Boards’ Assessment of the Request to Consolidate

Should a board agree to voluntarily consolidate units? That depends primarily upon the effectiveness of the present unit structure in meeting the needs of your district and your employees.

Suppose, for example, you presently have three bargaining units, for teachers, secretaries/aides, and custodians/cafeteria workers. The contracts expire in alternating years. You are pleased with the tone and outcome of all these negotiations. In such a case, there is no reason to agree to consolidate the units.

The only apparent gain is that there will be just one set of negotiations, rather than three, and you will have one or two years off between these negotiations when there will be no bargaining occurring.

But there are at least two real losses in consolidating such units. First, the mixing of professional and nonprofessional employees generally results in less attention being placed on the real problems of the nonprofessional group. Negotiations over their concerns are generally put off until the end of bargaining, and dealt with quite summarily. Therefore, if you are concerned about using negotiations to uncover and address the true concerns of your support staff, consolidation of their units with your professional staff unit is counterproductive. Second, the larger the percentage of total employees covered by a single contract, the greater the bargaining power of the union during negotiations. A threat of picketing, job actions or strikes is more significant if mixed groups of employees are involved. Therefore, under these circumstances, a board may not wish to grant voluntary recognition.

Suppose, on the other hand, you have six bargaining units covering a total of just 300 employees. Certain units cover less than 15 employees. There is rivalry and jealousy among the various unions involved. Your bargaining team is engaged in virtually non-stop negotiations, and your administrators spend an inordinate amount of time processing grievances and studying the numerous and very different contracts in effect.

In this situation, unit consolidation may be to your advantage. You should generally not agree to a single bargaining unit, for the reasons cited above. A structure with two or three units, however, might be to the advantage of everyone involved.

² *Barnegat Board of Education*, PERC No. 88-91, 14 *NJPER* 19096.

³ *Englewood Board of Education*, PERC No. 82-25, 7 *NJPER* 12229 (1981). See also *Moonachie Board of Education*, D.R. No. 82-28, where the bargaining history was too short and informal to bar consolidation; *Burlington County Vocational and Technical High School Board of Education*, D.R. No. 82-43, where bargaining history was not raised as an objection by any party; *Lacey Township Board of Education*, D.R. No. 82-48, where voluntary agreement to consolidate teachers and clerical units was held against a board which later argued that its successful bargaining history with its custodians should block a consolidation of the custodians with the new teacher/clerical unit.

⁴ See, for example, *Bordentown Regional Board of Education*, PERC No. 84-126, 10 *NJPER* 15136, *aff’d* App. Div. Dkt. A-4503-83T6, April 9, 1985; *Piscataway Board of Education*, PERC No. 84-124, 10 *NJPER* 15134; *Glen Rock Board of Education*, PERC No. 84-125, 10 *NJPER* 15135.

In the absence of a voluntary board agreement to a merger of existing units, the union can always seek a PERC unit determination. Given PERC's policies, it is likely that the union will prevail in a merger, if its petition is pro-cedurally correct. The only action currently available for boards to delay or discourage the merger of existing units is to negotiate staggered expiration dates for contracts with its bargaining units. Alternating expiration dates results in staggered negotiations; it also prevents concurrent "open periods" in contracts when merger petitions are timely. This strategy may retard mergers; however, it may also retard and complicate settlements. As petitions are considered timely at the expiration of contracts, unions with a strong commitment to consolidation may opt not to bring negotiations to an end so that a timely petition can be filed.

Severance

Severance involves the removal of employees from a bargaining unit. Accomplished either through negotiations or through a PERC petition, severance procedures are usually initiated by boards that find that the inclusion of certain employees in the unit is inappropriate under the law. These claims usually center on the inclusion of supervisors in a nonsupervisory unit or the status of managerial and confidential employees.

Severance of Supervisors

Probably the most frequent application of severance procedures in school districts has involved the removal of supervisors from a unit consisting predominantly of nonsupervisors. The major impetus for this was the promulgation of the State Board of Education rules for the evaluation of tenured teachers, which resulted in increased evaluative functions for districts' supervisors.

