

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL)
CONSTRUCTION EQUIPMENT)
OPERATORS' LABOR COUNCIL, et al.)

Relators)

vs.)

CITY OF CLEVELAND, et al.)

Respondents)

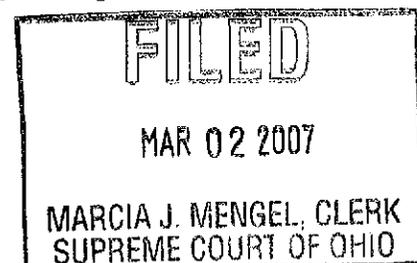
CASE NO. 2006-2056

ORIGINAL ACTION IN MANDAMUS

RELATORS' MOTION TO STRIKE AND REMOVE
EXHIBITS 1, 3, 4, 5, AND 7 TO 13
FROM RESPONDENT'S EVIDENCE

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MOTION TO STRIKE EVIDENCE

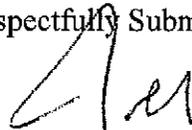
Relator Municipal Equipment Operators Labor Council and the individually-named Relators (collectively the "CEO Union") move this Court for an entry that strikes and orders Exhibits 1, 3, 4, 5, and 7 to 13 to be removed from Respondent's Evidence filed herein on February 23, 2007 by Respondents, City of Cleveland, its mayor and city council (collectively, "Cleveland"). The bases for this motion are that:

A – Exhibits 3 and 4 in Respondent's Evidence are affidavits which are not based upon personal knowledge, are over three years old, and are based upon premises determined to be false by the Ohio State Employment Relations Board (hereafter "SERB") in *SERB Opinion 2006-008*.

B – Exhibits 1, 5, 7, and 8 are legal arguments, with no evidentiary content, which were copied from briefs drafted by the Cleveland Law Department attorneys and submitted in other cases.

C – Exhibits 9-13 are not authenticated copies, and are not relevant to the instant case.

Respectfully Submitted:



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BRIEF IN SUPPORT

A. The Affidavits.

Exhibits 3 and 4 are respectively, the affidavits of Steven DeLong, Business Agent for International Union of Operating Engineers, Local 18 and William Fadel an attorney for Local 18. The described exhibits are not made upon personal knowledge as required by Sup. Ct. Rule Prac. X, sec. 7, are dated over three years ago, and are based upon assumed factual premises which were found to be false in *SERB Opinion 2006-008*, which is included in Relators' Evidence as Exhibit "C" and is attached hereto.

Cleveland had every opportunity to submit proper evidence, during the time originally allotted plus the 10 day extension granted by this Court's order. Properly-authenticated documents or affidavit testimony are required by Ohio Sup. Cr. R. of Practice X sec. 7. In opposing the requirement of the Cleveland City Charter, requiring the payment of wages to building trades employees at prevailing wage rates, Cleveland is constrained to follow, not only the Civil Rules of Evidence, but also the rules of this Court. As this Court decided in *State ex rel. Sekermestrovich v. Akron* (2001), 90 Ohio St. 3d 536. "Affidavits filed in original actions must be based on personal knowledge. *Sekermestrovich* was a mandamus action in which the Court rejected affidavits submitted as evidence which were clearly not based upon personal knowledge, resulting in a ruling in favor of the opposite party. Similarly, this Court rejected claims which were not supported by affidavits which were not based upon personal knowledge, but upon "information and belief."

The affidavits submitted by Cleveland are dated over three years ago, are not stated to rest upon personal knowledge, and do not appear upon their faces to have been made upon personal knowledge. Since the time those affidavits were sworn, much information has been discovered which makes the use of those sworn statements suspect. Those affidavits were rejected by a SERB-

appointed Fact-Finder as a sufficient basis for making a recommendation. The Fact Finder's Report and Recommendations dated May 10, 2004, is included in the evidence submitted herein by Relators as Exhibit K, (see page 14, text and footnote) and is attached hereto. The same affidavits were stricken from evidence by this Court in Case no. 90-1780, where they were submitted as Exhibits I & J, as discussed below under argument B below. Perhaps most importantly, the affidavits of Messrs. DeLong and Fadel reveal within their own statements that they rest upon a demonstrably false premise. After the date of the proffered affidavits, SERB ruled that IUOE Local 18 was never a collective bargaining agent for Cleveland's construction equipment operators and master mechanics. Mr. DeLong's affidavit, as well as Mr. Fadel's affidavit depend heavily upon this alleged "fact." A hearing on this question and related issues, was held pursuant to this Court's decision in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362. In *SERB Opinion 2006-008*, (attached hereto as Exhibit "C".) SERB stated that: (a) Local 18 was never a bargaining representative for Cleveland's CEOs; (b) wages of the CEOs were never the result of collective bargaining before February of 2005; (c) no package of benefits was in place for the CEOs before February of 2005; and (d) that Local 18's role had simply been to inform Cleveland of the rates negotiated in private sector contracts.

These conclusions of SERB were explicitly supported by one of the affiants in the proffered affidavits, William Fadel on behalf of IUOE Local 18. Included in Relators' Evidence as Exhibit "E" is a motion by William Fadel asking that SERB adopt specifically the recommended decision of an administrative law judge which is incorporated in *SERB Opinion 2006-008*. A copy of Mr. Fadel's motion is attached hereto. The submission of the proffered conclusory affidavits, made over three years ago without personal knowledge, and since proven wrong in certain respects, would deprive Relators of the important opportunity to cross-examine the affiants. Having been given

sufficient notice and additional time, Cleveland can be expected to have brought its evidence into conformity with law, and to have obtained current statements.

