

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., MUNICIPAL )  
CONSTRUCTION EQUIPMENT )  
OPERATORS' LABOR COUNCIL, *et al.*, )

Case No. 06-2056

Relators )

Original Action for Writ of Mandamus

vs. )

CITY OF CLEVELAND, *et al.*, )

Respondents )

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**RESPONDENTS' BRIEF**

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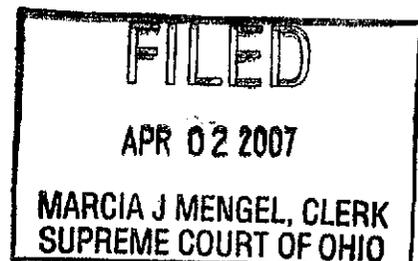
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## STATEMENT OF FACTS

This is not a case of the Respondents, City of Cleveland failing to pay construction equipment operators prevailing wages and denying accrued sick-time from 1994-2005. This is a case of greed, plain and simply put. The construction equipment operators for the last thirteen+ years have whined their way through every available Ohio forum: administrative and judicial. There is before this Court an appeal filed by the current bargaining representative union<sup>1</sup> challenging prevailing wage payments and the Respondents denial of accrued sick-time from January 30, 2003 through February 13, 2005 (the effective date of the current contract was February 14, 2005).<sup>2</sup> The Court of Appeals for the Eighth Judicial District denied the union's appeal, sustaining the grant of summary judgment for Respondents.<sup>3</sup>

In November 2006, Relators filed this Original Action in Mandamus with the Court, with the same complaints, and overlapping the dates from 2003 to 2005 (still under appeal<sup>4</sup>). Relators' filed their brief March 12, 2007.<sup>5</sup> Relators have tried these arguments before and did not prevail.<sup>6</sup> Relators' arguments do not establish their allegations that Respondents have failed to compensate construction equipment operators the prevailing wages or allowed accrual of sick-time from 1994-2005.<sup>7</sup>

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<sup>1</sup> Municipal Construction Equipment Operators Labor Council Inc. (MCEO)

<sup>2</sup> See: *State ex rel. International Union of Operating Engineers Local 18, 18 A, 18 B, 18C, 18 RA, AFL-CIO v. Respondents of Cleveland* (July 25, 1990), Cuyahoga App. 57729, unreported, 1990 WL 109078 \*1; reversed, *State ex rel. International Union of Operating Engineers Local 18, 18 A, 18 B, 18C, 18 RA, AFL-CIO v. Respondents of Cleveland* (1992), 62 Ohio St.3d 537.

<sup>3</sup> *State ex rel. Municipal Construction Equipment Operators Labor Council v. City of Cleveland, et al.*, 2006 WL 2374408

<sup>4</sup> *Id.*

<sup>5</sup> Supreme Court Case No. 06-1688, the MCEO union filed this appeal. The parties have submitted and filed their briefs.

<sup>6</sup> *State of Ohio ex rel. Municipal Construction Equipment Operators' Labor Council, Successor-In-Interest to State of Ohio ex rel. International Union of Operating Engineers, Local 18 v. City of Cleveland* (2004) 102 Ohio St.3d 1419, 807 N.E.2d 365

<sup>7</sup> *Id.*

This case is another attempt by Relators to argue that the City has not complied with the 1992 Supreme Court Order and Writ requiring the City to comply with Charter §191 mandating prevailing rate compensation for tradesmen.<sup>8</sup> There was subsequent litigation alleging non-compliance in 1998, but all such claims were dismissed. Relators displaced International Union of Operating Engineers, Local 18 (Local 18), in January 2003, and have continued to argue that that the Respondents have been non-compliant with this Court's 1992 Order and Writ since 1994. Post 1992, Respondents did offset the dollar value of the outside prevailing rate by the City contribution to PERS it is required by statute to pay. Since the outside rate includes, among other things, an employer's contribution to the Union pension fund, not to so offset the rate would constitute a double-dip and result in the City being required to pay in excess of the outside rate.<sup>9</sup> Respondents maintain that it has been in compliance with the 1992 Order and Writ. This is confirmed by both the officers of and counsel for the former collective bargaining representative (Local 18 served Relators in some capacities from which Relators have been advantaged over the years) that monitored Respondents' compliance through January 2003.<sup>10</sup> Respondents argue that the prevailing rate is a value (compilation of costs) and not a fixed numerical rate.

Respondents also contend that regardless of the determinations by the State Employment Relations Board, the agreements between the City and Local 18 cannot be undone or void *ab initio*. The logical extension of any such argument would result in absolute labor chaos. No agreements between parties could ever be enforced against subsequent representation. In this respect, any finding against the City may be enforceable from January 2003 forward – a period

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<sup>8</sup> *State ex rel. International Union of Operating Engineers Local 18, 18 A, 18 B, 18 C, 18 RA, AFL-CIO v. Respondents of Cleveland (1992)*, 62 Ohio St.3d 537.

<sup>9</sup> *Stasiuk v. City of Cleveland* (December 4, 1990), Cuyahoga Cty. Common Pleas Case No. 949449, pp. 27-9 for Judge Carroll's discussion and analysis of "duplicative" payments.

<sup>10</sup> Respondents Exhibits 3, Affidavit of William Fadel; and, 4, Affidavit of Steven DeLong

of time in which the City has been bargaining with this Union on wages and has offered retroactivity upon ratification and council approval of an agreed upon collective bargaining agreement, and the matter on appeal in this Court.

The Supreme Court disposed of *State ex rel. Municipal Construction Equipment Operators* [FN. 6] by dismissing the case. The Court let stand Respondents position that municipalities with Charter amendments and local ordinances adopting prevailing wage language may offset against the outside rate for private industry. The offset is for the value of benefits found within municipal employment that are either duplicated by virtue of statute or unavailable in the outside workplace (i.e. sick, vacation, longevity benefits not required of outside contractors).<sup>11</sup>

In so deciding, the Court appears to have adopted the “Value” argument we put forth. It has also had an opportunity to weigh-in on a matter that goes to the heart of the *Consolo* matter mentioned above. It certainly doesn’t hurt that the Court has indicated that the City’s argument has merit. In the end, counsel for the MCEOs probably regrets this ill-advised end-around the Supreme Court’s jurisdiction in *Consolo*.

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<sup>11</sup> *Stasiuk*

## ARGUMENT

This Court has set forth three requirements, which a relator must meet to establish a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law.<sup>12</sup> Relators in this case have failed to establish that the respondent had a clear legal duty to perform the act requested or that they had no plain and adequate remedy at law. Respondents contend that this matter has been litigated and that Relators are barred by the doctrine of *res judicata*. Section 2731.05 of the Ohio Revised Code provides that a “writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.” Relators had plain and adequate remedies at law to obtain the relief it seeks, in various legal actions. Relators pursued those remedies and were unsuccessful. The doctrine of *res judicata* bars Relators from seeking mandamus relief. In *National Amusements, Inc. v. City of Springdale*, this Court opined that “[I]t has long been the law of Ohio that “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or *might have been* litigated in a first lawsuit.”<sup>13</sup> The doctrine of *res judicata*” encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes.<sup>14</sup> Relators have unsuccessfully pursued litigation in this Court, and other forums, on these same claims. Relators, either as members of Local 18, unrepresented by Local 18, represented by the MCEO union, or as individual plaintiffs, have for

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<sup>12</sup> *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 451 N.E.2d 225

<sup>13</sup> (1990), 53 Ohio St.3d 60, 62. See also, *Rogers v. Whitehall* (1986) Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388. “[W]here a party is called upon to make good his cause of action \*\*\*, he must do so by all the proper means within his control, and if he fails in that respect \*\*\*, he will not afterward be permitted to deny the correctness of the determination, not to re-litigate the same matters between the parties.” *Covington & Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus.

<sup>14</sup> *Brown v. Felsen* (1979), 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767.

years litigated and re-litigated these and related issues. They have not prevailed. Regardless of their belief in the correctness of the determination, Courts have not supported their arguments.

