

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.,)	Ohio Supreme Court
MUNICIPAL CONSTRUCTION EQUIPMENT)	Case No. 06-1688
OPERATORS' LABOR COUNCIL,)	
)	On appeal from the Cuyahoga
Appellant/Relator)	County Court of Appeals,
)	Eighth Appellate District
vs.)	
)	Court of Appeals
CITY OF CLEVELAND, et al.)	Case No. CA 05-86263
)	Original Action in Mandamus
Appellee/Respondents)	

APPELLEE/RESPONDENTS' BRIEF ON THE MERITS

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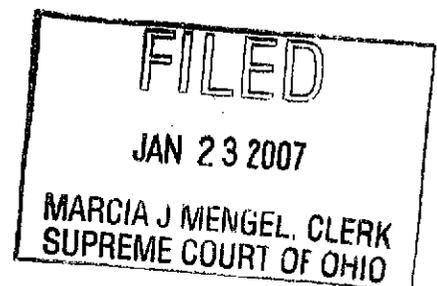


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STATEMENT OF THE CASE

Appellee/Respondents incorporate by reference the Statement of the Case presented by Appellant/Relator on page 1 of its Brief on the Merits.

STATEMENT OF THE FACTS

Appellant/Relator, Municipal Equipment Operators' Labor Council (MCEO Labor Council) is an employee organization that has been recognized under Ohio's Collective Bargaining Law, Ohio Revised Code §4117.01, et seq, since January 30, 2003, as the exclusive representative of a bargaining unit comprised of two classifications of City of Cleveland employees, construction equipment operators and master mechanics. (Record No. 23¹, Exhibit A – Certification of Election Results and of Exclusive Representative.) On February 14, 2005 a collective bargaining agreement between the Appellee/Respondent City of Cleveland and Appellant/Relator MCEO Labor Council was ratified. (Record No. 23, Exhibit D – Collective Bargaining Agreement.) This agreement was the result of negotiations by these parties between January 30, 2003 and February 13, 2005, with terms of the agreement including compensation to the bargaining unit members for lack of pay increases during the period from January 30, 2003 and February 14, 2005. (Record No. 23, Exhibit D, at p. 2.) The collective bargaining agreement also included, upon ratification of the agreement, sick time credit of three days paid sick leave for all full-time employees (Record No. 23, Exhibit D, at p. 12), and ten days vacation leave, with pay, for all regular full-time employees with one or more years of continued employment (Record No. 23, Exhibit D, at p. 18).

Prior to January 30, 2003 this bargaining unit was represented by the International Union of Operating Engineers, Local 18, in litigation in Ohio courts. See: *State ex rel. International*

Union of Operating Engineers Local 18, 18 A, 18 B, 18C, 18 RA, AFL-CIO v. City of Cleveland (1992), 62 Ohio St.3d 537. Local 18 had represented this bargaining unit in Court on matters arising from their employment relationship with the City of Cleveland, specifically issues concerning wages and benefits. Appellant/Relator challenged Local 18 in an election, was successful, and was recognized by the State Employment Relations Board as the exclusive representative for this bargaining unit on January 30, 2003 before the recognition only Local 18 had ever represented the bargaining unit on issues of prevailing wages or benefits in Court or before the State Employment Relations Board. (Record No. 23, Exhibit B - Affidavit of William Fadel; and Exhibit C – Affidavit of Steven DeLong.)

Prior to the recognition of the MCEO Labor Council as exclusive representative on January 30, 2003, the wages that members of the bargaining unit received were calculated and based on a two part formula. First, the prevailing wage rate for the same classification of worker in private industry is determined. Next, an adjustment to such prevailing wage rate was undertaken to offset the value of the fringe benefits that members of the bargaining unit received as City of Cleveland employees. (See: Record No. 23, Exhibit B - Affidavit of William Fadel; Exhibit C – Affidavit of Steven DeLong.) This adjustment was accomplished because the state statute establishing “prevailing wages” incorporates a number of benefits into the calculation of prevailing wage rates for which the public employer is entitled to a credit or offset. (Ohio Rev. Code § 4115.03 (E), Ohio Admin. Code 4101:9-4-07.)