B. The Legal Arguments Submitted as Evidence.

Exhibits 1, 5, 7, and 8 are excerpts of briefs containing legal arguments, which were written on behalf of Cleveland by Cleveland Law Department lawyers. It is well known that the arguments of lawyers are not evidence. *Pollard v. Hunt* (2005), 164 Ohio App.3d 353 (2nd Dist.); *State v. Luckett* (2001), 144 Ohio App.3d 648 (8th Dist.). Cleveland's inclusion of legal arguments in its purported submission of "evidence" constitutes an effort to circumvent the page-limit restrictions of this Court for briefs, and/or to present arguments in advance of the briefing schedule. The findings of a court, or other tribunal with jurisdiction, define the scope of a ruling. The arguments or statements made by lawyers in a case are, by their nature, intended to be self-serving. Those statements are not, in themselves, proof of a conclusion. As lawyers we are trained to seek to convince the decider-of-facts that our cause is just. One hopes that this is done in an honest and open manner, but the arguments are nevertheless intended to be persuasive and self-serving by their very nature. It is not wrong to recognize this, but we should also recognize that that fact well-justifies the rule in our jurisprudence, that these arguments may not be taken as evidence. Experience in the field of litigation repeatedly shows that the gravamen of a court's decision does not always agree with the points most heavily stressed by the lawyers as advocates for their clients. Consequently, Exhibits 1, 5, 7, and 8, all of which are entirely composed of legal argument, should be stricken from the "Evidence" submitted by Cleveland.

Further, Exhibit "1" offered by Cleveland is a reply brief it submitted in Supreme Court Case No. 90-1780. The reply brief includes two attached Exhibits, "I" & "J" which in turn have further attachments from yet another individual. Those purported Exhibits "I" & "J" were themselves

stricken by this Court from the evidence in Case No. 90-1780. Still further, those Exhibits "I" & "J", dated February 3, 2004, are identical to the proffered Exhibits "3" & "4" in the instant case. Those affidavits are themselves subject to being stricken, as discussed above, because they are not based upon personal knowledge, are stale, and rest upon demonstrably false premises.

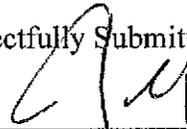
C. The Labor Contracts.

Cleveland's Exhibits 9 through 13 purport to be copies of labor contracts. No authentication of these copies is offered within the evidence submitted by Cleveland. This Court's decision in *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St.3d 357 is submitted by Cleveland as its Exhibit "2". The labor contracts attached by Cleveland as Exhibits 9 to 13 are not the labor agreements to which this Court refers in that opinion as being the source of prevailing wage rates. *Id.* at 358. "Evidence which is not relevant is not admissible." Evid. R. 402. Consequently, Relators ask that this Court strike and remove Exhibits 9 to 13, as no other admissible evidence demonstrates that they have any relevance to this matter, and they are not authenticated.

CONCLUSION

For all of the reasons set forth above, the CEO Union prays that the Court will issue an Entry that strikes Exhibits 1, 3, 4, 5, and 7 to 13, and orders that they shall be removed from the Evidence filed by Cleveland.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing "Motion to Strike and Remove From Exhibits 1, 3, 4, 5 and 7 to 13 From Respondent's Evidence," has been served via regular U. S. Mail upon the following this 1st day of March, 2007:

Robert Triozzi, Esq.
Theodora Monegan, Esq.
William Sweeney, Esq.
City of Cleveland, Department of Law
City Hall
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
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30 E. Broad Street, 17th Floor
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LIST OF EXHIBITS

- C. *SERB Opinion 2006-008* In the Matter of Municipal Construction Equipment Operators' Labor Council, IUOE Local 18, and the City of Cleveland, – making findings of fact and conclusions of law to answer questions presented in *State ex rel. Consolo v. Cleveland*, (2004) 103 Ohio St. 3d 362.
- E. Motion by William Fadel on behalf of Local 18, filed August 31, 2006, for SERB to adopt the Recommended Determination of Administrative Law Judge Beth Jewell.
- K. Report and Recommendations of SERB Fact Finder Virginia Wallace-Curry, dated May 10, 2004.

EXHIBIT "C"

SERB Opinion 2006-008 in SERB Case No. 2002-REP-06-0116

Directive making findings of fact and conclusions of law – as indicated by the Ohio Supreme Court in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St.3d 362

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.

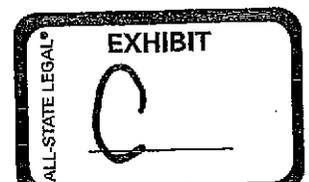
Case No. 2002-REP-06-0116

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.

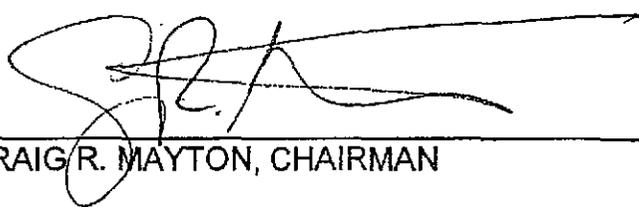
On February 6, 2006, a hearing was held. Subsequently, all parties filed post-hearing briefs. On July 20, 2006, a Recommended Determination was issued by the Administrative Law Judge. On August 16, 2006, the City of Cleveland filed exceptions to the Recommended Determination. On August 29, 2006, MCEOLC 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.

EXHIBIT "E"

**Motion by Local 18 , filed August 31, 2006, for SERB to Adopt the Recommended
Determination of Administrative Law Judge Beth Jewell**

- Wages of Cleveland CEOs were not the result of collective bargaining until the CEO concluded a Contract in 2005
- No collective bargaining agreement covered the Cleveland CEOs
- No benefit package had been negotiated nor implemented for Cleveland CEOs
- Cleveland CEOs had no exclusive bargaining representative until the CEO Union was elected in 2003

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

MUNICIPAL CONSTRUCTION)	CASE NO. 02-REP-06-0116
EQUIPMENT OPERATORS')	
LABOR COUNCIL)	
)	
Employee Organization,)	BETH A. JEWELL
)	Administrative Law Judge
and)	
)	
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS,)	
LOCAL 18)	
Employee Organization,)	
)	
and)	
)	
CITY OF CLEVELAND)	
)	
Employer.)	