**Proposition of Law No. 1:**

The Respondents, City of Cleveland, are not in violation of Charter § 191<sup>15</sup> and correctly calculated and paid prevailing wages under R.C. § 4115, et seq. and OAC § 4101:9-4-07.

The prevailing wage-rate paid to Relators from 1994 – 2005 was correctly calculated using a two-part formula, based upon the definitions in R.C. 4115.03 (E) and OAC § 4101:9-4-07 (A) (3). First, the State of Ohio Department of Commerce calculates the prevailing wage-rate for various classifications of same and similar workers in private industry is determined.<sup>16</sup> The public employer takes the next step in determining the prevailing wage-rate by calculating the allowable adjustments to the prevailing wage-rate, which is the setoff value of benefits paid to Relators.<sup>17</sup> The state statute allows the offset value when establishing “prevailing wages.”<sup>18</sup> The Administrative Code enumerates the benefits the public employer may deduct as a credit or offset when calculating the prevailing wage-rates.<sup>19</sup>

After Relators became the recognized representative for the bargaining unit in 2003, it entered into negotiations with the Respondents of Cleveland on collective bargaining issues, including wages and benefits of the members of the bargaining unit, both past, present and future. The negotiations and fact-finding culminated with a collective bargaining agreement, effective February 14, 2005, which addressed these issues.

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<sup>15</sup> Relators’ Exhibit (Joint) A, Charter of the City of Cleveland, p. 63

<sup>16</sup> Prevailing Wage Division, Ohio Department of Commerce, Division of Wage and Hours; the calculations are completed annually and sent to the relevant labor organizations. Prevailing Wage rates are generally sent out annually in late April with a May 1, effective date.

<sup>17</sup> Respondents Exhibits 3, Affidavit of William Fadel, and 4, Affidavit of Steven DeLong; see also OAC § 4101:9-4-07 (A) (3)

<sup>18</sup> Id.

<sup>19</sup> Id.

Furthermore, Relators brought this same issue of prevailing wages to this Court on October 30, 2003, soon after the MCEO union became the recognized representative for the bargaining unit. Relators filed a Motion to Show Cause Why Respondents Should Not Be Deemed Contemnors of the Ohio Supreme Court's 1992 writ of mandamus<sup>20</sup>. In their motion, Relators requested the Ohio Supreme Court issue a writ mandating Respondents to pay presently and in the future prevailing wages to those persons whom they employ as construction equipment operators and master mechanics. This did not occur. After the parties filed briefs and exhibits, this Court found Respondents not to be in contempt of the 1992 mandamus order. Relators have not prevailed in any of their claims for prevailing wages, without offset, or benefits from which they had been and continued to be exempted by City ordinance, beginning in 1980 through 2003.<sup>21</sup>

Relators' cite to the Ohio code sections to support their argument that they were entitled to accrued sick time. The City of Cleveland is a charter, home rule municipality.<sup>22</sup> As Relators' point out, the City passed C.O. 171.31 in 1980, excluding those employees paid prevailing wages from accruing sick leave.<sup>23</sup> This remains the law, by ordinance, in the City of Cleveland. Relators point to Article II, § 26, of the Ohio Constitution as limiting the City's home rule authority related to sick leave. The codified ordinance is not a law of a general nature. The *Reuss* case cited by Relators is inapplicable to this matter. This case is limited to the transfer of

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<sup>20</sup> In 1992 the previous employee organization representing this bargaining unit sought a writ in mandamus from the Ohio Supreme Court seeking recognition that the wage and benefits to be received by the bargaining unit members be based on Ohio's prevailing wage laws. In *IUOE, Local 18 v. Respondents of Cleveland* the Ohio Supreme Court ruled the wages and benefits of this bargaining unit be based on Ohio's prevailing wage law and issued a writ in mandamus.

<sup>21</sup> Relators' Exhibit N

<sup>22</sup> Relators' Exhibit (Joint) A and the Ohio Constitution § 3, Article XVIII

<sup>23</sup> See attached, *Stasiuk v. City of Cleveland*, Not Reported in N.E.2<sup>nd</sup>, 1988 WL 39293, at \*9, where Eighth Judicial District Court of Appeals noted that members of the crafts and trades paid prevailing wages were not excluded from accruing sick time from 1973 to the date of the ordinance – 1980. The ordinance has been in place and in effect since 1980. Those employees receiving prevailing wages – and without collective bargaining agreements with different terms – do not accrue sick leave.

accumulated sick leave, not establishing that *all* employees employed by a governmental entity are entitled to sick leave.<sup>24</sup> In *Stasiuk*, Judge Carroll's analysis of the City's policies, using the rational basis test, found that the City had a legitimate governmental interest in creating a "legislative classification" such as the crafts and trades persons. The employees in this classification received higher hourly-rate wages.<sup>25</sup> The court's conclusion in *Stasiuk* was that crafts and trades persons were not entitled to more than the prevailing wage. This decision provides an excellent discussion of the building and crafts trades, prevailing wages, and the responsibilities of the municipality relating to wages and benefits. What is clear, and has been clear since *Pinzone*<sup>26</sup> is that Relators want – and have wanted – more than they are entitled to by law, even though as a group, they remain one of the highest paid workers in the City.<sup>27</sup> Respondents have complied with the court orders related to computing and paying prevailing wages to employees in the building trades and crafts.

In 1987 most, but not all, of the Respondents' building trades unions entered into agreements with Respondents that provided wage and benefits. The building trades' union members agreed to 80% of the prevailing wage-rate set by the State for private industry. In return for the reduced hourly rate, the Respondents would provided to these employees the same benefits all other public employees received, including, as examples accrual of sick and vacation times.<sup>28</sup> Relators', *et al.*, the construction equipment operators, and master mechanics, refused to enter into a similar agreement and chose to be paid at 100% of the prevailing wage-rate.<sup>29</sup> In private industry, construction equipment operators do not accrue vacation or sick leave. In

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<sup>24</sup> *State ex rel. Reuss v. City of Cincinnati, et al.* (1995) 102 Ohio App.3d 521, 522

<sup>25</sup> Respondents Exhibits 14 and 15

<sup>26</sup> *State ex rel. Pinzone, et al. v. City of Cleveland, et al.* (1973), 34 Ohio St.2d 26, 295 N.E.2d 408

<sup>27</sup> *Id.*

<sup>28</sup> See attached case, *Stasiuk, et al., v. City of Cleveland* (December 4, 1990), Cuyahoga Common Pleas No. 949449, unreported, at page 21, ¶52.

<sup>29</sup> *Id.*

private industry, construction equipment operators do not work 2080 hours a year, the standard work year for full-time City of Cleveland employees. Even in the absence of a collective bargaining agreement, under state statute and local ordinances, Relators are not entitled to the relief they seek.

**Proposition of Law No. 2:**

The Respondents, City of Cleveland, are not in violation of R.C. § 145.03 when making deductions allowable under OAC § 4101:9-4-07.

**Proposition of Law No. 3:**

Respondents, City of Cleveland, are not in violation of R.C. §§ 124.38 and 124.39 relating to the denial of sick-time. Ohio Constitution, Article XVIII, § 3 and Charter §§ 1 and 2<sup>30</sup>, and the Codified Ordinance 171.31 are the controlling and pertinent legal bases for the Respondents actions.

Respondents are not in violation of R.C. §§ 128.38 and 39 or R.C. 145, *et seq.*, concerning accrual of sick leave and offsets or credits taken by a municipality for pension contributions. Relator's evidence and arguments fail to take into consideration the offset or credit the Respondents are entitled to by virtue of statutorily mandated PERS contributions, as well as minor offsets such as contributions to contractor funds that are non-existent to this bargaining unit. These offsets are justified and allowable by state statute and administrative code. Any evidence indicating the City took offsets that the law clearly permits is not probative of a violation of this Court's 1992 Writ and Judgment. This is so even if one were to apply the wrong agreement – the Construction Employers Association agreement.

