

IN THE SUPREME COURT OF OHIO

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

APPELLANT/RELATOR'S REPLY BRIEF TO
APPELLEE/RESPONDENTS' BRIEF ON THE MERITS

Stewart D. Roll (Reg. #0038004) (Counsel of Record)
Patricia M. Ritzert (Reg. #0009428) (Counsel of Record)
25101 Chagrin Boulevard, Suite 350
Cleveland, Ohio 44122-5687
(216) 360-3737
(216) 593-0921 Fax

*Counsel for Appellants
Municipal Construction Equipment
Operators' Labor Council, et al.*

Robert J. Triozzi, Esq., Director of Law (0016532)
Jose Gonzalez (0023720) (Counsel of Record)
City of Cleveland Law Department
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077
(216) 664-2894
(216) 664-2663 Fax

*Counsel for Appellees
City of Cleveland, et al.*

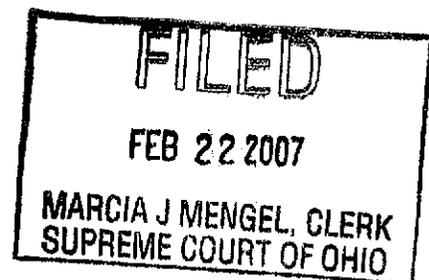


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STATEMENT OF FACTS

SERB Opinion 2004-004 (Supplement to the Briefs (hereafter “Supp.”) at p.103) establishes the following fact:

Between January 30, 2003 and August 5, 2004 Cleveland committed an unfair labor practice when it pretended to bargain with the Municipal Construction Equipment Operators’ Labor Union (hereafter the “CEO Union”), the Appellants herein, but “refused to engage in any give-and-take whatsoever.” *SERB Opinion* 2004-004 at p. 5.

SERB Opinion 2006-008 (Supp. at p. 82) establishes the following facts:

1. The wages of the CEOs were not the result of collective bargaining until after February 14, 2005.

2. The construction equipment operators and master mechanics (hereafter “CEOs”) working for Cleveland were not in a bargaining unit and were not represented by an exclusive bargaining agent until January 30, 2003, when the CEO Union was certified.

3. Cleveland did not enter into a collective bargaining agreement with a bargaining unit of CEOs until February 2005. *SERB Opinion* 2006-008 (Supp. p. 82 at 96).

4. The Cleveland CEOs had no benefits package until February 14, 2005.

During a period when no agreement is in effect between a public employer and employees, state or local laws other than R.C. Chap 4117 control wages, hours, and terms and conditions of public employment. R.C. 4117.10(A). The Cleveland City Charter (Record at no.18, Exhibit 1; Record at no. 30, Exhibit 1; Supp. at p. 1) is such a local law. *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 367 at 367, ¶22. The Cleveland Charter requires that construction trades employees of Cleveland, including construction equipment operators and master mechanics who are plaintiffs in this case (hereafter “CEOs”), be paid at prevailing wage rates. (Record, Id. at sec. 191) Therefore, the CEOs are entitled to be paid at the prevailing wage rate.

The prevailing wage rate is that rate received by private sector workers in the same trade and the same locality, under private sector collective bargaining agreements. For the Cleveland CEOs, the private sector agreement is the Construction Employers' Association Building Agreement with the International Union of Operating Engineers, Local 18 (referred to hereafter as the "Building Agreement") (Record at no. 18, Exhibits 10 and 11; Record at no. 30, Exhibits 2 and 3; Supp. at pp. 33 and 44). The prevailing wage rate requirement is satisfied when gross wages for CEOs are set at the prevailing wage rate in the Building Agreement. *Pinzone v. Cleveland* (1973), 34 Ohio St. 2d 26 at 31.

The wage rates under the Building Agreement are broken into certain components which are listed in the contracts, together with the dollar amount for each component. The components are a Base Rate, Health and Welfare (H&W), Pension, Apprenticeship, and CISP. The prevailing wage rate for the Cleveland area is the sum of the dollar values listed for each component. See Recommendations of SERB-appointed Fact Finder Virginia Wallace Curry at p. 13 (Record at no. 18 Exhibit 12; Supp., p. 65); Inter-Office Correspondence between Cleveland officials¹ containing the true "formula" for the prevailing wage, i.e. 100% of the private sector wage per the Building Agreement (Record at no. 31, Exhibit B; Supp. at p. 22); Cleveland Ordinance 1682-79 (Record at no. 18, Exhibit 2; Supp. p. 6); Affidavit of Santo Consolo containing the 1979 rates referred to in Cleveland Charter sec. 191 (Record at no. 31, Exhibit A; Supp. at p. 9); ruling of SERB in *SERB Opinion* 2006-008 (Supp. at p. 82).

¹ The October, 1993, Inter-Office Correspondence from the Assistant Commissioner to Cleveland's Commissioner of the Division of Water states: ". . . I have been reviewing the contract between the Construction Employee (sic) Association Building Agreement and the International Union of Operating Engineers, which is what was used as the basis for determining the prevailing wages. . . The break down of their salaries is as follows:" The Assistant Commissioner, Nicholas Jackson, then lists all components - 100% - of the rate as it then appeared in the Building Agreement. (Record at no. 31, Exh. 2; Supp. at p.6).

From the gross wage only such payroll deduction as are allowed by law and the consent of the employee may be imposed. A reduction of the gross wage rate below the prevailing wage is improper. The State Employment Relations Board cited and quoted with approval, in *SERB Opinion* 2006-008, the decision of this Ohio Supreme Court in *Pinzone, supra*, as follows: "Permitting an offset for such 'fringe benefits' would necessarily encourage arbitrary and probably inaccurate lowerings of the base municipal wage scale." Cleveland did not appeal that decision. It is now final.