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



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EXHIBIT "K"

SERB Fact Finder's report from Virginia Wallace-Curry dated May 10, 2004

STATE EMPLOYMENT RELATIONS BOARD

May 10, 2004

In the Matter of the Fact-finding Between:

CITY OF CLEVELAND)

And)

MUNICIPAL CONSTRUCTION EQUIPMENT)
OPERATORS' LABOR COUNCIL)

SERB Case No. 03-MED-06-0685

APPEARANCES

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Outside Counsel
Asst. Director of Law
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Commissioner of Division of Water
Director of Public Service

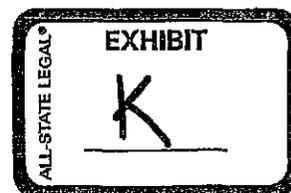
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Treasurer, CEO Group A
Witness, CEO Group B
Secretary, CEO Group A
Vice-President, CEO Group A
Witness, CEO Group B
Witness, CEO Group A
Witness

Fact-finder

Virginia Wallace-Curry



INTRODUCTION

This matter concerns the fact-finding proceeding between the City of Cleveland, (the "City") and the Municipal Construction Equipment Operators' Labor Council (the "Union" or "MCEO Union"). The bargaining unit consists of approximately 50 construction equipment operators and master mechanics. The parties are negotiating their first collective bargaining agreement. For many years, the equipment operators and support personnel were represented by the International Union of Operating Engineers Local 18 ("Local 18"). However, Local 18 was never "certified" as the union's representative, and the City and Local 18 never entered into a collective bargaining agreement.

In attempting to negotiate their first collective bargaining agreement, the City and the new MCEO Union met in June 2003. After one negotiating session, the negotiations were shut down by the Union. They recommenced in November 2003. After two meetings, the parties believed they reached a Tentative Agreement on all issues on December 9, 2003. However, the City disagreed with the Union's draft of the Agreement regarding the Recognition and Craft Jurisdiction sections of the Tentative Agreement. When the parties were unable to reach agreement on those issues, the City stated that the Tentative Agreement was no longer viable and reopened several issues for Fact-finding.

Virginia Wallace-Curry was appointed Fact-finder in this matter by the State Employment Relations Board. A fact-finding hearing was held on March 11 and March 12, 2004, at which time the parties were given full opportunity to present their respective positions on the issues. The fact-finding proceeding was conducted pursuant to Ohio Collective Bargaining Law and the rules and regulations of the State Employment Relations Board, as amended.

In making the recommendations in this report, consideration was given to criteria listed in Rule 4117-9-05 (K) of the State Employment Relations Board.

BACKGROUND

Historically, the wages of this bargaining unit were set by the City's Charter, because there was no collective bargaining agreement. The City's Charter requires that they be paid a "prevailing wage rate" as established by industry contracts in the geographic area. Hence, the City's equipment operators were paid a rate commensurate with private industry, and, like construction equipment operators in the private sector, they did not receive benefits, such as vacation, sick leave, longevity and health care.

In 2003, the equipment operators voted in the MCEO Union as its bargaining representative. It did not become a member of the Building Trades Council, a group of trades unions representing City employees which bargain together and have a single joint collective bargaining agreement. The MCEO Union and the City began negotiations for their own separate agreement in June 2003.

The parties believed they reached a Tentative Agreement in December 2003. The City argues that it made it clear that the final proposal was a package deal that must be accepted or "all bets are off." The Union prepared a draft of the Tentative Agreement and the members voted to accept it. However, when the Tentative Agreement was sent to the City, the City asserted that the Union incorrectly drafted the language the parties had agreed to. The City found three substantive changes in the draft, two of which the City argued significantly impacted the issues being externally litigated by the Union against the City. The Union initially agreed that two of

the three "changes" noted by the City could be deleted from the final draft, but insisted that the "Craft Jurisdiction" language remain as drafted by the Union.

The City had initially proposed that the language from the Trades Council Agreement be used as a guide in drafting the Craft Jurisdiction provision. However, the City argued that since the MCEO Union was not a member of the Trades Council, the specific references to that entity would need to be excised. In the draft agreement, references to the Trades Council Agreement were deleted; however, the Union made reference instead to the Construction Employer's Agreement. The last sentence of the Union's draft states: "The City will give special weight to the description of work to be performed by a [sic] Operating Engineers, as described in the current Building Agreement between the Operating Engineers and the Construction Employers Association."

The City took issue with this language, because the City argued that, by inserting the reference to the Building Agreement, the Union was attempting to create a recognition of the Construction Employers' Association Agreement ("CEA Agreement"), which is an issue being contested by the City before the Ohio Supreme Court in a separate litigation. The City responded that either no reference to an outside contract be mentioned or that the Highway Heavy Agreement be referenced as a guide for jurisdictional issues. The City believes that the Highway Heavy Agreement is the more applicable agreement. The Union rejected the City's proposals. Because the parties were unable to resolve the matter, it is now before the Fact-finder.

The City reopened six issues:

- Craft Jurisdiction
- Wages and Benefits
- Insurance

- Hours of Work and Overtime.
- Recognition
- Duration

The Union initially proposed maintaining the language on all issues as drafted in the parties' "Tentative Agreement," which the Union sent to me on January 21, 2004. Again, on March 3, 2004, in an email, the Union reiterated that it was proposing the language of the "Tentative Agreement" as its positions at fact-finding. The Union did not submit a pre-hearing brief beyond its January 21, 2004, correspondence. On the eve of the day before the fact-finding hearing, the Union, in response to the City's pre-hearing brief, emailed the City and me changes to its original proposals on Craft Jurisdiction and Duration.

The City objects to the Union's "last minute" changes. The City argues that the parties had agreed to exchange the proposals to be argued at fact-finding by March 17, 2004, which the City did. The Union insisted from January 21, 2004, until the day before the hearing that its position was contained in the "Tentative Agreement" as written. The City argues that the Union should not be permitted to change its position at 6:15 PM of the night before the hearing.

I find it ironic that the Union believes it is OK to change its position at the last minute, when, in an email to me and the City's representative, dated March 3, 2004, the Union's representative insisted on knowing what the City intended to argue at fact-finding, "[u]nless Cleveland plans to keep its response to this inquiry secret until April 7, 2004. . . ." The Union had ample opportunity to reply and alter its position after receiving the City's proposals on March 17, 2004, yet chose to communicate its final proposal until late on April 6, 2004, the evening before the Fact-finding hearing.

Nonetheless, in making my recommendation, I will consider the Union's changes to its

originally proposed positions, even though it is beyond the deadline set by the parties. First, according to statute, the parties must submit their positions on unresolved issues prior to the day of the hearing. Technically, the Union submitted its changes to its positions prior to the day of the hearing, even though they were communicated at 6:15 PM of the evening before. Second, the City already expressed its intent to open these issues for discussion, and I doubt that the City's positions would have changed with more notice by the Union. Third, as to the issue of duration, the Union's original proposal to follow the expiration date as stated in tentative agreement was moot, because the expiration date of March 31, 2004, had already passed. It made no sense to propose that the agreement should expire on date long gone.