Relators' attempts to make much of the decisions of the State Employment Relations Board<sup>31</sup> that determined Local 18 was not a deemed certified representative of Relators, and that there had been no collective bargaining between the parties. Respondents may still take issue

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<sup>30</sup> Relators' Exhibit A (Joint), Charter, p. 9

<sup>31</sup> Relators' Exhibit C

with that decision, but regardless, the decisions of the Board are not dispositive in this matter to support any of Relators claims in this case. It is well-settled Ohio law that in the absence of a collective bargaining agreement state and local laws relating to terms and conditions of employment governs. Regarding wages, in this case, the state statute and administrative code support the legal deductions made from the prevailing wage-rate. Regarding the accrual of sick leave, C.O. 171.31(a) excludes *hourly rate craft employees paid on the basis of building trades prevailing wages*.<sup>32</sup> [Emphasis added] Respondents' codified ordinance exempts crafts and trades from accruing sick leave because the prevailing wage rate builds that cost in when determining the hourly rate.<sup>33</sup>

Relators' seek to recoup alleged underpayments without supporting documentation for their calculations. Respondents did not underpay construction equipment operators, but paid the prevailing wage rate with proper and legal deductions. Respondents have never agreed to the prevailing wage rates claimed by Relators in the Construction Employers Association Building Agreements (CEA).<sup>34</sup> There are various prevailing wages determined by the State, setting wages that *generally* fit building trades and craft jobs, but the descriptions. [Emphasis added] Respondents, after reviewing work assignments and duties of construction equipment operators, determined that the Highway Heavy prevailing rates more closely correspond to the work done.<sup>35</sup> Relators presume the rate they chose is applicable, which is far from accurate. Relators cannot establish that Respondents have underpaid them. Even Relators' evidence, Exhibit G, shows that the City had discovered overpayments to construction equipment operators when calculating overtime. The City incorrectly added the fringe benefit amount to the base prevailing wage-rate,

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<sup>32</sup> Relators' Exhibit (Joint) N

<sup>33</sup> R.C. 4115.03 (E) (j)

<sup>34</sup> Respondents' Exhibits 9-13

<sup>35</sup> *Id.*, and see, Relators' Exhibit K at pp. 14 and 16. The parties do not agree on the applicable prevailing wage.

substantially increasing the premium pay. The rates applicable to the work done by construction equipment operators came from separate agreements that Local 18 had with other employers than the one Respondents had historically relied upon. Past practice does not apply here. The prevailing rate is what it is. The undeniable fact is these employees hired by the City over at least the last 20 years have been paid approximately \$1.60 per hour more than the appropriate prevailing rate. It is the City's position that it has the unilateral authority to correct this mistake.

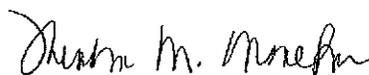
## CONCLUSION

Respondents are not in violation of state statutes, the administrative code, or its own Charter and codified ordinances when determining the prevailing wages of the construction equipment operators. Respondents are not in violation of the codified ordinance or state statute related to accrual of sick leave. Respondents paid Relators prevailing wages, less any legal statutory credits. With or without a collective bargaining agreement from 1994 through 2005 (although similar issues remain on appeal to this court related to 2003 to 2005), Respondents paid Relators correctly.<sup>36</sup> Respondents respectfully request this Court dismiss this matter and further that no writ be issued.

Respectfully submitted,

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<sup>36</sup> There is an issue remaining of which prevailing rate is applicable, Highway Heavy or the CEA agreement. The Fact-Finder in 2004 agreed with the City that Highway Heavy was more closely related to the work actually done by construction equipment operators. But, since the City had used the prevailing wage rate under the CEA agreement, she recommended continuing the higher rate pending future negotiations.

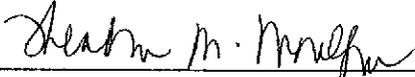
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Brief was sent by U.S. Mail, postage prepaid, on this

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# **APPENDIX**

Westlaw.

Not Reported in N.E.2d

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Not Reported in N.E.2d, 1988 WL 39293 (Ohio App. 8 Dist.)  
 (Cite as: Not Reported in N.E.2d)

**H**

Stasiuk v. City of Cleveland Ohio App., 1988. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,  
 Cuyahoga County.

Mitchell STASIUK, et al., Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, Defendant-Appellant.  
 No. 53718.

April 28, 1988.

Civil Appeal from Common Pleas Court, Case No. 949,449.

Harry T. Quick, Cleveland, for plaintiffs-appellees.  
 Marilyn G. Zack, Director of Law, Nick Tomino, Chief Counsel, Malcolm C. Douglas, Asst. Dir. of Law, City of Cleveland Law Department, Cleveland, for defendant-appellant.

MATIA, Judge.

\*1 Defendant-appellant, City of Cleveland (the City), appeals from the entry of final judgment in favor of plaintiffs-appellees, Mitchell Stasiuk, Gust N. Michos and John G. Zone, by the Cuyahoga County Court of Common Pleas. The trial court's judgment, to which the parties stipulated, was a partial summary adjudication affecting three members of a class consisting of approximately 800 present and former building and construction trades (or "crafts") employees of the City. Damages were assessed in favor of the appellees respectively in the amounts of \$66,591.35, \$42,218.67 and \$64,664.36, representing unpaid holiday, vacation and sick leave pay. The trial court also made an express determination per Civ.R. 54(B) that there was no just reason for delay.

This matter had its genesis in the filing of a complaint by the late Michael Kavalec on

November 19, 1975. Mr. Kavalec was a construction equipment operator employed by the City. He claimed that he had been denied sick leave pay for an 88-day illness and sought judgment for that pay in the amount of \$8,018.56. On July 14, 1976, an amended complaint was filed asserting a class action for unpaid holiday, sick leave and vacation pay alleged to have wrongfully been denied Michael Kavalec and other similarly situated employees of the City. On November 17, 1976, the trial court certified the action a class action to be maintained on behalf of a class consisting of " \* \* \* plaintiff Michael Kavalec and all other members of the building and construction trades employed by the City of Cleveland between May 7, 1969 and July 14, 1976."

On July 13 and September 20, 1977, plaintiff Michael Kavalec and the City filed cross-motions for summary judgment. On July 23, 1981, the trial court issued a judgment entry and opinion. The trial court identified codified ordinance sections concerning sick leave pay, longevity pay, paid holidays, and vacation pay and certain resolutions of the Board of Control, all of which denied the named benefits to building and construction trade employees of the City.

The trial court determined that the Board of Control had exceeded its authority in denying sick leave pay to building and construction trade employees. The trial court found for the City on the issue of longevity pay. The trial court ruled that the denial of paid holidays to the named class was an unconstitutional denial of equal protection under the law to the members of the class. The trial court further determined that the City's denial of vacation pay was based on an unreasonable and unconstitutional legislative classification of the affected employees. By way of dicta, the trial court questioned the logic beyond the City's denial of benefits to the class as well as the effectiveness of the City's actions in achieving the objective of encouraging qualified individuals to seek

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government employment.

The City attempted to appeal the trial court's ruling of July 23, 1981. Upon motion of the plaintiff the appeal was dismissed by this court for want of a final appealable order.

On September 14, 1982, the City moved to amend its answer to assert the defenses of limitations and release. On October 22, 1982, the trial court denied the unopposed motion.

\*2 On October 3, 1983, the City filed a motion for reconsideration of the trial court's ruling in favor of plaintiffs on the parties' cross-motions for summary judgment. To this motion the City appended the affidavit of Charles Pinzone, Executive Secretary of the Cleveland Building and Construction Trades Council, who testified that the denial of fringe benefits to building and construction trade employees of the City was consistent with their receipt of wages equivalent to those of private sector building and construction trade workers. Mr. Pinzone explained that in the private sector building and construction trade employment is characterized by seasonality, sensitivity to economic cycles and the absence of long term employment by single employers, as a result of which collective bargaining on behalf of such workers has focused on maximizing wages to the exclusion of fringe benefits. The affiant stated that as a result of 1972 Ohio Supreme Court ruling in a case in which he was plaintiff, the City was prohibited from calculating the value of fringe benefits into the wage scale paid its building and construction trade employees. On February 12, 1986, the trial court denied the City's motion for reconsideration.

