

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL)
CONSTRUCTION EQUIPMENT)
OPERATORS' LABOR COUNCIL, et al.) CASE NO. 06-1688
Appellant/Relators)
vs.)
CITY OF CLEVELAND, et al.)
Appellee/Respondents)

APPELLANT/RELATOR MUNICIPAL CONSTRUCTION EQUIPMENT
OPERATORS' LABOR COUNCILS' BRIEF ON THE MERITS

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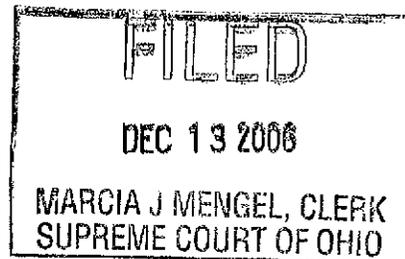


TABLE OF CONTENTS

	Page
Table of Authorities	v
Statement of Facts	1
Argument	5
Assignment of Error I THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT THE CITY OF CLEVELAND’S MOTION FOR SUMMARY JUDGMENT.	8
Proposition of Law A The possibility of engaging in collective bargaining is not a “remedy-of-law” which will preclude the availability of a writ of mandamus for public employees who are denied their lawful wages and benefits.	9
Proposition of Law B An interpretation of a contract which renders a provision in the contract meaningless and of no effect will be rejected when an alternate interpretation gives meaning to all provisions in the contract.	12
Proposition of Law C	
i. A relator in a mandamus action does not have an adequate remedy in the ordinary course of the law by way of declaratory judgment where complete relief for relator can only be obtained by mandated action on the part of a public official.	17
ii. Pursuant to R.C. §2731.09, disputed facts in a mandamus action shall be determined through evidentiary hearing as in civil trial, regardless of whether a declaratory judgment has been requested.	17
iii. A court in a mandamus action has the duty to interpret the constitution and applicable laws, and may not render judgment against a relator rather than do so.	17
Proposition of Law D When considering a motion for summary judgment, a court may not assume asserted facts to be true and render judgment thereon.	20

Assignment of Error II

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DENYING RELATOR
CEO UNION’S MOTION FOR SUMMARY JUDGMENT. 21

Proposition of Law A

A municipal charter provision requiring that certain employees shall be compensated at prevailing wage rates means that such employees shall receive as gross wages 100% of the prevailing wage rate, with only such payroll deductions as are permitted by law. 22

Proposition of Law B: Pursuant to R.C. §4117.10(A), in the absence of a collective bargaining agreement as defined in R.C. §4117.01, all applicable state and local laws pertaining to the wages, hours, and terms and conditions govern public employees, including a municipal charter and R.C. §§124.38 and .39 providing the accrual of paid sick leave and a cash payment for unused sick leave upon retirement. 25

Proposition of Law C: Res Judicata is not applicable when the facts and legal issues actually litigated in two cases are not the same. 26

Proposition of Law D: A Court may not base a summary judgment upon the asserted existence of a collective bargaining agreement, when the evidence shows that no collective bargaining agreement had been made, and that evidence is further supported by rulings of the state employment relations board. 28

Proposition of Law E: A municipality may not, by ordinance, eliminate sick leave provided under a state law providing for the health, safety and general welfare of all employees. Ohio Const. Art. II, Sec. 34. 31

Conclusion 34

Proof of Service 37

Appendix 38

- A. Amended Notice of Appeal
- B. Judgment Being Appealed
- C. Opinion Supporting Judgment Being Appealed
- D. Dissenting Opinion

- E. *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St.3d 362
and
State ex rel. IUOE v. Cleveland (1992), 62 Ohio St.3d 537
- F. *SERB Opinion* 2004-004 in *SERB v. Cleveland* Case No. 2003-ULP-06-0322
- G. SERB Order Directing Administrative Hearing in SERB
Case No. 02-REP-06-116 "In Matter of Municipal Construction Equipment
Operators' Labor Council, et al."
- H. Recommended Determination of Administrative Law Judge
Beth Jewell, after hearing
- I. Motion of IUOE Local 18 to join CEO Unions's Motion for
Approval of Recommended Determination
- J. *SERB Opinion* 2006-008 in Case No. 02-REP-06-0116 "In the Matter
of Municipal Construction Equipment Operators' Labor Council, et al."
- K. Cleveland City Charter Sec. 191
- L. Cleveland Ordinance No. 1682-79 (1979)
- M. Ohio Const. Art. II Sec. 26 and 34
Ohio Const. Art. XVII Secs. 3 and 7
- N. Revised Code §§2731.01 through .09
- O. Revised Code §§ 4117.01
4117.05
4117.08
4117.10
4117.11
4117.14
- P. Cleveland City Code Sec. 171.31

TABLE OF AUTHORITIES

CASES

<i>Ameigh v. Baycliffs Corp.</i> , 81 Ohio St.3d 247 (1998)	26
<i>Am. Financial Servs. Assn. v. Cleveland</i> (2006), ___ Ohio St. 3d ___, 2006-Ohio-6043	31
<i>Calco v. Stow</i> (Apr. 29, 1981) 9 th Dist. No. 9990 at 4	23
<i>Chelentis v. Luckenback S.S.Co.</i> , 247 U.S. 372 (1918)	9
<i>Cleveland ex rel. Neelon v. Locher</i> (1971), 25 Ohio St.2d 49	23
<i>Deluca v. Aurora</i> (2001), 144 Ohio Supp.3d 501, 511	23
<i>Doe v. Shaffer</i> (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243	4
<i>Dresher v. Burt</i> (1996), 75 Ohio St.3d 280, 292	5
<i>Ebert v. Bd. of Mental Retardation</i> (1980), 63 Ohio St. 2d 31	31,32
<i>Farmers Natl. Bank v. Delaware Ins. Co.</i> (1911), 83 Ohio St. 309	11
<i>Ford Motor Co. v. John L. Frazier & Sons</i> , 8 Ohio App.2d 158, 161 (1964)	16
<i>Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities</i> <i>Authority</i> , 78 Ohio St.3d 353 (1997)	14
<i>Four Star Service, Inc. v. Akron</i> , (Oct. 27, 1999), 9 th Dist. No. 19124, at 5	13
<i>Fraternal Order of Police v. East Cleveland</i> (1989), 64 Ohio App. 3d 421 at 424 (Cuy. Cty.)	33
<i>Grafton v. Ohio Edison Co.</i> (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 245	4
<i>Henkle v. Henkle</i> (1991), 75 Ohio App.3d 732, 735	21
<i>In Re: Kelley & Ferraro Asbestos Cases</i> , 153 Ohio App.3d 458, 2003 Ohio 3936 (Eighth Dist. Ct. App., 2003)	14,15
<i>Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.</i> (1984), 15 Ohio St.3d 321, 323-24	13
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	19
<i>Metcalfe v. Akron</i> , 2006-Ohio-4470 (9 th District Aug. 30, 2006)	21
<i>Nelson v. Tubbs Jones</i> (1995) 104 Ohio App.3d 823 at 825	25
<i>Reed v. Youngstown</i> (1962), 173 Ohio St. 265	23
<i>SERB v. Cleveland</i> 02-REP-06-0116	2,3,20
<i>SERB Opinion</i> 2004-004	2,3,6,8,9,11,28,29,30
<i>SERB Opinion</i> 2006-008	3,7,20,29
<i>South Euclid Fraternal Order of Police v. D'Amico</i> (1983) 13 Ohio App. 3d 46 at 47 (Cuy. Cty.)	32,33
<i>State ex rel. Adkins v. Sobb</i> (1986), 26 Ohio St.3d 46 at 48	10,33
<i>State ex rel. Ashbrook v. Brown</i> (1988), 39 Ohio St3d 115, 117	18
<i>State ex rel. Bednar v. N. Canton</i> (1994), 69 Ohio St. 3d 278.	10
<i>State ex rel. Bossa v. Giles</i> (1980), 64 Ohio St.2d 273	10
<i>State ex rel. Britton v. Scott</i> (1983), 6 Ohio St.3d 268	10
<i>State ex rel. Consolo v. Cleveland</i> (2004), 103 Ohio St.3d 362 at 367 ..	3,7,12,13,19,20,26,27,34
<i>State ex rel. Fattlar v. Boyle</i> (1988), 83 Ohio St.3d 123 at 125	17,18,19

<i>State ex rel. Fenske v. McGovern</i> (1984), 11 Ohio St.3d 129	10
<i>State ex rel Freeman v. Morris</i> (1991), 62 Ohio St.3d 107, 109	25
<i>State ex rel. Hipp v. N. Canton</i> (1994), 70 Ohio St.3d 102	9
<i>State ex rel. IUOE v. Cleveland</i> (1992), 62 Ohio St.3d 537 at 539	3,5,7,8,9,10,19,20,24,25,26,34
<i>State ex rel. Ohio Civ. Serv. Employees Assn. AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.</i> (2004), 014 Ohio St.3d 122	18
<i>State ex rel. Pell v. Westlake</i> (1980), 64 Ohio St.2d 360	23
<i>State ex rel. Pinzone v. Cleveland</i> (1973), 34 Ohio St.2d 26	21,22
<i>State ex rel. Plain Dealer Publishing Co. v. Barnes</i> (1988), 38 Ohio St.3d 165 at 168	23
<i>State ex rel Randel v. Scott</i> (1952), 95 Ohio App. 197	32
<i>State ex rel. Reuss v. Cincinnati</i> (1995) 102 Ohio App. 3d 521 at 524	34
<i>State ex rel. Tomino v. Brown</i> (1989), 47 Ohio St.3d 119, 120	18
<i>State ex rel. Villari v. Bedford Hts.</i> (1984), 11 Ohio St.3d 222 at 223	5,10
<i>Temple v. Wean United, Inc.</i> (1977), 50 Ohio St.2d 317 at 327	4
<i>Viock v. Stowe - Woodward Co.</i> (1983), 13 Ohio App.3d 7, 12	4
<i>Weir v. Rimmelin</i> (1984) 15 Ohio St. 3d 55 at 56	33
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003- Ohio-5849 at ¶11	13

CONSTITUTIONAL PROVISIONS

Ohio Const. Art. II, §26	32
Ohio Const. Art. II, §§ 26&34	30,33
Ohio Const. Art. IV, §3(B)	1
Ohio Const. Art. XVIII, §§3, 7	31,33

STATUTES

R.C. §9.44	33
R.C. §124.38	5,24,31,32,33
R.C. §124.39	5,24,31,34
R.C. §2731.01	1
R.C. §2731.02	1
R.C. §2731.05	9
R.C. §2731.06	19
R.C. §2731.09	17,18,35
R.C. §4117.	4,5
R.C. §4117.01(C)	1,24
R.C. §4117.01(D)	1
R.C. §4117.05	2,19
R.C. §4117.05(A)(2)	6,30
R.C. §4117.05(B)	6,30
R.C. §4117.08	28
R.C. §4117.08(A)	6,28
R.C. §4117.09	2
R.C. §4117.10(A)	3,5,8,24,25

R.C. §4117.11(A)(1)	2
R.C. §4117.11(A)(5)	2
R.C. §4117.14	28
R.C. §4117.14(A)	28
R.C. §4117.14(B)(1)	28
R.C. §4117.14(B)(2)	28

RULES OF COURT

Civ. R. 8 (C)	25
Civ. R. 12(B)	25
Civ. R. 56	4,18
Civ. R. 56(C)	4,5
Civ. R.56(E)	

Cleveland City Charter

City Code Sec. 171.31 “Sick Leave”	32
Cleveland City Charter §191	2,7,22,23
Cleveland Ordinance No. 237-05	
Cleveland City Council Ordinance 1682-79 (1979)	22

Secondary Authorities

11 O.Jur.2d 399, Contracts, Section 155	
63 O. Jur.3d <u>Judgments</u> §§417, 419 at pp.202-203	26
67 O.Jur.3d § 123 (1999)	17

**APPELLANT/RELATOR MUNICIPAL CONSTRUCTION EQUIPMENT
OPERATORS' LABOR COUNCIL'S BRIEF ON THE MERITS**

Assignment of Error I

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT.

Assignment of Error II

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DENYING RELATOR CEO UNION'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

This case was filed with the Eighth District Court Appeals as an original action pursuant to R.C. §2731.01, 2731.02 and Ohio Const. Art. IV, §3(B). The action was filed by the Municipal Construction Equipment Operators' Labor Council (hereafter the "CEO Union"), an employee organization as defined in R.C. §4117.01(C), on behalf of its members. The CEO Union is a certified exclusive collective bargaining agent as defined in R.C. §4117.01(D). The action sought a writ of mandamus to require Respondents (hereafter collectively referred to as "Cleveland") to provide compensation to the CEO Union's members at prevailing wage rates for the period from January 30, 2003 to February 14, 2005. The Eighth District court ordered that cross-motions for summary judgment be filed by the parties. The motion of Cleveland for summary judgment was granted. The motion of the CEO Union for summary judgment was denied.

STATEMENT OF FACTS

During the relevant time period from January 30, 2003 to February 14, 2005, the Petitioner CEO Union was the exclusive bargaining agent for construction equipment operators and

master mechanics employed by Cleveland (hereafter referred to collectively as “CEOs”). The relevant time period extends from the date on which the CEO Union was certified as the exclusive bargaining representative of the CEOs pursuant to R.C. §4117.05, and the date upon which it and Cleveland entered into a collective bargaining agreement - February 14, 2005.¹ The CEO Union had no collective bargaining agreement with Cleveland during the relevant time period.² The period from January 30, 2003 to February 14, 2005 was made the subject of this lawsuit for the specific reason that it is easily established that no collective bargaining agreement was in place during that time. The two-year delay in reaching a collective bargaining agreement was due to Cleveland’s bad faith in bargaining. This was the ruling of the State Employment Relations Board (hereafter “SERB”)³, which stated “Despite its protestations that it was not refusing to bargain, the City’s conduct at the June 14, 2003 meeting can only be described as “surface bargaining.” The City refused to engage with the Union in any give-and-take whatsoever. . . . the City of Cleveland violated R.C. §§4117.11(A)(1) and (A)(5) by engaging in bad-faith ‘surface bargaining’ when it refused to propose any reasonable alternatives. . . .”

When no collective bargaining agreement is in place, the Cleveland City Charter⁴ controls

¹The Certification of the CEO Union is admitted by Cleveland. The date of the first collective bargaining agreement is contained in Exhibit 9 attached to Petitioner’s Motion for Summary Judgment, which is the Cleveland Ordinance no. 237-05 approving the collective bargaining agreement as provided in R.C. §4117.09, passed February 14, 2005.

² This is explicit in the findings adopted by SERB in *SERB v. City of Cleveland*, *SERB Opinion* 2004-004, See Record at no. 18, Exhibit 8 and Appendix F. hereto.

³See *SERB Opinion* 2004-004

⁴A copy of the relevant Charter section 191 is in the Record at no. 18, Exhibit 1 and App.

the wages of the CEOs.⁵ The Charter requires that the CEOs are be compensated at the prevailing wage rate. The prevailing wage rates are set forth in a contract commonly referred to as the “Building Agreement,” between the Construction Employers Association and the International Union of Operating Engineers, Local 18⁶. During the relevant time period CEOs were paid less than the prevailing wage rate.⁷ Specifically, CEOs were compensated:

- \$4.57 per hour below the prevailing rate from January 30, 2003 through April, 2003;
- \$5.77 per hour below the prevailing rate from May, 2003 through April, 2004; and
- \$6.97 per hour below the prevailing rate from May, 2004 through February 13, 2005.

Prior to the certification of the CEO Union as the exclusive bargaining representative of the Cleveland CEOs, those employees had no collective bargaining representative.⁸ The wages of the CEOs prior to February 14, 2005, were not the result of collective bargaining.⁹ For a time, these issues had been clouded by the unsupported assertions of Cleveland at various times that it had a collective bargaining relationship with another labor union, referred to herein as “Local 18.” SERB

⁵ See *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 3d 537 at 539 - When negotiations between public employees represented by an exclusive bargaining agent and a city have not produced a collective bargaining agreement, [mandamus will lie] to resolve a wage dispute by compelling compliance with a city charter provision pursuant to R.C. § 4117.10(A); and *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362 at 367 - “If appellees prevail . . . on their claim that their wages did not result from collective bargaining, then the city charter controls.”

⁶ The two Building Agreements for the relevant time period are in the Record no. 18, Exhibit 10 (which covers the years from May of 2000 through April of 2003), and Exhibit 11 (which covers the period from May of 2003 through April of 2006). The actual pay rates for the relevant period are set forth in the Affidavit of Frank P. Madonia, President, CEO Union, Record 18, Exhibit 5.

⁷ The actual pay rates for the relevant period are set forth in the Affidavit of Frank P. Madonia, President, CEO Union, Record at no. 18, Exhibit 5, and Second Madonia Affidavit Record at 30, Exhibit 9.

⁸ *SERB Opinion 2006-008, SERB v. Cleveland*, case no. 02-REP-06-0116, see Appendix J. at p. 2.

⁹ *Id.* See also *SERB Opinion 2004-004*, in the Matter of Municipal Construction Equipment Operators’ Labor Council, et al., in which SERB states that efforts began in 2003 to negotiate the first contract on behalf of CEOs.

specifically determined that the claimed relationship never existed, neither before nor after the enactment of R.C. §4117, in 1984.¹⁰

Local 18 supported, and asked SERB to adopt, the findings that it had not been the bargaining representative for Cleveland CEOs, and that no collective bargaining agreement existed between it and Cleveland¹¹. Cleveland has not appealed the rulings by SERB, which are now final.

STANDARD OF REVIEW

On appellate review, the decision of a trial court granting a motion for summary judgment pursuant to Ohio R. Civ. Pro. 56 is reviewed *de novo*. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 ("We review the grant of summary judgment *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 245").

During a *de novo* review, this Supreme Court, acting here as an appellate court, will apply the standards in Rule 56, Ohio R. Civ. Pro. This Court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Pursuant to Civ.R. 56(C), summary judgment is proper if: "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317 at 327.

¹⁰ *Id.*

¹¹ Local 18's motion is attached as Appendix I.

“The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of a genuine issue of material fact as to some essential element of the non-moving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. To support the motion, such evidence must be present in the record and of the type listed in Civ.R. 56(C). *Id.*

JURISDICTION

The jurisdiction of courts over a claim for wages or benefits made by a public employee in the absence of a collective bargaining agreement has been established. *State ex rel. IUOE v. Cleveland*, (1992) 62 Ohio St.3d 537. It is beyond cavil, as discussed below in this brief, that the Cleveland CEOs were not covered by a collective bargaining agreement during the relative period herein. Pursuant to R.C. §4117.10(A), in that situation local laws and state law outside R.C. Chap. 4117 is applicable, and jurisdiction belongs to this court. A writ of mandamus issued by a court is the appropriate remedy for a public employee who is denied wages or benefits which are granted by state or local law. *State ex rel. Villari v. Bedford Hts.* (1984), 11 Ohio St.3d 222 at 223. In the instant case compensation is being sought for the deficiency of wages below the prevailing wage rates guaranteed by Cleveland City Charter Sec. 191 and paid sick leave is being sought as guaranteed by R.C. §§124.38 and 39.

ARGUMENT

With respect to both of the assignments of error below, the significance of the relevant period of time (from January 30, 2003 to February 14, 2005) should be recognized. That period was made the subject of this lawsuit for the specific reason that it is demonstrable that no collectively bargained agreement was in effect, and the Cleveland City Charter required that construction and building

trades employees receive the prevailing wage rate. This is supported by several uncontradicted items of evidence. First, *SERB Opinion 2004-004* sets forth certain facts relevant to negotiations which took place in 2003, which were suspended due to bad faith bargaining by Cleveland. *SERB Opinion 2004-004* clearly states that the negotiations which took place in 2003 were toward an initial collective bargaining agreement (at p. 2). The findings specifically adopted by SERB further specify that the starting point for the negotiations was a contract Cleveland had with another bargaining unit and a proposal from the CEO Union. (See *SERB Opinion 2004-004* at p. 2 of proposed order of administrative law judge at Finding of Fact no. 4). The law provides that any alteration of existing terms are a mandatory subject of bargaining if a prior agreement exists. R.C. §4117.08(A). No previous contract existed to serve as the basis for bargaining. Cleveland did not proffer any prior contract at that time. Cleveland has never, at any time, produced an agreement or contract dated earlier than February 14, 2005 between it and a labor union for the CEOs.

Second, two long-term Cleveland employees, Frank P. Madonia and Santo Consolo, presented their affidavits verifying that they were not covered by a collective bargaining agreement nor represented by a labor union in their employment with Cleveland until January 31, 2003.

Third, when the CEO Union filed a Request for Recognition by Cleveland as the exclusive bargaining agent for CEOs, it did so pursuant to R.C. §4117.05(A)(2), supported by the declarations of a majority of the CEOs. Section 4117.05(B) would not have permitted the certification of the CEO Union by SERB if a "lawful written agreement" had been in effect between Cleveland and another organization. R.C. §4117.05(B) states in relevant part:

Nothing in this section shall . . . permit the state employment relations board to certify . . . an exclusive representative . . . if there is in effect a lawful written agreement . . . between the public employer and another employee organization

which . . . has been recognized . . . as the exclusive representative. . . .

Thus, during the certification process it was established that no agreement covering the CEOs was in existence.

Fourth, the findings of SERB administrative law judge Beth Jewell, adopted by the full state employment relations board, were issued. These findings establish in *SERB Opinion 2006-008* that no contract covered the Cleveland CEOs before February 14, 2005. Further, the Opinion states that the CEOs had no bargaining representative and did not engage in collective bargaining with Cleveland before the certification of the CEO Union January 30, 2003.

It is indisputable that during the period January 30, 2003 to February 14, 2005 no collectively bargained agreement was in place. Since no agreement was in place, the Cleveland City Charter sec. 191 requires compensation of CEOs at prevailing wage rates. This Court's decisions in *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St.3d 537 at 599 and *State ex rel. Consolo* (2004), 103 Ohio St.3d 362 at 367 respectively determined that "when negotiation between public employees represented by an exclusive bargaining agent and a city have not produced a collective bargaining agreement, [mandamus will lie] to resolve a wage dispute by compelling compliance with a city charter provision," and "[when] wages did not result from collective bargaining, then the city charter controls." The inevitable conclusion is that during the subject period of time, the CEOs working for Cleveland were entitled to receive compensation for their services at prevailing wage rates.

Assignment of Error I

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT.

The first reason stated by the Eighth District for denying judgment to the CEO Union was

that the collective bargaining agreement entered into between Cleveland and the CEO Union was a “remedy at law” which was exercised by Relator and precludes relief by way of a writ of mandamus. This reasoning was erroneous.

Proposition of Law A. Collective bargaining is not a “remedy-of-law” which will preclude the availability of a writ of mandamus for public employees who are denied lawful wages and benefits.

Bargaining is not a “remedy-at-law.” The Ohio Supreme Court considered and rejected the arguments raised by Cleveland in 1992 that an alternative remedy to mandamus was available to enforce the CEO’s right to the prevailing wage. *State ex rel. IUOE v. Cleveland*, (1992) 62 Ohio St.3d 537 at 540. This Court also rejected in *State ex rel. IUOE*, the theory proposed by the Court below that the bargaining process is a legal “remedy”. In response to the argument that when bargaining fails to resolve a dispute the ultimate “relief” is a strike (which may also fail to produce the desired result) this court stated:

“Neither remedy [ie. negotiation or strike] directly enforces [the Union’s] right, established by charter provision pursuant to R.C. 4117.10(A), to have its members compensated in accordance with prevailing wage in industry.

...

Statutory remedies are adequate and the city charter, in light of R.C. 4117.10(A), identifies a clear legal right to the relief sought and a concomitant clear legal duty to grant that relief.” *State ex rel. IUOE* at 540.

[underlining added]

That rule announced in 1992 applies with even more force to the current situation. In this case an adjudication has already been made by SERB in *SERB Opinion 2004-004* that bargaining was fruitless because Cleveland engaged in the bad faith practice of “surface bargaining.” During the

period that Cleveland was engaging in the bad faith practices, and consequently negotiations could not move forward, the CEOs were receiving less than the prevailing wage rates. Clearly the “remedy” for the bad faith bargaining was not a “remedy” for the failure to receive the prevailing wage. That is, the cease and desist order ultimately issued by SERB against Cleveland in *SERB Opinion 2004-004* did not put in the pockets of the CEOs the prevailing wage to which they were entitled under the Cleveland Charter.

A “remedy at law” is a “means employed to enforce a right or redress an injury.” *Chelentis v. Luckenback S.S. Co.*, 247 U.S. 372 (1918). A remedy-at-law is enforceable in court. *Id.* Negotiating over one’s rights is not the same as enforcing them. If a person has a right to a thing negotiation is unnecessary and one may enforce that right in court. The judgment of the court which grants a person that thing to which he has a right, does not also require him to give up some other thing in exchange. In the instant case, the public officials would be properly compelled to do that which the Cleveland City Charter requires them to do by a writ of mandamus from this court. *State ex rel. IUOE, supra*, and *State ex rel. Consolo, supra*.

R.C. §2731.05 provides that a “writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law,” indicating that an “adequate” remedy is one which carries the force of law, not a self-help remedy or a procedure that leaves the injured party to engage in trading in order to obtain what he is due. Further, an “adequate” remedy is a remedy which secures the rights of the party seeking relief. Whether a remedy is adequate requires an examination of those rights. A finding that an adequate remedy at law exist is a decision on the merits, since the lack of an adequate remedy at law is a necessary element for the issuance of a writ of mandamus. In *State ex rel. Hipp v. N. Canton* (1994), 70 Ohio St.3d 102 this court reversed an appellate ruling

dismissing a mandamus complaint, based on the pleadings, and stating that a remedy at law existed. This court stated: “We have previously approved mandamus as the remedy for . . . denial of promotion of a public employee and back pay with interest, citing *State ex rel. Bednar v. N. Canton* (1994), 69 Ohio St. 3d 278.