The facts set forth in the evidence demonstrate that during the period January 30, 2003 to February 14, 2005, the Cleveland CEOs, were underpaid by:

- \$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.

(Affidavits of Frank P. Madonia, President of the CEO Union, Record at no. 18 Exhibit 5; Record at no. 30, Exhibit 9; and Supp. at pp. 25 and 30.)

ESSENTIAL CORRECTIONS TO CLEVELAND'S STATEMENT OF FACTS

It is the CEO Union's position that in the absence of a collective bargaining agreement during the period January 30, 2003 and February 14, 2005 the prevailing wage requirement of the Cleveland City Charter is operative, as stated by this court in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St.3d 352 at 367 (¶ 22). The collective bargaining agreement entered into on February 14, 2005 specifically states that it is to have no effect on lawsuits (plural) pertaining to prevailing wage rates, except that an offset against an eventual judgment is permitted for a payment Cleveland is to make following execution of the agreement. That payment was made to acknowledge a pay raise Cleveland withheld during the contract negotiations. See Record no. 22, Exh. D at p. 2.

Although that collective bargaining agreement should have no effect on this case, the

Appellees City of Cleveland, Mayor of Cleveland, and Cleveland City Council (hereafter referred to collectively as “Cleveland”) have so freely misrepresented that agreement, that many corrections need to be made to the alleged factual statements made by Cleveland in its brief on the merits. The number and importance of these corrections is distressing². However, since this case was decided below upon a motion for summary judgment, it is important for this Court to recognize the liberties which Cleveland has taken when making unsupported representations of fact. In particular, when considering Cleveland’s motion for summary judgment directed against the CEO Union, the court below should have, and this Court must, construe all of the evidence most strongly in favor of the non-moving party, i.e. the CEO Union. Summary judgment will not be granted unless, viewing the evidence “most strongly in favor of the party [the CEO Union] 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. The dissenting judge below did distinguish the issues of fact, and concluded that whether the collective bargaining agreement was a settlement of all past claims was not established.

Cleveland invented and inserted a false quotation in its brief.

While purporting to quote a collective bargaining agreement entered into between Cleveland and the CEO Union, Cleveland inserted a fictitious heading as a part of the alleged quotation, which does not appear in the original.

The following section is reproduced here as it appears in the February 14, 2005 collective bargaining agreement:

² The U.S. 6th Circuit noted a similar approach to facts by Cleveland in *Jordan v. Cleveland*, (2006), 464 F. 3d 584. In its opinion, at the very beginning of its statement of the facts in the record, the court said “We are constrained to note that Cleveland’s appellate briefing presented a totally different - an impermissibly one-sided - version of the facts. That does violence to the fundamental principle that ...all reasonable inferences [must be] drawn...” in favor of the opposite party. *Jordan* at 588, fn.2.

“Recognition and Wages

The following job classifications of Construction Equipment Operator Group ‘A’, Group ‘B’ and Master Mechanic are recognized on a sole and exclusive basis, are considered craft positions and shall be paid at the following regular hourly rates:

<u>Time Period</u>	<u>Group A</u>	<u>Group B</u>	<u>Master Mechanic</u>
Effective February 14, 2005	\$28.94	\$28.862	\$29.14
Effective April 1, 2006 (3% general wage increase)	\$29.81	\$29.73	\$30.02

On or about April 1, 2005 (but no later than May 1, 2005) the City shall make a one-time lump sum payment of \$500.00 to each full-time employee (which shall not be rolled into the base wage). 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.)”

Cleveland distorted the last sentences of this section on wages (on page 6 of its brief on the merits) by presenting them as a separate paragraph and inserting a fictitious heading, beginning as follows:

Back pay [this phrase does not appear in the agreement - see above]

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.) [The quoted section is from the middle of the full section quoted on the previous page.]

Cleveland followed the above paragraph with two more purportedly quoted sentences, one

from page twelve of the collective bargaining agreement and another from page eighteen. Cleveland substituted the altered headings “Sick Time” and “Vacation Time” using changed wording and formatting of those headings (flush left and underlined) to match the format of the fictitious heading about back pay, and make them appear as if they were all part of one section of the agreement. Cleveland then placed the quoted sentences and false or substituted headings together in one purported quotation. In the actual agreement, the sentences are separated by 6 or 10 pages. Still further, none of the sentences in the falsely constructed quotation are put in the context of the surrounding language.

The Court is invited to compare the false quotation on pages 6 - 7 of Appellees’ brief on the merits with the actual language in the collective bargaining agreement at pages 1-2, 12, and 18. Cleveland’s misrepresentation was intended to give a reader of its brief the false impression that a section on “back pay” and back benefits was included in the agreement when it was not. In contrast, upon reading the full agreement, one receives no impression that Appellants intended to release or waive all back claims for the prevailing wage or paid sick leave.

The section which covers compensation in the “Recognition and Compensation” section quoted in full above, lists the going-forward wage rates for the various classifications within the bargaining unit. Then, within that provision, Cleveland acknowledges that during the 13 months preceding the approval of the contract, Cleveland did not grant wage increases (i.e. raises) to its CEOs. The payment for the raise the CEOs did not receive in 2004 is specifically stated “**not to be rolled into the base wage.**” [Underlining added.] In fact, the purpose of the paragraph is clear - it was only to give employees the annual increment in wages - a raise - which Cleveland withheld during negotiations. Thus it was not intended to be a correction to base wages. Even though counsel for Cleveland did not participate in the negotiation of the collective bargaining agreement, the

inventions set out above are inexcusable.³

The unrefuted evidence below showed that the CEOs' wages remained between \$4.57 and \$6.97 per hour below the prevailing wage rates throughout the relevant period from January 30, 2003 to February 14, 2005.