Following unsuccessful efforts to bring the matter to trial on the damages issue the parties entered into a stipulated final judgment on the claims of the three named plaintiffs who had been substituted for the late Michael Kavalec. This timely appeal followed.

#### I.

##### Assignment of Error Number One

Appellant's first assignment of error is that:

"THE TRIAL COURT ERRED IN HOLDING THAT THE DETERMINATION OF THE CITY OF CLEVELAND NOT [sic] PROVIDE THE FRINGE BENEFITS OF PAID VACATIONS, PAID HOLIDAYS AND PAID SICK LEAVE TO ITS BUILDING AND CONSTRUCTION TRADES EMPLOYEES DENIED EQUAL PROTECTION TO THOSE EMPLOYEES WHEN (A) IT IS UNDISPUTED THAT THOSE EMPLOYEES CONSTITUTED A DISTINCT CLASS OF MUNICIPAL EMPLOYEES COMPENSATED ON A TOTALLY DIFFERENT BASIS AND RECEIVING SUBSTANTIALLY HIGHER PAY THAN ANY OTHER CLASS OF MUNICIPAL WORKER; AND (B) IT IS UNCONTROVERTED THAT THOSE EMPLOYEES WERE PAID AND RECEIVED HOURLY WAGES EQUAL TO WAGES PAID TO PRIVATE SECTOR EMPLOYEES IN THE SAME OCCUPATIONS AND THAT THOSE HOURLY RATES WERE SIGNIFICANTLY ENHANCED AS A CONSEQUENCE OF THE FACT THAT PRIVATE SECTOR BUILDING TRADES EMPLOYEES DO NOT RECEIVE ANY FRINGE BENEFITS."

Before proceeding to the arguments advanced by the appellant in support of its first assignment of error, it is appropriate to focus on what it is that is being reviewed and the posture of this case. Civ.R. 56(C) provides that:

" \* \* \* Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party

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being entitled to have the evidence or stipulations construed most strongly in his favor.”

An irrelevant or unnecessary factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be some *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 211, 106 S.Ct. 2505 (1986). A factual dispute is material if it might affect the outcome of the suit under the governing law. *Id.* A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* 91 L.Ed.2d 202, 211-12.

\*3 The burden of showing that there is no genuine issue of material fact suitable for trial falls upon the party moving for summary judgment. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The nonmoving party has no burden of proof in resisting a motion for summary judgment, but has a burden of rebuttal to supply evidentiary materials supporting the opposing position. *Whiteleather v. Yosowitz* (1983), 10 Ohio App.3d 272, paragraph one of the syllabus.

Civ.R. 56(E) provides in pertinent part:

“ \* \* \* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

Civ.R. 56(E) only states that if the nonmoving party fails to satisfy the burden of rebutting the moving party's evidentiary materials, summary judgment shall be entered against him *if appropriate*; the question whether reasonable minds can come to but one conclusion and that conclusion is adverse to the party opposing the motion is not automatically answered in the affirmative. *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d

198, 201-02.

The foregoing analysis is intended to make it clear that simply because the parties in filing cross-motions for summary judgment both asserted that there were no genuine issues of material fact neither concludes judicial inquiry on the point, nor reduces review of an order granting one or the other party's motion for summary judgment to a review of pure questions of law. This is especially so given the posture of this case on appeal from a partial summary adjudication of the rights of three members of a class of 800. This court will not issue advisory opinions on matters not specifically adjudicated by the trial court. All matters that are reviewed will be considered from the perspective of whether summary judgment was appropriate.

Appellant's first assignment of error raises the primary issue in this case: whether the trial court erred in ruling that no genuine issue of material fact existed and that as a matter of law appellees' constitutional right to equal protection of the law was violated by the City's denial of fringe benefits to appellees. Appellant argues that the appellees as a class are distinguished by the privilege of higher wages which compensate them for the fringe benefits they do not receive. Appellant further argues that the disparity in treatment of the appellees as a class with respect to fringe benefits is rational and does not offend their guarantee of equal protection. Appellant submits that the trial court intruded into the legislative domain by basing its judgment on an assessment of the wisdom and desirability of the City's policy of withholding fringe benefits from appellees. Appellant contends that the weight of authority stands in opposition to the trial court's ruling and that the trial court misapplied the authority upon which it relied.

Assigning logical priority to appellant's various arguments, the first matter to be dealt with is the appellees' status as a “class” or “legislative classification” and the concomitant standard of constitutional analysis properly to be applied to appellees' equal protection claims. Appellees are a class of employees claiming to be denied fringe benefits accorded other employees of the City. That there exists a disparity in fringe benefits is

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beyond dispute. What is in dispute is whether the denial of fringe benefits is a denial of equal protection to the members of the class. The class is not distinguished by race, color, creed or such other characteristic as would invite a finding of invidious discrimination. Under such circumstances, this court has held that the proper standard for constitutional analysis of equal protection claims is as follows:

\*4 "In adjudicating an equal protection claim against state action which discriminates among classes, a mere rationality test is to be employed where neither a fundamental interest nor a suspect class is involved. *Massachusetts Bd. of Retirement v. Murgia* (1976), 427 U.S. 307, 312. Thus, under this test, a classification must be upheld as constitutionally permitted, *unless its assailant demonstrates that it is not rationally related to the furthering of any legitimate state interest*. See, e.g. *Vance v. Bradley* (1979), 440 U.S. 93, 96-97." *State, ex rel. Ohio Civil Service Employees Assn., v. Stackhouse* (1981), 1 Ohio App.3d 121, 123 (emphasis supplied).

As a practical matter, the rational basis test requires that a legislative classification, albeit imperfect or discriminatory, will not be set aside if any set of facts reasonably may be conceived to justify it. *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 135, citing *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426.

Appellant's fundamental contention is that the City's policy of withholding fringe benefits from appellees is rationally based upon the fact that the appellees as a class are distinguished by the privilege of higher wages which serve to compensate them for the fringe benefits they do not receive. The focal point of appellant's argument is the case of *State, ex rel. Pinzone v. Cleveland* (1973), 34 Ohio St.2d 26. In *Pinzone* the Ohio Supreme Court ruled that Section 191 of the Charter of the City of Cleveland along with its enabling ordinance compelled the City of Cleveland to enact wage ordinances establishing pay scales for its building and construction trade employees exactly equal to those of said employees' private sector counterparts. The Court further ruled that the City could not offset

lower wage scales for crafts workers by factoring in the value of fringe benefits. This ultimately led the City to upgrade the wage scales of these workers and to eliminate all fringe benefits, the precise practice in the private sector.

Appellees' opposition to appellant's argument is almost exclusively procedural in nature. Appellees vigorously maintain that no factual basis exists in the record to support the appellant's contentions that appellees as a class are the only employees of the City paid on an exact parity with their private sector counterparts and that the compensation in both the public and private sectors is enhanced due to the absence of fringe benefits typically accorded other lower paid workers. Appellees submit that appellant's belated attempt by motion for reconsideration to authenticate the factual predicate for their argument is an impermissible attempt to get a second bite at the apple. Appellees' argument with respect to the Pinzone affidavit is not without merit, especially given the duration of this action. Appellant's response that the trial court's order granting summary judgment was subject to revision at any time prior to the entry of final judgment, per Civ.R. 54(B), is inadequate because the trial court denied appellant's motion for reconsideration.

However, appellees misapprehend the burdens, on motion as opposed to at trial, attendant to the issue of their alleged privileges as a class as it relates to their contention that the denial of fringe benefits constitutes a denial of appellees' right to equal protection of the law. The sole affidavit in support of appellees' motion for summary judgment was that of the late Michael Kavalec who testified that:

\*5 " \* \* \* he has not received sick leave with pay, paid holidays, longevity pay or paid vacations for the duration of his employment with the City, and specifically dating from 1969.

"Affiant states that said benefits have not been paid to members of the building and construction trades employed by the City from 1969 to present, except for sick leave that was paid up to 1973."