To repeat the holding in *State ex rel. IUOE, supra*, neither bargaining nor going out on strike “directly enforces” the “right established by charter provision” to be “compensated in accordance with prevailing wage in industry.” Engaging in the give-and-take of bargaining requires the cooperation of both parties. Although cooperation is desirable, it cannot preclude the enforcement of rights, particularly when one party refuses to recognize the rights of the other, as Cleveland as historically failed to do with respect to the Cleveland charter’s prevailing wage requirement.

Bargaining is not a means of enforcing existing rights. It is a means of altering or creating rights. The Cleveland Charter confers a right on CEOs to receive compensation in accord with the prevailing wages in industry. Mandamus is the appropriate remedy to compel payment of the prevailing wage when no collective bargaining agreement is in effect. *State ex rel. IUOE, supra* at 539. See also *State ex rel. Villari v. Bedford Hts.* (1984), 11 Ohio St.3d 222 at 223. “It is well-settled that a claim by a public employee of entitlement to wages or benefits which are granted by statute or ordinance is actionable in mandamus. See *State ex rel. Britton v. Scott* (1983), 6 Ohio St.3d 268; *State ex rel. Bossa v. Giles*, (1980), 64 Ohio St.2d 273; *State ex rel. Fenske v. McGovern*, (1984), 11 Ohio St.3d 129.” “A public employee’s claim for wages or benefits that are granted by statute or ordinance is actionable in mandamus. . . . The writ is properly issued when the right to relief is clear and the amount can be established with certainty.” *State ex rel. Adkins v. Sobb*, (1986), 26 Ohio St. 3d 46 at 48. The Ohio Supreme Court further stated that the amount to be recovered need not be

known, but must be ascertainable.” *Id.* at 49. This establishes that mandamus, rather than bargaining or striking, is the remedy-at-law which can to enforce the CEOs’ right to the prevailing wage.

The assertion by the Eighth District that “negotiation” is a “remedy-at-law,” is a novel argument, never previously accepted. No precedent or logic supports that theory. It is ironic that this novel argument should be advanced by the party which was found to have bargained in bad faith,¹² and thus to have delayed the achievement of a collective bargaining agreement. A deficiency of \$6.97 per hour¹³ below the prevailing wage rate, multiplied by 1400 hours of labor, equals a shortage in gross wages of \$13,940. Cleveland seeks now to take advantage of the delay caused by its bad faith, and avoid compensating its employees for the deficiency in its wages.

Proposition of Law B. An interpretation of a contract which renders a provision in the contract meaningless and of no effect will be rejected when an alternate interpretation gives meaning to all provisions in the contract.

The collective bargaining agreement does not bar a writ of mandamus enforcing the right to prevailing wages .

“In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.” *Farmers Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, syllabus.

The Eighth District construed a clause in the parties’ February 14, 2005 collective bargaining

¹² *SERB Opinion* 2004-004.

¹³ See Record at no. 18, Exhibit 5, Affidavit of Frank Madonia at ¶14.

agreement as barring this litigation, when the terms of the agreement clearly state that the contract will have no effect on claims for prevailing wage rates. The last substantive paragraph of the 2005 collective bargaining agreement states:

“This Agreement shall have no effect on or be used by either party to this Agreement, . . . in lawsuits related to any claims for back or future pay benefits pertaining to prevailing wage rates, . . . except with respect to a \$2,500 offset to any judgment against the City for back pay pertaining to the period of January 1, 2004 through January 31, 2005.” [Underlining added.]

It was proven herein that no litigation was currently in progress on February 14, 2005.¹⁴ However, the parties clearly intended that a “judgment” might be taken “against the City.” The parties further clearly state that the agreement “shall have no effect on” “lawsuits related to any claims . . . pertaining to prevailing wage rates.” The Eighth District ignored these expressions of intent by the parties.

While quoting that the collective bargaining agreement “represents a complete and final understanding of bargainable issues,” the Eighth District failed to give effect to the “understanding” of the parties that some of those issues pertaining to back pay and prevailing wage were going to be resolved in lawsuits, that the contract would have no effect in any lawsuit, other than a mere offset for a single year. The case of *State ex rel. Consolo v. Cleveland* was pending during the early period of negotiation of the agreement. A clause was proposed during that time that the agreement would have no effect on the claims for back wages in pending litigation. The *Consolo* case was decided by this Court in October of 2004 as *State ex rel. Consolo v. Cleveland* (2004) 103 Ohio St. 3d 362, but the possibility of future litigation was not foreclosed. Once the *Consolo* case was decided, the word “pending” was removed from the text. Further litigation was clearly anticipated by both parties.

¹⁴ Record at no. 18, Exhibit 5. Affidavit of Frank Madonia.

Within its terms, the contract permitted a partial offset against an eventual judgment against Cleveland.

In interpreting a contract, a court's role "is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶ 11. In doing so, "[w]e examine the . . . contract as a whole and presume that the intent of the parties is reflected in the language used We look to the plain and ordinary meaning . . . " *Id.*

At the time the agreement was executed, there were no existing lawsuits before any court involving the CEO Union and Cleveland. However, *State ex rel. Consolo* identified certain factual issues which, when decided, might establish the CEOs right to receive the prevailing wage during the time period covered by the *Consolo* case. The right of CEOs to prevailing wages during the two years prior to conclusion of the agreement was apparently discussed, but a definitive result was left to litigation, as set forth in the quoted paragraph above. Shortly after the agreement was executed, a lawsuit was filed. Until filed, a lawsuit was impending or imminent. The language in the quoted paragraph referring to a "judgment," reflected the parties' anticipation that a lawsuit would shortly be filed. Rather than giving effect to the intent of the parties, the Eighth District's interpretation of the 2005 Agreement renders it a nullity. Where the parties agreed that the agreement would "have no effect" on lawsuits, the Eighth District construed it instead as precluding all relief.

{¶C} Where an ambiguity exists, interpretation of a contract involves both factual and legal questions. *Four Star Service, Inc. v. Akron*, (Oct. 27, 1999), 9th Dist. No. 19124, at 5. Where that ambiguity is coupled with a material issue of fact supported by proper evidentiary materials, summary judgment is improper. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 323-24. Although appellant contends that the intent of the parties is clear

that the contract shall have no affect on litigation, if the Eighth District perceived ambiguity it should not have granted a summary judgment.

A general rule of construction is that a contract provision should be interpreted to be consistent with the remainder of the contract. In *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St. 3d 353 (1997), the Ohio Supreme Court stated, in pertinent part, that

In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.

See also, *In Re Kelley & Ferraro Asbestos Cases*, 153 Ohio App. 3d 458, 2003 Ohio 3936 (Eighth Dist. Ct. App., 2003).

An accepted meaning for the word “pending” is “imminent or impending.” Merriam-Webster's Collegiate® Dictionary, Eleventh Edition. When one recognizes that the definition of pending includes “impending,” the language in the body of the paragraph is consistent with the heading, as well as being consistent with the remainder of the contract. The Court of Appeals disregarded the rule that when possible the terms of a contract should be interpreted so as to be in harmony with the overall contents of the instruments. *Foster Wheeler* at p. 10. “Words should be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the fact or overall contents of the instrument.” The heading and body of the agreement are reconciled by the above accepted definition of “pending,” to include “impending.” Cleveland has advanced no logical reason for the inclusion of the paragraph. Cleveland knew there were no lawsuits currently pending before any court. The parties must have

either mistakenly left the word in the heading, or they anticipated that a suit would be filed soon – i.e. that it was impending.

Further, it is obvious that the reference to an offset of only \$2,500 was made in anticipation of additional litigation. The provision of an offset “against a judgment” is a clear indication that both parties anticipated that a judgment would be rendered, and is likewise a clear indication that it was not intended nor anticipated that all litigation would cease. If the collective bargaining agreement were meant to provide full compensation for all back prevailing wage claims, the agreement would have so stated. It did not. It specifically limited the use of the contract in lawsuits, and specifically anticipated a judgment, and specifically stated that the \$2,500 could only be used as an offset.

If the agreement were intended to settle all past claims, the “no effect on litigation” paragraph is rendered meaningless. The reasonable interpretation is that the parties agreed: (1) that Cleveland’s payment of the \$2,500 would not be used by the CEO Union as an admission by Cleveland that it had failed to pay the prevailing wage rate, and (2) that the \$2,500 payment would not be asserted by Cleveland as payment-in-full of back claims for prevailing wages.

The case of *In Re Kelley & Ferraro Asbestos Cases*, 153 Ohio App. 3d 458, 2003 Ohio 3936 (Eighth Dist. Ct. App., 2003) is relevant to this issue. In this case, the law firm of Kelley & Ferraro (“K&F”) represented thousands of plaintiffs who had filed asbestos claims against various defendants. K&F and the defendants reached a “Settlement Agreement” whereby the defendants agreed jointly and severally to pay damages of \$120 million over 10 years. The defendant companies formed a consortium and entered into a “Producer Agreement,” to facilitate the payment of the

damages pursuant to which each member was liable for only a certain portion of the settlement amounts. The plaintiffs were not parties to the Producer Agreement.

When some defendants failed to pay their share of the judgment, a question arose as to the proper interpretation of the Producer Agreement which divided the liabilities, when read in conjunction with the Settlement Agreement with the plaintiffs, which allowed joint and several liability.

The Court stated that

If possible, every provision in a contract should be held to have been inserted for some purpose and to perform some office, and an attempt must be made to harmonize, if possible, all the provision of a contract. *Id.* at p. 466 (quoting from *Ford Motor Co. v. John L. Frazier & Sons*, 8 Ohio App.2d 158, 161 (1964), which in turn quoted from 11 O. Jur. 2d 399, Contracts, Section 155.)

The Court continued,

In harmonizing apparently conflicting clauses of a contract they must be construed so as to give effect to the intention of the parties as gathered from the whole instrument, and where the object to be accomplished is declared in the instrument, the clause which contributes the most essentially to that object will control. So, anything in an agreement which in any way conflicts with the chief purpose therein must give way to the clause which makes the major intent effective. *Id.* at p. 467 (Again, quoting from *Ford Motor, supra.*)

The object declared in the instant collective bargaining agreement is that the agreement will have no effect on lawsuits, except for a stated offset against a "judgment." The language most essential to that declared purpose - in the body of the "no effect on litigation" provisions- makes that intent effective.

Construing the evidence most strongly in favor of the Relator's members, the contract may not be considered a bar to their claim.

Proposition of Law C. (i) A relator in a mandamus action does not have an adequate remedy in the ordinary course of the law by way of declaratory judgment where complete relief for relator can only be obtained by mandamus action on the part of the public official. (ii) Pursuant to R.C. §2731.09, disputed facts in a mandamus action shall be determined through evidentiary hearing as in civil trial, regardless of whether a declaratory judgment has been requested. (iii) A court in a mandamus action has the duty to interpret the constitution and applicable laws, and may not render judgment against a relator rather than do so.

The law has no preference for declaratory judgment over a mandamus action. At ¶22 of its decision, the Eighth District posited that a declaratory judgment would have been a more “comprehensive” solution to the issues in this case. The Eighth District suggested that only in a declaratory judgment proceeding could it have resolved factual issues. Had this issue been raised in the briefs, Appellant would have cited R.C. §2731.09 which states that in a mandamus action, issues of fact must be tried and further proceedings thereon had in the same manner as in civil actions. See also 67 O. Jur. 3d §123 (1999). Once the relator establishes a prima facie case, the burden of going forward with the proof rests upon the respondent and the respondent, of course, has the burden of proving any affirmative defense which he asserts. *Id* at §145. A court considering a petition for a writ of mandamus may hold hearings and make determinations of fact. That is the course the Eighth District should have taken, if it believed genuine issues of material fact were present. It is therefore unnecessary to couple this mandamus action with a request for declaratory judgment, in order for issues of fact to be resolved. Further, a court considering a mandamus action has a duty to construe constitutions and local laws, if necessary, and thereby determine whether a legal right on the part of the relator and legal duty on the part of the respondent exist. *State ex rel.*

Fattlar v. Boyle (1998), 83 Ohio St. 3d 123 at 125, citing *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119, 120; *State ex rel. Ashbrook v. Brown* (1988), 39 Ohio St.3d 115, 117.

Not only was a request for a declaratory judgment unnecessary, but declaratory judgment alone would not be an adequate remedy at law. Declaratory judgment, merely announces the existence of a duty to be performed. It has generally not been deemed as adequate as the writ of mandamus, which compels performance. Relator did not have a plain and adequate remedy in the ordinary course of law by way of an action for declaratory judgment where a mandatory injunction was also required to obtain complete relief. *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.* (2004) 014 Ohio St. 3d 122.

The Eighth District's order that the parties to this action should file cross motions for summary judgment, and the references in its opinion to a declaratory judgment being needed to resolve issues of fact and law, taken together with its insistence that the right to relief in mandamus must be free of factual issues, suggests that it has mixed the standard for issuance of a writ of mandamus with the requirements for rendering a summary judgment. Under Rule 56, Ohio R. Civ. Pro., judgment may be issued summarily when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. A writ of mandamus should issue when the relator has a clear legal right to the performance by a public official of his duty under the law. The Eighth District appears to have interpreted the statements "It should not issue in doubtful cases" and "the proof must be plain, clear, and convincing," quoted at ¶¶5 and 6 of the decision appealed herein, as meaning that if issues of fact are present the writ must be denied. This is incorrect, for the statutes provide the means for the resolution of factual issues through a trial, see R.C. 2731.09, and the Ohio Supreme Court has proclaimed that a court in mandamus has the duty to interpret the

constitution and laws. *State ex rel. Fattlar, supra*. R.C. §2731.06 allows that a writ of mandamus may issue when no valid excuse can be given for not doing the act to which the relator has a right. Cleveland has proposed several excuses over the years, for not providing the prevailing wage, but none of those excuses are valid. The court below did not perform its duty to examine evidence and discover that the excuses given were not valid.

When no other remedy at law is available, the court must attempt to provide that justice which a party would otherwise be denied, through issuance of the writ. *Marbury v. Madison*, 5 U.S. 137 (1803). This court has already applied that concept to this group of employees when it found that a writ requiring payment of the prevailing wage was appropriate in the absence of a collective bargaining agreement. *State ex rel. IUOE, supra*, and *State ex rel. Consolo, supra*.

Proposition of Law D. When considering a motion for summary judgment, a court may not assume asserted facts to be true and render judgment thereon.

The Eighth District's disregard for the decision of the SERB administrative law judge, which decided matters the court considered issues of fact, contradicts that court's assertion that it should defer to the expertise of SERB. It was the clear argument of Appellant CEO Union that the factual issues pending before SERB were not relevant to the period January 2003 to February 14, 2005, that is, the period beginning with its (the CEO Union's) election and certification as the first exclusive bargaining agent for the CEOs, extending through two years of negotiations during which Cleveland acted in bad faith, and ending when a collective bargaining agreement was reached which complies with R.C. §4117.05. In the absence of a collective bargaining agreement, the instruction of *State ex*

rel. IUOE, *supra*, and *State ex rel. Consolo*, *supra*, make clear that these employees must receive the prevailing wage rate.

The Eighth District determined that it would consider as relevant the claimed, but unsupported, existence of a pre-2003 contract, but acknowledged that the question of whether collective bargaining or a collectively bargained contract, ever existed was at that time before SERB.¹⁵ One of the questions put before SERB was whether the wages of the CEOs were the result of collective bargaining.¹⁶ In its opinion, the Eighth District stated “SERB’s particular expertise in labor issues should be given deference,” however, when the recommended determination of the administrative law judge was released, the two-judge majority in the instant case below chose to ignore the decision in its entirety. The dissenting judge specifically referred to the administrative law judge’s decision, indicating that the court was aware of the decision.

Instead of deferring to the expertise of SERB, the Eighth District pushed its decision to filing before SERB approved the administrative law judge’s recommendation, noting innocently in a footnote that “SERB has not yet rendered a decision.” SERB has ruled, and the issues of fact are resolved in favor of relator.

Assignment of Error II

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DENYING RELATOR CEO UNION’S MOTION FOR SUMMARY JUDGMENT.

¹⁵ *SERB* Case no. 02 REP 06-0116 before Administrative Law Judge Beth Jewell.

¹⁶ *SERB Opinion* 2006-008 at p. 2.

As ordered by the Eighth District Court of Appeals, the Appellant/Relator CEO Union filed a motion for summary judgment and met its burden of producing evidence in support of each element of its case. "Once the moving party's burden has been satisfied, the non-moving party must meet its burden as set forth in Civ.R. 56(E). *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material to demonstrate a genuine dispute over the material facts. *Id.* See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735." *Metcalf v. Akron*, 2006-Ohio-4470 (9th District Aug. 30, 2006). Cleveland did not produce evidence which demonstrated a genuine dispute as to material facts. Instead, Cleveland rested upon its assertions: (1) that it dealt with a different exclusive bargaining agent for CEOs (without presenting proof of that contention), (2) that the CEO Union members receive benefits of employment (without presenting proof of that contention, naming the alleged benefits, or proving an hourly value for alleged benefits),

Proposition of Law A. A municipal charter provision requiring that certain employees shall be compensated at prevailing wage rates means that such employees shall receive as gross wages 100% of the prevailing wage rate, with only such payroll deductions as are permitted by law.

Appellant's members are entitled to receive 100% of the prevailing wage. This Court rendered its opinion in *State ex rel. Pinzone v. Cleveland* (1973), 34 Ohio St.2d 26, that mandamus will lie to compel compliance with a municipal charter requiring that municipal wages be set in accordance with the prevailing wage in private industry. Still further, this Court ruled that the prevailing wage rate should not be offset by fringe benefits, saying:

“Permitting an offset for such “fringe benefits” would necessarily encourage arbitrary and probably inaccurate lowerings of the municipal wage scale. Clearly, this is not the intent or meaning of Section 191.” (*Pinzone* at p.31).

In 1979 Cleveland City Council enacted Ordinance 1682-79 (1979) (Exhibit “F”), which set the wage of building trades employees, including Construction Equipment Operators Group 1 (now referred to as “Group A”) Construction Equipment Operators Group 2 (now referred to as “Group B”) and Master Mechanics, at prevailing wage rates in private industry. The wages so set were taken from the then-current Building Agreement union contract for private sector construction equipment operators. A true copy of the relevant portion of the 1979 Building Agreement is attached to the affidavit of Santo Consolo, Exhibit “I” to 31 in the Record. In accord with the *Pinzone* decision, all components (100%) of the wage rate in the private sector contract were added together to calculate the prevailing wage rates prescribed in Cleveland Ordinance 1682-79.

In November 1980, the people of the City of Cleveland adopted the current version of Charter §191 by popular vote, effective February 17, 1981. Sec. 191 of the Charter (Appendix K) refers specifically to the schedule of compensation for building trade employees passed by the city council in 1979 as 1979 Ord. 1682-79¹⁷. The “Building Agreement” wage rates shown for 1979 in the attachment to the Affidavit of Santo Consolo (Record at no. 31, Exhibit A), when all components are totaled (100%), are the same as the prevailing wage rates in the 1979 ordinance, and the same as the wages paid in 1979 to Mr. Consolo, as also evidenced in Mr. Consolo’s Affidavit. These items of evidence are unrefuted by Cleveland.

¹⁷Appendix at L.

The Building Agreements' components are as follows: Base rate + H & W (Health and Welfare) + Pension + Industry Advancement Program (IAP) + Apprenticeship Program.

Classification	Effective Date	1979 "Building Agreement" Private sector contract-100% of all components	1979 Ordinance #1682-79 pay range	Difference
CEO 1 (or A)	May 1, 1979	\$15.88	\$15.88	None
CEO 2 (or B)	May 1, 1979	\$15.73	\$15.73	None
CEO 3 (or C)	May 1, 1979	\$15.38	\$15.38	None
CEO 4 (or D)	May 1, 1979	\$14.60	\$14.60	None
Master Mechanic	May 1, 1979	\$16.38	\$16.38	None

This chart shows that the rates established in the benchmark 1979 Ordinance, referred to in City Charter §191, included all components, and were thus equal to 100% of the prevailing wage. This is what the people of Cleveland approved when they voted on the Charter.

The charter of a municipality is enacted by the vote of the people and, as the will of the people, carries supreme authority within a municipality. The Ohio Supreme Court in *State ex rel. Pell v. Westlake* (1980), 64 Ohio St. 2d 360, stated:

We begin the analysis by recognizing that the charter of a city, as approved by the residents of that city, represents the framework within which the city government must operate. *Cleveland ex rel. Neelon v. Locher* (11971), 25 Ohio St. 2d 49.

The Ninth District Court of Appeals expressed the relationship in this way:

A municipal charter acts as the constitution of the municipality. *Calco v. Stow* (Apr. 29, 1981) 9th Dist. No. 9990, at 4, citing *State ex rel. Pell v. Westlake* (1980), 64 Ohio St. 2d 360, 361. Accordingly, when provisions of a city's charter and its ordinances conflict, the charter provision prevails. *Reed v. Youngstown* (1962), 173 Ohio St. 265, paragraph two of the syllabus. See, also, *Deluca v. Aurora* (2001), 144 Ohio Supp. 3d 501, 511.

The Ohio Supreme Court has also held that “. . . ordinances and resolutions in conflict with provisions of [a] city charter [are] invalid.” *State ex rel. Plain Dealer Publishing Co., v. Barnes* (1988), 38 Ohio St. 3d 165 at 168. Consequently, the vote of the people of Cleveland, adopting a Charter requirement for compensation at prevailing wage rates which cites compensation set at 100% of those rates, may not be overridden by any other municipal power. The vote of the people requires payment to the CEOs at 100% of the prevailing wage. Cleveland’s payment of wages at below the prevailing wage rates was improper and should be remedied by the issuance of the requested writ of mandamus.

Proposition of Law B. Pursuant to R.C. §4117.10(A), in the absence of a collective bargaining agreement as defined in R.C. §4117.01, all applicable state and local laws pertaining to the wages, hours, and terms and conditions govern public employees, including a municipal charter and R.C. §§124.38 and .39 providing the accrual of paid sick leave and a cash payment for unused sick leave upon retirement.

If there is no collective bargaining agreement, 100% of the prevailing wage rates must be paid. Under R.C. §4117.10(A), in the absence of a collective bargaining agreement, the public employer (here, Cleveland) and the public employees are “subject to all applicable state or local laws pertaining to the wages, hours, and terms and conditions of employment for public employees.”

This Ohio Supreme Court specifically ruled in 1992¹⁸ that R.C. §4117.10(A) means that the wages of construction equipment operating engineers employed by Cleveland continue to be

¹⁸*State ex rel. IUOE v. Cleveland*, (1992) 62 Ohio St. 3d 537

governed by the City Charter when “there is no collective bargaining agreement.” *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St.3d 357 at p.540.

“When negotiations between public employees represented by an exclusive bargaining agent and a city have not produced a collective bargaining agreement, will mandamus lie to resolve a wage dispute by compelling compliance with a city charter provision pursuant to R.C. 4117.10(A)? We find that it does, . . . and allow the writ.” *State ex rel. Internat’l Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St. 3d 537 at 539.

Further

“. . . the city charter, in light of R.C. 4117.10(A), identifies a clear legal right to the relief sought and a concomitant clear legal duty to grant that relief.” *Id.* At 540.

See also, *Consolo, supra*, at 368, ¶22.

To reiterate, SERB determined¹⁹ that Cleveland does not provide benefits of employment to CEOs.

Cleveland had no valid reason to reduce the gross wages of CEOs below the prevailing wage rates.

Proposition of Law C. Res Judicata is not applicable when the facts and legal issues actually litigated in two cases are not the same, nor does it apply to an issue that was not litigated and presented to a court for adjudication.

The Eighth District’s reliance on the concept of *res judicata* is misplaced.

“. . . Civ. R. 8(C) designates *res judicata* as an affirmative defense. Further, Civ. R. 12(B) lists those defenses which may be raised by motion, and this procedural rule does not mention *res judicata*. Thus, the affirmative defense of *res judicata* must be raised in a responsive pleading; otherwise, it is waived. See *State ex rel. Freeman v. Morris* (1991), 62 Ohio St. 3d 107, 109. . .” *Nelson v. Tubbs Jones* (1995), 104 Ohio App. 3d 823 at 825.

¹⁹*SERB Opinion* 2006-008. App. At F.

In *Nelson*, a dismissal based upon *res judicata* was reversed because the Defendant attempted to raise this defense by motion. As discussed below, to decide whether *res judicata* applies requires inquiry into the facts and issues of both the previous case and the current case. It is not a preliminary matter.

A statement in a prior case cannot be *res judicata* on an issue, in a subsequent suit unless:

“ . . . the matter attempted to be disputed in the subsequent suit must have been put in issue in the first action, and therein necessarily tried and determined. It is the collateral estoppel aspect of *res judicata* that precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action based on a different cause of action.” 63 O. Jur.3d Judgments §§417, 419 at pp. 202-203. [Underlining added.]

The assertion of *res judicata* thus necessarily raises factual issues that require inquiry into the issues actually litigated previously, the identities of the parties, whether the same claims are presented, and whether relevant facts have changed.

The Ohio Supreme Court in *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247 (1998) re-emphasized that where the judgment of a court is not dispositive of issues that a party later seeks to litigate, *res judicata* is not applicable, even though the discussion in a prior case decision mentions the issues that are the subject of current litigation.

In 2003 this Ohio Supreme court declined to find Cleveland in contempt of court for failing to comply with the 1992 writ of mandamus issued against it, requiring it to pay construction equipment operators at prevailing wage rates, in the case of *State ex rel. IUOE v. Cleveland* (1992), 762 Ohio St. 3d 537. No rationale was stated for the decision. However, various defenses were raised by Cleveland, which might have been resolved in the case of *State ex rel. Consolo v.*

Cleveland (2004) 103 Ohio St. 3d 362, but which this court deferred to SERB. Among those questions was whether any agreement existed that Cleveland could pay CEOs less than the full prevailing wage rates, and whether a “benefits package” had been negotiated for CEOs. The false assertions of Cleveland that it had formed a collectively bargained agreement, and that it was paying the full prevailing wage rate, might have served to prevent a contempt finding.