Cleveland repeatedly misquotes the limited period for which Cleveland is permitted an offset under the contract.

Specifically mentioned within the agreement is the limited time period for the raise Cleveland withheld: January 1, 2004 through January 31 2005. This is not the relevant period for this lawsuit. The relevant period for this lawsuit is January 30, 2003, the date the CEO Union was certified by SERB, to February 14, 2005, the date a collective bargaining agreement could finally be reached. (See Record at no. 1, Petition for Writ of Mandamus, ¶15) The parties' intended consequence of Cleveland paying, in one sum, the raise the CEOs never got in 2004 (which was not a correction of the base wage) is described on page 30 of the contract. (Record at no. 22, Exhibit D, p. 30). This consequence is that when a judgment is eventually rendered for the underpayment of the CEOs below the prevailing wage rates, the judgment with respect to the limited time period of January 1, 2004 to January 31, 2005 will be offset (reduced) by the small \$2500 payment. The paragraph reads as follows:

The 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.** [Boldface added.]

Throughout its brief on the merits, Cleveland misquotes the period of time printed in boldface above, for which an offset was agreed, against a future judgment. Cleveland asserts

³ Such misstatement is surprisingly consistent with what the U.S. 6th Circuit remarked upon in *Jordan, supra* at p. 596, fn.13: "Cleveland attempts to misstate the record by characterizing the grant of acting time as entirely discretionary. That, however, is belied by the statements [in evidence] and by [its] own policy."

falsely, but repeatedly, that the time period in bold above, and in the quoted section on page 1 of this brief, is **January 30, 2003 to February 14, 2005**, i.e. the full relevant time period for purposes of this case. See Appellee/Respondents' brief on the merits at pp. 1, 4, 6, 8, 9, 12 and 13. Upon each of those pages, Cleveland's misrepresentation is calculated to give a false impression that the agreement was intended to specifically cover the time period relevant to this case, when it was not so intended.

Cleveland blatantly misrepresents its bargaining history.

Without evidentiary support, Cleveland claims to have begun negotiating with the CEO Union immediately upon its certification on January 30, 2003. See Appellee/Respondents' brief on the merits at p. 6. In fact, for six months after the certification of the CEO Union in January of 2003 Cleveland refused to meet and negotiate. The CEO Union filed a Notice to Negotiate pursuant to R.C. §4117.14(B)(2) to force Cleveland to the bargaining table. (Record at no. 18, Exhibit 14, Supp. at p. 100). It is documented in the evidence below and in *SERB Opinion 2004-004*, that Cleveland displayed bad faith by pretending to negotiate while refusing to engage in any give-and-take whatsoever. SERB ruled in *SERB Opinion 2004-004* that Cleveland negotiated in bad faith at the first attempted negotiating session in June of 2003. Thereafter, Cleveland rejected the recommendations of a SERB Fact-Finder, and, as set forth in *SERB Opinion 2004-004*, Cleveland resisted the probable cause ruling of SERB and protested the proposed order of the administrative law judge, until finally Cleveland was found guilty in August of 2004 of an unfair labor practice for bargaining in bad faith. *Id.* This ruling was not appealed by Cleveland and is now final.

Affidavits presented by Cleveland are cited for propositions which they do not support.

On page 2 of the Appellee/Respondents' Brief on the Merits, reference is made twice to affidavits of a William Fadel and a Steven DeLong. In both instances the affidavits, which are in the record, do not contain the statements attributed to them. This Court is invited to examine those

affidavits to discover that the affiant Fadel does not claim that “Local 18” was a bargaining representative for Cleveland CEOs, as alleged by Cleveland. This Court is also invited to examine those affidavits to discover that the affiants do not refer to or describe a “two-part formula” for “adjusting” (read as “lowering”) the prevailing wage hourly rate according to non-existent fringe benefits.⁴

Cleveland insinuated that a lawsuit between it and the CEO Union was docketed in court as of February 14, 2005. This is not true. As of February 14, 2005, no case was docketed in any court between Cleveland and the CEO Union pertaining to prevailing wage rates or outside contracts.

Unfortunately, Cleveland has progressed far in the various legal disputes with its own CEOs on the strength of its unsupported assertions, made with an air of authority and as an arm of local government. Fortunately, when facts are carefully examined the truth becomes evident. This occurred during the hearings before SERB’s administrative law judges that resulted in *SERB Opinions* 2004-004 and 2006-008. It also occurred in the proceedings before the SERB-appointed Fact Finder. The truth also became evident most recently during an arbitration in which the arbitrator ruled that Cleveland was violating the terms of the February 14, 2005 collective bargaining agreement and ordered it to cease and desist.⁵ Cleveland has continued to violate that agreement and has been found in contempt of court for doing so, yet is obstinate in its conduct. See attached rulings of the Cuyahoga County Court of Common Pleas. In the instant case, the CEO Union members ask that this court take the same careful view of the evidence, without deferring to a governmental party’s bald assertions.

⁴Yet again, the U.S. Sixth Circuit remarked on Cleveland’s behavior: “Again, Cleveland’s selective portrayal of the evidence from its own perspective, ignoring the evidence favoring [the opposite party] is impermissible.” *Jordan, supra*, at 596, fn. 16.