The issues on which the City and the Union still agree are listed as such at the end of this report and are incorporated therein.

ISSUES AT IMPASSE

I. Craft Jurisdiction

Union's Proposal

Cleveland agrees that those persons identified in the Recognition article of this collective bargaining agreement shall be employed by it to operate, maintain, repair and have exclusive jurisdiction over the following equipment: articulated loader, with any attachment; skid steer loader, with any attachments; basic tractor, with any attachments; trenchers; pavers and pavement finishing machines; rollers; track drive tractors, bulldozers, loader, backhoes and excavators; graders and grader tractors, with any attachment; pavement grinders and road planers; self loading tractors with conveyors; tractor mounted snow blowers; gradall or rubber tire excavators, backhoes, cranes or drag lines; all terrain forklifts. Except in cases of emergencies, all work with respect to the equipment described in this Article shall be performed by the CEO Union, and there shall be no interruption of work. The Union can file a grievance at Step 2 of the Grievance Procedure

for alleged violations of this Article.

The Union argues that the most appropriate description of the Craft Jurisdiction of the bargaining unit would be to list the equipment for which the bargaining unit has exclusive jurisdiction to operate, maintain, and repair. The Union argues that this would eliminate the need to reference the Building Agreement between the Operating Engineers and the Construction Employers Association, to which the City objected. The testimony of members of the bargaining unit demonstrates that these are the types of equipment that MCEO members operate, maintain and repair on a regular basis. Cleveland's Civil Service Commission's description of these employees' equipment is out of date, incomplete and does not accurately reflect what equipment these employees are tested on by the Civil Service and are required to use and repair on a daily basis. The Union seeks to avoid an agreement that allows the Civil Service Commission to make changes to this list of equipment.

The Union argues that the language proposed by the City is deficient because 1) it includes the Civil Service Commission's identification of what equipment these employees operate, repair and are tested on, which is inaccurate and incomplete, and 2) it will encourage the City to continue to use persons whom it employs but have not been subjected to competitive testing by the Civil Service Commission to operate or repair this equipment, contrary to the mandate of the City's charter.

City'S Proposal

The City agrees to abide by the City Civil Service Commission description of the work to be assigned to employees and will attempt not to assign work falling within their craft jurisdiction to other 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 Union can file a grievance at Step 2 of the Grievance Procedure for alleged violations of this Article.

The City argues that it is without question that what the Union presented as a tentative agreement on Craft Jurisdiction was not what was proposed or agreed to by the City. Indeed, the Union's unilateral modification of this Article, in large part, led to the unraveling of the "Tentative Agreement." The City argues that the Union's modification was unacceptable because it imposed upon the City a recognition of the jurisdiction provision of the Construction Employers Association contract, a provision that has little application to these members and would greatly expand the jurisdiction of their work.

As presented at the hearing, the work of the City's construction equipment operators falls substantially within the jurisdiction description of the Highway Heavy Agreement. However, since the Union strenuously objected to referencing that Agreement in the parties' contract, the City has proposed a very employee-favorable article which captures the spirit of the true tentative agreement reached by the parties, referencing the Civil Service description for construction equipment operators and master mechanics.

Recommendation

The City agrees to abide by the City Civil Service Commission description of the 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 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 Union can file a grievance at Step 2 of the Grievance Procedure for alleged violations of this Article.

The above recommended language is modeled on the "Tentative Agreement" reached by

the parties regarding Craft Jurisdiction, minus the last sentence which the City argued was never part of the deal. The omitted sentence states: "The City will give special weight to the description of work to be performed by a [sic] Operating Engineers, as described in the current Building Agreement between the Operating Engineers and the Construction Employers Association." I believe that the City would not have agreed to the inclusion of this sentence for several reasons. First, the CEA contract description of the work performed by the Operating Engineers does not precisely match the description of work performed by the City's Operating Engineers who are members of this bargaining unit. For example, the list of equipment that operating engineers under the CEA contract operate and repair does not match that given by the Union in their proposal. Only a small fraction of the equipment listed in the CEA contract is applicable to this bargaining unit. Such a blanket reference to the CEA contract would be overly inclusive and inaccurate.

Second, the Union and the City are currently litigating before the Ohio Supreme Court which contract, the CEA contract or the Highway Heavy contract, is more applicable to this bargaining unit in determining the appropriate prevailing wage rate to be used. The City would never have agreed to craft jurisdiction language that would have compromised its position in that lawsuit.

Consequently, I believe that the above passage is the closest to what the parties intended. The passage given to the Union by the City as a guide, the Trades Council Agreement, has a sentence similar to the one omitted above and in contention, but the sentence makes reference to unions affiliated with the Trades Council. Because this MCEO is not affiliated with the Trades Council, the Union substituted reference to the CEA Building Agreement. That could not have

been what the City had in mind. Omission of the sentence is more logical.

The Union's proposal on Craft Jurisdiction which lists equipment over which the bargaining unit would have exclusive jurisdiction is not recommended, because it seeks to secure a monopoly on the use of equipment that is shared by other bargaining units. The City cannot afford to be limited in that way.

II Wages and Benefits

City's Proposal

Employees will continue to earn their current wage rates with no increase provided. Wages shall be determined by this Agreement and not through reference to external contracts. This proposal also contemplates that for allowing employees to maintain their current wage rates, the contract will specifically state that the employees will not be entitled to other benefits, including but not limited to longevity, paid sick leave, holidays, vacation and employer-paid health and life insurance. Finally, the contract shall specify that this Agreement shall supercede the City Charter as it applies in any way to these employees. (Moreover, this proposal shall not be construed in any way as an admission or a reflection of the City's position regarding what the "prevailing wage" is as referenced under the City Charter).

The City argues that the members of the bargaining unit should not receive a wage increase. The City asserts that the employees have been over-paid for years, because they were paid the "prevailing rate" for construction employees, who do not perform the same kind of work as the bargaining unit. The work performed by this bargaining unit more closely resembles that of employees covered by the Highway Heavy Agreement, who are paid at a lower rate than the construction employees.