PERC decisions in this area have consistently concluded that supervisors who hire, fire, or evaluate employees, or who make effective recommendations on these matters, are supervisors under the Act and should not remain in the same unit as nonsupervisors. PERC reasons that the supervisor suffers a conflict of interest when he must make important employment decisions regarding employees who are in the same union and covered by the same contract as the supervisor.⁵

It is not important how long the supervisors have been in the same unit as the nonsupervisors. PERC has held that, even if the supervisors were mixed with their subordinates in a bargaining unit prior to 1968, the first year of the PERC Law, they can now be severed. The board must only show that the affected supervisors are primary evaluators of other unit members and make effective recommendations on hiring, firing, or disciplining unit members; these functions are generally seen as

creating a substantial potential for conflict in a unit consisting of supervisory and nonsupervisory employees. (For standards applicable to an all supervisors' unit, please see the "Determination of the Appropriate Supervisory Unit" article in this section of *The Negotiations Advisor*.)

The timing of a petition to sever supervisors is not limited. A petition to sever supervisors can be filed at any time during a contract's term. The effective date of the severance, however, will usually be the expiration of the current agreement.

If your district presently has principals, supervisors, or chairpersons in the teachers' bargaining unit, and these people are true supervisors under the Act, i.e., they hire, fire and evaluate employees, you can have them removed from the teachers' unit. Most teacher unions will agree to do so, especially if the supervisory employees also wish severance, and the matter can thus be handled in your normal negotiations. If the union refuses to sever them, or demands a trade-off for the severance which you find unacceptable, a petition can be easily filed with PERC.

In nearly all school districts, it is in management's interest to have the supervisors out of the teacher unit, in order to spare them the conflict of interest pressure, increase their identification with the central administration and board, and permit you to devote appropriate time and resources to their particular needs. It is possible, even probable, that once severed, the supervisors will form their own unit and demand to negotiate. They have a right to do so. Even if they do, this additional unit, and the time needed to negotiate regarding it, are a small price to pay for the successful severance.

Severance of Managerial and Confidential Employees

Boards of education have also initiated severance procedures seeking to sever other employees from an existing unit. Assistant superintendents, for example, are managerial employees under the PERC Law, and cannot be included in any bargaining unit. Severance of such persons, if done by PERC, is effective immediately, not at the contract's expiration.

The more common error is the inclusion of confidential employees in bargaining units, particularly secretarial units. A person is a confidential employee if he or she has such job responsibilities or knowledge regarding management's negotiations strategy and goals that membership in a bargaining unit would be incompatible with his or her official duties. The secretaries to the Superintendent and Assistant Superintendent usually fall within this category. So might the secretaries to the Board Secretary or Bookkeeper (as well as these positions themselves), if they are involved in typing confidential

⁵ See *Ramsey Board of Education*, D.R. No. 82-37; *Paterson Board of Education*, D.R. No. 82-46; *Parsippany-Troy Hills Board of Education*, D.R. No. 82-51; *Bloomfield Board of Education*, D.R. No. 82-56; *Edison Township Board of Education*, D.R. No. 82-8.

memos regarding the Board's negotiations efforts. In determining the confidential status of a position, PERC will go beyond the position's title and job description to examine the employee's actual duties.⁶

An employee who is a confidential employee under the law cannot be included in any bargaining unit, and PERC will sever this employee at the Board's request, effective immediately. PERC's standards are strict; however, employees who merely have access to files or data containing information that might be relevant to negotiations will likely not be excluded.⁷

Severance Petitions Filed by Employees

Occasionally, a classification of employees will file a petition with PERC seeking severance from an existing unit. However, a desire of a classification of employees, such as support staff or shop teachers, to be severed from a larger, mixed unit of teachers and non-teachers is difficult to achieve. PERC's disposition toward large units imposes a heavy burden on a sub-group seeking severed representation in a small unit. (This is another reason to oppose consolidation of units; once accomplished, it may be nearly impossible to reverse.) The board and/or the group seeking severance would need to demonstrate that the existing unit's history demonstrates an unstable relationship, that the incumbent organization is unstable and that the incumbent union had not provided responsible representation.⁸ The union's failure to achieve gains or to maintain benefits for the sub-group of employees in one round of negotiations may not be an indication of irresponsible representation.⁹

Although it may be difficult to sever an entire classification of employees from an existing bargaining unit, greater success is possible in removing inappropriate positions such as supervisors and confidential employees.