⁵ The Arbitrator’s award in favor of the CEOs was confirmed by the Cuyahoga County Common Pleas Court in *Municipal Construction Equipment Operators’ Labor Council v. Cleveland*, Case No. CV-06-592248.

STATEMENT OF THE CASE

The CEO Union appeals both the denial of its motion for summary judgment and the grant, in a split decision, of summary judgment against the CEO Union and in favor of Cleveland. However, it is the order granting summary judgment which was a "final order." As a consequence, this appeal is directed first to the failure of the court below to properly apply Ohio R. Civ. Pro. 56. According to the principles announced by this Court, summary judgment is improper when evidence is not construed most strongly in favor of the non-moving party. The dissent below recognized that genuine issues of material facts exist. Summary judgment will not be granted unless:

"(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.

ARGUMENT IN REPLY

Jurisdiction is Proper in Court for a Writ of Mandamus. Cleveland's argues that simply because collective bargaining took place at some point in time, until an agreement is reached no law protects the employees, and courts are divested of all jurisdiction over any aspect of the employment. This Ohio Supreme Court has already disposed of this argument in the case of *State ex rel. Walker v. Lancaster City School Dist.* (1997), 79 Ohio St. 3d 216 at 218. In that case, not only had collective bargaining occurred, but a collective bargaining agreement was in place for a bargaining unit which included the plaintiff seeking a writ of mandamus. In *Walker*, the public employee claimed that under state law she was due to be credited an additional year of service - leading to a step up in pay. The public employer asserted that she was limited to what remedies might be available under the agreement, which did not include filing suit in court. Justice Cook, in a well-reasoned opinion, observed and explained that the rights which the employee was seeking to enforce

did not arise from the collective bargaining agreement. Rather, the rights arose from applicable state law. Since the employee was not alleging a violation of the collective agreement, but a violation of law, jurisdiction in court was proper and remedies under the contract were inadequate.

In the instant case, during the relevant period of time January 30, 2003 to February 14, 2005, no collective bargaining agreement had been reached, and Cleveland was acting in bad faith during negotiations. Jurisdiction in court is proper to obtain a writ requiring that Cleveland follow its own Charter and pay its employees at 100% of the prevailing wage rates. See also, *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 3d 537. To rule otherwise would allow Cleveland to profit from its bad faith.

Assignment of Error I: THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT

Proposition of Law A: Collective bargaining is not a "remedy at law" for the enforcement of rights under local law.

This issue was settled by this Court in *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 3d 537 at 539. 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 wages in industry.

...
Statutory remedies are not adequate and the [Cleveland] 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]

Proposition of Law B: A contract should be interpreted so as to give meaning to all its provisions.

The majority opinion below adopted an interpretation of the February 14, 2005 collective bargaining agreement which rendered meaningless a paragraph which states that the agreement will have no effect on lawsuits (plural) pertaining to the prevailing wage. The majority limited that provision only to lawsuits which were docketed in a court on the date the contract was signed. It is

undisputed that on that date no lawsuit between the parties to the contract was then docketed in any court. (Record at no. 30, Exhibit 9, Second Affidavit of Frank P. Madonia at ¶8; Supp. At p. 30) Thus, the effect of the court's ruling was to treat the provision as applying to only a situation which did not, could not possibly, exist⁶.

Further, the court's interpretation failed to give effect to the parties' clearly-expressed intent that some aspects of the employment relationship - the payment of prevailing wages under the Cleveland City Charter - should be decided in court rather than by contract. Certainly a court would prefer agreements or settlements to litigation. However, when an agreement cannot be reached, the parties can agree that litigation will be the ultimate dispute resolution method.

Finally, both the majority opinion, and Cleveland, in its argument, have ignored the basic rule that when considering a motion for summary judgment, evidence must be construed most strongly in favor of the party against which the motion is made. *Temple v. Wean, supra*. If the majority below believed that the evidence of the agreement was ambiguous, it was bound to resolve that ambiguity in favor of the CEO Union, when considering Cleveland's motion.

Construing the evidence most strongly in favor of the CEO Union, the conclusion must be reached that all provisions of the agreement are given effect only if the prevailing wage issue proceeds in court to a judgment, against which Cleveland may assert its offset of \$2500.

"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.

⁶ Once again, the observations of the 6th Circuit in the *Jordan* case are consistent, that the Court said "Cleveland has tried to escape that obvious error by arguing" for an interpretation that "impermissibly strains the plain reading of [a rule]. Here, Cleveland strains the plain reading of the agreement, that the parts understanding on the issue of back wages and prevailing wage rates was that it would be decided in "lawsuits."

Proposition of Law C When only a writ of mandamus will compel payment by a public official, declaratory judgment is inadequate. Within a mandamus action, a court has the obligation to determine the facts and to interpret the law.

The majority below abandoned its duty to interpret the law, with the dismissive phrase “it is not clear.” It is obvious from a reading of Cleveland’s brief on the merits that it concedes the points raised in this Proposition of Law. Cleveland’s only response was that the discussion in the majority appellate opinion involving declaratory judgment was only a “reference in passing,” and not the real basis for the ruling of the Court of Appeals. See Appellee/Respondents’ Brief on the Merits at p. 11.

Proposition of Law D: A summary judgment may not be based upon unsupported assertions of fact.

Appellant stands by its argument in its Brief on the Merits. The majority below clearly assumed, without the benefit of any supporting evidence, that some prior agreement controlled the wages of the Cleveland CEOs. Also the majority clearly failed to defer to the emerging decision of SERB, which holds directly to the contrary. Cleveland attempts to downplay the clear statement on page 10 of the Eighth District’s majority opinion that some “status quo terms” from a non-existent prior agreement governed the wages of the CEOs, rather than the City Charter. The dissenting judge, however, realized the importance of the SERB administrative law judge’s decision that the CEOs had no prior exclusive bargaining representative. (Exhibit D to CEO Union’s Brief on the Merits Dissenting Opinion at p. 2). No prior bargaining agent, unit, nor collective agreement existed.