In *State ex rel. Consolo*, the Ohio Supreme Court itself did not consider the contempt action to be dispositive. Instead, this Court identified the issues as it perceived them. As of the present day, the rulings made by this Court in *State ex rel. Consolo*, and the subsequent findings of SERB, render the failure of the contempt action of no consequence. The *Consolo* decision makes clear that the this court was concerned about the relationships among Cleveland, Local 18, and the CEOs, not a belief that Cleveland’s duty under its Charter to pay the prevailing wage rate was not enforceable by mandamus. *Consolo* held that if SERB determined that no collective agreement covered the CEOs’ wages, Cleveland’s duty to pay prevailing wages was enforceable by mandamus. *State ex rel. Consolo* at ¶20. In the absence of a collective bargaining agreement, the Charter’s requirement for prevailing wages is controlling.

The Eighth District failed to carefully examine the evidence. The evidence showed that no pre-2003 agreement existed, no exclusive bargaining agent existed before January of 2003, since there was no pre-2003 agreement, the phrase “status quo terms” is meaningless, and the theory - for that is all that it is - that an unwritten collective bargaining agreement was in place was unfounded.

In the absence of a stated rational for the refusal to find Cleveland in contempt, it not possible to state which issues, if any, were litigated and decided in that action. The instant case, moreover,

is not a contempt action, but is a request for a writ of mandamus. Different elements are present. A ruling in a contempt action does not mean that the Cleveland CEOs will never again be afforded the protection of the City Charter and paid at prevailing wage rates.

Proposition of Law D. A Court may not base a summary judgment upon the asserted existence of a collective bargaining agreement, when the evidence shows that no collective bargaining agreement had been made, and that evidence is supported by rulings of the state employment relations board.

The Eighth District acted in blatant disregard of Rule 56, Ohio Civ. Pro. when it based a summary judgment upon the presumed existence of an agreement. The absence of a Collective Bargaining Agreement was established by the evidence and in two rulings by SERB. In *SERB Opinion 2004-004*, the board stated that the CEO Union and Cleveland began to negotiate an “initial” contract in 2003²⁰ the reference to an “initial” contract means that when the negotiations commenced, no other agreement was in effect. R.C.§4117.08 lists among the topics which are the dispute settlement procedures of R.C.§4117.14 mandatory subjects of collective bargaining, “the continuation modification, or deletion of an existing provision of a collective bargaining agreement.” (R.C.§4117.08(A)). Thus if an agreement already exists its terms will necessarily be a starting point for the negotiation of a new agreement. R.C.§4117.14(A) refers to disputes under existing agreements, the negotiation of successor agreements, and the negotiation of initial agreements. Subsection 4117.14(B)(2) deals with initial negotiations, as opposed to R.C.§4117.14(B)(1) which describes the procedures where a party seeks to terminate, modify, or

²⁰SERB Opinion 2004-004 at P.2

negotiate a successor to an existing agreement. In the instant case there was no existing agreement.

Cleveland was found to have committed an unfair labor practice during the initial bargaining session over its initial proposal,²¹ toward an initial agreement.²² The starting point proposed by Cleveland was a contract it had recently reached with other employees. In 2006, Local 18 specifically asked SERB to adopt the findings that it was not an exclusive bargaining representative, and that it did not enter into collective bargaining agreement with Cleveland on behalf of the CEOs.²³

The Eighth District did not give deference to the *SERB Opinion* 2004-004 when it posited below that an existing agreement “remained in effect” after the CEO Union was certified on January 30, 2003. Construing the evidence most strongly in favor of the CEO Union, as must be done when considering Cleveland’s motion for summary judgment, in the Eighth District and this court cannot conclude that a contract was in effect as of January 30, 2003. SERB concluded similarly in *SERB Opinion* 2006-008 that no CEO contract was in effect at any time prior to February 14, 2005. Therefore, the Eighth District wrongly entered a summary judgment against the CEO Union, on the theory that certain “status quo terms” took priority over the Cleveland Charter prevailing wage requirement.

SERB Opinion 2004-004 clearly states that the negotiations which took place in 2003 were toward an initial collective bargaining agreement. (at p.2) The findings specifically

²¹ *Id* at Finding of Fact no. 4, adopted by SERB at p.1 of Opinion

²² *Id* at p.2

²³ Motion of Local 18 that SERB adopt the recommended findings and conclusions of the administrative law judge. Appendix I.

adopted by SERB further specify that the starting point for the negotiations was a contract Cleveland had with another bargaining unit, and a proposal from the CEO Union. *SERB Opinion* 2004-004 at p.2 of proposed order of administrative law judge at Finding of Fact no. 4). No previous contract covering the CEOs existed, is mentioned, nor served as the basis for negotiations.

Two long-term employees presented their affidavits²⁴ verifying that they were not covered by a collective bargaining agreement nor represented by a labor union in their employment with Cleveland until January 30, 2003.

As further evidence, it was shown below that when the CEO Union filed a Request for Recognition by Cleveland as the exclusive bargaining agent for CEO's, it did so pursuant to R.C. §4117.05(A)(2), supported by the declarations of a majority of the CEOs. The CEO Union was certified as the exclusive representatives. R.C. §4117.05(B) would not have permitted the certification of the CEO Union by SERB if a "lawful written agreement" had been in effect between Cleveland and another organization. R.C. §4117.05(B) states in relevant part:

Nothing in this section shall...permit...the state employment board to certify...an exclusive representative...if there is in effect a lawful written agreement...between the public employer and another employee organization which...has been recognized...as the exclusive representative...

Thus, during the certification process it was established that no agreement covering the CEOs was in existence.

²⁴Frank P. Madonia Record at 18, Exhibit 5, and Record at 30, Exhibit 9 (Second Affidavit of Frank Madonia) and Santo Consolo, Record at no. 31, Exhibit A, Affidavit of Santo Consolo.

Consequently, the conclusion of the court below that a prior contract might have existed is contrary to the evidence, is based only on supposition, and does not permit the entry of summary judgment in Cleveland's favor.

Proposition of Law E: A municipality may not, by ordinance, eliminate sick leave provided under a state law providing for the health, safety and general welfare of all employees. Ohio Const. Art. II, Sec. 34.

Ohio Const. Art. II, Sec. 34 specifically provides that "no other provision of the constitution shall impair or limit" the power of the state to provide for the health, safety and general welfare of all employees. The "home rule" section of the Ohio Constitution, Art. XVIII, Sec. 7, is specifically limited by Sec. 3 of Art. XVIII so as not to conflict with "general laws" and matters of statewide concern. The limits of municipal home rule power were thoroughly discussed by this Court recently in *Am. Financial Servs. Assn. v. Cleveland* (2006), ___ Ohio St. 3d ___, 2006-Ohio-6043, finding that Cleveland's "predatory lending" ordinance was in conflict with, and subordinate to, a state law of general application relating to a matter of state-wide concern. Revised Code sec. 124.38 states that employees in municipal offices:

" . . . shall be entitled, for each completed eighty hours of service, to sick leave of four and six-tenths hours with pay. . . . Unused sick leave shall be cumulative without limit." §124.38

And R.C. §124.39 provides:

" . . . an employee of a political subdivision covered by section 124.38 or 3319.141 [3319.14.1] of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be

paid in cash for one-fourth the value of the employee's accrued but unused sick leave credit. . . .”

This requirement for paid sick leave is a general statute relating to a state-wide concern for the health and welfare of public employees throughout the state.

This court stated in *Ebert v. Bd. of Mental Retardation* (1980), 63 Ohio St. 2d 31

“R.C. §124.38 . . . ensures that the employees of [certain] offices will receive at least a minimum sick leave benefit . . .” at p. 32, citing *State ex rel Randel v. Scott* (1952), 95 Ohio App. 197 with respect to paid sick leave, said “The municipality would not have the power to reduce the allowance [for sick leave] so provided . . .” at p. 32

“We interpret R.C. 124.38 as conferring a minimum benefit upon the board’s employees . . .” At p. 33.

Cleveland eliminated all sick leave for building and construction trades employees with the enactment of a section of Cleveland City Code. That Code sec. 171.31 “Sick Leave” provides:

(a) All full-time annual rate City employees and all full-time hourly rate employees, **except hourly rate craft employees paid on the basis of building trades prevailing wages**, shall be entitled to sick leave with pay..

The City of Cleveland conceded in sworn admissions that it does not provide paid sick leave to the CEOs in its employ. (Record at 30, Exhibit 8, admissions nos. 4 and 5²⁵)

In *South Euclid Fraternal Order of Police v. D’Amico* (1983) 13 Ohio App. 3d 46 at 47 (Cuy. Cty.) This court held that R.C. sec. 124.38 is a law of general nature and has uniform operation throughout Ohio under Section 26, Article II of the Ohio Constitution. R.C. §124.38

²⁵**Request for Admission no. 4:** That Cleveland does not accrue, and has not, since 1992, accrued an entitlement to paid sick leave for Construction Equipment Operators Group A and Group b , nor Master Mechanic employees.” “ANSWER: ADMITTED.”

Request for Admission no. 5: Cleveland pays Construction Equipment Operators and Master Mechanics for sick days only if the employee has accrued an entitlement to sick leave during service for Cleveland in some other employment classification.” “ANSWER: ADMITTED.”

gives employees a vested right in accumulated sick leave, the right to use sick leave, and does not give the employing unit the right to grant sick leave, or to deny, but only the power to see that sick leave is used for the limited purposes stated in the statute. A local ordinance which denied the use of sick leave where it was permitted by sec. 124.38 was declared unconstitutional.

In *State ex rel. Adkins v. Sobb* (1986), 26 Ohio St. 3d 46, the relators seeking a writ of mandamus were police officers for a charter city. Their municipal employer, by ordinance, attempted to disregard R.C. §9.44 which combines periods of state and local government employment when figuring vacation leave credits. The City disregarded state employment and counted only municipal service. The City claimed its home rule power allowed it to disregard R.C. §9.44 when regulating the vacation leave of its employees. The Ohio Supreme Court issued a writ of mandamus and upheld the state law, on the basis that Article II, Sec. 34 of the Ohio Constitution, *supra*, gives laws providing for the general welfare of all employees precedence over laws enacted under the home rule power of municipalities, and O. Const. Art. XVIII sec. 3 prohibits municipalities from conflicting with general laws.

Both *South Euclid, supra*, and *Fraternal Order of Police v. East Cleveland* (1989), 64 Ohio App. 3d 421 at 424 (Cuy. Cty.) declare that R.C. §§124.38 and 124.39 are laws of a general nature, which provide for the comfort, health, safety and general welfare of all employees, govern a statewide concern, and they prevail over conflicting municipal ordinances. Such statutes take precedence over local ordinances enacted under home rule authority of municipalities. *Weir v. Rimmelin* (1984) 15 Ohio St. 3d 55 at 56.

Consequently, the City of Cleveland's attempt to exclude Petitioner's members from receiving paid sick leave is unconstitutional. See also *State ex rel. Reuss v. Cincinnati* (1995) 102 Ohio App. 3d 521 at 524; *Ebert v. Bd. Of Mental Retardation* (1980) 63 Ohio St. 2d 31 at 33. Relator prays that this court shall issue a writ of mandamus requiring that Cleveland comply with the state statute and provide accrued paid sick leave at the rate of 4.6 hours for every 80 hours worked during the relevant time period, and that Cleveland pay to those employees who retired during the relevant period for their accumulated but unused sick leave, in accord with R.C. §124.39.

CONCLUSION

The Eighth District Court of Appeals erred when it entered summary judgment in favor of Cleveland, and when it failed to enter summary judgment in favor of Relator CEO Union for the reasons that follow:

- “Negotiation” is not a remedy-at-law which bars the issuance of a writ of mandamus.
- The facts pertaining to the relevant time period eliminate all ambiguity and establish that no collective bargaining agreement on wages previously existed.
- The ruling in *State ex rel. Consolo, supra* establishes that in the absence of a collective bargaining agreement, the City Charter requirement for prevailing wage rates is controlling and the request for a contempt finding under the 1992 writ is irrelevant. Under *State ex rel. IUOE v. Cleveland, supra* and *State ex rel. Consolo, supra*, jurisdiction is proper in the court in an action for mandamus to compel the payment of wages to public employees.

- Pursuant to R.C. §2731.09 it is the responsibility of a court to determine questions of fact in an action for a writ of mandamus. Consequently it is not proper to render judgment against the realtor, simply because issues of fact are present.

It was error for the Eighth District Court of Appeals to deny Relator's Motion for Summary Judgment because:

- The Cleveland Charter grants Relator's members the clear legal right to be compensated at prevailing wage rates.

- No other remedy-at-law is available for public employees to receive the wages they are due.

- Cleveland has a clear legal duty to follow its Charter.

- During the relevant period of time, no genuine issue of fact exists that no collective bargaining agreement covered the CEOs.

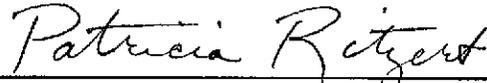
- The amounts of the prevailing wage rates for construction equipment operators A and B and Master Mechanics is established with certainty.

- The amounts of the wages actually paid are below the prevailing wage rates.

Relator prays that the ruling of the Eighth District court shall be reversed, and that summary judgment should be granted in favor of Relator on behalf of its members and a writ issued which compels Cleveland to produce the number of hours worked by each CEO employee so as to allow an accurate calculation of the amounts due to each employee in order to compensate for the deficiency below the prevailing wage rates, and so as to allow an accurate calculation of the paid sick leave with which each employee should be credited, at the rate of 4.6 hours for every 80

hours worked. Relator further prays that the Court for an award of prejudgment and post judgment interest.

Respectfully submitted,



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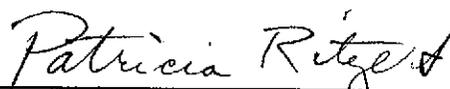
*Representing Relator CEO Union and
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief on the Merits was served upon the following
this 12th day of December, 2006 via regular U.S. mail:

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APPENDIX

- A. Amended Notice of Appeal
- B. Judgment Being Appealed
- C. Opinion Supporting Judgment Being Appealed
- D. Dissenting Opinion
- E. *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St.3d 362
and
State ex rel. IUOE v. Cleveland (1992), 62 Ohio St.3d 537
- F. *SERB Opinion* 2004-004 in *SERB v. Cleveland* Case No. 2003-ULP-06-0322
- G. SERB Order Directing Administrative Hearing in SERB
Case No. 02-REP-06-116 "In Matter of Municipal Construction Equipment
Operators' Labor Council, et al."
- H. Recommended Determination of Administrative Law Judge
Beth Jewell, after hearing
- I. Motion of IUOE Local 18 to join CEO Unions's Motion for
Approval of Recommended Determination
- J. *SERB Opinion* 2006-008 in Case No. 02-REP-06-0116 "In the Matter
of Municipal Construction Equipment Operators' Labor Council, et al."
- K. Cleveland City Charter Sec. 191
- L. Cleveland Ordinance No. 1682-79 (1979)
- M. Ohio Const. Art. II Sec. 26 and 34
Ohio Const. Art. XVII Secs. 3 and 7
- N. Revised Code §§2731.01 through .09
- O. Revised Code §§ 4117.01
4117.05
4117.08
4117.10
4117.11
4117.14
- P. Cleveland City Code Sec. 171.31

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL)
CONSTRUCTION EQUIPMENT)
OPERATORS' LABOR COUNCIL)
Relator/ Appellant)
vs.)
CITY OF CLEVELAND, ET AL.)
Respondents/Appellees)
CASE NO. 06-1688)
Eighth District Court of Appeals)
Case No. CA-05-086263)
AMENDED)
NOTICE OF APPEAL)
OF RIGHT from)
CASE THAT ORIGINATED)
in the)
EIGHTH DISTRICT)
COURT OF APPEALS)

.....
The Relator Municipal Construction Equipment Operators' Labor Council, hereby gives notice that it appeals from the attached judgment of the Eighth District Court of Appeals, Cuyahoga County, in Case No. CA-05-086263, to the Ohio Supreme Court. This appeal is taken from a judgment in a case which originated in the court of appeals, and therefore this is an appeal of right. The judgment from which this appeal is taken is dated August 15, 2006.

This notice is accompanied by a copy of the court of appeals judgment entry which is being appealed. That judgment entry bears the file stamp of the clerk of the court of appeals at page 12, reflecting the date of August 15, 2006 on which it was filed for journalization under App. R. 22 (E).

FILED
SEP 14 2006
MARCOIA J. MARSH, CLERK
SUPREME COURT OF OHIO

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Amended Notice of Appeal of Right from Case that Originated in the Eighth District Court of Appeals was served via regular U.S. mail, postage prepaid, the 11th day of September, 2006 on the following:

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COLLEEN CONWAY COONEY, P.J.:

The relator, the Municipal Construction Equipment Operators' Labor Council (hereinafter "the Union"), brought this mandamus action against the respondents, the City of Cleveland, the Mayor of Cleveland, and Cleveland City Council (hereinafter collectively referred to as "the City"), to obtain certain benefits for its union members, the City's construction equipment operators.

In its first claim, the Union seeks, pursuant to the City's Charter, Sec. 191, to compel the City to pay its members the prevailing wage paid in the building and construction trades for the subject period of time, which is January 30, 2003, when the Union became the certified union for the construction equipment operators, to February 13, 2005, when the City and the Union effected a collective bargaining agreement. In the second claim, the Union, pursuant to R.C. 124.38, seeks to compel the City to provide sick time benefits for the subject period and, in the third claim, the Union seeks payment of unused sick leave for retiree members during the subject period pursuant to R.C. 124.39.

Both parties filed motions for summary judgment and briefs in opposition. This court concludes that there is no genuine issue of material fact and denies the application for a writ of mandamus.

The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the

requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914, and *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 374 N.E.2d 641. Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108, and *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86.

Moreover, mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Connole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; and *State ex rel. Dayton-Oakwood Press v. Dissinger* (1940), 32 Ohio Law Abs. 308.

Additionally, "the issuance of a writ of mandamus rests, to a considerable extent at least, within the sound discretion of the court to which application for the writ is made. The writ is not demandable as a matter of right, or at least is not wholly a matter of right; nor will it issue unless the relator has a clear right to the relief sought, and makes a clear case for the issuance of the writ. The facts submitted and the proof produced must be plain,

clear and convincing before a court is justified in using the strong arm of the law by way of granting the writ." *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 31.

In the present case, the Union had a remedy which it exercised and which now precludes the granting of mandamus, namely effecting a collective bargaining agreement. The agreement, effective February 14, 2005, provides on the last page that it "represents a complete and final understanding on all bargainable issues between the City and the Union ***." This scope would necessarily include past grievances and the bargainable issues of benefits before the parties effected the agreement. Indeed, on the relevant issues, wages and sick time benefits, consideration was given for the time period prior to the effective date of the agreement. In the wages section, the parties agreed that the City would make a one-time lump sum payment of \$2,500 to each employee who worked 1,400 or more hours during 2004; employees who worked less than 1,400 hours would receive an adjusted payment based on a percentage of hours worked. This provision was made in consideration of the fact that there had been no pay increases for some time before the agreement became effective.

On the issue of sick time benefits, the equipment operators had not received any paid sick time before the effective date of

the agreement.¹ The agreement provided that upon ratification, all regular full-time employees would be credited with three days of paid sick leave. This further establishes that the scope of the agreement encompassed the bargainable issues of previous grievances and benefits.

Additionally, the agreement contained the following section:

Agreement Has No Effect on Pending Litigation

This agreement shall have no effect on or be used by either party to this Agreement, or any other entity, in lawsuits related to any claims for back or future pay benefits pertaining to prevailing wage rates, or outside contracts, except with respect to a \$2,500.00 offset to any judgment against the City for back pay pertaining to the period of January 1, 2004 through January 31, 2005.

Although the gravamen of this section would seem to preclude the use of the agreement as a bar to lawsuits such as this mandamus action, the use of the phrase "Pending Litigation" in the heading of this section limits the reach of the following clause to lawsuits pending on February 14, 2005. The Union did not commence the instant action until two months after the effective date of the agreement. Thus, the instant case falls outside the applicable savings clause. Accordingly, this mandamus action is barred because the Union had a remedy concerning its claims for prior benefits and exercised it.

¹ Because of the seasonal nature of the work of construction equipment operators, such workers in the private sector received a higher prevailing wage, but no benefits. Likewise, comparable City employees were entitled to the full prevailing wage, but no benefits.

Additionally, res judicata also bars this action. The City, the construction equipment operators and their unions have been litigating the issues of wages and benefits for approximately seventeen years. In 1989, the International Union of Operating Engineers, Local 18 (hereinafter "Local 18"), commenced a mandamus action in this court to compel the City to pay the prevailing wage pursuant to Cleveland Charter Section 191.² *State, ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St.3d 537, 584 N.E.2d 727. The Ohio Supreme Court allowed the writ and directed the City to pay the prevailing wage, including future and back wages, to the equipment operators as required under the Charter.

On October 30, 2003, during the subject period of time, the Union filed a motion to show cause why the City should not be held in contempt for failing to comply with the Court's 1992 order to pay the prevailing wage. That claim is identical to the Union's first claim in the instant case. The Supreme Court considered the Union's motion and ruled "that appellees [the City] are found not to be in contempt." April 28, 2004 journal entry in Supreme Court Case No. 90-1780.

² Local 18 represented the equipment operators at that time. However, the scope and duration of that representation is currently before the State Employment Relations Board ("SERB") in other related litigation.

"It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit' (emphasis sic) (quoting *Rogers v. Whitehall* [1986], 25 Ohio St.3d 67, 69, 494 N.E.2d 1387, 1388). We also declared that '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'" *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331, 653 N.E.2d 226 quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60,62, 558 N.E.2d 1178, 1180.

In *Grava*, the Supreme Court found that a valid, final judgment extinguishes a claim, stating "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions," are extinguished. *Id.* Thus, the Supreme Court's decision that the City was not in contempt of its previous order to pay the prevailing wage, extinguishes the Union's first claim, at the very least, that the City has a duty enforceable in mandamus to pay the prevailing wage. *State ex rel. Banaszekwycz v. Merrick* (1968), 15 Ohio St.2d 234, 238 N.E.2d 802 (a motion to produce transcript denied by the probate court precluded the same relief in mandamus because of res judicata), and *State ex rel. Welsh v. Ohio State Medical Bd.* (1964), 176 Ohio St.3d 136, 198 N.E.2d 74.

The Union has not established that this court has jurisdiction over these claims. In October 2001, various construction equipment operators commenced *Consolo v. Cleveland and Local 18*, Cuyahoga County Common Pleas Court Case No. CV-451905. The individual operators sought declaratory judgment, mandamus, and money damages from the City for prevailing wages pursuant to Charter Section 191 and sick time benefits as a matter of equal protection. The lawsuit also stated claims against Local 18 for unfair labor practices, alleging that it did not properly represent the equipment operators.

On appeal from our decision, the Ohio Supreme Court ruled that any claims against Local 18 should have been brought before SERB, because such claims involved alleged unfair labor practices. *Consolo v. Cleveland*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114. Thus, this court did not have jurisdiction over those claims. The Supreme Court also noted that, in 1998, there appeared to be some form of collective bargaining between Local 18 and the City. Local 18 agreed to compensation less than the prevailing wage and also agreed to a reduction in certain benefits, including retirement benefits, in exchange for the City's foregoing any recoupment of double retirement benefits it had paid. The Supreme Court ruled that SERB must first determine various threshold issues. Until SERB resolved whether Local 18 was the representative of the construction equipment operators and whether

collective bargaining occurred, the matter was not ripe for judicial adjudication. Those issues are within SERB's exclusive jurisdiction. To the extent that there was collective bargaining over these matters, then SERB also has exclusive jurisdiction over the claims as unfair labor practices.

In addition, the Supreme Court dismissed the claim for sick time benefits as a restatement of the unfair labor practices claims and because the courts "should not decide constitutional issues if the case can be decided without reaching them." 103 Ohio St.3d at 368, quoting *Cincinnati v. Ohio Council 8, American Fedn. of State, Cty. and Mun. Emp., AFL-CIO* (1991), 61 Ohio St.3d 658, 672, 576 N.E.2d 745. Following this decision, SERB agreed in August 2005 to determine the issues noted by the Ohio Supreme Court, including: "Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators *** with equal or better benefits than are provided by the City Charter?" Thus, SERB will examine at least to some extent the sick time issue.³

This court concludes that the claims sub judice are not justiciable, on the grounds of either jurisdiction or ripeness, at least until SERB has ruled on the issues raised in *Consolo*. If SERB determines that some form of collective bargaining determined

³ SERB has not yet rendered a decision.

wages and/or benefits, then under the "status quo ante" rule, SERB would retain jurisdiction of those matters.

In *Young v. Washington Local School Dist. Bd. of Edn.* (1993), 85 Ohio App.3d 37, 41, 619 N.E.2d 62, the court held,

"Applying the common law of contracts to this case, we find that where both parties to a public employee collective bargaining agreement continue to operate as if there were a contract, and neither party breaches or indicates its intention to no longer be bound, then the status quo continues. We also hold that since the terms of a collective bargaining agreement, entered into under R.C. Chapter 4117, prevails over conflicting law unless it falls within one of exceptions listed in R.C. 4117.10(A), the conflicting contract terms would prevail during this carryover period."

Cf. *Internatl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 20 v. Toledo* (1988), 48 Ohio App.3d 11, 548 N.E.2d 257; *Cleveland Police Patrolmen's Assn. v. Cleveland* (1994), 95 Ohio App.3d 645, 643 N.E.2d 559; *SERB v. Cleveland*, SERB HO 1997-HO-008 (1-24-97); and OAC 4117-9-02(E).

In the instant case, both the City and the construction equipment operators continued their relationship pursuant to the status quo terms without strike or lock-out. Therefore, this court concludes that the collective bargaining terms, if any, continued into the subject period of time and that jurisdiction remains with SERB.