Appellees established the fact of a disparity in fringe benefits, but did not establish that no genuine

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issue of material fact existed as to whether that disparity was rationally related to the furtherance of a legitimate state interest. Appellant addressed this in its brief in support of its motion for summary judgment at 14-15:

“ \* \* \* Plaintiffs allege that the fact of exclusion alone shows the unreasonableness and unconstitutionality of that determination. Plaintiffs do not demonstrate, however, as they are required to demonstrate, the unreasonableness of that determination.

“Within the general class of hourly rate employees is the sub-class of crafts employees. The differences between that sub-class and other sub-classes is real and significant and justifies differences in the grating (sic) of the fringe benefit in issue-the nature and term of work is different, the wage rates are different, the union affiliations and bargaining agents are different, and lastly, only the crafts employees were beneficiaries of the Supreme Court's ruling in the *Pinzone* case previously discussed. *The financial implications of that decision are vividly depicted in the series of salary ordinances appended to Plaintiffs' Brief which shows that, since 1969 to the present, the salary range for each classification of craft worker has increased dramatically. These increases came about, in significant part, because of compliance with the Pinzone decision. Because of the City's need to comply with that decision, there was a reasonable basis for distinguishing between crafts and other hourly employees in determining the availability of this fringe benefit.*” (emphasis supplied).

A review of the series of salary ordinances appended to the appellees' brief indeed indicates significant increases in salary range for building and construction trade employees of the City over the years from 1969 to 1976. There is a particularly noticeable increase in maximum hourly wages for crafts workers between the City Record of January 20, 1971 and September 12, 1973. Since *State, ex rel. Pinzone, v. Cleveland* (1973), 34 Ohio St.2d 26, was decided on April 18, 1973, it readily may be surmised, as argued by the City in the trial court, that the increases came about in compliance with

the *Pinzone* decision.

Where a party moving for summary judgment by its own evidence shows that a genuine issue of material fact exists summary judgment is improper. *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d 198, 201. Inasmuch as the Ohio Supreme Court in *Pinzone* not only mandated the establishment of wage scales for building and construction trades employees of the City on a parity with those of the private sector, but precluded an offset for fringe benefits not received by those employees in the private sector, there is at least a genuine issue of material fact as to whether the City's withdrawal of said fringe benefits to those workers had a rational basis. Hence, summary judgment on equal protection grounds was inappropriate.

\*6 The foregoing conclusion is consistent with recurring themes in the federal authorities argued by the parties. The wisdom of a legislative classification is not a proper subject of judicial inquiry; the question is whether the classification is rationally related to the furtherance of a legitimate governmental purpose. *Confederation of Police v. City of Chicago* (N.D.Ill.1980), 481 F.Supp. 566; *Medler v. United States, Bur. of Reclamation* (C.A. 9, 1980), 616 F.2d 450; *Anderson v. Winter* (C.A. 5, 1980), 631 F.2d 1238; *Alford v. City of Lubbock* (C.A. 5, 1982), 664 F.2d 1263; *Jackson Firefighters Assn. v. City of Jackson* (C.A. 5, 1984), 736 F.2d 209. The courts are cognizant of the potential for untoward over-extension of equal protection claims into the realm of legislative social and fiscal policy decisions. *Anderson v. Winter, supra*; *Jackson Firefighters Assn. v. City of Jackson, supra*. However, policy decisions remain subject to equal protection scrutiny under the rational basis standard. *Alford v. City of Lubbock, supra*.

The wholesale exclusion of a class of public employees from the enjoyment of emoluments such as the fringe benefits at issue in this case will not escape equal protection scrutiny on a case-by-case basis. The situation here does not invite equal protection claims by every government employee

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who feels that he or she is entitled to the same salary, vacation schedule, working hours or other employment benefit received by some other government employee, the concern of the court in *Confederation of Police v. City of Chicago, supra* (police unsuccessfully contested denial of time and one-half for overtime).

The outcome here also is consistent with *Roth v. Public Employees Retirement Bd.* (1975), 44 Ohio App.2d 155, wherein the Franklin County Court of Appeals held:

"The provisions of R.C. 145.02 which grant to public employees who are receiving benefits from municipal policemen or firemen pension plans the right to participate, under certain conditions, in the Public Employees Retirement Fund, but withholds such privilege from employees receiving benefits under pension plans provided for municipal employees generally, denies to the latter the equal protection of the law." *Id.*, syllabus.

A close reading of the *Roth* opinion clearly reveals that the court found that the disparate treatment of county employees who were formerly municipal police officers or firefighters and those who were formerly other municipal employees was not rationally related to the furtherance of any legitimate state interest.

\*7 The *Roth* court found that as between the two classes of employees:

" \* \* \* the differences, to be valid, must be between these plaintiffs and other county employees desiring to participate in PERS. We do not think a basically valid distinction may be based upon the type of former employment *per se.* \* \* \*." *Id.* 44 Ohio App.2d 155, 159.

Appellees press this reasoning as invalidating the City's asserted justification for denying their class fringe benefits based on comparison to crafts workers in the private sector. Again, however, the burden of proof was upon appellees to eliminate any genuine issue of material with respect to the City's position that appellees receive higher wages than other city employees in order to compensate

appellees for the fringe benefits they do not receive.

This court holds that a genuine issue of material fact persists in the case *sub judice* which precludes summary disposition of appellees' equal protection claim that the City's denial to them of fringe benefits is not rationally related to the furtherance of a legitimate governmental interest.

Appellant's first assignment of error is well taken.

## II.

### Assignment of Error Number Two

Appellant's second assignment of error is that:

"THE TRIAL COURT ERRED IN HOLDING THAT THE CLEVELAND'S MAYORS FROM 1969 to 1979 ABUSED THEIR DISCRETION BY DETERMINING THAT THE CITY'S BUILDING AND CONSTRUCTION TRADES EMPLOYEES WOULD NOT RECEIVE PAID VACATIONS WHEN THOSE EMPLOYEES RECEIVED A WAGE AND BENEFIT (sic) PACKAGE EQUAL AND PARALLEL TO THAT RECEIVED BY THEIR PRIVATE SECTOR COUNTERPARTS."

Appellant's argument is directed to a statement in the trial court's Judgment Entry and Opinion that:

" \* \* \* [T]he previous legislation conferred unbridled discretion upon the mayor or other executive body, and the discretion was abused. \* \* \* "

It is axiomatic that an abuse of discretion by a public officer entails more than an error in judgment. Abuse of discretion contemplates passion, prejudice, bias, perversity of will, or similar repugnant states of mind underlying improper official conduct. *City of Cleveland, ex rel. Industrial Pollution Control, Inc. v. City of Cleveland* (November 27, 1985), Cuyahoga App. Nos. 49446, 49495, 49777 (unreported). Appellant argues that the actions of the City's mayors in complying with the directive of a codified

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ordinance vesting them with discretion to grant or withhold vacation pay could not rise to the level of an abuse of discretion. For their part, appellees concede that they do not rely on such a "slender reed" as abuse of discretion in support of their claims.

The court finds that appellant's argument is well taken for the reason that the trial court's finding of an abuse of discretion was based on the erroneous determination that the denial of vacation pay to appellee was unconstitutional as a matter of law. The full text of the trial court's decision in this respect is as follows:

"In the opinion of this Court, the Board of Control Resolution No. 013-76, which excludes only the employees in the building and construction trades from the paid holidays granted to all other hourly rate employees, is an unreasonable classification in violation of the Equal Protection Clause. Article I, Section 2 of the Ohio Constitution. Likewise, Codified Ordinance No. 171.28 governing vacations with pay, and excluding hourly rate craft employees, paid on the basis of prevailing private sector wages, from vacation benefits, is an unconstitutional legislative classification. For the time period 1969 to 1979, the ordinance read that the mayor or other authority *may* grant vacations to city employees. In fact, the craft workers were never granted paid vacations. Thus, the previous legislation conferred unbridled discretion upon the mayor or other executive body, and the discretion was abused. The plaintiffs are entitled to compensation for paid holidays and paid vacations for the period from 1969 to the present.' Judgment Entry and Opinion, 5-6.