After Appellant/Relator became the recognized representative for the bargaining unit in 2003, it entered into negotiations with the City of Cleveland on collective bargaining issues, including past, present and future wages and benefits for the members of the bargaining unit. A

¹ Record No. 23 is Appellee/Respondents Motion for Summary Judgment.

collective bargaining agreement that addressed these wage and benefit issues was ratified by the parties on February 14, 2005. (Record No. 23, Exhibit D – Collective Bargaining Agreement.)

On October 30, 2003 Appellant/Relator filed a “Motion to Show Cause Why Respondents Should Not Be Deemed Contemnors” of the Ohio Supreme Court’s 1992 writ of mandamus, which had been obtained by Local 18, which required the City to pay bargaining unit members based on prevailing wage rates. (Record No. 23, Exhibit E – Motion to Show Cause; and Exhibit F - Online docket of Ohio Supreme Court Case No. 90-1780.) Appellant/Relator’s motion specifically requested that the Court decide issues of past and future prevailing wages. (Record No. 23, Exhibit E – Motion to Show Cause, p. 6.) On April 28, 2004 the Ohio Supreme Court ruled the City of Cleveland was not to be in contempt of the 1992 mandamus order. (Record No. 23, Exhibit G - Entry.)

ARGUMENT

It is undisputed that commencing in January, 2003 the bargaining unit comprised of construction equipment operators and master mechanics were represented by Appellant/Relator the Municipal Construction Equipment Operators’ Labor Council (MCEO Labor Council). It is also undisputed that as a result of negotiations between the MCEO Labor Council and Appellee/Respondent City of Cleveland, a collective bargaining agreement was ratified on February 14, 2005. The agreement specifically provides that “This Agreement shall address all matters pertaining to hourly wages, and hours, or terms or conditions of employment mutually expressed between the parties”. (Record No. 23, Exhibit D, p. 1.) Furthermore, the Agreement provides that “This Agreement represents a complete and final understanding on all bargainable issues between the City and the Union”. (Record No. 23, Exhibit D, at p. 31.) The Agreement specifically establishes compensation to bargaining unit members for back pay and benefits

during the period after January 30, 2003, when the MCEO Labor Council became the representative for the bargaining unit, and before the Collective Bargaining Agreement was ratified in February, 2005. (Record No. 23, Exhibit D, p. 2 (\$2,500 per employee for back pay), p. 12 (credit of 3 days paid sick leave) and. p. 18 (10 days vacation leave with pay credit).)

The Court of Appeals correctly ruled that the MCEO Labor Council's requested writ of mandamus was barred because a remedy existed for its claims of prior wages and benefits due to its bargaining unit, and Appellant/Relator exercised it through its collective bargaining negotiations. (Appellant/Relator's Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 5.) The collective bargaining agreement clearly reflects the results of negotiations between the parties regarding wages and benefits for the period from January 30, 2003 to February 13, 2005.

In addition, on October 30, 2003, the MCEO Labor Council had filed a “Motion to Show Cause Why Respondents Should Not Be Deemed Contemnors” seeking the same remedy they sought in the underlying action for writ of mandamus on the issue of prevailing wages. (Record No. 23, Exhibit E – Motion to Show Cause, p. 6.) On April 28, 2004 this Honorable Court, finding the City of Cleveland not in contempt, denied the motion. (Record No. 23, Exhibit G.) The Court of Appeals found this decision extinguished the MCEO Labor Council's prevailing wages claim on the basis of *res judicata*. (Appellant/Relator's Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 6-7.)

In this case it is the bargaining relationship between the parties, City of Cleveland and the MCEO Labor Council between January, 2003 and February 14, 2005, reflected in the collective bargaining agreement ratified in 2005, which defines the obligations of the City as to payment of wages and benefits to bargaining unit members during that period. There is no dispute that

collective bargaining took place between the parties during the time period critical to this litigation. As was noted in *Consolo v. City of Cleveland* (2004), 103 Ohio St.3d 362:

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. *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 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. *Consolo v. City of Cleveland* (2004), 103 Ohio St.3d 362, 367.

The Court of Appeals specifically noted this part of the Consolo decision in ruling lack of jurisdiction over the subject matter. Appellant/Relator's Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 10-11. Appellant/Relator's claims regarding back pay and benefits due during the period of time they were the recognized employee organization representing the affected parties is a matter over which the State Employment Relations Board has exclusive jurisdiction.