Moreover, the Union has failed to show that jurisdiction does not properly lie with SERB. SERB's particular expertise in labor issues should be given deference. As the Supreme Court noted in

Consolo: "SERB also has exclusive authority to determine whether appellees's compensation levels were the result of collective bargaining. Where collective bargaining has occurred, R.C. 4117 prevails over any and all other conflicting laws." Therefore, SERB, not this court, is the proper entity to determine the scope of the February 2005 collective bargaining agreement, especially the issues of whether benefits for the subject period of time as well as past grievances were part of the consideration for the current agreement.

Finally, mandamus will not issue in doubtful cases. It should issue only when there are clear legal rights and clear legal duties. The instant case lacks such clarity. In considering the preclusive effects of the February 2005 collective bargaining agreement, the *International Union of Operating Engineers* case, its subsequent contempt motion, the *Consolo* case, and any related issues, there are too many doubts and uncertainties concerning this matter for mandamus to issue.

The court notes that in *Consolo*, which concerned the prevailing wage under the Charter and benefits, including sick time, the plaintiffs sought a more comprehensive legal solution, seeking declaratory judgment relief and money damages in addition to mandamus relief. The unresolved issues in the instant case appear more appropriate for declaratory judgment, for which this court lacks jurisdiction. *State ex rel. Neer v. Indus. Comm.*

(1978), 53 Ohio St.2d 22, 371 N.E.2d 842; *State ex rel. Bedocs v. Indus. Comm.* (Nov. 25, 1986), Franklin App. No. 86AP-497; and *State ex rel. Ministerial Day Care v. Zelman*, (Cuyahoga App. No: 82128), 2003-Ohio-2653, affirmed, 100 Ohio St.3d 347, 2003-Ohio-6447. Although an action for declaratory judgment is not necessarily an adequate remedy at law precluding mandamus, it may be. Furthermore, the court may consider the availability of declaratory judgment in exercising its discretion whether the writ should issue. *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 1999-Ohio-130, 716 N.E.2d 704; *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289; and *State ex rel. Eliza Jennings, Inc. v. Noble* (1990); 49 Ohio St.2d 71, 551 N.E.2d 128.

Accordingly, this court grants the City's motion for summary judgment, denies the Union's motion for summary judgment, and declines to issue the writ of mandamus. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

CHRISTINE T. McMONAGLE, J. CONCURS

MARY EILEEN KILBANE, J. DISSENTS
(SEE SEPARATE DISSENTING OPINION)

FILED AND JOURNALIZED
PER APP. R. 22(E)

AUG 15 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

[Signature: Colleen Conway Cooney]
COLLEEN CONWAY COONEY
PRESIDING JUDGE

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 86263

STATE OF OHIO, ex rel., :
MUNICIPAL CONSTRUCTION :
EQUIPMENT OPERATORS' LABOR :
COUNCIL, : D I S S E N T I N G
: :
Relator : O P I N I O N
: :
-vs- :
: :
CITY OF CLEVELAND, et al. :
: :
Respondents :

DATE OF DECISION: August 15, 2006

JOURNAL ENTRY

MARY EILEEN KILBANE, J., DISSENTING:

For the following reasons, I respectfully dissent from the majority opinion as I find there are genuine issues of material fact that preclude the granting of respondents' motion for summary judgment.

I find that genuine questions remain as to whether the construction equipment operators ("CEO") were entitled to prevailing wage and sick time benefits during the period of January 30, 2003 to February 13, 2005. I believe that a material question remains as to whether in agreeing to the collective bargaining agreement with the City, the Union supplied consideration for benefits for the subject period of time as well as for past grievances. As such, I cannot find as a matter of law that the

Union had and pursued an adequate remedy of law.

Additionally, on July 20, 2006, SERB's administrative law judge issued a decision that Local 18 was not the exclusive bargaining representative for the CEO's. As such, this recommendation raises additional questions of fact that preclude the granting of summary judgment.

For the abovementioned reasons, I would deny respondents' motion for summary judgment and dissent from the majority opinion.

CONSOLO ET AL., APPELLEES, v. CITY OF CLEVELAND ET AL., APPELLANTS.

[Cite as *Consolo v. Cleveland*, 103 Ohio St.3d 362, 2004-Ohio-5389.]

Municipal corporations — Public employment — Subject-matter jurisdiction of the State Employment Relations Board — State Employment Relations Board has exclusive jurisdiction to decide whether collective bargaining occurred.

(No. 2003-0230 — Submitted January 14, 2004 — Decided October 20, 2004.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 81117, 2002-Ohio-7065.

O'CONNOR, J.

{¶ 1} Appellees, including Santo Consolo, work as construction-equipment operators and master mechanics for appellant city of Cleveland. Thirty-eight of the 40 appellees are or were dues-paying members of appellant International Union of Operating Engineers, Local 18 (“Local 18”). On October 30, 2001, appellees filed a complaint in common pleas court seeking a declaratory judgment, a writ of mandamus, and a money judgment against appellants, asserting that appellants are illegally denying prevailing wages to appellees. Appellees contend that they are entitled to wages and benefits consistent with those of other city employees pursuant to a writ of mandamus that this court issued in 1992, ordering the city to pay back and future wages to them in accordance with Cleveland’s city charter. *State ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St.3d 537, 584 N.E.2d 727 (“*IUOE*”). Appellees claim that the city failed to pay increases in prevailing wages after 1993 and stopped paying pension contributions as part of appellees’ compensation in 1998.

SUPREME COURT OF OHIO

{¶ 2} Appellees also claim that in 1998, Local 18 negotiated with the city on their behalf but without their authorization. In a verbal agreement that appellees claim they never ratified, Local 18 agreed with the city that appellees would waive their right to receive a pension contribution and prevailing-wage increases. This agreement apparently occurred after the city and Local 18 agreed that the pension contributions were a windfall to appellees because they also participated in the public retirement system.

{¶ 3} As part of their claim regarding prevailing wages, appellees allege that the city has violated R.C. 124.38 in failing to provide paid sick leave and has treated appellees differently from similarly situated city employees by failing to provide certain employment benefits such as paid vacations, group term life insurance, and longevity pay. According to appellees, this disparate treatment has denied them equal protection of the law.

{¶ 4} Both the city and Local 18 filed motions to dismiss for lack of subject-matter jurisdiction and other deficiencies in the complaint. After a hearing, the trial court found appellees' allegations tantamount to unfair-labor-practice claims and thus within the exclusive jurisdiction of the State Employment Relations Board ("SERB"). The court granted appellants' motions to dismiss. The appellate court reversed, holding that the trial court did not lack jurisdiction over the equal-protection claim or, potentially, any claim regarding what constitutes a "prevailing wage." The city and Local 18 have appealed, asserting, among other allegations, that SERB has exclusive jurisdiction to determine the claims raised by appellees. This cause is before us upon our acceptance of a discretionary appeal.

I

IUOE

{¶ 5} Appellants in this case were before us as opposing parties in *IUOE*, 62 Ohio St.3d 537, 584 N.E.2d 727. In that case, Local 18 sought a writ of

mandamus in the court of appeals on behalf of the appellees here, asking that the city be ordered to pay “prevailing wages” as required by the city’s charter. The city and Local 18 stipulated several facts, including that “as defined in R.C. 4117.01, the city recognized Local 18 as the exclusive bargaining representative of its construction equipment operators and master mechanics” and that no collective bargaining agreement existed at that time. *IUOE*, 62 Ohio St.3d at 538, 584 N.E.2d 727. The court of appeals refused to grant the writ because the actions alleged in the complaint “arguably constituted an unfair labor practice under R.C. 4117.11(A)(5),” over which SERB has exclusive jurisdiction. *Id.* We reversed that decision and issued the writ, noting that a collective-bargaining agreement did not exist and the rights Local 18 sought to enforce emanated from the city charter and not from R.C. Chapter 4117. We ordered back and future wages paid in conformity with the city charter.

{¶ 6} In the case sub judice, appellees claim that after *IUOE*, the city violated its charter by not annually increasing their wages and by reducing the retirement benefit that appellees accrue. Appellees argue that Local 18, by agreeing to these changes, essentially gave up the ground it had won for appellees in *IUOE*.

{¶ 7} Appellants counter that wages negotiated under R.C. Chapter 4117 prevail over conflicting laws, including city charters. Indeed, R.C. 4117.10(A) states, “[T]his chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.” When asked to review this statute, we held, “The provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, *including municipal home-rule charters * * **” (Emphasis added.) *Cincinnati v. Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Employees, AFL-CIO* (1991), 61 Ohio St.3d 658, 576 N.E.2d 745, paragraph one of the syllabus. Appellees do not dispute this holding.

SUPREME COURT OF OHIO

They instead contend that the holding does not apply here because there is no collective-bargaining agreement.

{¶ 8} It is important to note that the appellees' allegations are contrary to facts stipulated in *IUOE*. Appellees assert that Local 18 is not and never has been their exclusive bargaining representative. They also assert that the R.C. 4115.03(E) definition of "prevailing wage" is controlling. Before visiting the prevailing-wage issue, we first focus upon Local 18's relationship with appellees.

II

Local 18

{¶ 9} The city contends that appellees were in privity with Local 18 in *IUOE* and that the stipulations from *IUOE* estop appellees from asserting that Local 18 is not their exclusive bargaining representative. Collateral estoppel, however, does not apply because *IUOE* does not speak to Local 18's current status as collective-bargaining representative. Hence, even if appellees might otherwise have been estopped from litigating issues decided by *IUOE*, the identity of appellees' bargaining representative after 1992 was not an issue addressed in that opinion. Moreover, Local 18's status was neither actually litigated nor essential to our judgment. Local 18's status as a collective-bargaining representative appears to have been stipulated in *IUOE* to demonstrate its standing to file suit against the city. Here, appellees agree that Local 18 was a collective-bargaining agent but not their exclusive bargaining agent as contemplated by R.C. 4117.05. This distinction was immaterial to our *IUOE* decision. It may be key here. Therefore, *IUOE* does not bar appellees from arguing that Local 18 is not their exclusive bargaining agent.¹

{¶ 10} The city and Local 18 do not dispute that they never entered into a collective-bargaining agreement and that Local 18 was never certified as the

1. This holding does not, however, exclude appellants from citing *IUOE* to show that the parties have treated Local 18 as appellees' exclusive bargaining representative.

exclusive collective-bargaining agent for appellees. They both contend, however, that Local 18 is “deemed” certified because it represented appellees prior to the enactment of R.C. Chapter 4117. Section 4(A) of 1983 Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 367. See *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Employees, AFL-CIO v. Cincinnati* (1994), 69 Ohio St.3d 677, 681-682, 635 N.E.2d 361. They also assert that Local 18, in fact, negotiated on behalf of appellees. Appellants conclude that since Local 18 is deemed certified and has been treated as certified by the parties, any claim that Local 18 is no longer appellees’ exclusive bargaining agent must be brought before SERB. Appellees counter that uncodified Section 4(A) is not applicable here.

{¶ 11} Under Section 4(A) of 1983 Am.Sub.S.B. No. 133, a bargaining representative is deemed certified where “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” prior to April 1, 1984. The representative will 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.” *Id.* See, also, *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 345, 587 N.E.2d 835.

{¶ 12} It is not clear whether Local 18 represented appellees prior to April 1, 1984. It is also unclear how long a representative can retain “deemed certified” status. Thus, there are questions of law and fact regarding whether Local 18 should be deemed to have been appellees’ exclusive representative any time from 1994 through 1998. As SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117,” these questions must be first addressed by SERB. *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 572 N.E.2d 87, paragraph one of the syllabus.

SUPREME COURT OF OHIO

{¶ 13} Appellees claim that Local 18 breached a fiduciary duty by not becoming a certified exclusive bargaining agent. We will not address this claim. If SERB determines that Local 18 was deemed certified, this claim will be moot. Moreover, this claim centers upon actions that the appellees claim Local 18 should have taken under R.C. Chapter 4117, i.e., seeking SERB certification. “R.C. Chapter 4117 has created a series of new rights and set forth the remedies and procedures to be applied regarding those rights. * * * [T]hose remedies and procedures are exclusive.” *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d at 170, 572 N.E.2d 87. Therefore, any issues pertaining to Local 18’s certification and fiduciary duties must be brought before SERB as an unfair-labor-practice allegation.

{¶ 14} Appellees also allege that Local 18 agreed to compensation adjustments on appellees’ behalf without their authorization or ratification. Local 18’s approval of the compensation adjustments takes us beyond the holding of *IUOE*. In that case, because the union never agreed to the unilateral wage changes, the city charter applied. Here, where Local 18 actively represents appellees and negotiates the terms and conditions of their employment, some form of collective bargaining occurred. Collective bargaining on behalf of public employees is the province of SERB.

{¶ 15} R.C. 4117.11(B) reads, “It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

{¶ 16} “(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. * * *

{¶ 17} “(2) Cause or attempt to cause an employer to [commit an unfair labor practice].”

{¶ 18} If Local 18 negotiated a decrease in appellees’ salaries without their knowledge or consent, that conduct would likely constitute an unfair labor practice under R.C. 4117.11(B)(1). Moreover, falsely informing the city that

appellees had agreed to the changes could also violate R.C. 4117.11(B)(2). As SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117,” this question must also be first addressed by SERB. *Franklin Cty. Law Enforcement Assn.*, 59 Ohio St.3d 167, 572 N.E.2d 87, paragraph one of the syllabus.

{¶ 19} All of appellees’ claims against Local 18 should have been brought before SERB. The trial court correctly dismissed those claims.

III

Prevailing Wages

{¶ 20} Appellees contend that the city violated its charter by not paying “prevailing wages,” a term that encompasses wages and benefits. See R.C. 4115.03(E). This claim is twofold. First, the city allegedly failed to pay the prevailing wage by not giving raises from 1994 through 1998. Second, the city allegedly stopped providing the benefits required by R.C. 4115.03 in 1998.

{¶ 21} These issues are not ripe for our review. Because appellees allege that Local 18 approved or acquiesced in the compensation decisions, *IUOE* does not apply here. As addressed above, SERB should be given the opportunity to determine whether Local 18 was an employee organization, an exclusive representative, or neither. SERB also has exclusive authority to determine whether appellees’ compensation levels were the result of collective bargaining. Where collective bargaining has occurred, R.C. Chapter 4117 prevails over any and all other conflicting laws.² *Franklin Cty. Law Enforcement Assn.*, 59 Ohio St.3d at 170, 572 N.E.2d 87. In *IUOE*, we stated that the city must comply with its charter, specifically because the employees’ compensation was not a result of collective bargaining. If appellees’ compensation levels were the result of

2. “Except for sections 306.08, 306.12, 306.35, and 4981.22 of the Revised Code and arrangements entered into thereunder, * * * this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.” R.C. 4117.10(A). Appellees do not contend that the excepted sections apply here.

SUPREME COURT OF OHIO

collective bargaining under R.C. Chapter 4117, then the city's charter provisions would be inapplicable. We have already stated that SERB has exclusive jurisdiction to decide whether collective bargaining occurred.

{¶ 22} If appellees prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls. *IUOE*, 62 Ohio St.3d 537, 584 N.E.2d 727. Appellees' argument that the R.C. 4115.03(E) definition of "prevailing wages" should apply to the city charter will be considered only if the city charter is established as controlling. That said, we note that we have expressly held, "A city which has adopted a charter under the Home-Rule Amendment to the Ohio Constitution and has adopted civil service regulations consistent with the statutes with respect to civil service is not amenable to the provisions of * * * Section 4115.03 et seq., Revised Code, commonly referred to as the Prevailing Wage Law, with respect to the construction of public improvements with its classified civil service employees." *Craig v. Youngstown* (1954), 162 Ohio St. 215, 55 O.O. 110, 123 N.E.2d 19, syllabus.

IV

Equal Protection

{¶ 23} Appellees assert that they were denied equal protection because the charter grants other city employees paid sick leave, holidays, and vacation, term life insurance, dental insurance, longevity pay, and other benefits. Appellees, on the other hand, are provided with the right to negotiate these aspects of their employment. Appellees' equal-protection claim is not based on the language of the charter but rather on the alleged resulting disparity. If appellees and Local 18 had succeeded in negotiating a benefit package that was as good as or better than that received by the other employees, the claim would vanish. This equal-protection claim is simply a restatement of the unfair-labor-practice claims. "Courts should not decide constitutional issues if the case can be decided without

reaching them.” *Cincinnati v. Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp.*, 61 Ohio St.3d at 672, 576 N.E.2d 745, fn. 7, citing *Kinsey v. Bd. of Trustees of Police & Firemen’s Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 225, 551 N.E.2d 989. Because the equal-protection claim is based upon alleged unfair labor practices, which, once resolved, might remedy the claimed compensation disparity, the equal-protection claim will not become ripe until after SERB reviews it. We therefore decline to rule upon the equal-protection claim now.

V

Conclusion

{¶ 24} All of the claims asserted by appellees relate to rights created by R.C. Chapter 4117. These claims must be pursued through SERB.

Judgment reversed.

MOYER, C.J., F.E. SWEENEY, PFEIFER, LUNDBERG STRATTON and O’DONNELL, JJ., concur.

RESNICK, J., concurs in judgment only.

Persky, Shapiro & Arnoff Co., L.P.A., Steward D. Roll, Patricia M. Ritzert and Paul R. Rosenberger, for appellees.

Sobodh Chandra, Director of Law, Jose M. Gonzalez and William A. Sweeney, Assistant Directors of Law, for appellant city of Cleveland.

Wuliger, Fadel & Beyer, William Fadel and Joan E. Pettinelli, for appellant International Union of Operating Engineers, Local 18.

62 Ohio St.3d 537; State, ex rel. Internatl. Union of Operating Engineers, v. Cleveland; 584 N.E.2d 727

Page
537

The State, ex rel. International Union of Operating Engineers, Local 18, 18a, 18b, 18c, 18ra, AFL-CIO, Appellant, v. City of Cleveland et al., Appellees.

[Cite as State, ex rel. Internatl. Union of Operating Engineers, v. Cleveland (1992), 62 Ohio St.3d 537]

Municipal corporations-Public employment-When negotiations between public employees represented by an exclusive bargaining agent and a

Page
538

city have not produced a collective bargaining agreement, a writ of mandamus will lie to resolve a wage dispute by compelling compliance with a city charter provision pursuant to R.C. 4117.10(A).

(No. 90-1780-Submitted September 17, 1991 - Decided February 12, 1992.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 57729.

On May 15, 1989, relator-appellant, International Union of Operating Engineers Local 18, 18A, 18B, 18C, 18RA, AFL-CIO ("Local 18"), filed a complaint in the Court of Appeals for Cuyahoga County seeking a writ of mandamus requiring the city of Cleveland, its council and its mayor ("city") to pay members of Local 18, the exclusive bargaining representative for the city's construction equipment operators and master mechanics, back and future wages in accordance with prevailing wage rates paid in private industry, as set forth in Section 191 of the city's charter. Before May 1, 1987, overtime wages were paid in conformity with the Construction Employers Association Building Agreement ("Agreement") with Local 18; sometime after May 1, 1987, the city unilaterally changed the wage structure for overtime. Also, prior to May 1, 1987, the city did not make shift differential payments as provided for in the Agreement. In early 1987, Local 18 and the city began negotiating a collective bargaining agreement pertaining to wages, hours, and other terms and conditions of employment, but negotiations reached an impasse in June or July 1987, and no such agreement was achieved.

On March 13, 1990 the parties entered into stipulations of fact that: as defined

in R.C. 4117.01, the city recognized Local 18 as the exclusive bargaining representative of its construction equipment operators and master mechanics; since April 1, 1984, the city and Local 18 have been unable to negotiate a collective bargaining agreement; since May 1, 1987, the city has not paid prevailing wages; and no collective bargaining agreement exists between the parties concerning wages, hours, and other terms and conditions of employment.

The court of appeals denied the writ of mandamus, finding that the city's unilateral change in wages in this case arguably constituted an unfair labor practice under R.C. 4117.11(A) (5) for "[r]efus[ing] to bargain collectively with the representative of * * * employees recognized as the exclusive bargaining representative or certified pursuant to Chapter 4117. of the Revised Code," and for which the filing of an unfair labor practice charge under R.C. 4117.12 provides an adequate remedy at law.

The cause is before this court upon an appeal as of right.

Page
539

Wuliger, Fadel & Beyer, William Fadel and Kathleen M. Sasala, Cleveland, for appellant.

Craig S. Miller, Director of Law, and Franzetta D. Turner, Cleveland, for appellees.

Per Curiam.

The case presents a single question: When negotiations between public employees represented by an exclusive bargaining agent and a city have not produced a collective bargaining agreement, will mandamus lie to resolve a wage dispute by compelling compliance with a city charter provision pursuant to R.C. 4117.10(A)? We find that it does, and reverse the decision of the court of appeals and allow the writ.

The city contends that mandamus is not appropriate because of the availability of other remedies, namely R.C. 4117.11, 4117.12 and 4117.14. Although the city characterizes the negotiation procedures of R.C. 4117.14 as "elaborate yet precise," it contends that this remedy is adequate and can lead to the relief which Local 18 seeks. R.C. 4117.14 prescribes certain procedures for settling disputes arising out of negotiations involving existing or initial collective bargaining agreements. If the procedures do not resolve the dispute, then noncritical employees, such as those represented by Local 18, are granted the right to strike. Thus, the city argues, the

right to strike is an adequate remedy.

The city also argues, and the court of appeals held, that its failure to negotiate a collective bargaining agreement may be an unfair labor practice for which relief is available under R.C. 4117.12. If so, SERB would investigate the violation and, if probable cause were found, conduct a hearing. In the appropriate case an order would issue and temporary relief or a restraining order would be granted. In addition, by appeal to the court of common pleas from the order granting or denying relief, the court could enforce, modify or set aside the order.

Local 18 contends that city charter Section 191 specifically requires the city to pay its city construction equipment operators and master mechanics according to the prevailing wages in industry. In support, Local 18 points to an excerpt from Section 191:

"Only in the case of employees in those classifications for which the Council provided in 1979 a schedule of compensation in accordance with prevailing wages paid in the building and construction trades, the schedule established by the council shall be in accordance with prevailing rates of salary or compensation for such services."

Local 18 coordinates that excerpt with a reference to R.C. 4117.10(A):

"* * * Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. * * *" (Emphasis added.)

Here, there is no existing collective bargaining agreement.

The statutory remedies proposed by the city would not grant the relief sought by Local 18. The relief available to Local 18, if the city were guilty of an unfair labor practice, under R.C. 4117.12, is a "cease and desist" order from SERB requiring collective bargaining which may be enforced through a court of common pleas. R.C. 4117.13. The ultimate relief available for an unresolved dispute under R.C. 4117.14 is the right to strike.

Neither remedy directly enforces Local 18's right, established by charter provision pursuant to R.C. 4117.10(A), to have its members compensated in

accordance with prevailing wages in industry. We have allowed resort to local law under R.C. 4117.10(A) where collective bargaining agreements did not specifically cover certain matters. See *State, ex rel. Clark, v. Greater Cleveland Regional Transit Auth.* (1990), 48 Ohio St.3d 19, 548 N.E.2d 940; *Bashford v. Portsmouth* (1990), 52 Ohio St.3d 195, 556 N.E.2d 477; *State, ex rel. Caspar, v. Dayton* (1990), 53 Ohio St.3d 16, 558 N.E.2d 49. The same reasoning applies here when there is no collective bargaining agreement.

Local 18's statutory remedies are not adequate and the city charter, in light of R.C. 4117.10(A), identifies a clear legal right to the relief sought and a concomitant clear legal duty to grant that relief.

We reverse the judgment of the court of appeals and allow a writ of mandamus directing respondents to comply with city charter Section 191 by paying back and future wages to the city's construction equipment operators and master mechanics, members of International Union of Operating Engineers Local 18, 18A, 18B, 18C, 18RA, AFL-CIO, in accordance with prevailing wage rates.

Judgment reversed and writ allowed.

MOYER, C.J., SWEENEY, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

HOLMES, J., dissents.

HOLMES, J., dissenting. I would affirm the court of appeals in all respects.

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**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cleveland,

Respondent.

Case No. 2003-ULP-06-0322

**ORDER
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
August 5, 2004.

On June 17, 2003, the Municipal Construction Equipment Operators' Labor Council ("Intervenor") filed an unfair labor practice charge with the State Employment Relations Board ("Board" or "Complainant") alleging that the City of Cleveland ("Respondent") had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On October 1, 2003, the Board found probable cause to believe an unfair labor practice had been committed and directed the unfair labor practice case to hearing.

On February 26, 2004, an expedited hearing was held. Subsequently, the parties filed briefs setting forth their positions. On April 15, 2004, a Proposed Order was issued by the Administrative Law Judge, recommending that the Board find that the Respondent violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) when it engaged in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items. On May 10, 2004, the Respondent filed exceptions to the Proposed Order. On May 24, 2004, the Complainant filed a response to the Respondent's exceptions.

After reviewing the record, the Proposed Order, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference. The Board also issues this Order, with a Notice to Employees, to the City of Cleveland to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and from refusing to bargain collectively with the exclusive representative of its employees, by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items during

the parties' negotiations for their initial collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

The City of Cleveland is hereby ordered to:

- (1) Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished by the Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

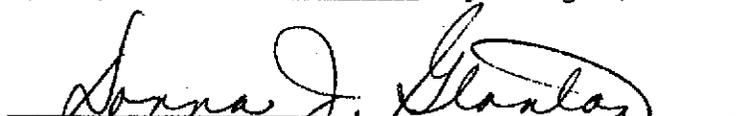
DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 9th day of August, 2004.



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE STATE EMPLOYMENT
RELATIONS BOARD, AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and from refusing to bargain collectively with the exclusive representative of its employees, by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items during the parties' negotiations for their initial collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished to the State Employment Relations Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
3. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

SERB v. City of Cleveland, Case No. 2003-ULP-06-0322

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT RELATIONS BOARD, :
: CASE NO. 03-ULP-06-0322
Complainant, :
: :
v. : **BETH C. SHILLINGTON**
: Administrative Law Judge
CITY OF CLEVELAND, :
: PROPOSED ORDER
Respondent. :

I. INTRODUCTION

On June 17, 2003, the Municipal Construction Equipment Operators' Labor Council filed an unfair labor practice charge against the City of Cleveland (the "City"), alleging that the City violated §§ 4117.11(A)(1) and (A)(5).¹ On October 1, 2003, the State Employment Relations Board ("SERB or "Complainant") found probable cause to believe that the City violated §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith.