SERB’s decision in *SERB Opinion* 2006-008 is now final. No collective bargaining agreement covered the CEOs either before or during the relevant time period.

Assignment of Error II: THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DENYING RELATOR CEO UNION’S MOTION FOR SUMMARY JUDGMENT

Proposition of Law A Arbitrary reductions in gross wages, before payroll deductions, bring the wage rate below the prevailing wage.

The question of whether Cleveland could set gross wages below the prevailing rate was

addressed in *SERB Opinion* 2006-008. The full State Employment Relations Board adopted with approval the ruling of this Court in *Pinzone v. Cleveland* (1973), 34 Ohio St. 2d 26 at 31 stating:

Permitting an offset for such 'fringe benefits' [against the prevailing wage rate] 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 [of the Cleveland City Charter].

Cleveland has been guilty of attempted arbitrary lowerings of the prevailing wage rate. Cleveland refers to a "two-part formula" by which it purports to reduce the wages of its construction trades employees, yet it has never set out such a "formula." Cleveland has asserted that it should be able to reduce the gross wages of employees entitled to the prevailing wage rate by the amount of nonexistent "fringe benefits" which it does not name. In fact, both Cleveland's ordinances (Recorded at no. 29, Exhibit 13, Chap. 13, Employment Provisions of Cleveland Codified Ordinances), and the Sworn Admissions of its Chief Personnel Management (Record at no. 30, Exhibit 8; Supp. At p. 117), as well as the final decision of SERB in *SERB Opinion* 2006-008 (Supp. At p. 82) all establish that Cleveland CEOs did not receive "fringe benefits," nor paid sick leave.

The record of evidence in this case supports only the proposition that the gross wages of the CEOs should be equal to 100% of the prevailing wage rate in the Building Agreement. This was the decision of a Fact-Finder appointed by SERB during the attempted negotiations with Cleveland. (Supp. at p.65; Record at no. 29 the CEO Union's Motion for Summary Judgment, Exhibit 12, Report and Recommendations of Fact-Finder Appointed by SERB at p. 13 "Recommendation: ... the prevailing hourly wage rate shall be determined by adding the basic wage rate, plus a health and welfare component, plus a pension component, plus apprenticeship, plus CISP."). Thus, Ms. Wallace-Curry states as her recommendation that "the prevailing wage rate is 100% of the sum of all components of the wages appearing in the . . . Building Agreement." *Id.* at p. 13. Ms. Wallace-Curry's decision is in agreement with the decision in *Pinzone*, quoted above.

In 1993, Cleveland was in agreement with SERB's Fact-Finder and with this Court's ruling

in the *Pinzone* case, with respect to the inclusion of all components of the prevailing wage. This is shown in the Inter-Office Correspondence between the Commissioner of Cleveland's Division of Water and his Assistant Commissioner, in which he clearly includes every component (100%) of the prevailing wage rate in the Building Agreement, when calculating the gross wages due to the CEOs. (Record at no. 31; Exhibit B, Memo from Asst. Water Comm'r to Water Comm'r; Supp. at p. 22.)

Local 18 urged SERB to adopt the recommended decision of the administrative law judge in *SERB Opinion* 2006-008 which included the findings that CEOs did not get fringe benefits, and approved *Pinzone*. (Motion by Local 18, Exhibit I to Appellant's Brief on the Merits.) The SERB Fact-Finder, the *Pinzone* case, the 1993 Cleveland Water Commissioner, and *SERB Opinion* 2006-008, are all in agreement with Local 18 which is a party to the private sector Building Agreement.

Still further, the evidence below includes sworn admissions by Cleveland's Chief of Personnel Management that CEOs did not receive fringe benefits. Cleveland had no excuse for paying them less than 100% of the prevailing wage.

Cleveland's argument stretches credulity beyond all limits, that a single \$2500 payment for the raise it withheld during negotiations in 2004, which "shall not be rolled into the base wage," was full payment for decades of avoiding its prevailing wage and sick leave obligations. The failure to pay wages for several years was not cured with a one-time payment acknowledging "no wage increases" during the 13 months from "January 30, 2004 through January 31, 2005." For one man for one 2000-hour year, a wage shortage of \$4.57 per hour robs him of \$9,140. A wage shortage of \$6.97 per hour for a year deprives him of \$13,940. Cleveland's theory of settlement is simply not reasonable.

Settlement language must be clear. No settlement language appears in the collective bargaining agreement. The burden of proving "accord and satisfaction" is upon the party pleading it as an affirmative defense. In order to obtain a summary judgment, Cleveland has the burden of producing language which releases or settles a claim and as to which no issue of material fact exists.

“A settlement agreement itself is a contract designed to terminate a claim by preventing or ending litigation...” 15 Ohio Jur.3d Compromise, Accord, and Release §70, p.786 (2006). No language in the collective bargaining agreement purports to prevent or end litigation. No language in the agreement releases or waives claims, and no language in the agreement designates any part of it as “payment-in-full” for past claims.