If your district has confidential or managerial employees in any bargaining unit, you should act to get them out. If you are dissatisfied with the present bargaining unit because it contains professionals and nonprofessionals, and you feel that negotiations are unnecessarily long and confusing, you can propose to the union to sever the unit, so that both parties can give adequate attention to the needs of the different groups. Your chances of success, obviously, are slim, but they are even worse before PERC.

Additions

Additions to a bargaining unit involves adding new job titles to a unit where similar titles already exist, and adding whole groups of employees to a unit that already exists.

How should you treat a newly created position? If a new type of administrative position is created, for example, which involves supervision of teachers, and a supervisor unit already exists in your district, that new job likely belongs in that unit. You can agree to place it in voluntarily and then apply that contract's terms to the new job (or negotiate slightly different ones if the job has a special uniqueness that justifies different terms and conditions).

If you believe it doesn't belong in the unit because of a conflict of interest with the other unit members or for other reasons, you can refuse to include it. The union can file a petition with PERC, arguing that the appropriate unit for the new job is the union's present unit, and PERC will decide the case. If the job belongs in the unit because of its similarity with other jobs there, PERC will so order, effective immediately. If it doesn't belong, it stays out.

If the union seeks mid-contract to add a long-existing job to the unit, claiming that it should have always been in the unit, or that the union didn't know the job wasn't being treated according to the contract, the same options exist. You can agree to add it, or refuse to and send the union to PERC. If PERC determines that the job was known to both parties (or they should have known about it) and they intentionally ignored it during negotiations, PERC will not order the job included at that time. If the job logically belongs in the unit, however, PERC may order the job included upon the expiration of the contract. Of course, if PERC determines that the job doesn't belong in the unit in question, the matter ends.

Of greater trouble to boards is the attempted addition of groups of previously unorganized staff to an existing unit. This may include efforts to add unrepresented secretaries to a custodians' unit or unorganized support staff to an existing teachers' unit. Additions of this type may be achieved voluntarily or will require procedures akin to those required for consolidation of units as an election to determine the wishes of the employees seeking representation will be involved. Given PERC's standards for determining community of interest among school employees and its policy of avoidance of unit proliferation, it is likely that PERC will find the proposed enlarged unit appropriate and order an election, if the petition is timely and otherwise procedurally correct. In accordance with the PERC Law, PERC will order two elections when there is a desire to create a unit which includes professional and nonprofessional employees: nonprofessional employees will vote to express their desires for representation and a "professional option" election is held to determine if the professionals desire the inclusion of nonprofessional members in their unit.

⁶ See, for example, *State of New Jersey*, PERC No. 87-147, 13 NJPER 18185.

⁷ See *Passaic County Regional High School District No. 1 Board of Education*, PERC No. 77-19, 3 NJPER 34.

⁸ *Jefferson Township Board of Education*, PERC No. 61 (1971).

⁹ *Passaic County Technical and Vocational High School*, PERC No. 87-73, 13 NJPER 18026.

Boards faced with demands to include unorganized nonprofessional employees in their teacher unit will be well-served by consulting their attorney, professional negotiator, or the NJSBA Labor Relations Department to discuss their options and the complexities of negotiating a “new” contract with the expanded unit.

Conclusion

The structure of bargaining units is a very important factor in negotiations, contract administration, and effective personnel relations. Boards entering negotiations should carefully review their present recognition clauses to see if certain positions should be deleted, perhaps to be included in another unit. If your board receives a request to merge or expand a unit, do not respond before contacting your attorney, professional negotiator, or the Labor Relations Department.