Unit Clarification

A petition for clarification of an existing bargaining unit or units may be filed by a collective bargaining representative or an employer where no question concerning the majority status of the exclusive bargaining representative is pending at the time the unit clarification petition is filed. Such a petition may be filed under each of the Acts administered by the Board where there is a dispute over the unit inclusion or exclusion of employee(s), or where there has been an accretion to or reorganization of the work force.[1] In addition, under the State Labor Relations Act and the Municipal Employee Relations Act, such a petition may be filed where the collective bargaining representative or the employer seeks a reorganization of the existing structure of a bargaining unit or units.[2]

Upon receipt of a unit clarification petition, the Board notifies the other party involved and requires the party to file a response to the petition within a specified time, but not less than 15 days. The response should include a specific admission or denial of each claim made in the petition, and a concise statement setting forth the reasons in support of or in opposition to the unit clarification proposed by the petitioner.[3]

Board staff may intervene actively with the parties to seek to resolve any unit clarification issues in dispute. Staff will make the parties aware of Board case law precedents on the issue(s) in dispute. Staff may engage in telephone conference calls and/or meetings with the parties to seek to informally resolve issues.

If unit clarification issues are not informally resolved, then a panel of three Board members will decide the matter through issuance of written findings of fact, opinion and order after a hearing and filing of briefs. If the Board decides that the

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[1] Articles 14, 24, 34, 54, 64, and 74, Board Rules of Practice.
[2] Articles 24 and 34, Board Rules of Practice.
[3] Sections 14.3, 24.3, 34.3, 54.3, 64.3, and 74.3, Board Rules of Practice.

employee or employees in dispute should be added to the bargaining unit, the Board issues an order adding the employee or employees to the unit without an election.

In some unit clarification cases before the Board, at issue is whether the job duties of a position have changed so that an employee previously included in a bargaining unit should be excluded as either a confidential or supervisory employee, or whether duties have changed so that an employee previously excluded from a bargaining unit as supervisory or confidential now should be included in the unit because they no longer are confidential or supervisory employees. In such cases, the criteria discussed above, concerning whether an employee is supervisory or confidential, apply.

Some of these cases have involved situations where the Board previously has issued decisions on whether employees should be excluded from bargaining units as supervisory employees. The party petitioning to change the status of employees has the burden of demonstrating that circumstances have changed sufficiently with respect to the duties of the employees, since the Board either had included them in, or excluded them from, the bargaining unit to now warrant a different result.[4]

In cases where employees' exclusion from bargaining units as supervisory employees resulted from an agreement between a union and an employer rather than a Board decision, the Board determined that the burden was on the union to demonstrate that circumstances had changed with respect to the supervisory duties of the employees since the parties' agreement and convince the Board by a

[4] Colchester Police Officers Association and Town of Colchester, 26 VLRB 9 (2003). Ferrisburg Central School Board and Ferrisburg Educational Support Personnel Association, 24 VLRB 104, 114 (2001). City of Montpelier and Local 2287, IAFF, 18 VLRB 374 (1995). Burlington Firefighters Association and City of Burlington, 18 VLRB 137 (1995). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995).

preponderance of the evidence that the employees were no longer supervisory employees.[5]

However, in an earlier case, a municipal employer sought to exclude three individuals from a bargaining unit as confidential employees who were included in the unit by agreement of the employer and the union approximately a year earlier. The Board determined that the employer was not required to demonstrate changed job responsibilities to have the employees removed from the bargaining unit. The Board cited the lack of Board involvement in the addition of the positions to the bargaining unit and the intent of the legislature that the Board maintain ultimate control of the composition of the bargaining unit to ensure that ineligible employees do not remain in the bargaining unit.[6]

Another type of unit clarification case concerns an attempt by an incumbent union to add to an existing bargaining unit, without a representation election, a group of employees previously excluded from the unit. In response to a petition filed by a union under the Municipal Act, the VLRB declined to add a group of employees to an existing bargaining unit without allowing them the opportunity to decide in an election whether they wished to be represented by the union, where the group of employees had been excluded from the bargaining unit at the time the bargaining unit was formed 15 years earlier.[7]

The Board concluded that the democratic rights of the employees to determine whether they wished to be represented by the union outweighed any negative effect of leaving them out of the unit.[8] The Board indicated that their historical exclusion

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[5] International Brotherhood of Electrical Workers Local 300 and City of Burlington Electric Department, 26 VLRB 103, 110-111 (2003). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995).
[6] Village of Essex Junction and Local 1343, AFSCME, 12 VLRB 211, 216-217 (1989).
[7] Local 1343, AFSCME, Burlington Area Public Employees Union, 4 VLRB 391 (1981).
[8] Id. at 398.

from the unit had not hurt the efficiency of management's operations or the productive nature of collective bargaining between the city and the union, and that a tradition of harmonious and mutually beneficial relations between an employer and its employees is a factor of considerable force that should not be tampered with for insubstantial reasons.[9]