On February 17, 2004, a complaint was issued. An expedited hearing was held on February 26, 2004, wherein the parties presented testimonial and documentary evidence. Subsequently, both parties filed post-hearing briefs.

II. ISSUE

Whether the City violated §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith?

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

III. FINDINGS OF FACT²

1. The City of Cleveland is a "public employer" as defined by § 4117.01(B). (S. 1)
2. The Municipal Construction Equipment Operators' Local Council (the "Union") is an "employee organization" as defined by § 4117.01(D) and is the exclusive representative for a bargaining unit of the City's employees. (S. 2)
3. The Union was certified as the exclusive representative on January 30, 2003, replacing the International Union of Operating Engineers, Local 18. (S. 3)
4. Before the parties' initial collective bargaining session, as its initial proposal, the City mailed the Union a copy of a collective bargaining agreement it had recently reached with the Cleveland Building and Construction Trades Council ("CBCTC"). On May 14, 2003, the Union mailed the City a counterproposal. (S. 5, 6; C. Exhs. 3, 4, 5, 6, 7)
5. The City and the Union met for their first collective bargaining session on June 13, 2003. (S. 4)
6. The June 13, 2003 meeting began at 10 a.m. in Cleveland City Hall and was attended by five negotiating-team members from each side. (T. 20; Jt. Exh. 2)
7. Assistant Law Director William Sweeney spoke first. He outlined the City's position and explained how the City's proposal came about from extensive negotiations between the City and the CBCTC. Mr. Sweeney explained that the City did not want to enter into a collective bargaining agreement with the Union that differed substantially from the City's collective bargaining agreement with the CBCTC because this situation would cause "labor chaos" and disrupt the relationships the City had established with other unions. The City also stated that it could not offer different benefits to the Union. (T. 21-23, 26, 95-96, 97)
8. The City demanded that the Union move off its wage counterproposal of 100 percent of the prevailing wage rate contained in a contract known as the "Building Agreement" between the International Union of Operating Engineers,

² References in the record to the Joint Stipulations of Fact filed by the parties are indicated parenthetically by "S.," followed by the stipulation number. References to the transcript of hearing are indicated parenthetically by "T.," followed by the page number(s). References to the Joint Exhibits in the record are indicated parenthetically by "Jt. Exh.," followed by the exhibit number(s). References to the Complainant's exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit number(s). References to the City's exhibits in the record are indicated parenthetically by "R. Exh.," followed by the exhibit number(s). References to the stipulations, transcript, and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Finding of Fact.

Local 18 and a number of private employers of construction equipment operators. The City demanded that the Union accept the City's wage proposal of 80 percent of a different prevailing wage rate contained in a contract known at the "Heavy Highway" contract. (T. 26-30)

9. The City reviewed with the Union a list of 31 items in the Union's counterproposal that the City viewed as unacceptable. Some of these items were unacceptable to the City because they differed from the City's current practices. The City also stated that it believed that the Union's proposals on management rights, overtime, and hiring were "illegal." The Union responded to the City's concern regarding management rights by offering to include a management rights clause in the collective bargaining agreement. (T. 31-32, 35, 61-62, 75-76, 79; C. Exh. 8)
10. The Union asked the City to set aside the wage issue and move forward to negotiate the remaining items of concern that the City had reviewed with the Union. The City refused, stating only that the Union's counterproposal was unacceptable. The City took the position that it would not discuss anything further until the Union moved off its wage proposal. The City asked the Union to caucus for the purpose of preparing a different counterproposal on the wage issue and on the other issues. (T. 32, 33-34, 99, 105-106, 126-128, 154-155; R. Exh. 2)
11. The Union refused to withdraw its counterproposal and submit new counterproposals. The City would not discuss anything further. The City left the bargaining session. The session lasted 52 minutes. (T. 33-35, 126-128)

IV. ANALYSIS AND DISCUSSION

Section 4117.11 provides in relevant part as follows:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
 - (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code***;
* * *
 - (5) Refuse to bargain collectively with the representative of its employees recognized as the exclusive representative *** pursuant to Chapter 4117. of the Revised Code[.]

Section 4117.01(G) provides as follows:

"To bargain collectively" means 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. "To bargain collectively" 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.

At issue in this case is whether the City engaged in bad-faith bargaining during the June 13, 2003 negotiation session. Based upon the record herein, the City bargained in bad faith in violation of §§ 4117.11(A)(1) and (A)(5).³ In In re Springfield Local School Dist Bd of Ed, SERB 97-007 (5-1-97), at 3-46, SERB stated as follows:

Good-faith bargaining is determined by the totality of the circumstances. The duty to bargain does not compel either party to agree to a proposal or require either party to make a concession. A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. Hard bargaining, however, is not bad-faith bargaining.

In the private sector, when a party is found to have used negotiation techniques to frustrate or avoid mutual agreement, that party is said to have engaged in "surface bargaining." A party is alleged to have engaged in surface bargaining based upon the totality of its conduct at or away from the bargaining table, since an intent to frustrate an agreement is rarely articulated. "More than in most areas of labor law, distinguishing hard bargaining from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous." "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." Although an employer may be willing to meet at length and confer with the union, the employer has refused to bargain in good faith if it merely goes through the "motions" of bargaining, such as where an employer offers a proposal that cannot be accepted, along with an inflexible attitude on major issues and no proposal of reasonable alternatives. We adopt the foregoing treatment of "surface bargaining" as persuasive authority under O.R.C. Chapter 4117.

³ Section 4117.11(A)(1) represents an alleged derivative violation of § 4117.11(A)(5) in this instance. In re Amalaamated Transit Union, Local 268, SERB 93-013 (6-25-93) at n.14.

In In re Toledo City School Dist Bd of Ed, SERB 2001-006 (10-1-01) ("Toledo"), the Board found that "hard bargaining" had occurred. In that case, the union was not required to back down from its position, nor was the employer required to give in to the union's demands. But in that case, the parties exchanged proposals and counter-proposals on several occasions. Through negotiations, the parties were able to resolve many issues before reaching ultimate impasse on the remaining issue.

Despite its protestations that it was not refusing to bargain, the City's conduct at the June 13, 2003 meeting can only be described as "surface bargaining." The City refused to engage with the Union in any give-and-take whatsoever. The City expressed a desire to obtain the Union's consent to the terms set forth in the CBCTC agreement. The City's expressed desire for uniformity evidenced an inflexible attitude on major issues. The City's refusal to make any counterproposals to the Union's opening counterproposal indicates that while the City was willing to "meet and confer" with the Union on June 13, 2003, the City was not willing to propose any reasonable alternatives on the 31 items at issue. Thus, the City, unlike the employer in the Toledo case, engaged in "surface bargaining," not hard bargaining.

The City rejected the Union's suggestion that the parties table the wage issue for the moment and move on to negotiate other items. When the Union refused to submit another counterproposal despite the lack of movement by the City, the City terminated the negotiation session. The City's inflexible attitude on June 13, 2003, constituted bad-faith "surface bargaining" in violation of §§ 4117.11(A)(1) and (A)(5).

V. CONCLUSIONS OF LAW

Based upon the entire record herein, this Administrative Law Judge recommends the following Conclusions of Law:

1. The City of Cleveland is a "public employer" as defined by § 4117.01(B).
2. The Municipal Construction Equipment Operators' Local Council is an "employee organization" as defined by § 4117.01(D).
3. The City of Cleveland violated §§ 4117.11(A)(1) and (A)(5) by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board issue an **ORDER**, pursuant § 4117.12(B), requiring the City of Cleveland to do the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Municipal Construction Equipment Operators' Labor Council,

Petitioner,

and

International Union of Operating Engineers, Local 18,

Employee Organization,

and

City of Cleveland,

Employer.

Case No. 02-REP-06-0116

ORDER DIRECTING ADMINISTRATIVE HEARING

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich: August 25, 2005.

On April 11, 2005, the Municipal Construction Equipment Operators' Labor Council ("Petitioner") filed a Petition for Administrative Hearing with SERB, in which it requested that the Board appoint a hearing examiner to adjudicate certain issues that the Ohio Supreme Court had found to be within the agency's jurisdiction in *Consolo v. City of Cleveland* (2004), 103 Ohio St. 3d 361.

In that case, employees formerly represented by the International Union of Operating Engineers ("Employee Organization" or "Local 18") and since January 30, 2003, represented by the Petitioner, had claimed that the City of Cleveland ("Employer") had unlawfully failed to pay them prevailing wages. The Court concluded that the employees' claims turned on a number of issues that were within SERB's jurisdiction to determine.

On May 2, 2005, Local 18 and the Employer filed a Joint Motion to Strike the Petitioner's Petition for Administrative Hearing and Brief in Opposition. The Petitioner responded by filing on May 11, 2005, an Opposition to Respondents' Motion to Strike Petition for Administrative Hearing.

We have considered the arguments raised by Local 18 and the Employer maintaining that the Board possesses no legal authority to conduct such a hearing outside the parameters of an unfair labor practice charge proceeding. However, in this particular matter, in which the Ohio Supreme Court has specifically identified issues that it says must first be addressed by SERB, we have decided to exercise our plenary jurisdiction to resolve them. We are cognizant of the mandate of Ohio Revised Code §4117.22, which charges SERB with construing Chapter 4117 liberally to promote orderly and constructive relationships between public employers and public employees.

It is our conclusion that holding the requested hearing and resolving underlying issues that have been specifically identified for us by the State's highest court will serve to promote orderly and constructive relationships among these parties.

Accordingly, we deny the Joint Motion to Strike the Petition, grant the Petition and order that testimony be taken before an Administrative Law Judge, upon notice to the Petitioner, the City, and Local 18, for the purpose of preparing recommendations to the Board on the following questions:

(1) Whether before April 1, 1984, Local 18 ever was the deemed certified representative of those persons employed by the City as construction equipment operators, who are now represented by Petitioner as their exclusive bargaining agent.

(2) If Question No. 1 is answered affirmatively, how long may a deemed certified representative retain that status if Local 18 never complied with the reporting requirements of Ohio Revised Code Section 4117.19?

(3) Was Local 18 the "exclusive representative" of those persons employed by the City as construction equipment operators anytime during the period of 1994 through 1998?

(4) Did Local 18 negotiate with the City a decrease in compensation of those persons employed by the City as construction equipment operators without their knowledge or consent?

(5) Did Local 18 falsely inform the City that those persons employed by the City as construction equipment operators had agreed to a decrease in compensation?

(6) Were the wages of the construction equipment operators who were appellees in the *Consolo* case the result of collective bargaining between Local 18 and the City?

(7) Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators described above in Paragraph (6) with equal or better benefits than are provided by the City Charter?

It is so ordered.

DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



CAROL NOLAN DRAKE, CHAIRMAN

I certify that a copy of this document was served upon each party's
representative by regular U.S. Mail this 3rd day of August,
2005



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

**MUNICIPAL CONSTRUCTION
EQUIPMENT OPERATORS' LABOR
COUNCIL,**

Employee Organization,

CASE NO. 02-REP-06-0116

and

**BETH A. JEWELL
Administrative Law Judge**

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 18,**

Employee Organization,

and

CITY OF CLEVELAND,

Employer.

RECOMMENDED DETERMINATION

I. INTRODUCTION

On April 11, 2005, the Municipal Construction Equipment Operators' Labor Council ("MCEOLC") filed a "Petition for Administrative Hearing," in which it requested that the State Employment Relations Board ("SERB" or "Board") appoint a hearing examiner to adjudicate certain issues that the Ohio Supreme Court had found to be within SERB's jurisdiction in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362. On August 25, 2005, the State Employment Relations Board ("SERB" or "Board") issued an Order Directing Administrative Hearing. In its order, SERB stated as follows:

We have considered the arguments raised by Local 18 and the Employer maintaining that the Board possesses no legal authority to conduct such a hearing outside the parameters of an unfair labor practice charge proceeding. However, in this particular matter, in which the Ohio Supreme Court has specifically identified issues that it says must first be addressed by SERB, we have decided to exercise our plenary jurisdiction to resolve them. We are cognizant of the mandate of Ohio Revised Code §4117.22, which charges SERB with construing Chapter 4117 liberally to promote orderly and constructive relationships between public employers and public employees.

Thereafter, the Board assigned this Administrative Law Judge to take testimony for the purpose of preparing recommendations to the Board on seven questions. A hearing was held on February 6, 2006, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. PROCEDURAL HISTORY

In 1973, the Ohio Supreme Court decided Pinzone v. Cleveland (1973), 34 Ohio St.2d 26 ("Pinzone"), holding that, under Section 191 of the City Charter of the City of Cleveland, wages for building and construction trades employees working for the City should be paid at the prevailing wage rates in the private sector, in accordance with a private sector contract between Cleveland Building and Construction Trades Employers Association and the Mechanical Contractors Association. The City argued that such items as paid sick leave, greater job security and more steady employment could be offset against the higher base wage in private industry. The Court disagreed: "Permitting an offset for such 'fringe benefits' would necessarily encourage arbitrary and probably inaccurate lowerings of the base municipal wage scale. Clearly, this is not the intent or meaning of Section 191." Pinzone, 34 Ohio St.2d at 31.

In State ex rel. Internatl. Union of Operating Engineers v. Cleveland (1992), 62 Ohio St.3d 537 ("IUOE"), an action in mandamus brought by Local 18 as the bargaining representative for construction equipment operators and master mechanics (collectively, "CEOs") working for the City, the Ohio Supreme Court issued a writ of mandamus ordering the City to pay back and future wages to the CEOs in accordance with the City Charter.

In 2001, forty CEOs filed a complaint in the court of common pleas, asserting that the City was not compensating them in accordance with IUOE and the City Charter.¹ See Consolo v. Cleveland (2004), 103 Ohio St.3d 362 ("Consolo"). In Consolo, the CEOs claimed that the City stopped paying increases in prevailing wages after 1993 and that the City stopped paying pension contributions in 1998. The CEOs additionally claimed that in 1998, Local 18 negotiated with the City on their behalf but without their authorization. The CEOs claimed that Local 18 and the City verbally agreed that the CEOs would waive their rights to pension contributions and prevailing wage increases. Local 18 and the City argued that the CEOs' claims belonged before SERB as unfair labor practices because Local 18 was the CEOs' exclusive bargaining representative during the time periods in question. The trial court dismissed the CEOs' claims, holding that the allegations were tantamount to unfair labor practice claims and thus within SERB's exclusive jurisdiction. The CEOs appealed. Ultimately, the Ohio Supreme Court upheld the trial court's dismissal, holding that SERB has the exclusive authority to determine whether the CEOs' compensation levels were the result of collective bargaining. However, the Ohio Supreme Court noted the following arguments

¹ On January 30, 2003, SERB certified the MCEOLC as the exclusive representative of City employees in a bargaining unit including CEOs.

asserted by the CEOs as appellees in the Consolo litigation:

It is important to note that the appellees' allegations are contrary to facts stipulated in IUOE. Appellees assert that Local 18 is not and never has been their exclusive bargaining representative. They also assert that the R.C. 4115.03(E) definition of "prevailing wage" is controlling. Before visiting the prevailing-wage issue, we first focus upon Local 18's relationship with appellees.

The city contends that appellees were in privity with Local 18 in IUOE and that the stipulations from IUOE estop appellees from asserting that Local 18 is not their exclusive bargaining representative. Collateral estoppel, however, does not apply because IUOE does not speak to Local 18's current status as collective-bargaining representative. Hence, even if appellees might otherwise have been estopped from litigating issues decided by IUOE, the identity of appellees' bargaining representative after 1992 was not an issue addressed in that opinion. Moreover, Local 18's status was neither actually litigated nor essential to our judgment. Local 18's status as a collective-bargaining representative appears to have been stipulated in IUOE to demonstrate its standing to file suit against the city. Here, appellees agree that Local 18 was a collective-bargaining agent but not their exclusive bargaining agent as contemplated by R.C. 4117.05. This distinction was immaterial to our IUOE decision. It may be key here. Therefore, IUOE does not bar appellees from arguing that Local 18 is not their exclusive bargaining agent.

Consolo, supra, at 364-365. The Court concluded, in relevant part, as follows:

"If appellees' compensation levels were the result of collective bargaining under R.C. Chapter 4117, then the city's charter provisions would be inapplicable.... If appellees prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls." Consolo, supra, at 367.

Following the Ohio Supreme Court's decision in Consolo, the MCEOLC filed its "Petition for Administrative Hearing" with SERB.

III. ISSUES

The following seven questions were presented by the Board for the Administrative Law Judge's consideration:

1. Whether before April 1, 1984, the International Union of Operating Engineers, Local 18 ("Local 18") ever was the deemed-certified representative of those persons employed by the City as construction equipment operators, who are now represented by the Municipal Construction Equipment Operators' Labor Council ("MCEOLC") as their

exclusive bargaining agent.

2. If Question No. 1 is answered affirmatively, how long may a deemed certified representative retain that status if Local 18 never complied with the reporting requirements of § 4117.19²?

3. Was Local 18 the "exclusive representative" of those persons employed by the City of Cleveland ("City") as construction equipment operators anytime during the period of 1994 through 1998?

4. Did Local 18 negotiate with the City a decrease in compensation of those persons employed by the City as construction equipment operators without their knowledge or consent?

5. Did Local 18 falsely inform the City that those persons employed by the City as construction equipment operators had agreed to a decrease in compensation?

6. Were the wages of the construction equipment operators who were appellees in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, the result of collective bargaining between Local 18 and the City?

7. Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators described above in Paragraph (6) with equal or better benefits than are provided by the City Charter?

IV. FINDINGS OF FACT³

1. The MCEOLC is an "employee organization" as defined in § 4117.01(D). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)

2. The International Union of Operating Engineers, Local 18 ("Local 18"), is an "employee organization" as defined in § 4117.01(D). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)

² All references to statutes are to the Ohio Revised Code, Chapter 4117, unless otherwise indicated.

³ All references to the transcript of hearing are indicated parenthetically by "T.," followed by the page number(s). All references to the parties' stipulations of fact in the record are indicated parenthetically by "S.," followed by the stipulation number(s). References to the MCEOLC's exhibits in the record are indicated parenthetically by "P. Exh.," followed by the exhibit number(s). References to Local 18's exhibits in the record are indicated parenthetically by "U. Exh.," followed by the exhibit number(s). References to the City's exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit number(s). References to the record in the Findings of Fact are for convenience only and are not intended to suggest that such reference is the sole support in the record for that related finding of fact.

3. The City of Cleveland ("City") is a "public employer" as defined in § 4117.01(B). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)
4. During the years before and at the time Chapter 4117 became effective, the Civil Service Employees Association ("CSEA") represented dues-paying civil service employees of the City by filing grievances on their behalf. The CSEA was open to all civil service employees, without regard to union affiliation. (T. 23, 57-58, 60)
5. Before and after Chapter 4117 became effective, the Construction Equipment Operators ("CEOs") working for the City received the prevailing wage under Section 191 of the City Charter. The CEOs relied upon Local 18 to inform the City of the current prevailing wage under Local 18's Building Agreement with the Construction Employers Association ("Building Agreement"). (T. 46, 111; U Exhs. 11-17; P. Exhs. 34-37)
6. On March 1, 1983, seven individual CEOs employed in the City's Water Department signed a letter to the Commissioner of the Water Department, accepting a new policy put in place by the department that clarified when the employees would receive overtime pay. Their signatures on the letter are witnessed by Local 18 Business Representative Dudley Snell. At that time, approximately 50 CEOs were employed by the City in various departments, including water, parks, streets, and the municipal power plant. (T. 124; C. Exh. 1, p. 7)
7. In 1987, employee organizations representing several bargaining units of employees working for the City entered into collective bargaining agreements with the City. These collective bargaining agreements typically involved wages in the amount of 80 percent of the prevailing wage rate, plus City fringe benefits. Although they were not receiving City fringe benefits, the CEOs did not want a collective bargaining agreement with a wage rate lower than the prevailing wage. The CEOs rejected the collective bargaining agreement proposed by the City. (T. 107-108; C. Exh. 1, pp. 7-9)
8. Between 1988 and 1996, many CEOs joined Local 18 and signed dues deduction authorization cards. (C. Exh. 8)
9. In 1992, the Ohio Supreme Court granted a writ of mandamus directing the City to comply with City Charter Section 191 by paying back and future wages to the City's CEOs in accordance with prevailing wage rates. Local 18 brought the mandamus action on behalf of its members who were working as CEOs for the City. State ex rel. Internatl. Union of Operating Engineers v. Cleveland (1992), 62 Ohio St.3d 537 ("IUOE").
10. On August 6, 1996, a meeting of Local 18 members working for the City was held at Local 18's Cleveland headquarters. At this meeting, Local 18 President Dudley Snell asked the members if they would like to vote on whether they wanted Local 18 to negotiate a contract with the City on their behalf. The members voted not to authorize Local 18 to represent them in negotiating a contract with the City. (T. 25-26, 27, 106, 132; P. Exh. 45)

11. After 1993, the City disputed the prevailing wage rate it was required to pay the CEOs. The City argued that it was entitled to offset certain items from the private sector prevailing wage rate. Local 18 then filed a contempt action to compel the City to comply with the terms of the Ohio Supreme Court's decision in IUOE, supra. In 1998, Local 18 and the City resolved this litigation by agreeing to a calculation of the prevailing wage rate that included a deduction for pension contributions, and Local 18 dismissed the contempt action. Local 18 President Snell and Assistant City Law Director Thomas Corrigan held a meeting with the CEOs to explain how Local 18 and the City had calculated the prevailing wage rate. The CEOs were not asked to vote on, and never voted to approve, the settlement of the litigation or the calculation of the prevailing wage rate. (T. 35-36, 134-135, 139-142, 143-144, 159-160; C. Exh. 1, pp. 24-27)

12. No City records can be found to indicate that the City Council approved a collective bargaining agreement between the City and a union that represented a bargaining unit including CEOs and master mechanics prior to February 14, 2005. (S., T. 12)

13. No City records indicate the receipt by the City prior to April 1, 1984, of a request for recognition by Local 18 to be the exclusive bargaining representative for a bargaining unit which included CEOs and master mechanics. (S., T. 13)

14. During the period of time from April 1, 1984 to February 5, 2002, SERB has no record of certification or recognition for the CEOs employed by the City in its Division of Streets or Division of Water. (P. Exh. 48)

15. On June 28, 2002, the MCEOLC filed a Request for Recognition with SERB, seeking to represent a proposed bargaining unit of City employees in the classifications of Master Mechanic, Construction Equipment Operator A, and Construction Equipment Operator B, within the City's Departments of Public Utilities and Public Service. (SERB Case No. 02-REP-06-0116)

16. Following the execution of a Consent Election Agreement, SERB conducted a secret ballot election on January 16, 2003. On January 30, 2003, SERB certified the MCEOLC as the exclusive representative of the employees in the proposed bargaining unit. (SERB Case No. 02-REP-06-0116)

V. ANALYSIS AND DISCUSSION

RECOMMENDED ANSWERS TO THE SEVEN QUESTIONS PRESENTED

1. Whether before April 1, 1984, the International Union of Operating Engineers, Local 18 ("Local 18") ever was the deemed certified representative of those persons employed by the City as construction equipment operators, who are now represented by the Municipal Construction Equipment Operators' Local Council ("MCEOLC") as their exclusive bargaining agent.

No. After examining the facts, and for the reasons that follow, it is recommended that Local 18 never was the deemed-certified representative of the CEOs.

1983 S 133, § 4, also referred to in SERB Opinions as the "temporary law" or the "uncodified law," provides in relevant part as follows:

(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. 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.

(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.

(C) Nothing in this act shall be construed to permit an employer to terminate or refuse to make payroll deductions of dues, fees, or assessments to any employee organization pursuant to written authorization; except that the deductions may not continue to be made after another employee organization has been certified under this act by the Board.

(F) This act does not preclude any nonprofit, voluntary, bona fide organization which, by tradition, custom and practice, has engaged in the processing of grievances for public employees before political subdivision civil service commissions as of June 1, 1983, from providing the services it has heretofore offered on a voluntary basis or from receiving a voluntary check-off of dues.

In In re City of Akron, SERB 94-012 (4-28-94)("Akron"), at 3-81, SERB explained deemed-certified status as follows:

An employee organization has deemed-certified status if, at the time Chapter 4117 went into effect, it was recognized by the employer as the

exclusive bargaining representative of certain employees of an employer in a specific bargaining unit. Thus, the crucial time for determining deemed-certified status is the law's effective date, April 1, 1984. The policy behind creating deemed-certified status was to preserve the status quo when the new law took effect and to ensure stability in public sector labor relations as the state entered an era of regulated collective bargaining.

The controlling factor in determining deemed-certified status is the type of relationship existing between the employee organization and the employer on April 1, 1984, specifically whether the employer exclusively recognized the employee organization as the representative of certain employees of an employer in a given bargaining unit at that time. Obviously, the most significant indicator of exclusive recognition is a collective bargaining agreement or memorandum of understanding between the employee organization and the employer in effect on that date, which by its terms recognizes the employee organization as the exclusive representative. However, exclusive recognition not specifically written might be proven through tradition, custom, practice, election, or negotiation.

In this case, the parties agree that no collective bargaining agreement or other writing exists to establish Local 18 as the exclusive representative of the CEOs. Even Local 18 asserts that the CEOs limited Local 18's "representation" to periodically informing the City of the amount of the prevailing wage under the Building Agreement and to representing the CEOs in grievance proceedings.