\*8 The trial court determined that the denial of vacation pay to appellees was unconstitutional. The trial court's characterization of the denial as an abuse of discretion was an amplification of its constitutional determination. Since the trial court was in error in determining that the City's denial of vacation pay to appellees was necessarily unconstitutional, it follows that the acts of the City's mayors in carrying out the City's policy were not an abuse of discretion.

Accordingly appellant's second assignment of error

is well taken.

### III.

#### Assignment of Error Number Three

Appellant's third assignment of error is that:

"THE TRIAL COURT ERRED IN HOLDING THAT THE CITY'S DENIAL OF PAID SICK LEAVE TO ITS BUILDING TRADES EMPLOYEES WAS NOT AUTHORIZED BY ORDINANCE, WHERE THE RELEVANT ORDINANCE EXPRESSLY AUTHORIZED THE CITY'S BOARD OF CONTROL TO MAKE RULES AND REGULATIONS CONCERNING SICK LEAVE ENTITLEMENT."

Effective May 7, 1969, Cleveland City Council enacted Ordinance No. 216-69 codified as section 1.4767 providing as follows:

"(a) all full time annual rate city employees and all full time hourly rate city employees shall be entitled to sick leave with pay.

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

As amended by Ordinance No. 2294-8C, effective October 29, 1980, the above legislation provides at recodified section 171.31(a) that:

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

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Prior to the revision of the subject sick leave pay ordinance, the Board of Control on August 1, 1973, denied sick leave pay to appellees via Resolution No. 475-73. The trial court ruled that the Board of Control thereby exceeded its authority. This court agrees.

\*9 The ordinance in question entitled all city employees to sick leave pay. Subsection (B) thereof enabled the Board of Control to establish rules and regulations for "those entitled to sick leave." No amount of legerdemaine can bootstrap the enabling subsection of the ordinance to authorize the Board of Control to modify the legislatively defined universe of city workers entitled to receive sick leave pay: "all full time annual rate city employees and all full time hourly rate city employees \* \* \*." Until the ordinance was modified in 1980, this universe included appellees.

Appellant's third assignment of error is without merit.

#### IV.

##### Assignment of Error Number Four

Appellant's fourth assignment of error is that:

"THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO THE CITY TO AMEND ITS ANSWER IN ORDER TO ASSERT THE DEFENSES OF LIMITATIONS AND RELEASE, BECAUSE NO PREJUDICE TO PLAINTIFFS COULD HAVE RESULTED THEREFROM."

Following the decision in *State, ex rel. Pinzone, v. City of Cleveland* (1973), 34 Ohio St.2d 26, the City procured releases for claims for fringe benefits arising directly or indirectly from that case from many members of the delineated class in this case. On September 24, 1982, the City moved to amend its answer to assert the defense of release and an unspecified defense of limitations. On October 22, 1982, the trial court denied the City's motion.

Civ.R. 8(C), governing affirmative defenses provides in pertinent part that:

"In a pleading to a preceding pleading, a party shall set forth affirmatively \* \* \* release \* \* \* statute of limitations \* \* \* and any other matter constituting an avoidance or affirmative defense. \* \* \*"

In *Spies v. Gibson* (1982), 8 Ohio App.3d 213, the Montgomery County Court of Appeals found no abuse of discretion where a trial court permitted a defendant to amend his answer to assert the defense of expiration of the one year statute of limitations for legal malpractice just prior to trial. The court supplied the following insightful analysis:

"Although expiration of the period specified by a statute of limitations is an affirmative defense which must be pleaded (Civ.R. 8[C] ), leave of a trial court to amend a pleading, in order to include an affirmative defense previously overlooked, will be freely given (Civ.R. 15[A] ) to permit all the applicable facts and law to be raised in order that the case may be decided on its merits, unless the party opposing the amendment can establish that actual prejudice will be visited upon him by allowance of the amendment. McCormac, Ohio Civil Rules Practice (1970) 193-195, Sections 9.01 and 9.02. The provision of Civ.R. 12(H), limiting amendments to those made as a matter of course under Civ.R. 15(A), applies only to raising the defenses listed in Civ.R. 12(B); it does not restrict a liberal granting of leave to amend to raise affirmative defenses listed in Civ.R. 8(C). See McCormac, Ohio Civil Rules Practice, *supra*, 167, at Section 7.36. Because the defense of statute of limitations is an affirmative defense listed in Civ.R. 8(C), and is not one of those listed in Civ.R. 12(B), the trial court was in a position to grant leave to defendant to amend his answer to include that defense, even though the time had elapsed within which defendant could have amended his answer as a matter of course. Under the circumstances of this case, there having been no showing by plaintiff of actual prejudice resulting from the amendment, we are unable to say that the trial court abused its discretion in applying the liberal amendment provision of Civ.R. 15(A). In fact, the trial court might well have abused its discretion had it not

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permitted the amendment. See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161 [63 O.O.2d 262], paragraph six of the syllabus." *Id.* 8 Ohio App.3d 213, 216.

Appellees contend that the trial court's disposition of the parties' cross-motions for summary judgment was in effect a trial on the merits of all liability issues. Appellees object to appellant's effort to assert an unspecified statute of limitations.

\*10 This court is of the opinion that the trial court erred in denying the City leave to assert the defense of release. Where an opposing party has suffered no prejudice from the moving party's delay in raising the issue of release a trial court does not have discretion to deny leave to raise that defense. See *Rowland v. Finkel* (1987), 33 Ohio App.3d 77 ( Civ.R. 60(B), defense of satisfaction).

Summary judgment, particularly partial summary adjudication, is not the equivalent of a trial. The situation here is that not all members of appellees' class have released any claims for damages that may exist in this case. Moreover, those damages have yet to be determined. No prejudice will accrue to those entitled to damages, nor will their recovery, if any, be affected by consideration of the validity and applicability of the defense of release.

With respect to the defense of "limitations" the City has failed to specify what statute of limitation might apply. The City has failed also to separately argue by brief to this court what statute of limitations might apply. Under these circumstances there can be no finding of an abuse of discretion in denying the City leave to assert an unspecified defense. It is incumbent upon a party seeking leave to amend an answer to assert an overlooked affirmative defense to specify the precise nature of the defense and make a *prima facie* showing of its validity and applicability to the case before the court.

Therefore, appellant's fourth assignment of error is well taken as to the defense of release only.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

MARKUS and THOMAS J. PARRINO,<sup>FN\*</sup> JJ.,  
 concur.

FN\* Judge Thomas J. Parrino, Retired  
 Judge of the Eighth Appellate District,  
 sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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*Stasiuk v. City of Cleveland*  
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STATE OF OHIO )  
 ) SS:  
COUNTY OF CUYAHOGA )

IN THE COURT OF COMMON PLEAS  
CASE NO. 949449

MITCHELL STASIUK, et al. )  
 )  
 Plaintiffs )  
 )  
 vs. )  
 )  
 CITY OF CLEVELAND )  
 )  
 Defendant )

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

James J. Carroll, J.:

FINDINGS OF FACT

1. Plaintiffs Mitchell Stasiuk, Gust Michos and John V. Zone are retired employees of Cleveland (Stasiuk Tr. 39; Michos Tr. 57, 58; Zone Tr. 47).<sup>1</sup>

2. The named plaintiffs were employed by Cleveland as crafts workers. Stasiuk was a journeyman painter employed by the City for 32-1/2 years commencing in 1953 and concluding with his retirement in 1984 (Stasiuk Tr. 35, 36, 523). Michos was a painter employed by Cleveland for 27-1/2 years from 1961 until retirement in 1988 (Michos Tr. 56, 554). Zone, a boilermaker, worked for Cleveland for 23 years from 1961 until 1984 (Zone Tr. 44, 47).

3. Plaintiffs were, on April 3, 1987, substituted for the original named plaintiff, Michael Kavalec, deceased, as representatives of a class comprised of "all . . . members of the various building and

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<sup>1</sup> Throughout these proposed findings, references to the record will be made to the name of the witness and the transcript pages where the testimony relied upon appears. The abbreviations PX and DX will denote plaintiffs' and defendant's exhibits respectively.

construction trades employed by the City of Cleveland between May 7, 1969 and July 14, 1976."