The City admits that they have paid this bargaining unit at the higher wage rate. But upon

reexamination of the job duties of the bargaining unit, the City believes that it should be paying them at the rates in the Highway Heavy Agreement. Although Union witnesses testified as to construction-like jobs they have performed over the years, that represents a minute fraction of the work they regularly perform. Employees spend nearly all of their time doing work described in the Highway Heavy Agreement, doing repair work to City streets or to address broken or worn pipelines.

Consequently, wage increases should not be granted. However, because this bargaining unit has not had an increase in the two or more years after the MCEO became the exclusive representative of the group, their wages are now below those stated in the Highway Heavy Agreement. Therefore, at most, their wages should be brought up to the level equaling those in the Highway Heavy Agreement.

Because of the serious financial difficulties that the City is facing, no other wage increases would be warranted. The City has had to implement massive budget cuts and layoff over 750 employees to compensate for a \$61 million debt.

The City also rejects that Union's proposal that employees be paid at 80% of the prevailing wage rate plus benefits. This offer was removed from the City's proposal when the Tentative Agreement fell through because of the Union's substantive changes to the original agreement. Therefore, the City propose that employees be paid their current wage rate (or 100% of the prevailing rate of the Highway Heavy Agreement) and no benefits. For years, the Union has opted for the full payment without benefits, and the City proposes that this practice be continued.

However, if benefits are provided, employees should receive 80% of the "wage" and

"health and welfare" line items of the Highway Heavy Agreement. The Union seeks the introduction of substantial benefits and an 80% multiplier which includes all of the monetary line items of the CEA contract, including credit for pension and others, such as apprenticeship and CISP. The Union seeks credit for the private-sector pension line item even though its members receive a 13.55% PERS contribution from the City toward their public sector pension benefits. The City has rightfully taken an offset for the PERS contributions since 1994 and this should not be eradicated by the Fact-finder.

Union's Proposal

Cleveland recognizes that the CEO Union is the sole and exclusive representative of those persons who are employed by the City and its departments to operate and repair the construction equipment that is described in the Craft Jurisdiction section of this Collective Bargaining Agreement. Those Cleveland employees are divided into the following job classifications, which are all craft positions recognized by Cleveland's Civil Service Commission.

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

The persons in these job classifications employed by Cleveland shall be paid at the rate of eighty percent (80%) of the prevailing hourly wage rates which have been established by the most current version of the Construction Employers Association Building Agreement (the "Building Agreement") between the Operating Engineers and the Construction Employers Association. The presently applicable Building Agreement is attached as Exhibit "A" to this Contract. The City of Cleveland and the CEO Union have agreed that 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.

As of May 1, 2003, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$36.80, \$36.65 and \$37.30; 80% of those hourly wage rates respectively are: \$29.44; \$29.32 and \$29.84.

As of May 1, 2004, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$38.00, \$37.85 and \$38.50; 80% of those hourly wage rates respectively are: \$30.40; \$30.28 and \$30.80.

As of May 1, 2005, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$39.20, \$39.05 and \$39.70; 80% of those hourly wage rates respectively are: \$31.36; \$31.24 and \$31.76.

The Union asserts that the above passage was a part of the "Tentative Agreement" agreed to by the parties. It reflects the Union's agreement to accept 80% of the prevailing wage rate received by employees covered by the CEA Agreement, in exchange for health insurance, longevity pay, paid sick leave, holidays, vacation and other benefits. The 80% of the prevailing wage rate should not be calculated by deducting the City's contribution to PERS.

All other trade unions, including ironworkers, carpenters, cement finishers, and electricians receive 80% of the prevailing wage rate, without deductions for PERS or anything else, in exchange for the above benefits, and the Union is only asking to be treated likewise. The amount of the prevailing wage rate for these unions is established by the relevant contract that the Building Association has with Local 18, or other outside contractor, or is published by the Ohio Department of Commerce Wage and Hour Division. For years the City has used the prevailing wage set out in the Building Agreement of the Construction Employers' Association and Local 18 Operating Engineers. During current negotiations, the City agreed to pay bargaining unit members 80% of the prevailing wage of the CEA Agreement in exchange for benefits and without any deductions for PERS, Apprenticeship or CISP. The Union merely argues that the City should stand by its original agreement.

Recommendation

The persons in the job classifications covered by this Agreement and employed by Cleveland shall be paid at the rate of eighty percent (80%) of the prevailing hourly wage rates which have been established by the most current version of the Construction Employers Association Building Agreement (the "Building Agreement") between the Operating Engineers and the Construction Employers Association. The City of Cleveland and the CEO Union have agreed that 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.

As of May 1, 2003, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$36.80, \$36.65 and \$37.30; 80% of those hourly wage rates respectively are: \$29.44; \$29.32 and \$29.84.

As of May 1, 2004, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$38.00, \$37.85 and \$38.50; 80% of those hourly wage rates respectively are: \$30.40; \$30.28 and \$30.80.

It is recommended that the Union's proposal, with a few modifications, be adopted. The Union's proposal is imbedded in the Recognition article of the Agreement. The above recommended language may be added to the Recognition clause or it may be a separate article unto itself. The matters contained in the Recognition portion of the Union's proposal that are at issue will be dealt with in a separate section of this report regarding Recognition. Also removed from the Union's proposal was the sentence requiring that the current CEA Agreement be attached to the parties' Agreement. In the City's January 19, 2004, letter to the Union regarding the Union's draft of the Tentative Agreement, the City objected to language requiring the attachment of the CEA Agreement to the parties' Agreement, and the Union agreed to make this deletion. Therefore, reference to the attached CEA agreement is not included in the recommended language here. Also deleted is the last paragraph referencing a wage rate for May

2005 which is beyond the recommended expiration date of the Agreement. (See Duration section below.)

Also, the recommendation that employees be paid 80% of the prevailing wage rate must come with the proviso that the City had originally put on their tentative agreement to this proposal, as reflected in the City's December 2, 2003, package proposal. The City's agreement that employees will be paid 80% of the prevailing wage from the Construction Employers Association Building Agreement is "not to be construed in any way as an admission by the City as to what the 'prevailing wage' is." If the parties do not have such an agreement in writing, then the proviso, as stated here, should be included in the language of the Agreement. The City's proviso is meant to preserve its position in the current litigation on the proper prevailing wage to pay these employees.