APPELLANT/RELATOR'S ASSIGNMENT OF ERROR NO. 1:

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENTS' THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT².

Appellee/Respondents' Proposition of Law No. 1: Mandamus is Not Appropriate Where the Remedies Sought By Relator Can be Obtained Through Collective Bargaining.

Three criteria must be met before a court may grant a writ of mandamus:

- 1) Relator must have a clear right to the requested relief;
- 2) Respondent must have a clear legal duty to perform the requested relief; and
- 3) Relator must have no plain and adequate remedy at law.

State ex rel. Ney v. Niehaus (1987), 33 Ohio St.3d 118; *State ex rel. Halloran v. Zapatory* (1984), 15 Ohio St.3d 73, 74; *Harris v. Rhodes* (1978), 54 Ohio St.2d 41. In addition, if the Relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath* (1997), 78 Ohio St.3d 45; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Ct. of Appeals for Cuyahoga Cty* (1990), 56 Ohio St.3d 33.

Ohio Revised Code §4117.08 (A) provides:

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.

It is undisputed the City and the MCEO Labor Council negotiated the wages, benefits, hours, terms and other conditions of employment of the construction equipment operator bargaining unit during the period from January 30, 2003 and February 13, 2005. Those negotiations culminated in a collective bargaining agreement that was ratified on February 14, 2005. That agreement specifically addressed the issues of wages and benefits during the period immediately preceding its ratification and provided for back pay, sick pay, and vacation time credits. Specifically terms of the Agreement provide:

Back pay

In recognition of no wage increases for the period of January 1, 2004 through January 31, 2005, the City shall make a one-time lump sum payment of \$2,500.00 to each employee who worked 1,400 or more hours during 2004, on the first regular pay-day after Agreement ratification (which shall not be rolled into the base wage). Any employee who worked less than 1,400 hours during 2004 shall receive an adjusted payment based upon a percentage of hours worked of a 2,080 hour year. (For example, if an employee worked 1,000 hours during 2004, Cleveland shall pay that employee \$1,201.93, which reflects a calculation of multiplying the percentage achieved based upon dividing 1,000 by 2,080 against \$2,500.00.). Record No. 23, Exhibit D, at p. 2.

² Appellee/Respondents position is that the Eighth District Court of Appeals was correct when it granted Appellee/Respondents' Motion for Summary Judgment and denied Appellant/Relator's Motion for Summary Judgment.

Sick Time

Upon ratification of this Agreement, all regular full-time employees shall be credited with three (3) days of paid sick leave. Record No. 23, Exhibit D, at p. 12.

Vacation Time

Upon ratification of this Agreement, all regular full-time employees with one or more years of continuous service as of the ratification date of this Agreement, shall be granted ten (10) days of vacation leave, with full pay. Record No. 23, Exhibit D, at p. 18.

The MCEO Labor Council does not have a clear right enforceable through a writ of mandamus to obtain compensation for the members of its bargaining unit at prevailing wage rates for the period of January 30, 2003 to February 14, 2005³. Where collective bargaining has occurred, R.C. Chapter 4117 prevails over any and all other conflicting laws. *Consolo v. City of Cleveland*, 103 Ohio St.3d at 367. The City and MCEO Labor Council negotiated during this period of time and entered into an Agreement that provided a one-time payment of back pay to cover discrepancies in wages that had been paid prior to the ratification of the agreement. Appellant/Relator is not entitled to further wage modification after entering into the collective bargaining agreement.

The City of Cleveland has no clear duty to pay the members of the Construction Equipment Operator (CEO) Bargaining Unit wages at the full prevailing wage rate from January 30, 2003 to February 14, 2005. First, the parties had the opportunity to negotiate adjustment to the wages paid CEOs during this period in arriving at the collective bargaining agreement, and a \$2,500.00 one-time back pay provision was agreed to by the parties. In addition, in the Agreement the parties agreed that CEOs would not be paid wages equivalent to the full prevailing wage after February 14, 2005. The Agreement specifically accounts for offsets to the prevailing wage rate when calculating the wages of CEOs in exchange for which the City will

provide fringe benefits, to include sick time and vacation time. (Record No. 23, pp. 1, 8-22.) The MCEO Labor Council seeks benefits outside of the Agreement it entered into with the City, for which it did not negotiate, either pre or post-Agreement ratification. Accordingly, the City has no duty to pay what is not required under the Collective Bargaining Agreement.