SERB examined the concept of exclusive recognition established through tradition, practice and negotiation in SERB v. City of Bedford Hts., SERB 87-016 (7-24-87), aff'd 41 Ohio App. 3d 21 (11-25-87) ("Bedford Hts."). In Bedford Hts., a memorandum of understanding was in effect from January 1984 to December 1985, which encompassed the crucial time for deemed-certified status. However, the memorandum contained no provision recognizing the employee organization as the exclusive representative of the employees. Because the contract was silent on the issue of exclusive recognition, the Board looked to the parties' tradition, custom, and negotiation to ascertain the employee organization's status.

The facts in Bedford Hts. are significantly different from those presented in this case, where the parties have never entered into a contract. Here, as in Akron, supra, the absence of any collective bargaining agreement on April 1, 1984, presents particular difficulties in establishing exclusive recognition:

Although exclusive recognition may conceivably be established without a formal contract in existence on April 1, 1984, the party seeking to prove such status without a contract has a substantial burden.... A collective bargaining agreement, even one without an exclusive recognition clause, is probative of the parties' relationship and may contribute to establishing

exclusive recognition. The existence of a contract shows that the employer and the employee organization conducted negotiations on terms and conditions of employment. Typically, the contract identifies the employees covered by the contract or the bargaining unit. Where no contract exists, status must be proven solely by evidence of live conduct and interaction between the parties, which rises to the level of exclusivity.

Akron, supra, at 3-82.

Here, without a contract, the City and Local 18 rely on dues deductions and grievance processing to establish exclusive representative status as of April 1, 1984. These factors are not persuasive. Under § 4(C) of the temporary law, an employer cannot refuse to make dues deductions under written authorization where no certified representative exists. But § 4(C) does not vest an employee organization with deemed-certified status. Under § 4(F) of the temporary law, an organization does not even have to be an employee organization to be allowed to continue processing grievances and have dues deducted if such was done as of June 1, 1983. An organization does not become deemed certified only by processing grievances and having dues deducted. Akron, supra, at 3-82. Furthermore, the evidence in the record reveals that both Local 18 and the CSEA were involved in processing the CEOs' grievances. Even for grievance processing purposes, Local 18 was not an exclusive representative.

Moreover, the record does not establish that the City ever actually *negotiated* wages with Local 18 before April 1, 1984. The record shows only that Local 18 periodically wrote letters *informing* the City of the prevailing wage rate under the Building Agreement.⁴ Even Local 18 does not characterize the CEOs' wages as being the result of collective bargaining: "The wages paid the CEOs were based upon the City Charter requiring the city of Cleveland, absent a collective bargaining agreement, to pay the prevailing wage rate negotiated between construction union and private employers."⁵

The only other documentary evidence of pre-April 1, 1984 contact between the City and Local 18 is a March 1, 1983 document involving Local 18 members who worked in the City's Water Department. According to a March 2, 1983 cover letter sent from the Commissioner of the Water Department to the Assistant Commissioner, the subject of the document is a staggered work week for the employees. Most significant about this document is that it was signed by the employees themselves, "acknowledg[ing] their agreement to the policy change." The Local 18 business representative's signature appears only in the capacity of witness to the employees' signatures.⁶ Rather than an indication of exclusive recognition, this document corroborates the hearing testimony of CEO witness Anthony Mangano, who stated that

⁴ C. Exh. 1, pp. 1-5.

⁵ Post-Hearing Brief of Local 18, p. 11.

⁶ C. Exh. 1, pp. 6-7.

he understood that he was on his own regarding conditions of employment.⁷

The earliest documentation of specific discussions on working conditions between the City and Local 18 are July and August 1987 letters involving efforts to negotiate a collective bargaining agreement.⁸ Such efforts, even if they culminated in a written collective bargaining agreement, could not make Local 18 a deemed-certified representative because the critical date, April 1, 1984, had long passed. "Private agreements reached after April 1, 1984 cannot bestow on the employee organizations involved deemed-certified status and do not confer 4117 rights." Akron, supra, at 3-82.

In sum, the parties in Bedford Hts. engaged in regular, full-fledged contract negotiations. The relationship between the City and Local 18 does not rise to the level of contract negotiations. In Bedford Hts., the description of the bargaining unit was clear. In this case, no evidence of a bargaining-unit description exists. And finally, in Bedford Hts. the employee organization had a written memorandum of understanding with the City effective January 1984 to December 1985, even though the written agreement was silent on the recognition issue. In the instant case, the City and Local 18 never signed a written agreement.

"Section 4 of the Temporary Law was designed to maintain the status quo in those public sector employer-employee collective-bargaining relationships predating April 1, 1984. But not all the degrees, shapes and forms of collective bargaining permitted by Chapter 4117 result in deemed-certified status. Only the existence of exclusive recognition on April 1, 1984 creates deemed-certified status after April 1, 1984." Akron, supra, at 3-83 to 3-84. The record in the case at issue does not establish that the relationship between the City and Local 18 was one of exclusive recognition on April 1, 1984. Thus, Local 18 never was a deemed-certified representative of the CEOs employed by the City.

2. If Question No. 1 is answered affirmatively, how long may a deemed certified representative retain that status if Local 18 never complied with the reporting requirements of Ohio Revised Code Section 4117.19?

The answer to Question No. 1 is no. Therefore, Question No. 2 is not applicable.

3. Was Local 18 the "exclusive representative" of those persons employed by the City of Cleveland as construction equipment operators anytime during the period of 1994 through 1998?

No, Local 18 was not the exclusive representative of the CEOs at any time. Under Question No. 1, supra, Local 18 was not deemed certified. Furthermore, it is undisputed that SERB has never certified Local 18 as the exclusive collective-

⁷ T. 98, 112.

⁸ F.F. No. 7.

bargaining representative for the CEOs under § 4117.05.

4. Did Local 18 negotiate with the City a decrease in compensation of those persons employed by the City as construction equipment operators without their knowledge or consent?

The record demonstrates that in 1998, the City and Local 18 informed the CEOs of the prevailing wage rate agreed to by Local 18 and the City to settle a contempt action. The CEOs did not consent to the prevailing wage rate agreed upon.

After 1993, the City disputed the prevailing wage rate it was required to pay the CEOs. The City argued that it was entitled to offset certain items from the private sector prevailing wage rate. Local 18 then filed a contempt action to compel the City to comply with the terms of IUOE, supra. In 1996, Local 18 members working for the City voted, at a meeting called by Local 18 President Snell, on whether to authorize Local 18 to negotiate a contract with the City. The members voted no. Thereafter, in 1998, Local 18 and the City resolved their litigated dispute over the calculation of the prevailing wage rate. Local 18 President Dudley Snell and Assistant City Law Director Thomas Corrigan held a meeting with the CEOs to explain how Local 18 and the City had calculated the prevailing wage rate.⁹ At this meeting, the CEOs were not asked to approve or consent to the prevailing wage rate agreed to by Local 18 and the City in settlement of the contempt action.

5. Did Local 18 falsely inform the City that those persons employed by the City as construction equipment operators had agreed to a decrease in compensation?

No. No evidence is present in the record that Local 18 informed the City that the CEOs themselves, as individual employees, had agreed to a decrease in compensation.

6. Were the wages of the construction equipment operators who were appellees in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, the result of collective bargaining between Local 18 and the City?

No. Collective bargaining cannot be held to have occurred because Local 18 never was the exclusive representative of the CEOs within the meaning of Chapter 4117. The wages paid to the CEOs were based upon the City Charter provision requiring the City to pay the prevailing wage rate in the Building Agreement negotiated between construction unions and private employers. Every witness who testified confirmed that Local 18 informed the City of the amount of prevailing wages only, and that Local 18 never was authorized by the CEOs to negotiate terms of employment.

Furthermore, the City and Local 18 do not dispute that they never entered into a collective bargaining agreement. The City did not enter into a collective bargaining agreement with a bargaining unit of CEOs until February 2005, after SERB certified

⁹ F.F. No. 10.

MCEOLC as the CEOs' exclusive representative in January 2003.

7. Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators described above in Paragraph (6) with equal or better benefits than are provided by the City Charter?

No. No evidence is present in the record that any benefits package was negotiated or implemented for the CEOs until February 2005, after SERB certified MCEOLC as the CEOs' exclusive representative in January 2003.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and **SERVED** on all parties listed below by Certified U.S. Mail, return receipt requested, this 20th day of July, 2006.

Beth A. Jewell

BETH A. JEWELL
Administrative Law Judge

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**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

**MUNICIPAL CONSTRUCTION
EQUIPMENT OPERATORS'
LABOR COUNCIL**)
)
)
)
 Employee Organization,)
)
 and)
)
**INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 18**)
)
 Employee Organization,)
)
 and)
)
CITY OF CLEVELAND)
)
)
 Employer.)

CASE NO. 02-REP-06-0116

**BETH A. JEWELL
Administrative Law Judge**

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 PETITION TO
JOIN IN THE RESPONSE OF MUNICIPAL CONSTRUCTION EQUIPMENT
OPERATORS' LABOR COUNCIL AND MOTION TO ADOPT THE RECOMMENDED
DETERMINATION OF ADMINISTRATIVE LAW JUDGE JEWELL.**

The International Union of Operating Engineers, Local 18 hereby petitions this Board to allow it to join in the response of Municipal Construction Equipment Operators' Labor Council to the city of Cleveland's Exceptions and respectfully moves this Board to adopt the Recommended Determination of Administrative Law Judge Jewell rendered July 20, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true copy of the **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 PETITION TO JOIN IN THE RESPONSE OF MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS' LABOR COUNCIL AND MOTION TO ADOPT THE RECOMMENDED DETERMINATION OF ADMINISTRATIVE LAW**

JUDGE JEWELL was mailed to the following counsel on **August 30, 2006**:

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The City of Cleveland



William I. Fadel, Esq.

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Municipal Construction Equipment Operators' Labor Council,

Employee Organization,

and

International Union of Operating Engineers, Local 18,

Employee Organization,

and

City of Cleveland,

Employer.

Case No. 2002-REP-06-0116

**DIRECTIVE
(OPINION ATTACHED)**

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
September 28, 2006.

On April 11, 2005, the Municipal Construction Equipment Operators' Labor Council ("MCEOLC") filed a "Petition for Administrative Hearing," in which it requested that the State Employment Relations Board ("SERB" or "Board") appoint a hearing examiner to adjudicate certain issues that the Ohio Supreme Court had found, in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, 2004-Ohio-5389, to be within SERB's jurisdiction. On August 25, 2005, the Board issued an Order Directing Administrative Hearing identifying seven questions to be addressed through the hearing by the Administrative Law Judge.

On February 6, 2006, a hearing was held. Subsequently, all parties filed post-hearing briefs. On July 20, 2006, a Recommended Determination was issued by the Administrative Law Judge. On August 16, 2006, the City of Cleveland filed exceptions to the Recommended Determination. On August 29, 2006, MCEOLC filed a response to the exceptions. On September 1, 2006, the International Union of Operating Engineers, Local 18 filed a petition to join the response of MCEOLC in support of the Recommended Determination.

After reviewing the record, the Recommended Determination, the Employer's exceptions, the Employee Organizations' responses to the exceptions, and all other filings in this case, the Board construes the Analysis and Discussion in the Administrative Law Judge's Recommended Determination as Conclusions of Law; adopts the Introduction, Procedural History, Issues, Findings of Fact, and Analysis and Discussion/Conclusions of Law in the Administrative Law Judge's Recommended Determination, incorporated by reference; and finds that: (1) International Union of Operating Engineers, Local 18 was not a deemed-certified bargaining agent on or before April 1, 1984, for those persons employed by the City of Cleveland as construction equipment operators; (2) International Union of Operating Engineers, Local 18 was not the exclusive representative for the construction equipment operators at any time during the period of 1994 through 1998; (3) the City of Cleveland and International Union of Operating Engineers, Local 18 informed the construction equipment operators of the prevailing wage rate agreed to by International Union of Operating Engineers, Local 18 and the City of Cleveland to settle a contempt action, but International Union of Operating Engineers, Local 18 did not negotiate a decrease in compensation of those persons employed by the City of Cleveland as construction equipment operators with the knowledge or consent of the construction equipment operators; (4) no evidence was presented in the record showing that International Union of Operating Engineers, Local 18 informed the City of Cleveland that the construction equipment operators themselves, as individual employees, had agreed to a decrease in compensation; (5) the wages of the construction equipment operators who were appellees in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, 2004-Ohio-5389, were not the result of collective bargaining between International Union of Operating Engineers, Local 18 and the City of Cleveland; and (6) no evidence was presented in the record showing that any benefits package was negotiated or implemented for the construction equipment operators until February 2005, which was after SERB certified the Municipal Construction Equipment Operators' Labor Council as the construction equipment operators' exclusive representative in January 2003.

It is so ordered.

MAYTON, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.

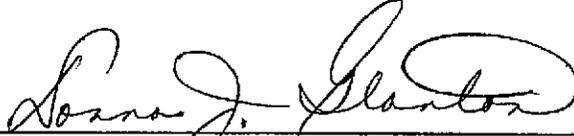


CRAIG R. MAYTON, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen days after the mailing of the State Employment Relations Board's directive.

Directive
Case No. 2002-REP-06-0116
September 28, 2006
Page 3 of 3

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 5th day of October, 2006.



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

direct\09-28-06.02

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

**MUNICIPAL CONSTRUCTION
EQUIPMENT OPERATORS' LABOR
COUNCIL,**

Employee Organization,

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 18,**

Employee Organization,

and

CITY OF CLEVELAND,

Employer.

CASE NO. 02-REP-06-0116

**BETH A. JEWELL
Administrative Law Judge**

**RECOMMENDED
DETERMINATION**

I. INTRODUCTION

On April 11, 2005, the Municipal Construction Equipment Operators' Labor Council ("MCEOLC") filed a "Petition for Administrative Hearing," in which it requested that the State Employment Relations Board ("SERB" or "Board") appoint a hearing examiner to adjudicate certain issues that the Ohio Supreme Court had found to be within SERB's jurisdiction in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, 2004-Ohio-5389. On August 25, 2005, the State Employment Relations Board ("SERB" or "Board") issued an Order Directing Administrative Hearing. In its order, SERB stated as follows:

We have considered the arguments raised by Local 18 and the Employer maintaining that the Board possesses no legal authority to conduct such a hearing outside the parameters of an unfair labor practice charge proceeding. However, in this particular matter, in which the Ohio Supreme Court has specifically identified issues that it says must first be addressed by SERB, we have decided to exercise our plenary jurisdiction to resolve them. We are cognizant of the mandate of Ohio Revised Code § 4117.22, which charges SERB with construing Chapter 4117 liberally to promote orderly and constructive relationships between public employers and public employees.

Thereafter, the Board assigned this Administrative Law Judge to take testimony for the purpose of preparing recommendations to the Board on seven questions. A hearing was held on February 6, 2006, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. PROCEDURAL HISTORY

In 1973, the Ohio Supreme Court decided Pinzone v. Cleveland (1973), 34 Ohio St.2d 26 ("Pinzone"), holding that, under Section 191 of the City Charter of the City of Cleveland, wages for building and construction trades employees working for the City should be paid at the prevailing wage rates in the private sector, in accordance with a private sector contract between Cleveland Building and Construction Trades Employers Association and the Mechanical Contractors Association. The City argued that such items as paid sick leave, greater job security and more steady employment could be offset against the higher base wage in private industry. The Court disagreed: "Permitting an offset for such 'fringe benefits' would necessarily encourage arbitrary and probably inaccurate lowerings of the base municipal wage scale. Clearly, this is not the intent or meaning of Section 191." Pinzone, supra at 31.

In State ex rel. Internatl. Union of Operating Engineers v. Cleveland (1992), 62 Ohio St.3d 537 ("IUOE"), an action in mandamus brought by Local 18 as the bargaining representative for construction equipment operators and master mechanics (collectively, "CEOs") working for the City, the Ohio Supreme Court issued a writ of mandamus ordering the City to pay back and future wages to the CEOs in accordance with the City Charter.

In 2001, forty CEOs filed a complaint in the court of common pleas, asserting that the City was not compensating them in accordance with IUOE and the City Charter.¹ See Consolo v. Cleveland (2004), 103 Ohio St.3d 362, 2004-Ohio-5389 ("Consolo"). In Consolo, the CEOs claimed that the City stopped paying increases in prevailing wages after 1993 and that the City stopped paying pension contributions in 1998. The CEOs additionally claimed that in 1998, Local 18 negotiated with the City on their behalf but without their authorization. The CEOs claimed that Local 18 and the City verbally agreed that the CEOs would waive their rights to pension contributions and prevailing wage increases. Local 18 and the City argued that the CEOs' claims belonged before SERB as unfair labor practices because Local 18 was the CEOs' exclusive bargaining representative during the time periods in question. The trial court dismissed the CEOs' claims, holding that the allegations were tantamount to unfair labor practice claims and thus within SERB's exclusive jurisdiction. The CEOs appealed. Ultimately, the Ohio Supreme Court upheld the trial court's dismissal, holding that SERB has the exclusive authority to determine whether the CEOs' compensation levels were the result of collective bargaining. However, the Ohio Supreme Court noted the following arguments asserted by the CEOs as appellees in the Consolo litigation:

¹ On January 30, 2003, SERB certified the MCEOLC as the exclusive representative of City employees in a bargaining unit including CEOs.

It is important to note that the appellees' allegations are contrary to facts stipulated in IUOE. Appellees assert that Local 18 is not and never has been their exclusive bargaining representative. They also assert that the R.C. 4115.03(E) definition of "prevailing wage" is controlling. Before visiting the prevailing-wage issue, we first focus upon Local 18's relationship with appellees.

The city contends that appellees were in privity with Local 18 in IUOE and that the stipulations from IUOE estop appellees from asserting that Local 18 is not their exclusive bargaining representative. Collateral estoppel, however, does not apply because IUOE does not speak to Local 18's current status as collective-bargaining representative. Hence, even if appellees might otherwise have been estopped from litigating issues decided by IUOE, the identity of appellees' bargaining representative after 1992 was not an issue addressed in that opinion. Moreover, Local 18's status was neither actually litigated nor essential to our judgment. Local 18's status as a collective-bargaining representative appears to have been stipulated in IUOE to demonstrate its standing to file suit against the city. Here, appellees agree that Local 18 was a collective-bargaining agent but not their exclusive bargaining agent as contemplated by R.C. 4117.05. This distinction was immaterial to our IUOE decision. It may be key here. Therefore, IUOE does not bar appellees from arguing that Local 18 is not their exclusive bargaining agent.

Consolo, supra at 364-365. The Court concluded, in relevant part, as follows: "If appellees' compensation levels were the result of collective bargaining under R.C. Chapter 4117, then the city's charter provisions would be inapplicable.... If appellees prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls." Consolo, supra at 367.

Following the Ohio Supreme Court's decision in Consolo, the MCEOLC filed its "Petition for Administrative Hearing" with SERB.

III. ISSUES

The following seven questions were presented by the Board for the Administrative Law Judge's consideration:

1. Whether before April 1, 1984, the International Union of Operating Engineers, Local 18 ("Local 18") ever was the deemed-certified representative of those persons employed by the City as construction equipment operators, who are now represented by the Municipal Construction Equipment Operators' Labor Council ("MCEOLC") as their exclusive bargaining agent.

2. If Question No. 1 is answered affirmatively, how long may a deemed certified representative retain that status if Local 18 never complied with the reporting requirements of § 4117.19²?

3. Was Local 18 the "exclusive representative" of those persons employed by the City of Cleveland ("City") as construction equipment operators anytime during the period of 1994 through 1998?

4. Did Local 18 negotiate with the City a decrease in compensation of those persons employed by the City as construction equipment operators without their knowledge or consent?

5. Did Local 18 falsely inform the City that those persons employed by the City as construction equipment operators had agreed to a decrease in compensation?

6. Were the wages of the construction equipment operators who were appellees in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, [2004-Ohio-5389,] the result of collective bargaining between Local 18 and the City?

7. Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators described above in Paragraph (6) with equal or better benefits than are provided by the City Charter?

IV. FINDINGS OF FACT³

1. The MCEOLC is an "employee organization" as defined in § 4117.01(D). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)

2. The International Union of Operating Engineers, Local 18 ("Local 18"), is an "employee organization" as defined in § 4117.01(D). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)

3. The City of Cleveland ("City") is a "public employer" as defined in § 4117.01(B). (Consent Election Agreement, December 2002, SERB Case No. 02-REP-06-0116)

² All references to statutes are to the Ohio Revised Code, Chapter 4117, unless otherwise indicated.

³ All references to the transcript of hearing are indicated parenthetically by "T.," followed by the page number(s). All references to the parties' stipulations of fact in the record are indicated parenthetically by "S.," followed by the stipulation number(s). References to the MCEOLC's exhibits in the record are indicated parenthetically by "P. Exh.," followed by the exhibit number(s). References to Local 18's exhibits in the record are indicated parenthetically by "U. Exh.," followed by the exhibit number(s). References to the City's exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit number(s). References to the record in the Findings of Fact are for convenience only and are not intended to suggest that such reference is the sole support in the record for that related finding of fact.

4. During the years before and at the time Chapter 4117 became effective, the Civil Service Employees Association ("CSEA") represented dues-paying civil service employees of the City by filing grievances on their behalf. The CSEA was open to all civil service employees, without regard to union affiliation. (T. 23, 57-58, 60)

5. Before and after Chapter 4117 became effective, the Construction Equipment Operators ("CEOs") working for the City received the prevailing wage under Section 191 of the City Charter. The CEOs relied upon Local 18 to inform the City of the current prevailing wage under Local 18's Building Agreement with the Construction Employers Association ("Building Agreement"). (T. 46, 111; U Exhs. 11-17; P. Exhs. 34-37)

6. On March 1, 1983, seven individual CEOs employed in the City's Water Department signed a letter to the Commissioner of the Water Department, accepting a new policy put in place by the department that clarified when the employees would receive overtime pay. Their signatures on the letter are witnessed by Local 18 Business Representative Dudley Snell. At that time, approximately 50 CEOs were employed by the City in various departments, including water, parks, streets, and the municipal power plant. (T. 124; C. Exh. 1, p. 7)

7. In 1987, employee organizations representing several bargaining units of employees working for the City entered into collective bargaining agreements with the City. These collective bargaining agreements typically involved wages in the amount of 80 percent of the prevailing wage rate, plus City fringe benefits. Although they were not receiving City fringe benefits, the CEOs did not want a collective bargaining agreement with a wage rate lower than the prevailing wage. The CEOs rejected the collective bargaining agreement proposed by the City. (T. 107-108; C. Exh. 1, pp. 7-9)

8. Between 1988 and 1996, many CEOs joined Local 18 and signed dues deduction authorization cards. (C. Exh. 8)

9. In 1992, the Ohio Supreme Court granted a writ of mandamus directing the City to comply with City Charter Section 191 by paying back and future wages to the City's CEOs in accordance with prevailing wage rates. Local 18 brought the mandamus action on behalf of its members who were working as CEOs for the City. State ex rel. Internatl. Union of Operating Engineers v. Cleveland (1992), 62 Ohio St.3d 537 ("IUOE").

10. On August 6, 1996, a meeting of Local 18 members working for the City was held at Local 18's Cleveland headquarters. At this meeting, Local 18 President Dudley Snell asked the members if they would like to vote on whether they wanted Local 18 to negotiate a contract with the City on their behalf. The members voted not to authorize Local 18 to represent them in negotiating a contract with the City. (T. 25-26, 27, 106, 132; P. Exh. 45)

11. After 1993, the City disputed the prevailing wage rate it was required to pay the CEOs. The City argued that it was entitled to offset certain items from the private sector prevailing wage rate. Local 18 then filed a contempt action to compel the City to comply with the terms of the Ohio Supreme Court's decision in IUOE, supra. In 1998, Local 18 and the City resolved this litigation by agreeing to a calculation of the prevailing wage rate that included a deduction for pension contributions, and Local 18 dismissed the contempt action. Local 18 President Snell and Assistant City Law Director Thomas Corrigan held a meeting with the CEOs to explain how Local 18 and the City had calculated the prevailing wage rate. The CEOs were not asked to vote on, and never voted to approve, the settlement of the litigation or the calculation of the prevailing wage rate. (T. 35-36, 134-135, 139-142, 143-144, 159-160; C. Exh. 1, pp. 24-27)

12. No City records can be found to indicate that the City Council approved a collective bargaining agreement between the City and a union that represented a bargaining unit including CEOs and master mechanics prior to February 14, 2005. (S., T. 12)

13. No City records indicate the receipt by the City prior to April 1, 1984, of a request for recognition by Local 18 to be the exclusive bargaining representative for a bargaining unit which included CEOs and master mechanics. (S., T. 13)

14. During the period of time from April 1, 1984 to February 5, 2002, SERB has no record of certification or recognition for the CEOs employed by the City in its Division of Streets or Division of Water. (P. Exh. 48)

15. On June 28, 2002, the MCEOLC filed a Request for Recognition with SERB, seeking to represent a proposed bargaining unit of City employees in the classifications of Master Mechanic, Construction Equipment Operator A, and Construction Equipment Operator B, within the City's Departments of Public Utilities and Public Service. (SERB Case No. 02-REP-06-0116)

16. Following the execution of a Consent Election Agreement, SERB conducted a secret ballot election on January 16, 2003. On January 30, 2003, SERB certified the MCEOLC as the exclusive representative of the employees in the proposed bargaining unit. (SERB Case No. 02-REP-06-0116)

V. ANALYSIS AND DISCUSSION

RECOMMENDED ANSWERS TO THE SEVEN QUESTIONS PRESENTED

1. Whether before April 1, 1984, the International Union of Operating Engineers, Local 18 ("Local 18") ever was the deemed certified representative of those persons employed by the City as construction equipment operators, who are now represented by the Municipal Construction Equipment Operators' Local Council ("MCEOLC") as their exclusive bargaining agent.

No. After examining the facts, and for the reasons that follow, it is recommended that Local 18 never was the deemed-certified representative of the CEOs.

1983 S 133, § 4, also referred to in SERB Opinions as the "temporary law" or the "uncodified law," provides in relevant part as follows:

(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. 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.

(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.