The City argues that the Union should be paid at the prevailing wage of those operating engineers covered by the Highway Heavy agreement, not the CEA agreement. It is my understanding that this issue is a subject of litigation between the parties. It appears to me that the Highway Heavy agreement is more applicable, but neither it nor the CEA agreement is a perfect match. However, because the matter is the subject of litigation, where more (and better¹) evidence will likely be presented, I am reluctant to change the longstanding practice of paying these employees at the rate established by the CEA Building Agreement based the information

¹The City presented as evidence of the proper contract to be used for comparison affidavits from Steven DeLong, Business Agent and District Representative of Local 18 of IUOE and William Fadel, the attorney who represented Local 18, who both stated that they believe the MCEO bargaining unit work more closely resembles the Highway Heavy work rather than the work in the CEA Agreement. However, neither of these individuals were available for questioning and I have only the limited information on the affidavit. At trial, the evidence would be more fully developed.

available to me. The City has admitted that it has paid these employees the prevailing wage rate established in the CEA Agreement. Although the City argues that it recently realized that it was paying these employees at the wrong wage rate, it seems more likely that the City has had its doubts as to the appropriate wage for years and has just now chosen to propose the lower wage rate. As of December 2, 2003, the City was still proposing employees be paid 80% of wage rate in the CEA Agreement.

The City's proposal to deny all benefits to these employees in exchange for 100% of the prevailing wage of the Highway Heavy seems like a punitive stance to take at this point. Although these employees have opted in the past to take the full wage rate in lieu of benefits, the Union has made it clear throughout the negotiations that it wanted to take advantage of the same option that other building trade employees have, i.e. benefits in exchange for less money. The City had agreed until the Tentative Agreement came unraveled at the 11th hour.

By recommending that employees receive 80% of the prevailing wage rate of the CEA Agreement, I am also recommending that employees receive the benefits that the parties originally agreed would be given in lieu of the cash. These benefits are reflected in the articles entitled Longevity, Maternity Leave, Sick Leave With Pay, Sick Leave Without Pay, Holidays, Life Insurance, Vacation and Health Coverage, as written in the Tentative Agreement drafted by the Union. The City had no problem with these articles as written.

It is also recommended that the prevailing wage rate not exclude deductions for pension or other matters, as proposed by the City. Again, the City's proposal of December 2, 2003, did not mention that the City would be taking these deductions. Rather, the City illustrates what the prevailing wage would be with an example: "(Ex. - for Group A Employees $\$36.80 \times .80 =$

\$29.44).” This calculation reflects 80% being take of the full prevailing wage of \$36.80, which the Union’s proposal cites as the Group A wage in 2003. No deductions were made before calculating the percentage. The City argues that it is entitled to take a deduction for its PERS contribution, but, again, the statute is not crystal clear on that issue, and it is a subject that is being litigated between the parties and should not be decided in this fact-finding.

After the close of the hearing, the City submitted a ruling by the Ohio Supreme Court which finds that the City is not in contempt of court in the suit filed by the Union regarding the payment of the prevailing wage. The City argues that this implies that the City was correct in deducting the PERS payment. The Union, of course, disagrees with this interpretation. I do not believe that it really affects my recommendation. If I had chosen to recommend the City’s position that it pay employees 100% of the prevailing wage rate, then maybe the PERS contribution could be deducted, because they would really be paying more than 100% of the prevailing wage rate, if the City’s interpretation is correct. However, the recommendation here is that the City pay less than 100% of the prevailing wage rate. The 80% portion is just a number that the City believed at one point was a fair reflection of cost to the City to provide the benefits listed. The City did not propose taking out the deductions for pension, apprenticeship and CISP. Therefore, it not recommended here. If indeed the City is correct, and it would cost the City more than 20% to cover the cost of all the benefits, including PERS, it can propose a different percentage of the prevailing wage rate as a rate of pay for these employees during the subsequent negotiations.

The City also argues that the employees should receive no wage increase, citing the City’s dire financial problems. However, this Union has had its wages on hold for the two or more

years since the MCEO has represented these employees. The dire financial problems do not impact these employees the same way as others. They perform work for propriety departments, such as the Water Division and Municipal Light and Power, which are revenue producing departments. None of these employees were subject to layoffs and most of the salaries are not heavily dependent on the General Fund, which is the fund that is suffering the most.

III. Insurance

City's Proposal

Those employees who wish to be covered under the City's insurance plans will have the option of purchasing one of the City's plans at the premium cost charged to the City by the carrier.

The City seeks the continuance of the status quo regarding insurance, as with other benefits. As noted, in the past, the bargaining unit had opted for 100% of the "prevailing wage rate" in exchange for not receiving benefits. This wage rate included a \$3.61 an hour component for health insurance. However, the City permitted these employees to purchase insurance at the City's cost. Currently, the City is proposing a maintenance of the 100% wage rate payment (in accordance with the Highway Heavy Agreement) and no benefits. Given that these members receive a monetary value for insurance coverage, they are not entitled to paid coverage. They will be permitted to purchase health care coverage at the premium cost charged to the City.

Union's Proposal

The Union proposes that employees receive the same health care insurance package as all other employees. In exchange, the Union will agreed to take 80% of the prevailing wage as stated in the CEA Agreement.

Recommendation

For all the reasons stated in the section on Wages and Benefits, it is recommended that the City provide health insurance to this bargaining unit in exchange for accepting 80% of the prevailing wage rate, as set forth above.

IV. Hours of Work and Overtime

City's Proposal

The normal work week for regular full-time employees shall be forty (40) hour per week. The City reserves the right, as operational needs and conditions require, to establish and change hours of work, shifts and schedules of hours.

Overtime shall be paid in accordance with the Fair Labor Standards Act.

The proposal of the Union would seriously hamper operations and create built-in overtime for equipment operators. Although the City proposed this language during negotiations, it realized later that the language created overtime due to the flex schedules routinely and historically worked by a significant number of equipment operators. As testified to by Commissioner Ciaccia, the Water Division runs a seven-day per week, 24-hour operation which requires coverage on the weekends and during off hours. A significant number of his equipment operators work regular schedules that encompass weekend and late-hour work at straight-time pay. The Union's proposal would require overtime payment for schedules that have been worked at straight-time for many years. The City's proposal, on the other hand, maintains the historical flexibility it has enjoyed. The City cannot effort significant overtime costs to be built into these Departments.