The MCEO Labor Council had a clear remedy at law. If it is the contention of Appellant/Relator that it did not negotiate wage and benefit adjustments with the City of Cleveland for the period from January 30, 2003 to February 14, 2005, as reflected in the Collective Bargaining Agreement, then it could have brought the matter before the State Employment Relations Board, as would be allowed under Ohio's Collective Bargaining Law, Ohio Revised Code Chapter 4117. The Appellant Relator did not do so. As noted in *Consolo*, SERB has exclusive jurisdiction to decide whether collective bargaining occurred. *Consolo*, 103 Ohio St.3d at 367. The Court of Appeals correctly noted in its opinion that it did not have jurisdiction, therefore, to determine this issue. (Appellant/Relator's Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 10-11.)

Appellee/Respondents' Proposition of Law No. 2: An Initial Collective Bargaining Agreement Between Parties Providing Wage and Benefit Adjustments for the Period Immediately Preceding Ratification of the Agreement During Which the Employee Organization was the Exclusive Bargaining Representative for the Bargaining Unit Estops the Employee Organization From Seeking Further Wage and Benefit Adjustments Through Mandamus.

On page 14 of Appellant/Relator's Brief on the Merits, the MCEO Labor Council points to the general rule of construction that a contract provision should be interpreted with the remainder of the contract. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Authority* (1997), 78 Ohio St.3d 353. The contract at issue in this case is the Collective Agreement between the parties. The Agreement provides not only for adjustment to wages with

³ This is the only remedy sought identified in Appellant/Relator's Statement of the Case. (Appellant Relator's Brief

a one-time lump sum \$2,500.00 wage adjustment per qualified employee, but also adjustment of paid sick time and paid vacation time for employees. If one examines the whole contract, a matter that Appellee/Respondents' contend correctly the province of the State Employment Relations Board, such review clearly points to give and take negotiations which culminated in the adjustment of compensation as had been paid to the members of the CEO bargaining unit for the period from January 30, 2003 to February 14, 2005.

The MCEO Labor Council attempts to take a provision in the Collective Agreement out of context and fails to include the full text and title of the provision. The Collective Bargaining Agreement states the following on page thirty:

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 or 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. Record No. 23, Exhibit D, at p. 30. (Underlined & italicized text was not included in the quotation in Appellant/Relator's Brief on the Merits).

The MCEO Labor Council neglected to include the title of this section, or the reference to other entities and outside contracts in their truncated excerpt of this section of the Collective Bargaining Agreement. As noted by the Court of Appeals, "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." (Appellant/Relator's Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 5.) The word "pending" when used as an adjective has the plain meaning of

“remaining undecided; awaiting decision” as in pending case. Bryan A. Gardner, Black’s Law Dictionary, 17th Ed., 1154 (1999)⁴.

As noted on page 12 the Appellant Relator’s Brief, the case of *Consolo v. City of Cleveland*, which includes as parties current and former members of the Construction Equipment Operator’s bargaining unit, was pending during the period the collective bargaining agreement was negotiated. That case involved a third party, the International Union of Operating Engineers, Local 18. The gravaman of the complaint involved the Plaintiffs attempt to obtain an adjustment to wages and certain benefits during the time prior to recognition of the MCEO Labor Council as exclusive representative for the CEO bargaining unit. The complaint not only presented claims against the City of Cleveland but also the International Union of Operating Engineers arising out of the Plaintiffs’ allegations that they were entitled to more pay and benefits than they had received during the time the International Union of Operating Engineers purportedly acted as their exclusive bargaining representative. In reversing the Court of Appeals ruling, and reinstating the order of the trial court dismissing the case, this Honorable Court noted that the issues presented were ones that had to be presented at the State Employment Relations Board. *Consolo*, 103 Ohio St.3d at 367. This was done, not by the Plaintiffs in *Consolo*, but by Appellant/Relator. (Supplement to Appellant/Relator’s Brief on the Merits, p. 82-96.) Now, with the SERB findings based on an exercise of the Board’s “plenary” jurisdiction, the *Consolo* Plaintiffs have filed a writ of mandamus with this Honorable Court attempting to resuscitate their claims in *Consolo* only against the City of Cleveland. Ohio Supreme Court Case No. 06-2056.