In a similar case, decided under the State Employees Labor Relations Act, the Board majority concluded that the union had not made a showing of significantly changed circumstances, or labor relations difficulties, since employees were excluded from a bargaining unit four years earlier, warranting adding the employees to the bargaining unit through a unit clarification petition.[10] In another State Employees Act case, the Board concluded that it was inappropriate to add a group of Community College of Vermont adjunct faculty to an existing bargaining unit of adjunct faculty at the four campus-based colleges of the Vermont State Colleges system without allowing the CCV faculty the opportunity to decide in an election whether they wished to be represented by the union.[11] The Board stated that a unit clarification petition was an inappropriate vehicle to at least double the size of the bargaining unit.[12]

The Board reached a different conclusion from these two cases in another case where a union sought to add, without an election, one water supply operator to an existing bargaining unit of city public works employees represented by the union. The water supply operator was the only non-supervisory and non-confidential employee of his department that was not in the existing bargaining unit. The Board stated:

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[9] Id. at 399.
[10] UE Local 267 and University of Vermont, 24 VLRB 260, 268-70 (2001).
[11] VSCFF and VSC, 17 VLRB 100 (1994).
[12] Id. at 103.

> In unit clarification cases, we are concerned with balancing the competing interests of management's rights, the right and duties of unions to achieve gains for its members, self-determination rights of the involved employee(s), harmonious labor relations and the protection of orderly bargaining in the public sector to ensure the continuity of public services. . . In weighing those interests here, we believe productive and harmonious labor relations are threatened if the Water Supply Operator is left out of the bargaining unit in which all other eligible employees of his department are included, particularly in a case such as this where there is a union shop provision, since the Water Supply Operator may receive the same (or greater) benefits as union members without paying union dues and thus enjoy a "free ride". We believe the democratic rights of the Water Supply Operator to determine whether he wishes to be represented by the Union are outweighed in this instance by the promotion of labor harmony.[13]

Accretion is another method by which a union may seek to add an employee or group of employees to an existing bargaining unit without an election. Accretion is the process whereby new employees, whose work and interests are aligned with those of employees in an existing bargaining unit, are added to that unit. If the duties of the new employees are identical or substantially similar to those of employees in an existing bargaining unit, it is appropriate to find an accretion.[14] A determination shall be made whether the new employee shares a community of interests with employees in the existing unit. [15] In accretion cases, the Board must consider the facts in light of conflicting policies of maintaining stability in bargaining relations

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[13] Local 1369, AFSCME AFL-CIO and City of Barre, 7 VLRB 36, 46 (1984).
[14] Grand Isle Supervisory Union-NEA and Alburgh School Board, 33 VLRB 1, 2 (2014), Barre Town School Chapter, AFSCME Local 1369 and Barre Town School District, 13 VLRB 364, 368 (1990). Woodstock Union High School Teachers Organization, Educational Support Personnel Unit and Woodstock Union High School District, 22 VLRB 186, 196 (1999). UE Local 267 and University of Vermont, 24 VLRB 260 (2001). AFSCME Council 93 and Town of Colchester, Town of Colchester and AFSCME Council 93, 30 VLRB 281 (2009).
[15] Grand Isle, 33 VLRB at 2. Barre Town, 13 VLRB at 369. Woodstock, 22 VLRB at 196. UE Local 267 and University of Vermont, 24 VLRB at 270.

and assuring that employees have the right to choose their own bargaining representative.[16]

In 2012, the Board granted a joint unit clarification petition filed by VSEA and the Judiciary Department to amend the order issued by the Board in 2000 certifying VSEA as the representative of all employees of the Vermont Supreme Court eligible to be represented by an employee organization pursuant to the Judiciary Employees Labor Relations Act. In granting the unit clarification petition, the Board added probate registers to the bargaining unit without a representation election based on an accretion. The probate registers had been excluded from the definition of employees covered by the Judiciary Employees Act when VSEA became the representative of employees. The probate registers were placed under coverage of the Act in 2011 as part of a court system restructuring. Given this change in statute and the similarity of duties of registers with employees in the existing bargaining unit, the Board determined it was appropriate to add them to the bargaining unit through an accretion.[17]

The reorganization of a workforce also was involved in a 2015 decision of the Board involving school support staff. Subsequent to 35 to 40 special education instructional assistants moving from being employed by individual school districts within a supervisory union to becoming employees of the supervisory union, and the supervisory union recognizing the school staff association as the representative of the instructional assistants, the association filed a unit clarification petition to add seven behavior interventionists employed by the supervisory union to the bargaining unit of instructional assistants. The behavior interventionists had been employed by the supervisory union since 2005 and had never been represented by an employee organization. The Board granted the association's petition, concluding that given the

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[16] Id.
[17] VSEA and Judiciary Department of the State of Vermont, 32 VLRB 21 (2012).

similarities between the positions and the ready movement of instructional assistants into behavior interventionist positions, productive labor relations would be threatened if behavior interventionists were not placed in the same bargaining unit as instructional assistants.[18]

[18] Caledonia North Education Association and Caledonia North Supervisory Union School Board, 33 VLRB 145 (2015).