Union's Proposal

Hours of Work

The normal work week for regular full-time employees shall be forty (40) hours of work in five (5) eight (8) hour days, exclusive of time allotted for meals, during the period starting at 12:01 a.m. Monday to 12:00 midnight Friday. The normal workday may be any eight- (8) consecutive hours, Monday through Friday, between the hours of 7:00 a.m. and 4:30 p.m., with one-half (½) hour lunch.

- A. All employees who work a regular day shall be allowed no less than thirty (30) uninterrupted minutes for a scheduled lunch period, except for other mutually agreed upon schedules with the Union.
- B. There shall be two (2) fifteen (15) minute rest periods on each shift each workday. The rest periods, to the extent practicable, will be scheduled during the middle two (2) hours of each half shift, but they may not be scheduled immediately before or after the meal period or at the start or end of a shift.
- C. When an employee works beyond his regular quitting time, the employee shall receive a fifteen (15) minute rest period if the employee works two (2) hours, but less than four (4) hours for each four (4) hour period, and in addition, a thirty (30) minute meal period if the employee works four (4) hours or longer.
- D. The City will dock employees on the basis of one-tenth (or six (6) minutes per hour) of one hour (or six (6) minutes).

All regular full-time employees shall be on a compensation basis of two thousand-eighty (2080) hours per year.

For those bargaining unit employees on the normal eight (8) hour day, five (5) day per week work week, shifts are defined as follows:

- 1st shift The majority of his normal hours of work fall after 7:30 a.m. and before 3: 00 p.m.

- 2nd shift The majority of his normal hours of work fall after 3:00 p.m. and before 12:30 a.m. and an employee on such shift is to receive a shift premium of fifty cents (\$.50) per hour.

- 3rd shift The majority of his normal hours of work fall between 12:30 a.m. and 7:30 a.m. and an employee on such shift is to receive a shift premium of seventy-five cents (\$.75) per hour.

Employees equally rotating between all three shifts shall receive twenty-five cents (\$.25) per hour. All shift premiums are paid on an hours-paid basis only.

There shall be no pyramiding of overtime due to these shift premiums or for any other reason.

Shift premiums are available only to employees assigned to the 2nd and 3rd shifts and not to employees assigned to another shift who may work overtime that occurs during a shift that is subject to a (higher) shift differential.

Overtime Premium Pay

The City shall be the sole judge of the necessity for overtime. All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked in excess of eight (8) in one (1) day, or forty (40) hours in the normal workweek. Overtime is to be calculated in thirty (30) minute increments.

All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked on Saturdays and Sundays, outside the period of their workweek, in compliance with the Hours of Work section, if applicable.

All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked on holidays, in addition to their holiday pay.

All paid holiday hours, paid sick leave hours, and paid vacations hours shall be counted as hours worked for the purpose of computing overtime.

There shall be no pyramiding of overtime or other premium pay compensation, no overtime pay shall be computed on whatever total overtime hours are the greater for the week, either on a daily or a weekly basis, but not on both.

Overtime shall be distributed as equally as possible within each classification in each work unit on a continuing basis. The City shall credit employees for all overtime hours worked and/or for overtime hours offered for which employees have declined or failed to work for any reason.

Emergency overtime cannot be refused. An emergency is defined as an impairment to City services or operations which cannot be delayed until the beginning of the next regular workday. However, an employee shall be excused from emergency overtime provided the City can obtain a replacement in time to meet the emergency.

Overtime shall be equalized on a continuing basis. The City shall credit employees for all overtime hours worked and/or for overtime hours offered or which employees have declined or failed to work for any reason.

The City will use its best efforts to provide employees with twenty-four (24) hours notice for overtime, with the understanding that by its

nature, overtime that results from an "emergency" is not susceptible to such notice.

The Union argues that this language was proposed by the City during contract negotiations. Even employees in the Water Division work set Monday through Friday schedules. Those who work on the weekends as part of their regularly scheduled work week do not receive overtime on the weekends. Other trade union employees follow the above schedule, and this bargaining unit is merely asking for the same benefits. The City's proposal would allow the City to change shifts at will and does not provide predictability for employees.

Recommendation

The above proposal is recommend as written by the Union. However, the Hours of Work and Premium Overtime provisions as written apply to employees who are not regularly scheduled to work on Saturdays or Sundays. In addition to the above proposal, it is recommended that the parties draft a provision or addendum that would address employees who work in departments that have 24/7 scheduling. Both parties agree that currently employees in the Water Division who work on Saturday or Sunday as a part of their regular work week do not receive overtime on the weekends. I do not believe that the City intended to build in automatic overtime for these employees. Therefore, a limited exception for these few employees must be written into the agreement to avoid the automatic overtime. The City's proposal, as stated above, is too open and vague. It would place the City in a position to change schedules and shifts as it pleases, which would seriously disadvantage the employees who desire predictability in scheduling. The City's proposal throws out all the above crafted language merely to avoid a situation for a few. The better idea is to keep the language, as written in the Union's proposal above, and add a

modification to keep the practice as it has been for employees regularly scheduled on Saturdays and Sundays, thus avoiding automatic overtime.

V. Recognition

City's Proposal

The following job classification are recognized and are represented on a sole and exclusive basis by the CEO Union:

- Construction Equipment Operator A
- Construction Equipment Operator B
- Master Mechanic

As with its "hours of work" proposal, the City is attempting to keep the language for this first contract straightforward and simple. The City's proposal recognizes the MCEO Union as the sole and exclusive representative for the three job classifications which it represents.

This article represents another provision of the "Tentative Agreement" that was unilaterally changed by the Union in its draft. Again, the Union sought the inclusion of references to the CEA Agreement and also attempted to bind the City to the CEA contract for future increases that would occur beyond the expiration of this Agreement -- items that were never proposed or agreed to by the City. The Union also unconventionally seeks the inclusion of wages in the Recognition article. Overall, the Union's proposal is nothing more than an effort to have a traditionally simple article serve as a vehicle to secure its position in the hotly-contested and litigated "prevailing rate" litigation.

The City's proposal is simple language traditionally seen in recognition clauses. Nothing more is needed.