⁴ That “pending litigation” means ongoing litigation is further supported by reference to the Ohio Rules of Civil Procedure. Civ. R. 26(B) allows for discovery in a “pending action.” Civ. R. 27(B), titled “Pending appeal,” starts off “(i)f an appeal has been taken...” Clearly “pending” means ongoing.

It is the *Consolo* case that the City and MCEO Labor Council were referring to with the identification of “pending litigation” on page 30 of the Collective Bargaining Agreement. The instant case on appeal before this Honorable Court was not pending and had not been filed on February 14, 2005. The City could not have contemplated this case been filed since it had negotiated with the MCEO Labor Council to provide bargaining unit members with wage and benefit adjustments to cover the period of time that the MCEO Labor Council had represented them before contract ratification. In light of the then pending *Consolo* litigation, the plain meaning of the provisions in the initial Collective Bargaining Agreement between the parties clearly estop the MCEO Labor Council from using a mandamus action to litigate matters which they have already negotiated in collective bargaining..

At this point the City of Cleveland addresses the Appellant/Relator’s Propositions of Law C & D. In Proposition of Law C Appellant/Relator addresses the characterization by the Court of Appeals of the issues raised in this case as best dealt with in a declaratory judgment action. This reference in passing to the remedy of declaratory judgment actions by the Court of Appeals addresses the Court’s concern that no clear legal rights or clear legal duties had been asserted by Appellant/Relator. There are too many unresolved issues as to the City’s clear legal duties and the clear legal rights of the MCEO Labor Council in light of the effects of the February, 2005 collective bargaining agreement, the 1992 *International Union of Operating Engineers* case, the subsequent contempt motion, and lastly, the *Consolo* case pending during the time of negotiation of the Agreement. (Appellant/Relator’s Exhibit C – Journal Entry and Opinion of Court of Appeals, p. 11.) The Court merely noted that, given the multiplicity of issues raised in multiple litigations and administrative hearings on behalf of the CEO bargaining unit, a declaratory

judgment action to resolve some of the issues as to duties and rights might be the better course of action.

In its Proposition of Law D Appellant/Relator attempts to assert the findings of the State Employment Relations Board, based on its “plenary” powers, regarding the “deemed-certified” status of the International Union of Operating Engineers, as having a bearing on the primary reason why summary judgment was rendered in the City’s favor. As set forth in this Brief on the Merits of Appellee/Respondents’, the primary basis that summary judgment was granted to the City was not the bargaining history between the City of Cleveland and any employee organization that may or may not have properly represented the interests of the Construction Equipment Operators’ bargaining unit prior to the MCEO Labor Council. Rather, the Court of Appeals granted the City’s Motion for Summary Judgment because there was no issue of material fact concerning that collective bargaining between the City of Cleveland and the MCEO Labor Council on the issues of wages and benefits for the period from January 30, 2003 to February 14, 2005. The collective bargaining agreement clearly sets forth the agreed to wage and benefit adjustments for this period. Furthermore, the MCEO Labor Council has already been unsuccessful in pressing the issue of adjustment of the CEOs wages by way of a separate contempt motion filed with this Honorable Court and it is now barred under the doctrine of *res judicata* from further litigating the issue. Lastly, the State Employment Relations Board was the exclusive authority to address the issues related to the extent of coverage of wages and benefits under the Collective Bargaining Agreement.

APPELLANT/RELATOR'S ASSIGNMENT OF ERROR NO. 2:

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

The arguments presented in the introductory text of the Argument and in Propositions of Law Nos. 1 and 2 are incorporated by reference herein as grounds for denial of the Motion for Summary Judgment of the MCEO Labor Council.

Appellee/Respondents' Proposition of Law No. 3: Where Collective Bargaining Has Occurred, R.C. Chapter 4117 Prevails Over Any And All Other Conflicting Laws.