4. Plaintiffs each contend that their claims are typical of the claims of the certified class (Stasiuk Tr. 32; Zone Tr. 41; Michos Tr. 51).

5. Plaintiff Mitchell Stasiuk became a journeyman painter in 1945 and worked in the private construction industry until 1953 (Stasiuk Tr. 33). From 1945 until commencing employment with Cleveland in 1953, he worked for approximately 15 different employers and was unable to ply his trade on a daily basis (Stasiuk Tr. 33, 34). While working in the private construction industry he was paid the prevailing union scale and did not receive paid sick leave or vacation and holiday pay (Stasiuk Tr. 34, 35, 545). Similarly, after joining the City, he received the prevailing union rate, but no sick leave, vacation pay or holiday pay (Stasiuk Tr. 36, 37, 546).

6. Plaintiff Gust Michos worked as a painter for Republic Steel from 1948 until 1953. While in that employ, he received less than union scale and received neither paid sick leave nor paid holidays. Republic did grant paid vacations (Michos Tr. 52, 53). From 1953 until 1961, Michos worked in the private construction industry. He worked, on an average, for from three to four employers each year (Michos Tr. 53). He found employment in private construction seasonal and subject to economic cycles. Thus, in a good year, he would work eight months out of twelve and in bad years not at all (Michos Tr. 54, 573-574). While in private construction he did not receive paid sick leave, holiday pay or vacation pay (Michos Tr. 55), nor did he receive those benefits after joining the City (Tr. 56).

7. Plaintiff John Zone received his journeyman boilermaker's papers in 1950 and worked for private contractors until 1960 (Zone Tr. 42). He found work in the private construction industry seasonal and subject to

economic cycles (Zone Tr. 43). Although able to secure full employment only sixty percent of the time, he observed that other trades encountered greater difficulty in maintaining levels of employment (Zone Tr. 43-45, 589). While working in the private sector he received neither paid vacations and holidays nor paid sick leave (Zone Tr. 47), nor did he receive those benefits when he entered Cleveland's employ (Zone Tr. 46). Excepting a two-week layoff episode for which he received back pay, Zone worked full time for Cleveland from 1961 until retirement in 1984 (Zone Tr. 46, 48, 591).

8. Defendant City of Cleveland is an Ohio municipal corporation. Its affairs are generally conducted under a Charter adopted by its electors and pursuant to ordinances and resolutions passed by the Council. The budgetary practices of Ohio political subdivisions, including municipal corporations, are governed by Ohio statutory law, including R.C. Chapter 5705 which requires that subdivisions of the state, such as Cleveland, maintain balanced budgets.

9. In the early 1970's, Cleveland's fiscal circumstances were dire. Because of the failure of various tax levies, there was a shortage of operating funds and the City was in great financial distress (Hamilton Tr. 221). Those fiscal problems have been chronic and continuing. Thus, Cleveland later went into default (Margolius Tr. 149). As recently as 1987, plaintiffs' economists, Burke, Rosen and Associates, noted that Cleveland's "well known problems" have been exacerbated by diminished federal funding, devotion of a high proportion of its budget to the police function and slow growth of its tax revenues (DX, BB, Report of Burke, Rosen and Associates dated June 2, 1987, p. 4).

10. Cleveland's work force has ranged in size during recent years from 7,839 persons in 1981 to 8,728 in 1986 (DX F-1, p. 14; F-3, p. 17).

That work force is spread among approximately 500 different job classifications (Margolius Tr. 189). Cleveland employees are represented by 43 unions (Haddad Tr. 67). The largest of the job classifications are Patrol Officer 1 (from 1080 employees in 1981 to 1259 in 1986); Firefighter 1 (533 in 1981 to 605 in 1986), and Waste Collectors (328 in 1981 to 246 in 1986). (DX F-1, F-3) Cleveland has at all pertinent times employed building tradesmen to perform maintenance work on City facilities (Haddad Tr. 104). The number of tradesmen employed by Cleveland during the past decade ranged from 158 in 1981 to 190 in 1986. (DX F-1, F-3) The City's crafts workers are concentrated in the Department of Public Utilities and the Division of Maintenance of the Parks, Recreation and Properties Department (Margolius Tr. 148-149).

11. This action is before this Court on plaintiffs' Second Amended Complaint. The proceeding commenced in 1975 and in 1976 was certified as a class action under Rule 23, Ohio Rules of Civil Procedure. The case is presently before this Court on remand from the Court of Appeals of Cuyahoga County for adjudication of the entitlement of plaintiffs and their class to paid vacations and holidays from and after May 7, 1969 and paid sick leave on and after October 29, 1980.<sup>2</sup> The Second Amended Complaint seeks an award of damages against Cleveland for claimed denial of sick pay, vacation pay and holiday pay in the amount of \$40,000,000.00.

12. This cause came on for trial on April 9, 1990 and was heard by the Court, as trier of the fact, through April 17, 1990.

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<sup>2</sup> Plaintiffs and class received paid sick leave from May 7, 1969 to October 1, 1972. The Court of Appeals determined that plaintiffs were entitled to paid sick leave from October 1, 1972 until October 29, 1980 and the issue of that entitlement is not before this Court.

13. Section 191 of Cleveland's Charter, in effect from November 8, 1938 until February 17, 1981,<sup>3</sup> provided in pertinent part (DX U-3):

The salary or compensation of all officers and employees in the unclassified service of the city shall be fixed by ordinance, or as may be provided by ordinance. The salary or compensation of all other officers and employees shall be fixed by the appointing fitness and seniority within the limits set forth in the Council's salary or compensation schedule for which provision is hereinafter made. The Council shall by ordinance establish a schedule of compensation for officers and employees in the classified service, which schedule shall be in accordance with the prevailing rates of salary or compensation for such services, shall provide for like compensation for like services, and shall provide minimum and maximum rates (which may be identical) of salary or compensation for each grade and classification of positions determined by the civil service commission under Section 126 of this Charter. For the guidance of Council in determining the foregoing schedule the civil service commission shall prepare salary or compensation schedules and the Mayor or any director may, and when required by Council shall, prepare suggested salary or compensation schedules.

14. On February 7, 1947, the Council of the City of Cleveland enacted Section 1.4754 of Cleveland's Codified Ordinances providing as follows with respect to compensation of building trades positions (DX U-2):

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<sup>3</sup> The prevailing wage provision of Section 191 of the Charter was amended effective February 17, 1981. The 1981 amendment is included in the appendix to these proposed findings as Appendix 1. The policies and practices of the City with respect to building trades employers were not changed by the amendment which provides specifically (DX U-1):

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

Salaries and compensation of officers and employees of the City of Cleveland, except those required to be fixed by Council, shall be fixed by the appointing authority within the schedule of compensation established by Council pursuant to Section 191 of the Charter, in accordance with ability, fitness, seniority, and efficiency.

On and after January 1, 1948, no change in the schedule of compensation so established shall be made except in the following manner:

- (a) In the case of positions involving the building trades an ordinance shall be introduced in Council at such time as the prevailing rate is established by negotiation with employers generally in the City of Cleveland, which ordinance, when passed, shall be in effect for a period of one year thereafter.

15. Until 1970, tradesmen employed by Cleveland received the same pay that outside tradesmen received from private industry -- the union rate (Pinzone Tr. 355; Stasiuk Tr. 36; Zone Tr. 45; Michos Tr. 57). According to the witness Charles Pinzone, Executive Secretary of the Building and Construction Trades Council, that mode of payment was in effect long before his involvement as a building trades union official (Pinzone Tr. 355) which dates back to 1964 (Pinzone Tr. 354). The practice had been that the trades unions would notify the City of union pay increases in the private sector and the City Council would implement the new rate by ordinance (Pinzone Tr. 356).

16. Commencing in 1970, Cleveland failed to implement the union rates negotiated by the building trades with the private construction industry and that practice continued after a new City administration came into office in November 1971 (Pinzone Tr. 356; Hamilton Tr. 222, 223, 234).