To the contrary, the language of the agreement clearly anticipates that “lawsuits” (plural) or “litigation” will proceed to judgment. (Recorded at no. 22, Exhibit D, at p. 30). In the same paragraph, Cleveland is permitted, by agreement, a limited offset against an eventual judgment. *Id.* Thus the language of the agreement expresses the intent of the parties that, having bargained, the issue of back wages at prevailing wage rates will need to be resolved through litigation. This Court should give effect to that intent. After a judgment is rendered Cleveland will take an offset against the judgment in the amount of \$2,500 as permitted on page 30 of the agreement.

Proposition of Law B: R.C. §§124.38 and .39, providing the accrual of paid sick leave, remain applicable in the absence of a collective bargaining agreement, pursuant to R.C. §4117.10(A).

Although it is true that R.C. Chapter 4117 overrides other laws, R.C. §4117.10(A) itself decrees that in the absence of a collective bargaining agreement, local and state laws outside of Chap. 4117 remain operative. The Cleveland City Charter and general state laws for the welfare of employees, such as the sick leave provisions of R.C. §§124.38 and 124.39 apply to the CEOs. See Ohio Const. Art. II, Sec. 34; *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St.3d at 539:

When negotiations between 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, as provided in to R.C. §4117.10(A), *State ex rel. IUOE v. Cleveland* (1992) 62 Ohio St. 3d 537; 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.

A municipality may not, by ordinance, eliminate sick leave required under a state law providing for the health, safety and general welfare of all employees.

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

This issue was thoroughly discussed in the Brief on the Merits. Cleveland ignores the fact that the instant action is not seeking a contempt ruling for Cleveland's failure to obey the 1992 writ of mandamus. In light of Cleveland's new and novel contentions, we are now litigating whether a writ of mandamus should issue today, to correct the under payments during January 30, 2003 to February 14, 2005.

Proposition of Law D: A Court may not base a summary judgment upon the assumed existence of an agreement which is not in evidence.

In its brief on the merits, Cleveland appears to have abandoned its argument that the CEOs' wages were covered by some earlier collective bargaining agreement. Indeed, it can hardly argue otherwise, having failed to appeal *SERB Opinion 2006-008*.

Cleveland has raised an inapplicable chapter of the Ohio Revised Code, ie. Chap 4115, the prevailing wage law. Cleveland Charter §191 does not make reference to the state prevailing wage law, but to the wage rates established by the Cleveland City Council. This Court noted in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St.3d 362 at 368 (¶22) that it has already "expressly held" that R.C. 4115.03 is not applicable to a charter city's classified civil service employees, such as the CEOs. Still further, it is set out in the record and has already been expressly held by SERB that Cleveland's CEOs did not receive "fringe benefits" nor paid sick leave.

Cleveland, again, blatantly misstates in its brief on the merits the holding of this Court in *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio st.3d 537. Cleveland falsely asserts that this Court "ruled the wages and benefits of the bargaining unit were to be based on Ohio's prevailing

wage law and issued a writ..” Appellee/Respondents’ brief on the merits at p. 15, fn. 6. This Court did not so rule. This Court’s decision was squarely based on the city charter, not state law:

“ . . . the city charter, in the light of R.C. 4117.10(A), identifies a clear legal right to the relief sought . . .” *State ex rel. IUOE, supra.*

No mention is made of “benefits,” nor of the prevailing wage law.

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 states:

“Laws may be passed fixing and regulating a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the Constitution shall impair or limit this power.”

This Court could not have stated the meaning of this provision more clearly than it did in *State ex rel. Adkins v. Sobb* (1986), 26 Ohio St.3d 46. In that case a charter city attempted to ignore R.C. §9.44, and disregard the years policemen served in state employment when figuring vacation leave. Relators sought a writ of mandamus requiring the city to include state service. The writ was granted because Article II, Sec. 34 of the Ohio Constitution gives state laws providing for the general welfare of all employees precedence over laws enacted under the home rule power of municipalities in Ohio. The municipal ordinance which disregarded a state law was invalid.

Cleveland has no answer to this argument. Rather than attempt to justify its denial of statutorily guaranteed (and therefore constitutionally guaranteed) paid sick leave, Cleveland instead asserts that the “kicker” of 3 sick days and two weeks vacation given in the 2005 collective bargaining agreement constituted a settlement of Cleveland’s wrongful failure to provide paid sick leave to these employees as mandated by R.C. §124.38. The collective bargaining agreement did not so state. No part of the February 2005 agreement should affect this litigation, neither as an admission of liability by Cleveland, nor as a waiver of rights by the CEOs.

Unlike “fringe” benefits of employment, R.C. §§124.38 and 124.39 do not allow a public employer discretion as to whether to provide paid sick leave. *Ebert v. Bd. of Mental Retardation*

(1980), 63 Ohio St. 2d 31, stating:

“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

See also *South Euclid Fraternal Order of Police v. D’Amico* (1983) 13 Ohio App. 3d 46 at 47 (Cuy. Cty.). Cleveland attempted to change what the legislature provided as the irreducible minimum of paid sick leave, for the well-being of public employees. For a Cleveland CEO, paid sick leave did not exist. When a construction equipment operator was ill or injured, he could request time off. If he was sick for one day out of a week, he was only paid for 32 hours that week. If he missed two months of work for a severely broken leg, he received no paycheck for two months. When Mr. Frank Madonia was required to take time off to care for his wife who was seriously ill, he received no paycheck. In fact, he had to borrow money so that he could pay the full premium for health insurance coverage, since Cleveland paid nothing toward his medical coverage. (Record at no. 30, Exh. 9 Second Affidavit of Frank P. Madonia; Supp. at p. 31.)