(C) Nothing in this act shall be construed to permit an employer to terminate or refuse to make payroll deductions of dues, fees, or assessments to any employee organization pursuant to written authorization; except that the deductions may not continue to be made after another employee organization has been certified under this act by the Board.

(F) This act does not preclude any nonprofit, voluntary, bona fide organization which, by tradition, custom and practice, has engaged in the processing of grievances for public employees before political subdivision civil service commissions as of June 1, 1983, from providing the services it has heretofore offered on a voluntary basis or from receiving a voluntary check-off of dues.

In In re City of Akron, SERB 94-012 (4-28-94) ("Akron"), at p. 3-81, SERB explained deemed-certified status as follows:

An employee organization has deemed-certified status if, at the time Chapter 4117 went into effect, it was recognized by the employer as the

exclusive bargaining representative of certain employees of an employer in a specific bargaining unit. Thus, the crucial time for determining deemed-certified status is the law's effective date, April 1, 1984. The policy behind creating deemed-certified status was to preserve the status quo when the new law took effect and to ensure stability in public sector labor relations as the state entered an era of regulated collective bargaining.

The controlling factor in determining deemed-certified status is the type of relationship existing between the employee organization and the employer on April 1, 1984, specifically whether the employer exclusively recognized the employee organization as the representative of certain employees of an employer in a given bargaining unit at that time. Obviously, the most significant indicator of exclusive recognition is a collective bargaining agreement or memorandum of understanding between the employee organization and the employer in effect on that date, which by its terms recognizes the employee organization as the exclusive representative. However, exclusive recognition not specifically written might be proven through tradition, custom, practice, election, or negotiation.

In this case, the parties agree that no collective bargaining agreement or other writing exists to establish Local 18 as the exclusive representative of the CEOs. Even Local 18 asserts that the CEOs limited Local 18's "representation" to periodically informing the City of the amount of the prevailing wage under the Building Agreement and to representing the CEOs in grievance proceedings.

SERB examined the concept of exclusive recognition established through tradition, practice and negotiation in SERB v. City of Bedford Hts., SERB 87-016 (7-24-87), aff'd 41 Ohio App. 3d 21 (11-25-87) ("Bedford Hts."). In Bedford Hts., a memorandum of understanding was in effect from January 1984 to December 1985, which encompassed the crucial time for deemed-certified status. However, the memorandum contained no provision recognizing the employee organization as the exclusive representative of the employees. Because the contract was silent on the issue of exclusive recognition, the Board looked to the parties' tradition, custom, and negotiation to ascertain the employee organization's status.

The facts in Bedford Hts. are significantly different from those presented in this case, where the parties have never entered into a contract. Here, as in Akron, supra, the absence of any collective bargaining agreement on April 1, 1984, presents particular difficulties in establishing exclusive recognition:

Although exclusive recognition may conceivably be established without a formal contract in existence on April 1, 1984, the party seeking to prove such status without a contract has a substantial burden.... A collective bargaining agreement, even one without an exclusive recognition clause,

is probative of the parties' relationship and may contribute to establishing exclusive recognition. The existence of a contract shows that the employer and the employee organization conducted negotiations on terms and conditions of employment. Typically, the contract identifies the employees covered by the contract or the bargaining unit. Where no contract exists, status must be proven solely by evidence of live conduct and interaction between the parties, which rises to the level of exclusivity.

Akron, supra at 3-82.

Here, without a contract, the City and Local 18 rely on dues deductions and grievance processing to establish exclusive representative status as of April 1, 1984. These factors are not persuasive. Under § 4(C) of the temporary law, an employer cannot refuse to make dues deductions under written authorization where no certified representative exists. But § 4(C) does not vest an employee organization with deemed-certified status. Under § 4(F) of the temporary law, an organization does not even have to be an employee organization to be allowed to continue processing grievances and have dues deducted if such was done as of June 1, 1983. An organization does not become deemed certified only by processing grievances and having dues deducted. Akron, supra at 3-82. Furthermore, the evidence in the record reveals that both Local 18 and the CSEA were involved in processing the CEOs' grievances. Even for grievance processing purposes, Local 18 was not an exclusive representative.

Moreover, the record does not establish that the City ever actually *negotiated* wages with Local 18 before April 1, 1984. The record shows only that Local 18 periodically wrote letters *informing* the City of the prevailing wage rate under the Building Agreement.⁴ Even Local 18 does not characterize the CEOs' wages as being the result of collective bargaining: "The wages paid the CEOs were based upon the City Charter requiring the city of Cleveland, absent a collective bargaining agreement, to pay the prevailing wage rate negotiated between construction union and private employers."⁵

The only other documentary evidence of pre-April 1, 1984 contact between the City and Local 18 is a March 1, 1983 document involving Local 18 members who worked in the City's Water Department. According to a March 2, 1983 cover letter sent from the Commissioner of the Water Department to the Assistant Commissioner, the subject of the document is a staggered work week for the employees. Most significant about this document is that it was signed by the employees themselves, "acknowledg[ing] their agreement to the policy change." The Local 18 business representative's signature appears only in the capacity of witness to the employees' signatures.⁶ Rather than an indication of exclusive recognition, this document

⁴ C. Exh. 1, pp. 1-5.

⁵ Post-Hearing Brief of Local 18, p. 11.

⁶ C. Exh. 1, pp. 6-7.

corroborates the hearing testimony of CEO witness Anthony Mangano, who stated that he understood that he was on his own regarding conditions of employment.⁷

The earliest documentation of specific discussions on working conditions between the City and Local 18 are July and August 1987 letters involving efforts to negotiate a collective bargaining agreement.⁸ Such efforts, even if they culminated in a written collective bargaining agreement, could not make Local 18 a deemed-certified representative because the critical date, April 1, 1984, had long passed. "Private agreements reached after April 1, 1984 cannot bestow on the employee organizations involved deemed-certified status and do not confer 4117 rights." Akron, supra at 3-82.

In sum, the parties in Bedford Hts. engaged in regular, full-fledged contract negotiations. The relationship between the City and Local 18 does not rise to the level of contract negotiations. In Bedford Hts., the description of the bargaining unit was clear. In this case, no evidence of a bargaining-unit description exists. And finally, in Bedford Hts., the employee organization had a written memorandum of understanding with the City effective January 1984 to December 1985, even though the written agreement was silent on the recognition issue. In the instant case, the City and Local 18 never signed a written agreement.

"Section 4 of the Temporary Law was designed to maintain the status quo in those public sector employer-employee collective-bargaining relationships predating April 1, 1984. But not all the degrees, shapes and forms of collective bargaining permitted by Chapter 4117 result in deemed-certified status. Only the existence of exclusive recognition on April 1, 1984 creates deemed-certified status after April 1, 1984." Akron, supra at 3-83 to 3-84. The record in the case at issue does not establish that the relationship between the City and Local 18 was one of exclusive recognition on April 1, 1984. Thus, Local 18 never was a deemed-certified representative of the CEOs employed by the City.

2. If Question No. 1 is answered affirmatively, how long may a deemed certified representative retain that status if Local 18 never complied with the reporting requirements of Ohio Revised Code Section 4117.19?

The answer to Question No. 1 is no. Therefore, Question No. 2 is not applicable.

3. Was Local 18 the "exclusive representative" of those persons employed by the City of Cleveland as construction equipment operators anytime during the period of 1994 through 1998?

No, Local 18 was not the exclusive representative of the CEOs at any time. Under Question No. 1, supra, Local 18 was not deemed certified. Furthermore, it is

⁷ T. 98, 112.

⁸ F.F. No. 7.

undisputed that SERB has never certified Local 18 as the exclusive collective-bargaining representative for the CEOs under § 4117.05.

4. Did Local 18 negotiate with the City a decrease in compensation of those persons employed by the City as construction equipment operators without their knowledge or consent?

The record demonstrates that in 1998, the City and Local 18 informed the CEOs of the prevailing wage rate agreed to by Local 18 and the City to settle a contempt action. The CEOs did not consent to the prevailing wage rate agreed upon.

After 1993, the City disputed the prevailing wage rate it was required to pay the CEOs. The City argued that it was entitled to offset certain items from the private sector prevailing wage rate. Local 18 then filed a contempt action to compel the City to comply with the terms of IUOE, supra. In 1996, Local 18 members working for the City voted, at a meeting called by Local 18 President Snell, on whether to authorize Local 18 to negotiate a contract with the City. The members voted no. Thereafter, in 1998, Local 18 and the City resolved their litigated dispute over the calculation of the prevailing wage rate. Local 18 President Dudley Snell and Assistant City Law Director Thomas Corrigan held a meeting with the CEOs to explain how Local 18 and the City had calculated the prevailing wage rate.⁹ At this meeting, the CEOs were not asked to approve or consent to the prevailing wage rate agreed to by Local 18 and the City in settlement of the contempt action.

5. Did Local 18 falsely inform the City that those persons employed by the City as construction equipment operators had agreed to a decrease in compensation?

No. No evidence is present in the record that Local 18 informed the City that the CEOs themselves, as individual employees, had agreed to a decrease in compensation.

6. Were the wages of the construction equipment operators who were appellees in Consolo v. City of Cleveland (2004), 103 Ohio St.3d 362, [2004-Ohio-5389,] the result of collective bargaining between Local 18 and the City?

No. Collective bargaining cannot be held to have occurred because Local 18 never was the exclusive representative of the CEOs within the meaning of Chapter 4117. The wages paid to the CEOs were based upon the City Charter provision requiring the City to pay the prevailing wage rate in the Building Agreement negotiated between construction unions and private employers. Every witness who testified confirmed that Local 18 informed the City of the amount of prevailing wages only, and that Local 18 never was authorized by the CEOs to negotiate terms of employment.

⁹ F.F. No. 10.

Furthermore, the City and Local 18 do not dispute that they never entered into a collective bargaining agreement. The City did not enter into a collective bargaining agreement with a bargaining unit of CEOs until February 2005, after SERB certified MCEOLC as the CEOs' exclusive representative in January 2003.

7. Did the City and Local 18 negotiate and implement a benefits package that provided the construction equipment operators described above in Paragraph (6) with equal or better benefits than are provided by the City Charter?

No. No evidence is present in the record that any benefits package was negotiated or implemented for the CEOs until February 2005, after SERB certified MCEOLC as the CEOs' exclusive representative in January 2003.

Chapter 37

OFFICERS AND EMPLOYEES

- § 191 Compensation of Officers and Employees
- § 192 Official Bond
- § 193 Continuation in Office
- § 194 Oath of Office
- § 195 Financial Interest in Contracts
- § 196 Hours of Labor
- § 197 Employment Contracts
- § 198 Minimum Wage—Repealed
- § 198-1 Annual Rate of Pay to Be Paid Members of Fire Division—Repealed
- § 198-2 Annual Rate of Pay to Be Paid Members of Police Division—Repealed
- § 199 Continuance of Contracts; Miscellaneous Provisions—Repealed
- § 199-1 Daylight Savings Time—Repealed

§ 191 Compensation of Officers and Employees

The salary or compensation of all officers and employees in the unclassified service of the City shall be fixed by ordinance, or as may be provided by ordinance. The salary or compensation of all other officers and employees shall be fixed by the appointing authority in accordance with ability, fitness and seniority within the limits set forth in the Council's salary or compensation schedule for which provision is hereinafter made. The Council shall by ordinance establish a schedule of compensation for officers and employees in the classified service, which schedule shall provide for like compensation for like services and shall provide minimum and maximum rates (which may be identical) of salary or compensation for each grade and classification of positions determined by the Civil Service Commission under Section 126 of this Charter. Only in the case of employees in those classifications for which the Council provided in 1979 a schedule of compensation in accordance with prevailing wages paid in the building and construction trades, the schedule established by the Council shall be in accordance with the prevailing rates of salary or compensation for such services. For the guidance of Council in determining the foregoing schedule the Civil Service Commission shall prepare salary or compensation schedules, and the Mayor or any director may, and when required by Council shall, prepare suggested salary or compensation schedules.

The salary of any officer or member of a board or commission in the unclassified service of the City shall not be increased or diminished during the term for which he was elected or appointed. Salaries and compensation fixed at the time this section takes effect shall continue in force until otherwise fixed as provided in this section. All fees pertaining to any office shall be paid into the City Treasury. (Effective February 17, 1981)

§ 192 Official Bond

The Mayor, the Director of Finance, the Commissioner of Accounts, the City Treasurer, and such other officers or employees as the Council may require so to do, shall give bonds in such amount and with such surety as may be approved by the Council. The premium on such bonds may be paid by the City. (Effective November 9, 1931)

§ 193 Continuation in Office

All persons holding administrative office, excepting the office of City Manager, at the time provisions of this Charter take effect, shall continue in office and in the performance of their duties until provisions shall have been made in accordance therewith for the performance of such duties or the discontinuance of such office. The directors of all departments, whether created by charter or by ordinance, shall continue in office and in the performance of their duties until their successors are appointed by the Mayor, as provided in this Charter, and until their successors have qualified. The powers which are conferred and the duties which are imposed upon any officer, commission, board or department of the City under the laws of the State shall, if such office or department is abolished by this Charter, be thereafter exercised and discharged by the officer, board or department upon whom or upon which are imposed corresponding functions, powers and duties hereunder. (Effective November 9, 1931)

tract, or by separate contract for each or any combination of said items as the Board of Control shall determine. Alternate bids for a period less than a year may be taken if deemed desirable by the Commissioner of Purchases and Supplies until provision is made for the requirements for the entire year.

Section 2. The cost of said contract shall be charged against the proper appropriation account and the Director of Finance shall certify thereon the amount of the initial purchase thereunder, which purchase, together with all subsequent purchases, shall be made on order of the Commissioner of Purchases and Supplies pursuant to a requisition against such contract duly certified by the Director of Finance.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.
Effective September 25, 1979.

Ord. No. 1678-79.

By Councilmen Burten, Getz, Russo and Forbes (by departmental request).

An emergency ordinance to amend Section 1 and the title of Ordinance No. 2851-78, passed January 8, 1979, relating to the issuance of a permit for the construction of a spur track easement across East 48th Place.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That Section 1 of Ordinance No. 2851-78, passed January 8, 1979, be and the same is hereby amended to read as follows:

Section 1. That the Director of Public Service be and he hereby is authorized to issue a permit, revocable at the will of Council, to Harry Rock and Company, its successors and assigns for the construction, maintenance and use of a spur track easement at the following described location:

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio; and known as being part of East 48th Place and being a strip of land 30 feet in width extending 15 feet northeasterly and 15 feet southwesterly from the following described centerline:

Beginning on the westerly line of East 48th Place at its intersection with the southerly line of Woodland Avenue, S.E.; thence southerly along said westerly line of East 48th Place 592 feet to the principal place of beginning of said centerline; thence southeasterly in a direct line about 56 feet to a point on the easterly line of East 48th Place distant 631 feet southerly from the southerly line of Woodland Avenue, S.E.

Further, that the title of said ordinance be amended to read as follows:

An emergency ordinance authorizing the Director of Public Service to issue a permit to Harry Rock and Company for the construction of a spur track easement across East 48th Place.

Section 2. That existing Section 1 of Ordinance No. 2851-78, passed January 8, 1979, be and the same is hereby repealed.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.
Effective September 25, 1979.

Ord. No. 1682-79.
By Councilman Forbes (by departmental request).

An emergency ordinance to amend Section 33 of Ordinance No. 1266-A-79, passed June 11, 1979, relating to hourly rates for craft employees.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That Section 33 of Ordinance No. 1266-A-79, passed June 11, 1979, be and the same is hereby amended to read as follows:

Section 33. Hourly Rates—Crafts.

Compensation for all persons employed by the hour in any of the following classifications shall be fixed by the appointing authority within the limits established in the following schedule for each classification:

	Effective Date	Minimum	Maximum
1. Asbestos Worker	5-1-79	\$ 5.00	\$16.07
2. Asphalt Construction Foreman	5-1-79	5.00	14.35
3. Asphalt Baker	5-1-79	5.00	13.32
4. Asphalt Tamper	5-1-79	5.00	13.32
5. Boiler Maker	6-1-79	5.00	16.06
5a. Boiler Maker—Certified High Pressure Welder	6-1-79	5.00	16.06
6. Bricklayer	5-1-79	5.00	16.25
7. Bricklayer Helper	5-1-79	5.00	12.97
8. Carpenter	5-1-79	5.00	16.31
9. Carpenter Foreman	5-1-79	5.00	17.06
10. No Provision			
11. Cement Finisher	5-1-79	5.00	15.89
12. Construction Equipment Operator—Group 1	5-1-79	5.00	15.88
13. Construction Equipment Operator—Group 2	5-1-79	5.00	15.73
14. Construction Equipment Operator—Group 3	5-1-79	5.00	15.38
15. Construction Equipment Operator—Group 4	5-1-79	5.00	14.60
16. Construction Equipment Operator—Oiler	5-1-79	5.00	12.10
17. Crane Operator—Electric	5-1-79	5.00	16.63
18. Curb Cutter	5-1-79	5.00	13.85
19. No Provision			
20. Curb Setter	5-1-79	5.00	13.85
21. Electrical Worker	5-1-79	5.00	16.63
22. Electrical Worker Foreman	5-1-79	5.00	17.53
23. Glazier	8-29-79	5.00	14.89
24. Ironworker	5-1-79	5.00	16.28
25. Ironworker Foreman	5-1-79	5.00	17.03
26. Jackhammer Operator	5-1-79	5.00	13.32
27. Master Mechanic	5-1-79	5.00	16.38
28. Overhead Floodlight Maintenance Man	5-1-79	5.00	16.63
29. Painter	5-1-79	5.00	14.83
	11-1-79	5.00	15.18
30. Painter Foreman	5-1-79	5.00	15.13
	11-1-79	5.00	15.48
31. Paint Spray Operator	5-1-79	5.00	15.23
	11-1-79	5.00	15.58
32. Paver	5-1-79	5.00	13.65
33. Paving Foreman	5-1-79	5.00	14.35
34. Pipefitter	5-1-79	5.00	16.37
35. Pipefitter—Certified High Pressure Welder	5-1-79	5.00	16.37
36. Pipefitter Foreman	5-1-79	5.00	15.87
37. Pipefitter Welder	5-1-79	5.00	16.37
38. Plasterer	5-1-79	5.00	16.24
39. Plumber	5-1-79	5.00	16.23
40. Plumber Foreman	5-1-79	5.00	16.98
41. Pounder	5-1-79	5.00	13.20
42. Roofer	5-1-79	5.00	16.11
43. No Provision			

	Effective Date	Minimum	Maximum
44. Sheet Metal Worker	5-1-79	5.00	16.22
45. Sign Painter	5-1-79	5.00	13.96
46. Sign Painter Foreman	5-1-79	5.00	14.96
47. Superintendent of Construction Equipment and Asphalt Plant		5.00	16.44

Section 2. That existing Section 33 of Ordinance No. 1266-A-79, passed June 11, 1979, be and the same is hereby repealed.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.
Effective September 25, 1979.

Ord. No. 1684-79.

By Councilmen Trenton and Forbes (by departmental request).

An emergency ordinance authorizing the Director of Port Control to enter into a Lease By Way of Concession with Midway Airlines for office and related space at Burke Lakefront Airport.

Whereas, Midway Airlines requires the use of certain office and related operations space in the West Concourse at Burke Lakefront Airport in connection with its air carrier operations; and

Whereas, the City of Cleveland desires to lease such space to Midway for such purpose in furtherance of the public purpose of providing facilities in aid of air commerce; and

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That any provision of the Codified Ordinances of Cleveland, Ohio, 1976 to the contrary notwithstanding, the Director of Port Control be and said Director hereby is authorized to enter into a Lease By Way of Concession with Midway Airlines for the use and occupancy of approximately 1560 square feet of office and baggage space and approximately 250 square feet of ticket counter, baggage handling and security screening area space, all in the West Concourse at Burke Lakefront Airport in connection with its air carrier operations; at a rental rate of \$2.00 per square foot per year for a one (1) year term commencing upon execution.

Section 2. That the Lease authorized hereby shall authorize the use of public air operations areas at the Airport in common with other users at the then prevailing landing, parking and other fees and rates, shall be prepared by the Director of Law and shall contain such additional conditions and provisions as he deems necessary to protect and benefit the public interest.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force

from and after the earliest period allowed by law.

Passed September 24, 1979.
Effective September 25, 1979.

Ord. No. 1686-79.

By Councilmen Trenton and Forbes (by departmental request).

An emergency ordinance authorizing and directing the rental by requirement contract of snow removal equipment, with operators, for the Division of Airports, Department of Port Control.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That the Director of Port Control be and hereby is authorized and directed to make a written requirement contract in accordance with the Charter and the Codified Ordinances of Cleveland, Ohio 1976, for the requirements for the necessary items of rental of snow removal equipment, with operators, for the period November 15, 1979, through March 31, 1980, in the approximate amount as procured during the preceding such period, to be procured by the Commissioner of Purchases and Supplies upon a unit basis for the Division of Airports, Department of Port Control.

Bids shall be taken in such manner as to permit an award to be made for all items as a single contract, or by separate contract for each or any combination of said items as the Board of Control shall determine.

Section 2. That the costs of said contract shall be charged against the proper appropriation account and the Director of Finance shall certify thereon the amount of the initial purchase thereunder, which purchase, together with all subsequent purchases, shall be made on order of the Commissioner of Purchases and Supplies pursuant to a requisition against such contract duly certified by the Director of Finance.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed September 24, 1979.
Effective September 25, 1979.

Ord. No. 1973-79.

By Councilman Forbes (by departmental request).

An emergency ordinance to issue notes in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) in anticipation of the issuance of bonds for the purpose of providing funds for improving streets, roads, alleys and boulevards in the City of Cleveland by grading, draining, curbing, paving, resurfacing, exten-

ding and widening and otherwise improving the same.

Whereas, pursuant to Ordinance Nos. 638-77 and 1073-78, passed by the Council of the City of Cleveland (the "Council") on April 25, 1977 and May 15, 1978, respectively, notes in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) were authorized for the purpose hereinafter stated and, under the authority of said ordinances, there is outstanding a note in the principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) which is dated October 6, 1978 and matures October 5, 1979; and

Whereas, this Council has determined that said outstanding note should be renewed by the issuance of new notes in anticipation of the issuance of bonds; and

Whereas, it has heretofore been duly certified to the Council that the estimated life of the property, asset or improvement proposed to be acquired or constructed from the proceeds of the bonds hereinafter referred to is at least five (5) years, and it has heretofore been further duly certified that the maximum maturity of said bonds is twenty (20) years, based upon the weighted average of the amounts allocated to the several classes of improvements as set forth in such certification, which allocation is hereby approved and confirmed, and that the maximum maturity of notes issued in anticipation thereof is eight (8) years from the date of the original notes issued for such purpose; provided, however, that if said notes are sold at private sale, then their maximum maturity may not exceed one (1) year; and

Whereas, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public property, health and safety of the City of Cleveland (the "City") and its inhabitants in that a note in anticipation of the bonds hereinafter referred to is about to mature and must be renewed with the proceeds of the notes herein authorized; now, therefore,

Be it ordained by the Council of the City of Cleveland, State of Ohio:

Section 1. That it is deemed necessary to issue bonds (the "Bonds") of the City in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) for the purpose of providing funds for improving streets, roads, alleys and boulevards in the City by grading, draining, curbing, paving, resurfacing, extending and widening and otherwise improving the same and the payment of such expenses as are incurred in connection with the issuance and sale of the Bonds for such purpose.

Section 2. That the Bonds shall be issued pursuant to the provisions of the Constitution of the State of Ohio, the Uniform Bond Law, Chapter 133 of the Revised Code of the State of Ohio, the Charter of the City of Cleveland and Chapter 177 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended, in the aggregate principal amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) for the purpose aforesaid. The Bonds shall be designated "Streets Improvement Bonds"; shall be of the denomination of Five Thousand Dollars (\$5,000.00) each or any multiple thereof; shall be dated approximately October 1, 1980; shall bear interest at the rate

§ 26**CONSTITUTION OF THE STATE OF OHIO****Article II - Legislative****§ 26 What laws to have a uniform operation**

§ 26 What laws to have a uniform operation

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

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§ 34**CONSTITUTION OF THE STATE OF OHIO****Article II - Legislative****§ 34 Welfare of employees**

§ 34 Welfare of employees

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.

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§ 3**CONSTITUTION OF THE STATE OF OHIO****Article IV - Judicial****§ 3 Court of appeals**

§ 3 Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for

review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

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§ 3**CONSTITUTION OF THE STATE OF OHIO****Article XVIII - Municipal Corporations****§ 3 Powers**

§ 3 Powers

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

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§ 7**CONSTITUTION OF THE STATE OF OHIO****Article XVIII - Municipal Corporations****§ 7 Home rule**

§ 7 Home rule

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

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§ 2731.01**Statutes & Session Law****TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES****CHAPTER 2731: MANDAMUS****2731.01 Mandamus defined.**

2731.01 Mandamus defined.

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

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§ 2731.02

Statutes & Session Law

TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES

CHAPTER 2731: MANDAMUS

2731.02 Courts authorized to issue writ - contents.

2731.02 Courts authorized to issue writ - contents.

The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

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§ 2731.05

Statutes & Session Law

TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES

CHAPTER 2731: MANDAMUS

2731.05 Adequacy of law remedy bar to writ.

2731.05 Adequacy of law remedy bar to writ.

The writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law.

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§ 2731.10

Statutes & Session Law

TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES

CHAPTER 2731: MANDAMUS

2731.10 Peremptory writ allowed on failure to answer.

2731.10 Peremptory writ allowed on failure to answer.

If no answer is made to an alternative writ of mandamus, a peremptory mandamus must be allowed against the defendant.

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§ 2731.09**Statutes & Session Law****TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES****CHAPTER 2731: MANDAMUS****2731.09 Pleadings - effect.**

2731.09 Pleadings - effect.

On the return day of an alternative writ of mandamus, or such further day as the court allows, the defendant may answer as in a civil action. If the writ is allowed by a single judge, said defendant may demur.

The plaintiff may demur to the answer or reply to new matter therein, and the defendant may demur to the reply, as in a civil action.