This proposition restates one of the findings in the *Consolo* case. *Consolo*, 103 Ohio St.3d at 367. Under authority of Ohio Rev. Code Chapter 4117 the MCEO Labor Council and the City entered into negotiations that commenced on or about January 30, 2003. These negotiations resulted in the first Collective Bargaining Agreement between these parties, which was ratified on February 14, 2005. The Agreement addressed wage and benefit adjustments for that period preceding ratification when the MCEO Labor Council was the exclusive representative for the CEO bargaining unit.

As this Court noted in *Consolo* "If appellees' compensation levels were the result of collective bargaining under R.C. Chapter 4117, then the city's charter provisions would be inapplicable." *Id.* Since the Collective Bargaining Agreement at issue herein addresses the wages and benefits for the period of time from January 30, 2003 to February 14, 2005, the City's charter provision on the subject does not apply.

In any event, the CEOs are not entitled to payment of wages equivalent to 100% of the prevailing wage rate when they receive fringe benefits for which the law specifically allows a deduction. Whether one looks to the City Charter §191, or the Ohio Supreme Court decision in *State ex rel. International Union of Operating Engineers Local 18, 18 A, 18 B, 18C, 18 RA, AFL-*

CIO v. City of Cleveland (1992), 62 Ohio St.3d 537, the calculation of the compensation to be paid building and construction trades employees in the City of Cleveland begins with the prevailing wage rates set for those employees in the private sector. However, in determining the actual compensation (wages) to be paid these employees the calculation does not end there. The City of Cleveland is entitled to offset from the prevailing wage rate any contribution it makes to provide CEO employees with benefits, to include health care, contributions to retirement plans, (e.g. Public Employee Retirement System), pensions or annuities on retirement, death benefits, compensation for injuries beyond that required by Chapters 4121 and 4123 of the Revised Code, compensation for illness, accidents, sickness, or disability, insurance to provide any of the foregoing, unemployment benefits in addition to those required by Chapter 4141 of the Revised Code, and vacation pay. (Ohio Administrative Code §4101:9-4-07 (A) (3).) The right to offset the cost of these benefits from the prevailing wage rate is not found in City of Cleveland Ordinances alone, but in the very definition of “prevailing wages” set forth in Ohio Rev. Code § 4115.03 (E).⁵ The value of the benefits being provided is specifically incorporated into the calculation of the prevailing wage rate for a classification of workers. An employer who provides such benefits is allowed to offset its contribution and is not required to pay 100% of the established prevailing wage rate as the employee wage. Providing the benefits listed in addition to wages equivalent to 100% of the prevailing wage rate would constitute a duplication of compensation. See: *Stasiuk v. City of Cleveland* (December 4, 1990), Cuyahoga Common Pleas No. 949449, unreported, at page 23, ¶160. (This case is attached to Respondent’s Motion for Summary Judgment, Rec. No.23). In the alternative, an employer that pays wages to building

⁵ In Appellant/Relator’ Motion for Summary Judgment the MCEO Labor Council identifies the City of Cleveland Ordinances which set forth that payment of wages based on 100% of prevailing wage rates will preclude receipt of benefits such as longevity pay, vacation leave, sick leave, holiday pay, life insurance, and health care. Rec. 18, p. 10-11.

and construction trades employees equaling 100% of the established prevailing wage rates does not have to provide those employees with separate benefits.

Appellee/Respondents' Proposition of Law No. 4: The Defense Of *Res Judicata* May Be Raised On Summary Judgment.

Appellant/Relator misstates the law with respect to consideration of the issue of *res judicata* by the Court of Appeals. On pages 25 and 26 of its merit brief the MCEO Labor Council incorrectly argues that *res judicata* may not be raised by motion, when that motion is a Civ.R. 56 motion for summary judgment.

It is true that *res judicata* is an affirmative defense that must be raised in a responsive pleading. Appellee Respondents did so in their 5th affirmative defense in their answer, specifically citing to the applicable cases supporting the defense. (Record No.13, p. 4.), While there is no disagreement here in that *res judicata* may not be raised in a Civ.R. 12 (B) motion to dismiss, *State ex rel. Freeman v. Morris* (1991), 62 Ohio St. 3d 107, 109, this case does not involve a motion to dismiss, rather the issue of *res judicata* was raised and briefed by Appellee/Respondents in their Civ.R. 56 motion for summary judgment. In *Freeman the Court specifically noted* noted that *res judicata* can be raised and decided by a Court in considering a motion for summary judgment. *Id.*

On October 30, 2003, some months after it became the recognized representative for the bargaining unit, the MCEO Labor Council filed a Motion to Show Cause Why Respondents Should Not Be Deemed Contemnors of the Ohio Supreme Court's 1992 writ of mandamus⁶.