Union's Proposal

Cleveland recognizes that the CEO Union is the sole and exclusive representative of those persons who are employed by the City and its departments to operate and repair the construction equipment that is described in the Craft Jurisdiction section of this Collective Bargaining Agreement. Those Cleveland employees are divided into the following job classifications, which are all craft positions recognized by Cleveland's Civil Service Commission.

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

This is only a portion of the Union's proposal on Recognition. The entire proposal is stated in the section on Wages and Benefits. It seeks to recognize the job classifications of this bargaining unit as "craft positions," which require qualification by Cleveland Civil Service Commission. The City offered no evidence to dispute that testing requirement or "craft position" status. Nor did the City present evidence to dispute that the MCEO Union should be recognized as the sole and exclusive representatives of all person who operate and repair the construction equipment identified by Mr. Madonia, President of the MCEO Union. Mr. Richiutto, City's Director of Public service, testified that he had no problem with the concept that only the construction equipment operators employed by the City should operate and repair the construction equipment. Recognition of a job classification without an explanation of what equipment is operated by persons who hold that job classification is meaningless.

Recommendation

The following job classification are recognized and are represented on a sole and exclusive basis by the CEO Union:

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

The City's proposal on Recognition is recommended. The Union's proposal on recognition references the equipment listed in the Craft Jurisdiction article, and the Union's version of that Article was not recommended. (See above.) The City's version is simple and closely tracks the language of the "Tentative Agreement."

In the "Tentative Agreement," the Recognition clause also contains information on wage rates. I have dealt with these issues separately, and they may be combined or put in separate sections. If combined, they will be nearly identical to the language in the "Tentative Agreement" minus the clauses with which the City took issue, i.e. attachment of the CEA Building Agreement, and tracking the wage rate increases as stated in the Building Agreement beyond the expiration of the Agreement. It is my understanding that the Union had originally agreed to remove these references prior to the Tentative Agreement coming unraveled.

VI. Duration

City's Position

The City proposes that the Agreement expire on June 30, 2004. The parties had initially agreed to an expiration date of March 31, 2004. However, since the parties are now beyond that date without a contract, the City proposes the expiration date of June 30, 2004. The City had contracts with approximately thirty other unions. Every one of those agreements expires on March 31, 2004. It is the City's desire to get this Union on the same timetable as the City's other Union contracts. However, the incorporation into the contract of an expiration date that has already passed does not make sense. Likewise, it is not reasonable to allow this small group of

employees to set a wage pattern for the City's 7,000 unionized employees, which would happen if an expiration date of March 31, 2006 or 2007 were recommended. It is the City's intention to propose an expiration date of March 31, 2007 during its negotiation of a successor agreement with this Union, which will be occurring a couple of months. It should be noted, as well, that the Union's proposal was, until the evening before the fact-finding hearing, for the contract to expire on March 31, 2004. It was willing to accept a short time frame for the agreement, even back in December 2003.

Union's Proposal

The Union proposes that the Agreement begin on January 1, 2004 and expire on April 30, 2006. The City's proposed expiration date of June 30, 2004 is irrational. The parties will have, at best, an agreement which lasts 39 days.

The Union's proposed expiration date would coincide with CEA Building Agreement, which the City has stipulated has long been the basis for determining these employees' pay. The inception date of January 1, 2004, is based upon the date that the City promised it would start the benefits noted above. The City should be held to this start date. The Agreement must last longer than 39 days and the Union proposes it last until April 30, 2006.

Recommendation

It is recommended that the Agreement between the parties have a retroactive start date of January 1, 2004 and extend until March 31, 2005. I believe that it is absurd and a waste of precious resources for the City and the Union to be required to renegotiate this Agreement in 39 days. This has obviously been a very contentious negotiation. The parties should live with an Agreement longer than just 39 before having to start back into negotiations again. In March

2005, the City should have their negotiations with other unions finished and will have the pattern set by unions larger than the MCEO. At that time, the City and the MCEO can negotiate a contract with expires in 2007 to get this Union back on track with the expiration of other union employees. By March 2005, the parties also may have a resolution of the pending litigation which may be helpful in negotiating the appropriate prevailing wage rate to use.

The retroactive start date of January 1, 2004, is recommended. This is the date the City originally planned on starting the benefits before the negotiations soured. This Union has been without a pay raise for a couple of years. Although a retroactive date may not work for health care benefits, all the other benefits are monetary based can easily be effective retroactively to January 1, 2004.

Tentative Agreements

The parties have agreed that the following Articles, which were part of the Union's draft of the Tentative Agreement, are still viable and should be incorporated into this fact-finding report as written in that document. They are:

- Purpose
- Management Rights
- Union Rights
- No Strike/No Lockout
- Limited Right to Strike
- Non-Discrimination
- Union Security and Check Off
- Union Representation
- Union Visitation
- Seniority
- Probationary Period
- Labor Management Committee
- Lay Off
- Recall
- Leave of Absence

- Military Leave
- Family Medical Leave
- Call In Pay
- Personnel Records
- Discipline
- Parking Ticket
- Grievance Procedure
- Voluntary Dispute Settlement Procedure
- Addendum B - Drug Testing
- Addendum C - Injury Pay Program

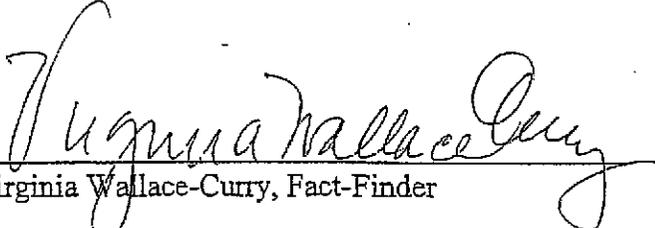
Submitted by:


Virginia Wallace-Curry, Fact-finder

May 10, 2004
Cuyahoga County, OH

CERTIFICATE OF SERVICE

Originals of this Fact-finding Report and Recommendations were served upon Jon M. Dileno, Esq., Duvin, Cahn & Hutton, Erieview Tower, 20th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, and upon Stewart D. Roll, Esq., Persky, Shapiro & Arnoff, Signature Square II, 25101 Chagrin Blvd., Suite 350, Cleveland, Ohio 44122-5687, by email and by express overnight mail, and upon Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, by regular mail, this 10th day of May, 2004.


Virginia Wallace-Curry, Fact-Finder