The pleadings have the same effect, must be construed, may be amended, and issues of fact made by them must be tried, and further proceedings thereon had, in the same manner as in civil actions.

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§ 4117.01**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.01 Public employees' collective bargaining definitions.**

4117.01 Public employees' collective bargaining definitions.

As used in this chapter:

(A) "Person," in addition to those included in division (C) of section 1.59 of the Revised Code, includes employee organizations, public employees, and public employers.

(B) "Public employer" means the state or any political subdivision of the state located entirely within the state, including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census; county; township with a population of at least five thousand in the unincorporated area of the township according to the most recent federal decennial census; school district; governing authority of a community school established under Chapter 3314. of the Revised Code; state institution of higher learning; public or special district; state agency, authority, commission, or board; or other branch of public employment.

(C) "Public employee" means 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, except:

(1) Persons holding elective office;

(2) Employees of the general assembly and employees of any other legislative body of the public employer whose principal duties are directly related to the legislative functions of the body;

(3) Employees on the staff of the governor or the chief executive of the public employer whose principal duties are directly related to the performance of the executive functions of the governor or the chief executive;

(4) Persons who are members of the Ohio organized militia, while training or performing duty under section 5919.29 or 5923.12 of the Revised Code;

(5) Employees of the state employment relations board;

(6) Confidential employees;

(7) Management level employees;

(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;

(9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code;

(10) Supervisors;

(11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty per cent of the normal year in the employee's bargaining unit;

(12) Employees of county boards of election;

(13) Seasonal and casual employees as determined by the state employment relations board;

(14) Part-time faculty members of an institution of higher education;

(15) Employees of the state personnel board of review;

(16) Participants in a work activity, developmental activity, or alternative work activity under sections 5107.40 to 5107.69 of the Revised Code who perform a service for a public employer that the public employer needs but is not performed by an employee of the public employer if the participant is not engaged in paid employment or subsidized employment pursuant to the activity;

(17) Employees included in the career professional service of the department of transportation under section 5501.20 of the Revised Code;

(18) Employees of community-based correctional facilities and district community-based correctional facilities created under sections 2301.51 to 2301.58 of the Revised Code who are not subject to a collective bargaining agreement on June 1, 2005.

(D) "Employee organization" means any labor or bona fide organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms, and other conditions of employment.

(E) "Exclusive representative" means the employee organization certified or recognized as an exclusive representative under section 4117.05 of the Revised Code.

(F) "Supervisor" means any individual who has authority, in the interest of the public

employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment, provided that:

(1) Employees of school districts who are department chairpersons or consulting teachers shall not be deemed supervisors;

(2) With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department. Where prior to June 1, 1982, a public employer pursuant to a judicial decision, rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that those members are supervisors, those members of a police or fire department do not have the rights specified in this chapter for the purposes of future collective bargaining. The state employment relations board shall decide all disputes concerning the application of division (F)(2) of this section.

(3) With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy;

(4) No teacher as defined in section 3319.09 of the Revised Code shall be designated as a supervisor or a management level employee unless the teacher is employed under a contract governed by section 3319.01, 3319.011, or 3319.02 of the Revised Code and is assigned to a position for which a license deemed to be for administrators under state board rules is required pursuant to section 3319.22 of the Revised Code.

(G) "To bargain collectively" means 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. "To bargain collectively" 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.

(H) "Strike" means continuous concerted action in failing to report to duty; willful absence from one's position; or stoppage of work in whole from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Strike"

does not include a stoppage of work by employees in good faith because of dangerous or unhealthful working conditions at the place of employment that are abnormal to the place of employment.

(I) "Unauthorized strike" includes, but is not limited to, concerted action during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Unauthorized strike" includes any such action, absence, stoppage, slowdown, or abstinence when done partially or intermittently, whether during or after the expiration of the term or extended term of a collective bargaining agreement or during or after the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code.

(J) "Professional employee" means any employee engaged in work that is predominantly intellectual, involving the consistent exercise of discretion and judgment in its performance and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship; or an employee who has completed the courses of specialized intellectual instruction and is performing related work under the supervision of a professional person to become qualified as a professional employee.

(K) "Confidential employee" means any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

(L) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Assistant superintendents, principals, and assistant principals whose employment is governed by section 3319.02 of the Revised Code are management level employees. With respect to members of a faculty of a state institution of higher education, no person is a management level employee because of the person's involvement in the formulation or implementation of academic or institution policy.

(M) "Wages" means hourly rates of pay, salaries, or other forms of compensation for services rendered.

(N) "Member of a police department" means a person who is in the employ of a police

department of a municipal corporation as a full-time regular police officer as the result of an appointment from a duly established civil service eligibility list or under section 737.15 or 737.16 of the Revised Code, a full-time deputy sheriff appointed under section 311.04 of the Revised Code, a township constable appointed under section 509.01 of the Revised Code, or a member of a township police district police department appointed under section 505.49 of the Revised Code.

(O) "Members of the state highway patrol" means highway patrol troopers and radio operators appointed under section 5503.01 of the Revised Code.

(P) "Member of a fire department" means a person who is in the employ of a fire department of a municipal corporation or a township as a fire cadet, full-time regular firefighter, or promoted rank as the result of an appointment from a duly established civil service eligibility list or under section 505.38, 709.012, or 737.22 of the Revised Code.

(Q) "Day" means calendar day.

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§ 4117.05**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.05 Employee organization to become exclusive representative - procedure.**

4117.05 Employee organization to become exclusive representative - procedure.

(A) An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by either:

(1) Being certified by the state employment relations board when a majority of the voting employees in the unit select the employee organization as their representative in a board-conducted election under section 4117.07 of the Revised Code;

(2) Filing a request with a public employer with a copy to the state employment relations board for recognition as an exclusive representative. In the request for recognition, the employee organization shall describe the bargaining unit, shall allege that a majority of the employees in the bargaining unit wish to be represented by the employee organization, and shall support the request with substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the bargaining unit wish to be represented by the employee organization. Immediately upon receipt of a request, the public employer shall either request an election under division (A)(2) of section 4117.07 of the Revised Code, or take the following action:

(a) Post notice in each facility at which employees in the proposed unit are employed, setting forth the description of the bargaining unit, the name of the employee organization requesting recognition, and the date of the request for recognition, and advising employees that objections to certification must be filed with the state employment relations board not later than the twenty-first day following the date of the request for recognition;

(b) Immediately notify the state employment relations board of the request for recognition.

The state employment relations board shall certify the employee organization filing the request for recognition on the twenty-second day following the filing of the request for recognition, unless by the twenty-first day following the filing of the request for recognition it receives:

(i) A petition for an election from the public employer pursuant to division (A)(2) of section 4117.07 of the Revised Code;

(ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish

to be represented by the employee organization filing the request for recognition;

(iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten percent of the employees in the described bargaining unit wish to be represented by such other employee organization; or

(iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

(B) Nothing in this section shall be construed to permit a public employer to recognize, or the state employment relations board to certify, an employee organization as an exclusive representative under Chapter 4117. of the Revised Code if there is in effect a lawful written agreement, contract, or memorandum of understanding between the public employer and another employee organization which, on the effective date of this section, has been recognized by a public employer as the exclusive representative of the employees in a unit or which by tradition, custom, practice, election, or negotiation has been the only employee organization representing all employees in the unit; 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 agreement do not affect the expiration of the original agreement.

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§ 4117.08**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.08 Matters subject to collective bargaining.**

4117.08 Matters subject to collective bargaining.

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section and division (E) of section 4117.03 of the Revised Code.

(B) The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the work force;

(9) Take actions to carry out the mission of the public employer as a governmental unit.

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement.

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§ 4117.09**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.09 Parties to execute written agreement - provisions of agreement.**

4117.09 Parties to execute written agreement - provisions of agreement.

(A) The parties to any collective bargaining agreement shall reduce the agreement to writing and both execute it.

(B) The agreement shall contain a provision that:

(1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances, and disputed interpretations of agreements, and which is valid and enforceable under its terms when entered into in accordance with this chapter. No publication thereof is required to make it effective. A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business.

(2) Authorizes the public employer to deduct the periodic dues, initiation fees, and assessments of members of the exclusive representative upon presentation of a written deduction authorization by the employee.

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit. Any public employee organization representing public employees pursuant to this chapter shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to the determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

The internal rebate procedure shall provide for a rebate of expenditures in support of

partisan politics or ideological causes not germane [germane] to the work of employee organizations in the realm of collective bargaining.

Any public employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion or religious body which has historically held conscientious objections to joining or financially supporting an employee organization and which is exempt from taxation under the provisions of the Internal Revenue Code shall not be required to join or financially support any employee organization as a condition of employment. Upon submission of proper proof of religious conviction to the board, the board shall declare the employee exempt from becoming a member of or financially supporting an employee organization. The employee shall be required, in lieu of the fair share fee, to pay an amount of money equal to the fair share fee to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code mutually agreed upon by the employee and the representative of the employee organization to which the employee would otherwise be required to pay the fair share fee. The employee shall furnish to the employee organization written receipts evidencing such payment, and failure to make the payment or furnish the receipts shall subject the employee to the same sanctions as would nonpayment of dues under the applicable collective bargaining agreement.

No public employer shall agree to a provision requiring that a public employee become a member of an employee organization as a condition for securing or retaining employment.

(D) As used in this division, "teacher" means any employee of a school district certified to teach in the public schools of this state.

The agreement may contain a provision that provides for a peer review plan under which teachers in a bargaining unit or representatives of an employee organization representing teachers may, for other teachers of the same bargaining unit or teachers whom the employee organization represents, participate in assisting, instructing, reviewing, evaluating, or appraising and make recommendations or participate in decisions with respect to the retention, discharge, renewal, or nonrenewal of, the teachers covered by a peer review plan.

The participation of teachers or their employee organization representative in a peer review plan permitted under this division shall not be construed as an unfair labor practice under this chapter or as a violation of any other provision of law or rule adopted pursuant thereto.

(E) No agreement shall contain an expiration date that is later than three years from the date of execution. The parties may extend any agreement, but the extensions do not affect the expiration date of the original agreement.

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§ 4117.10**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.10 Terms of agreement.**

4117.10 Terms of agreement.

(A) An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, and residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to section 5705.41 of the Revised Code, the provisions of division (A) of section 124.34 of the Revised Code governing the disciplining of officers and employees who have been convicted of a felony, and the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code prevail over conflicting provisions of agreements between employee organizations and public employers. The law pertaining to the leave of absence and compensation provided under section 5923.05 of the Revised Code prevails over any conflicting provisions of such agreements if the terms of the agreement contain benefits which are less than those contained in that section or the agreement contains no such terms and the public authority is the state or any agency, authority, commission, or board of the state or if the public authority is another entity listed in division (B) of section 4117.01 of the Revised Code that elects to provide leave of absence and compensation as provided in section 5923.05 of the Revised Code. Except for sections 306.08, 306.12, 306.35, and 4981.22 of the Revised Code and arrangements entered into thereunder, and section 4981.21 of the Revised Code as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat. 295, 49 U.S.C.A. 1609(c), as amended, and arrangements entered into thereunder, this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly. Nothing in this section prohibits or shall be construed to invalidate the provisions of an agreement establishing supplemental workers' compensation or unemployment compensation benefits or exceeding minimum requirements contained in the Revised Code

pertaining to public education or the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code.

(B) The public employer shall submit a request for funds necessary to implement an agreement and for approval of any other matter requiring the approval of the appropriate legislative body to the legislative body within fourteen days of the date on which the parties finalize the agreement, unless otherwise specified, but if the appropriate legislative body is not in session at the time, then within fourteen days after it convenes. The legislative body must approve or reject the submission as a whole, and the submission is deemed approved if the legislative body fails to act within thirty days after the public employer submits the agreement. The parties may specify that those provisions of the agreement not requiring action by a legislative body are effective and operative in accordance with the terms of the agreement, provided there has been compliance with division (C) of this section. If the legislative body rejects the submission of the public employer, either party may reopen all or part of the entire agreement.

As used in this section, "legislative body" includes the governing board of a municipal corporation, school district, college or university, village, township, or board of county commissioners or any other body that has authority to approve the budget of their public jurisdiction and, with regard to the state, "legislative body" means the controlling board.

(C) The chief executive officer, or the chief executive officer's representative, of each municipal corporation, the designated representative of the board of education of each school district, college or university, or any other body that has authority to approve the budget of their public jurisdiction, the designated representative of the board of county commissioners and of each elected officeholder of the county whose employees are covered by the collective negotiations, and the designated representative of the village or the board of township trustees of each township is responsible for negotiations in the collective bargaining process; except that the legislative body may accept or reject a proposed collective bargaining agreement. When the matters about which there is agreement are reduced to writing and approved by the employee organization and the legislative body, the agreement is binding upon the legislative body, the employer, and the employee organization and employees covered by the agreement.

(D) There is hereby established an office of collective bargaining in the department of administrative services for the purpose of negotiating with and entering into written agreements between state agencies, departments, boards, and commissions and the exclusive representative on matters of wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. Nothing in any provision of law to the contrary shall be interpreted as excluding the bureau of workers' compensation and the industrial commission from the preceding sentence. This office shall not negotiate on behalf of other statewide elected officials or boards of trustees of state institutions of higher education who shall be considered as separate public employers for the purposes of this chapter; however, the office may negotiate on behalf of these officials or trustees where authorized by the officials or trustees. The staff

of the office of collective bargaining are in the unclassified service. The director of administrative services shall fix the compensation of the staff.

The office of collective bargaining shall:

- (1) Assist the director in formulating management's philosophy for public collective bargaining as well as planning bargaining strategies;
- (2) Conduct negotiations with the exclusive representatives of each employee organization;
- (3) Coordinate the state's resources in all mediation, fact-finding, and arbitration cases as well as in all labor disputes;
- (4) Conduct systematic reviews of collective bargaining agreements for the purpose of contract negotiations;
- (5) Coordinate the systematic compilation of data by all agencies that is required for negotiating purposes;
- (6) Prepare and submit an annual report and other reports as requested to the governor and the general assembly on the implementation of this chapter and its impact upon state government.

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§ 4117.11**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.11 Unfair labor practice.**

4117.11 Unfair labor practice.

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization, or contribute financial or other support to it; except that a public employer may permit employees to confer with it during working hours without loss of time or pay, permit the exclusive representative to use the facilities of the public employer for membership or other meetings, or permit the exclusive representative to use the internal mail system or other internal communications system;

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.

(4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code;

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code;

(6) Establish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances;

(7) Lock out or otherwise prevent employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute;

(8) Cause or attempt to cause an employee organization, its agents, or representatives to violate division (B) of this section.

(B) It is an unfair labor practice for an employee organization, its agents, or

representatives, or public employees to:

(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

(2) Cause or attempt to cause an employer to violate division (A) of this section;

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit;

(4) Call, institute, maintain, or conduct a boycott against any public employer, or picket any place of business of a public employer, on account of any jurisdictional work dispute;

(5) Induce or encourage any individual employed by any person to engage in a strike in violation of Chapter 4117. of the Revised Code or refusal to handle goods or perform services; or threaten, coerce, or restrain any person where an object thereof is to force or require any public employee to cease dealing or doing business with any other person, or force or require a public employer to recognize for representation purposes an employee organization not certified by the state employment relations board;

(6) Fail to fairly represent all public employees in a bargaining unit;

(7) Induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer;

(8) Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both.

(C) The determination by the board or any court that a public officer or employee has committed any of the acts prohibited by divisions (A) and (B) of this section shall not be made the basis of any charge for the removal from office or recall of the public officer or the suspension from or termination of employment of or disciplinary acts against an employee, nor shall the officer or employee be found subject to any suit for damages based on such a determination; however nothing in this division prevents any party to a collective bargaining agreement from seeking enforcement or damages for a violation thereof against the other party to the agreement.

(D) As to jurisdictional work disputes, the board shall hear and determine the dispute

unless, within ten days after notice to the board by a party to the dispute that a dispute exists, the parties to the dispute submit to the board satisfactory evidence that they have adjusted, or agreed upon the method for the voluntary adjustment of, the dispute.

Effective Date: 04-01-1984

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§ 4117.14**Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4117: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING****4117.14 Settlement of dispute between exclusive representative and public employer - procedures.**

4117.14 Settlement of dispute between exclusive representative and public employer - procedures.

(A) The procedures contained in this section govern the settlement of disputes between an exclusive representative and a public employer concerning the termination or modification of an existing collective bargaining agreement or negotiation of a successor agreement, or the negotiation of an initial collective bargaining agreement.

(B)(1) In those cases where there exists a collective bargaining agreement, any public employer or exclusive representative desiring to terminate, modify, or negotiate a successor collective bargaining agreement shall:

(a) Serve written notice upon the other party of the proposed termination, modification, or successor agreement. The party must serve the notice not less than sixty days prior to the expiration date of the existing agreement or, in the event the existing collective bargaining agreement does not contain an expiration date, not less than sixty days prior to the time it is proposed to make the termination or modifications or to make effective a successor agreement.

(b) Offer to bargain collectively with the other party for the purpose of modifying or terminating any existing agreement or negotiating a successor agreement;

(c) Notify the state employment relations board of the offer by serving upon the board a copy of the written notice to the other party and a copy of the existing collective bargaining agreement.

(2) In the case of initial negotiations between a public employer and an exclusive representative, where a collective bargaining agreement has not been in effect between the parties, any party may serve notice upon the board and the other party setting forth the names and addresses of the parties and offering to meet, for a period of ninety days, with the other party for the purpose of negotiating a collective bargaining agreement.

If the settlement procedures specified in divisions (B), (C), and (D) of this section govern the parties, where those procedures refer to the expiration of a collective bargaining agreement, it means the expiration of the sixty-day period to negotiate a collective bargaining agreement referred to in this subdivision, or in the case of initial negotiations, it means the ninety day period referred to in this subdivision.

(3) The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lock-out, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, or for a period of ninety days where applicable.

(4) Upon receipt of the notice, the parties shall enter into collective bargaining.

(C) In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained in this section.

(1) The procedures may include:

(a) Conventional arbitration of all unsettled issues;

(b) Arbitration confined to a choice between the last offer of each party to the agreement as a single package;

(c) Arbitration confined to a choice of the last offer of each party to the agreement on each issue submitted;

(d) The procedures described in division (C)(1)(a), (b), or (c) of this section and including among the choices for the arbitrator, the recommendations of the fact finder, if there are recommendations, either as a single package or on each issue submitted;

(e) Settlement by a citizens' conciliation council composed of three residents within the jurisdiction of the public employer. The public employer shall select one member and the exclusive representative shall select one member. The two members selected shall select the third member who shall chair the council. If the two members cannot agree upon a third member within five days after their appointments, the board shall appoint the third member. Once appointed, the council shall make a final settlement of the issues submitted to it pursuant to division (G) of this section.

(f) Any other dispute settlement procedure mutually agreed to by the parties.

(2) If, fifty days before the expiration date of the collective bargaining agreement, the parties are unable to reach an agreement, any party may request the state employment relations board to intervene. The request shall set forth the names and addresses of the parties, the issues involved, and, if applicable, the expiration date of any agreement.

The board shall intervene and investigate the dispute to determine whether the parties have engaged in collective bargaining.

If an impasse exists or forty-five days before the expiration date of the collective bargaining agreement if one exists, the board shall appoint a mediator to assist the parties in

the collective bargaining process.

(3) Any time after the appointment of a mediator, either party may request the appointment of a fact-finding panel. Within fifteen days after receipt of a request for a fact-finding panel, the board shall appoint a fact-finding panel of not more than three members who have been selected by the parties in accordance with rules established by the board, from a list of qualified persons maintained by the board.

(a) The fact-finding panel shall, in accordance with rules and procedures established by the board that include the regulation of costs and expenses of fact-finding, gather facts and make recommendations for the resolution of the matter. The board shall by its rules require each party to specify in writing the unresolved issues and its position on each issue to the fact-finding panel. The fact-finding panel shall make final recommendations as to all the unresolved issues.

(b) The board may continue mediation, order the parties to engage in collective bargaining until the expiration date of the agreement, or both.

(4) The following guidelines apply to fact-finding:

(a) The fact-finding panel may establish times and place of hearings which shall be, where feasible, in the jurisdiction of the state.

(b) The fact-finding panel shall conduct the hearing pursuant to rules established by the board.

(c) Upon request of the fact-finding panel, the board shall issue subpoenas for hearings conducted by the panel.

(d) The fact-finding panel may administer oaths.

(e) The board shall prescribe guidelines for the fact-finding panel to follow in making findings. In making its recommendations, the fact-finding panel shall take into consideration the factors listed in divisions (G)(7)(a) to (f) of this section.

(f) The fact-finding panel may attempt mediation at any time during the fact-finding process. From the time of appointment until the fact-finding panel makes a final recommendation, it shall not discuss the recommendations for settlement of the dispute with parties other than the direct parties to the dispute.

(5) The fact-finding panel, acting by a majority of its members, shall transmit its findings of fact and recommendations on the unresolved issues to the public employer and employee organization involved and to the board no later than fourteen days after the appointment of the fact-finding panel, unless the parties mutually agree to an extension. The parties shall share the cost of the fact-finding panel in a manner agreed to by the parties.

(6)(a) Not later than seven days after the findings and recommendations are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendations; if neither rejects the recommendations, the recommendations shall be deemed agreed upon as the final resolution of the issues submitted and a collective bargaining agreement shall be executed between the parties, including the fact-finding panel's recommendations, except as otherwise modified by the parties by mutual agreement. If either the legislative body or the public employee organization rejects the recommendations, the board shall publicize the findings of fact and recommendations of the fact-finding panel. The board shall adopt rules governing the procedures and methods for public employees to vote on the recommendations of the fact-finding panel.

(b) As used in division (C)(6)(a) of this section, "legislative body" means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is party to the fact-finding process.

(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

(1) Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special police officers appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities, shall submit the matter to a final offer settlement procedure pursuant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties. The parties shall request from the board a list of five qualified conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American arbitration association and appoint therefrom.

(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code provided that the employee organization representing the employees has given a ten-day prior written notice of an intent to strike to the public employer and to the board, and further provided that the strike is for full, consecutive work days and the beginning date of the strike is at least ten work days after the ending date of the most recent prior strike involving the same bargaining unit; however, the board, at its discretion, may attempt mediation at any time.

(E) Nothing in this section shall be construed to prohibit the parties, at any time, from voluntarily agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure. An agreement or statutory requirement to arbitrate or to settle a dispute pursuant to a final offer settlement procedure and the award issued in accordance with the agreement or statutory requirement is enforceable in the same manner as specified in division (B) of section 4117.09 of the Revised Code.

(F) Nothing in this section shall be construed to prohibit a party from seeking enforcement of a collective bargaining agreement or a conciliator's award as specified in division (B) of section 4117.09 of the Revised Code.

(G) The following guidelines apply to final offer settlement proceedings under division (D)(1) of this section:

(1) The parties shall submit to final offer settlement those issues that are subject to collective bargaining as provided by section 4117.08 of the Revised Code and upon which the parties have not reached agreement and other matters mutually agreed to by the public employer and the exclusive representative; except that the conciliator may attempt mediation at any time.

(2) The conciliator shall hold a hearing within thirty days of the board's order to submit to a final offer settlement procedure, or as soon thereafter as is practicable.

(3) The conciliator shall conduct the hearing pursuant to rules developed by the board. The conciliator shall establish the hearing time and place, but it shall be, where feasible, within the jurisdiction of the state. Not later than five calendar days before the hearing, each of the parties shall submit to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rationale for that position.

(4) Upon the request by the conciliator, the board shall issue subpoenas for the hearing.

(5) The conciliator may administer oaths.

(6) The conciliator shall hear testimony from the parties and provide for a written record to be made of all statements at the hearing. The board shall submit for inclusion in the record and for consideration by the conciliator the written report and recommendation of the fact-finders.

(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers, taking into consideration the following:

(a) Past collectively bargained agreements, if any, between the parties;

(b) Comparison of the issues submitted to final offer settlement relative to the employees

in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

(8) Final offer settlement awards made under Chapter 4117. of the Revised Code are subject to Chapter 2711. of the Revised Code.

(9) If more than one conciliator is used, the determination must be by majority vote.

(10) The conciliator shall make written findings of fact and promulgate a written opinion and order upon the issues presented to the conciliator, and upon the record made before the conciliator and shall mail or otherwise deliver a true copy thereof to the parties and the board.

(11) Increases in rates of compensation and other matters with cost implications awarded by the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final offer settlement procedure, the awarded increases may be retroactive to the commencement of the new fiscal year. The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement.

(12) The parties shall bear equally the cost of the final offer settlement procedure.

(13) Conciliators appointed pursuant to this section shall be residents of the state.

(H) All final offer settlement awards and orders of the conciliator made pursuant to Chapter 4117. of the Revised Code are subject to review by the court of common pleas having jurisdiction over the public employer as provided in Chapter 2711. of the Revised Code. If the public employer is located in more than one court of common pleas district, the court of common pleas in which the principal office of the chief executive is located has jurisdiction.

(I) The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award.

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CODIFIED ORDINANCES OF THE CITY OF CLEVELAND

PART ONE — ADMINISTRATIVE CODE

Title XI — Employment And Compensation

Chapter 171 — Employment Provisions

Complete to June 30, 2006

Note: The legislative history of this chapter, except where specifically noted at the end of a section, is as follows: Ordinance No. 63410-A, passed September 22, 1924.

171.31 Sick Leave

1. (a) All full-time annual rate City employees and all full-time hourly rate employees, except hourly rate craft employees paid on the basis of building trades prevailing wages, shall be entitled to sick leave with pay.

(b) The Board of Control shall establish by resolution rules and regulations for those entitled to sick leave. Such resolution shall have regard to absence due to illness, exposure to contagious disease which could be communicated to other employees, death or serious illness in the employee's immediate family and any other equitable factor present in the absence of employees on account of illness. Such resolution may provide for cumulation of sick leave.

(Ord. No. 2294-80. Passed 10-27-80, eff. 10-29-80)