⁶ In 1992 a different employee organization acting on behalf of the CEO bargaining unit sought a writ in mandamus from the Ohio Supreme Court seeking recognition that the wage and benefits to be received by the bargaining unit members be based on Ohio's prevailing wage laws. In *IUOE, Local 18 v. City of Cleveland* the Ohio Supreme Court ruled the wages and benefits of this bargaining unit were to be based on Ohio's prevailing wage law and issued a writ in mandamus.

(Rec. No. 23, Exhibit E - Motion to Show Cause, and Exhibit F - Online docket of Ohio Supreme Court Case No. 90-1780.) In their motion to show cause the MCEO Labor Council specifically requested the Ohio Supreme Court to:

“(I)ssue an order requiring Respondents to appear and show cause why they should not be held in contempt of this Court’s mandate to presently and in the future pay prevailing wage rates to those persons whom they employ as construction equipment operators and master mechanics.” (Emphasis added). Rec. No. 23, Exhibit E - Motion to Show Cause at p. 6.

On December 24, 2003 the Ohio Supreme Court granted the motion for order to show cause and thereafter received briefs and exhibits from the parties in order to rule on whether Respondents were in contempt of the Ohio Supreme Court’s 1992 mandamus order. (Rec. No. 23, Exhibit F - Online docket of Ohio Supreme Court Case No. 90-1780.) On April 28, 2004 the Ohio Supreme Court found Respondents were not in contempt of the 1992 mandamus order. (Rec. No. 23, Exhibit G - April 28, 2004 Entry.)

The MCEO Labor Council is now barred from relitigating the issues raised in its unsuccessful Motion to Show Cause under the doctrine of *res judicata*. In *National Amusements, Inc. v. City of Springdale* (1990), 53 Ohio St.3d 60 at page 62 the Ohio Supreme Court found:

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 added.) *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388. "[W]here a party is called upon to make good his cause of action * * *, he must do so by all the proper means within his control, and if he fails in that respect * * *, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties." *Covington & Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus. The doctrine of *res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes." *Brown v. Felsen* (1979), 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767. "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals * * *." *Southern Pacific Rd. Co. v. United States* (1897), 168 U.S. 1, 49, 18 S.Ct. 18, 27-28, 42 L.Ed. 355.

The MCEO Labor Council unsuccessfully pursued prior litigation in the Ohio Supreme Court attempting to obtain the very relief it seeks in this mandamus filing. The Appellant/Relator is barred from relitigating those issues it raised or could have raised in the earlier Supreme Court filing.

The MCEO Labor Council and the City of Cleveland have also negotiated a collective bargaining agreement which specifically addresses wages and benefits for the period of time covered by Appellant/Relator's mandamus action. The filing of this mandamus action is both frivolous and vexatious. Appellant/Relator has pursued plain and adequate remedies at law, through Ohio's Collective Bargaining laws, through negotiation, and through the unsuccessful motion in to show cause filed with the Ohio Supreme Court. It should not be permitted to continue to harass Respondents further with litigation on issues that have been addressed, or could have been addressed, in other litigation and by way of the existing collective bargaining agreement.

CONCLUSION

For the reasons set forth herein, in addition to those originally set forth in the record, particularly in the opinion and judgment of the Court of Appeals and the City of Cleveland's Motion for Summary Judgment (Rec. 23), and Brief in Opposition to Relator's Motion for Summary Judgment (Rec. 29), Appellee/Respondents respectfully requests this Honorable Court to affirm the decision of the Court of Appeals granting Appellee/Respondents' Motion for Summary Judgment and denying Appellant/Relator's Motion for Summary Judgment.

Respectfully submitted

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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant/Respondent City of Cleveland's Merit Brief was mailed via regular U.S. mail on this 23d day of January, 2007, to:

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