PREJUDGMENT INTEREST

“[I]n determining whether to award prejudgment interest, a court need only ask one question: has the aggrieved party been fully compensated?” *Royal Elec. Constr. Corp. V. Ohio State Univ.* (1995), 73 Ohio St. 3d 110 at 116. The Second District explained that this rule is to be read “very broadly” and applied to all types of cases. *Heinz v. Steffen* (1996), 112 Ohio App. 3d 174 at 187.

An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing legitimate claims. . . . At the moment the cause of action accrued, the injured party was entitled to be left whole and . . . to be made whole. * * * All damages then, whether liquidated or unliquidated, . . . should carry interest from the time the cause of action accrues.” *Royal Elec.* at 116-117; *Heinz v. Steffen* at 188.

The gravamen of these two cases is that prejudgment interest is not awarded to punish a debtor for failing to pay a ascertainable or liquidated amount. Rather, prejudgment interest on money not paid when due is simply justified as a necessary part of compensation which will make the aggrieved

party whole. For example, a plaintiff who was underpaid by \$5 a half-decade ago is not made whole today unless he receives \$5 plus a half-decade of interest on that sum. Clearly, the CEOs will not be fully compensated unless they receive interest on wages from the respective payroll dates.

CONCLUSION

A writ of mandamus will issue when a party establishes that it has a clear legal right, that the respondent has a clear legal duty in response to that right, and the plaintiff has no other plain and adequate remedy at law. R.C. §§2731.01-.05. It is proven that Cleveland has failed to pay the CEOs at the prevailing wages rates, and that it has failed to provide paid sick leave. Mandamus 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.

The Cleveland CEOs have a clear legal right under Cleveland City Charter sec. 191 to be paid at prevailing wage rates (Supp. at p.1), and have the right under R.C. §§124.38 and 124.39 and Ohio Const. Art. II, Sec. 34 to be paid for sick leave.

Cleveland, through its mayor and council, are given the duty by the Cleveland Charter Sec. 191 to establish a wage schedule for the construction trades employees at prevailing wage rates, cause the payment of wages, and pay for sick leave. Thus Cleveland has a clear legal duty, enforceable in mandamus, to pay Appellant's members what they are due.

Cleveland has shown that it will bargain in bad faith, will misquote its agreements, and attempt to avoid complying with the prevailing wage requirement of its own Charter. Therefore, the CEO Union, on behalf of its members, asks that this court issue an order and writ of mandamus as prayed for in its Petition for a Writ of Mandamus (Record at no. 1) and in its Brief on the Merits, filed herein.

Respectfully Submitted,

Patricia Ritzert

STEWART D. ROLL (Reg. #0038004)

PATRICIA M. RITZERT (Reg. #0009428)

Persky, Shapiro & Arnoff Co., L.P.A.

Signature Square II

25101 Chagrin Boulevard, Suite 350

Beachwood, OH 44122

Phone: (216) 360-3737

Fax: (216) 593-0921

***Representing Municipal Construction Equipment
Operators' Labor Council***

CERTIFICATE OF SERVICE

A copy of the foregoing Appellants/Relator Reply Brief was served upon the following this

21st day of February, 2007 via regular U.S. mail:

Jose Gonzalez, Esq.
Theodora Monegan, Esq.
Robert Triozzi, Esq.
City of Cleveland, Department of Law
601 Lakeside Avenue
Cleveland, OH 44114.

Lindsay Williams,
Assistant Attorney general
Constitutional Office Section
30 E. Broad Street
Columbus, OH 43215-3428

Patricia Ritzert

STEWART D. ROLL (Reg. #0038004)
PATRICIA M. RITZERT (Reg. #0009428)
Persky, Shapiro & Arnoff Co., L.P.A.
Signature Square II
25101 Chagrin Boulevard, Suite 350
Beachwood, OH 44122
Phone: (216) 360-3737
Fax: (216) 593-0921

*Representing Individual Relators and
the Municipal Construction Equipment
Operators' Labor Council*

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MUNICIPAL CONSTRUCTION)	CASE NO. CV-06-592248
EQUIPMENT OPERATORS')	
LABOR COUNSEL,)	
)	
Plaintiff)	JUDGE DICK AMBROSE
)	
-vs-)	
)	
CITY OF CLEVELAND, OHIO, et al.)	<u>JUDGMENT ENTRY</u>
)	
Defendants.)	

{¶1} Before the Court is the City of Cleveland and Mayor Frank Jackson's ("Defendants") written proposal in response to the Court's order, journalized on November 20, 2006, requiring Defendants to provide the Court with a written proposal for not assigning craft jurisdiction work to Non-Municipal Construction Equipment Operator Employees by December 8, 2006. Defendants responded as directed on December 8, 2006, by filing what they captioned: *Defendants' Written Proposal to Comply with the Arbitration Award Issued May 15, 2006 by Calvin W. Sharpe* ("Defendants' Proposal"). Plaintiff responded on December 13, 2006 with *Plaintiff's Objections to and Proposed Modification of Defendants' Proposal to Purge Their Contempt* ("Plaintiff's Objections"). On December 15, 2006, Defendants filed *Defendants' Reply to Plaintiffs' Objections and Proposed Modification of the City's Proposal* (Defendants' Reply). On December 19, 2006 Plaintiff filed a *Motion to Strike Defendants' Reply and Alternative Motion for Leave to Respond to Reply*.

{¶2} The Court first notes and admonishes Defendants for failing to comply with Civil Rule 5(D) as the Certificate of Service on both Defendants' Proposal and Defendants' Reply does not list the date of service. In Plaintiff's Objections, counsel for Plaintiff notes that Defendants' Proposal was not mailed to counsel until December 11, 2006, three days after filing. In addition, Counsel for Plaintiff also points out that Defendants have also failed to comply with Civil Rule 11(D)

ALL-STATE LEGAL®
Exhibit

regarding leave to file Defendants' Reply. Ignorance or neglect of proper procedure will not be tolerated in this matter and any further failures by Defendants to comply with the Civil Rules will result in monetary sanctions against counsel.

{¶3} Defendants spend a considerable portion of both Defendants' Proposal and Defendants' Reply reciting the history of the collective bargaining and grievance process that placed this dispute before the Court and re-asserting their position that compliance with the Arbitrator Sharpe's decision does not vest the MCEO union with exclusive jurisdiction over work falling within its craft jurisdiction. In ordering Defendants to produce a written proposal for not assigning craft jurisdiction work to non-MCEO union employees, the Court is requiring Defendants to do what they have failed to do up to this point in time — that is, abide by the ruling of Arbitrator Sharpe. In response, Defendants' offered a four-point proposal that, in the Court's view, does not go far enough to address the need for written guidelines on this issue. Therefore, in accordance with its previous Order, the Court modifies Defendants' Proposal as follows:

- 1) Beginning with the Journalization of this Order, the City of Cleveland will schedule all heavy construction equipment assignments seven days in advance of the job for all jobs anticipated to require more than one-half days work and will notify MCEO union employees of these assignments. This requirement is not subject to limitation based on specific operating divisions within the City. However, the City is not required to offer work assignments to MCEO union employee's who are not otherwise qualified to perform the work in question (i.e. the City is not required to offer assignments as boom truck operators to MCEO employees who do not have high-tension line work experience, assuming such experience is necessary to perform the work).
- 2) Assignments that require use of heavy equipment for emergencies or that cannot be reasonably scheduled at least two days in advance may be assigned to non-MCEO union employees if MCEO union employees are not readily available for assignment at that time.

3) Assignment of available overtime for the operation, maintenance, repair, erection or dismantling of equipment within the craft jurisdiction of MCEO union employees will be made to available MCEO union employees whenever practicable.

4) (Eliminated).

{4} In order to purge their contempt, Defendants are to comply with the above orders as indicated or risk sanctions in the amount of \$1000.00 per day. This Order is subject to further modification by the Court and may be superseded by an agreement of the parties as to the issues raised herein.

IT IS SO ORDERED!

DATE: 12/19/06



JUDGE DICK AMBROSE



41587740

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MUNICIPAL CONSTRUCTION EQUIP.
Plaintiff

Case No: CV-06-592248

Judge: DICK AMBROSE

CITY OF CLEVELAND ETAL
Defendant

JOURNAL ENTRY

96 DISP.OTHER - FINAL

9-28-06. AFTER HEARING IN OPEN COURT AND ON THE RECORD AND AFTER CONSIDERATION OF PARTIES BRIEFS AND ARGUMENTS, COURT HEREBY DENIES DEFENDANTS MOTION TO VACATE ARBITRATION AWARD (FILED 8-07-06). COURT GRANTS PLAINTIFF'S REQUEST MADE PURSUANT TO ORC 2711.09 FOR AN ORDER CONFIRMING ARBITRATION AWARD. ARBITRATOR'S DECISION AND AWARD OF MAY 15, 2006 IN THE MATTER OF THE ARBITRATION BETWEEN MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS' LABOR COUNCIL AND CITY OF CLEVELAND, WHICH IS ATTACHED TO PLAINTIFF'S COMPLAINT AS EXHIBIT B, IS CONFIRMED AS A JUDGMENT OF THIS COURT.
COURT COST ASSESSED TO THE DEFENDANT(S).

Judge Signature

09/28/2006

- 96
09/28/2006

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FEDERAL MEDIATION AND CONCILIATION SERVICE

In the matter of the arbitration between

Municipal Construction Equipment
Operators' Labor Council

and

City of Cleveland

FMCS Case No. 558710

ARBITRATOR'S DECISION AND AWARD

Stewart D. Roll
Persky, Shapiro & Arnoff Co., L.P.A.
For the Union

Jose M. Gonzalez
Assistant Director of Law
For the City

Calvin William Sharpe
Arbitrator

May 15, 2006



Municipal Construction Equipment Operators' Labor Council (Union) has filed a grievance against the City of Cleveland (City) protesting the City's use of construction equipment. The City has denied the grievance. Dissatisfied with earlier relief the Union has now brought the matter to arbitration. Hearings were held on January 12 and 13, 2006, in Cleveland, Ohio.

I.

STATEMENT OF THE CASE

A.

ISSUES

1. Is the grievance substantively arbitrable?
2. If so, did the City violate the Agreement by permitting non-unit employees to operate and maintain construction equipment?
3. If so, what is the appropriate remedy?

B.

**RELEVANT PROVISIONS OF THE FEBRUARY 14, 2005 - MARCH 31, 2007
AGREEMENT**

Craft Jurisdiction

The City agrees to abide by the Cleveland Civil Service Commission description of work to be assigned to employees who are members of the CEO Union, and will attempt not to assign work falling within their craft jurisdiction to other City employees. Further, in cases of emergencies, overlapping, or ambiguous descriptions of work assigned to a particular craft or other City employees, there shall be no interruption of work. The CEO Union may file a grievance at Step 2 of the Grievance Procedure for resolution of the matter.

Civil Service Commission Description

IV.

AWARD

For reasons fully set forth in the preceding section, the grievance is sustained. The City shall cease and desist forthwith from violating the Craft Jurisdiction provision of the parties' Agreement.



CALVIN WILLIAM SHARPE
ARBITRATOR

5/15/06

DATE