17. As a consequence, the building trades unions, through Pinzone, brought suit to enforce payment of the prevailing union rate (Pinzone Tr. 356).

18. On May 5, 1972, the Court of Appeals of Cuyahoga County issued a writ of mandamus ordering Cleveland to implement the prevailing union rate. That Court stated the issue before it as follows:

The issues are whether under the Charter and Ordinances of the City of Cleveland the City has a duty to pay the skilled building trades craftsmen employed by it the prevailing rate of pay negotiated for each of the skilled building trades crafts in the area of the City of Cleveland and whether the Council of the City of Cleveland, Ohio, the legislative body of the Municipality, is obligated to discharge the municipality's duty by the appropriate ordinance.

The Court of Appeals concluded:

. . . the City of Cleveland had a clear legal duty to pass ordinances paying the members of the crafts represented by the building trades wage rates which are provided for in the wage schedule of the contract.

(Opinion, Court of Appeals of Cuyahoga County, reproduced as Appendix 2.)

That order was affirmed by the Supreme Court of Ohio in 1973. State, ex rel. Pinzone v. City of Cleveland (1973), 34 Ohio St. 2d 26.

19. Following the decision of the Supreme Court, Cleveland paid its building tradesmen all back wages owing as a consequence of the Court's decision in a two-installment payout amounting to approximately \$3,600,000.00 (Haddad Tr. 70; Hamilton Tr. 225).

20. In connection with that payout, the City received releases from various tradesmen (Haddad Tr. 71-74). The employees released:

. . . all claims . . . arising out of or in any manner related to my compensation by the said City of Cleveland, through and including May 1, 1973, including but not by way of limitation,

all claims for wages, including claims for overtime wages, fringe benefits (including sick pay, vacation pay, pension payments and contributions, and hospitalization allowances), and all other claims arising directly or indirectly from the decision of the Supreme Court of Ohio in the case of State, ex rel. Pinzone v. City of Cleveland.

(Defendant's Exhibit D.)

21. At all times after the Pinzone decision, Cleveland's policy and practice was to pay its craftsmen at rates set by negotiations between the various building trades locals and the private contractors association in the Cleveland construction area, i.e., the union rate (Haddad Tr. 79, 93, 94). The expectation of the building trades unions was that Cleveland would implement the prevailing union rate as established by periodic negotiations in the private construction industry (Pinzone Tr. 359, 360) and Mr. Pinzone testified that the City resumed and continued to pay the prevailing union rate up until the time a collective bargaining agreement between the City and the trades unions became effective on May 1, 1987 (Pinzone Tr. 357).

22. The City never considered varying from payment of the union rate, interpreting the governing ordinance as requiring payment of the private sector contract rates. Cleveland did not consider alternative modes of payment nor were any suggested to it (Hamilton Tr. 235, 236, 278, 279).

23. Plaintiffs' expert, Harvey Rosen,<sup>4</sup> defined the term "prevailing rate" as "a wage rate that a large number of individuals in a similar occupation or field would be earning at a particular time." (Rosen

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<sup>4</sup> Dr. Rosen received his Ph.D. in Economics from Case Western Reserve University in 1969 and has taught for the past 23 years at Cleveland State University where he is an associate professor. He is also a member of the private consulting firm of Burke, Rosen and Associates and has testified extensively, concentrating in the field of labor force damage determinations (PX 11; Tr. 603-605, 658-661).

Tr. 606) Dr. Rosen expressed the opinion that the proper means of determining a prevailing rate for Cleveland's craftsmen would have been the calculation of a blended rate, comprised of a weighted average of the union rates, non-union rates, and rates paid to crafts personnel working for industrial concerns such as General Motors or Ford Motor Company (Rosen Tr. 612-614).

24. Cleveland's expert on labor and industrial relations, Jack G. Day,<sup>5</sup> pointed out that the term "prevailing rate" normally refers to construction rates. The term "building trades," he noted, is a word of art which refers to skilled craftsmen who are highly paid for work in the private construction industry, not to plant maintenance employees who may be doing parallel work. Day asserted that the term "building trades" and "prevailing rates" describe conjunctive concepts and that "when you talk about prevailing rates in the building trades you are normally talking about organized labor and what they get as prevailing rates." (Day Tr. 458-461)

25. Based upon all the evidence in this case, including Cleveland's consistent practice of paying the prevailing union rate to its craftsmen, which existed before, as well as after, the decision in State, ex rel. Pinzone v. City of Cleveland, and the evidence described in Findings 23 and 24, this Court finds that the term "prevailing rate" as used in the context of this litigation means the "union rate".

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<sup>5</sup> Jack Day is an attorney who presently devotes a large portion of his time to labor arbitration. Admitted to the bar in 1939, he served with the United States Department of Labor, War Labor Board and National Wage Stabilization Board. As a practicing attorney, he conducted an extensive labor law practice, representing a variety of unions. He served as an Ohio appellate judge for 16 years and as Chairman of Ohio's State Employment Relations Board for 4 years (DX AA; Day Tr. 418-424).

26. Dr. Rosen, additionally, expressed the opinion that (a) the City did not pay the prevailing rate to its craftsmen; and (b) something less than a systematic method was utilized by the City in making its payroll decisions (Rosen Tr. 625, 626). The predicate for that opinion was his analysis of wage payments to craftsmen from 1969 through 1986 as reflected in PX 15, Tables 1 and 2, and PX 16(A). He testified that from 1969 to 1980 he found approximately 1,200 discrepancies between City pay bands and the prevailing union rate, while between 1981 and 1986 he counted 301 discrepancies between the prevailing rate and amounts actually paid by Cleveland to its trades employees. Dr. Rosen's method of calculating the discrepancies was to note any difference between the City rate and the prevailing union rate and to tally the number of persons in each classification in which the difference occurred (Tr. 623-626). For example, in 1973, he found variances between the City's pay band and the prevailing rate in four trades classifications having a total of eleven employees. He therefore counted eleven discrepancies for that year (PX 15(A)).

27. The instances of discrepancy are concentrated in the years 1969 through 1972 when Cleveland and the building trades litigated the prevailing wage issue in the Pinzone case. Specifically, 1,241 of the 1,737 discrepancies claimed by Dr. Rosen (71% of all discrepancies noted by Rosen) occurred during that period when the City admittedly did not pay the prevailing wage (Rosen Tr. 671-674). Those 1,241 noted discrepancies were the subject of the \$3,600,000.00 payout described in Finding 19, supra. Nor did Rosen give effect to any of the numerous other retroactive pay adjustments made by the City (Rosen Tr. 689).

28. The Rosen analysis did not ascribe any significance to the amounts of the discrepancies (Rosen Tr. 679, 689). Thus, he counted to

differences of one-half cent (Rosen Tr. 689), one cent (Rosen Tr. 684), two cents (Rosen Tr. 688), three cents (Rosen Tr. 681), four cents (Rosen Tr. 685), five cents (Rosen Tr. 685) and six cents (Rosen Tr. 679). Additionally, he counted as discrepancies instances in which Cleveland paid tradesmen slightly more than the prevailing wage. For example, he noted as discrepancies instances in which the City paid a painter foreman three cents more than the prevailing rate (PX 15; DX T, p. 1) and a pipefitter foreman one cent more than the prevailing wage (PX 15; DX T, p. 7).

29. In his analysis of the years 1973 through 1980, Rosen found no discrepancies in 29 of the 47 classifications evaluated (DX 15A, Rosen Tr. 674-684). All but eight of the discrepancies were for amounts of seven cents per hour or less (DX T, pp. 1-8). Dr. Rosen's analysis also unearthed discrepancies in 26 classifications during the 1981 to 1986 period. (PX 15, Table 1) All except twenty of those discrepancies were for amounts ranging from one-half cent to nine cents per hour. In summary, the Rosen study claims to have found 492 instances in which Cleveland paid an amount different than the prevailing wage over the 14-year period from 1973 through 1986. In only 28 of those instances did the disparity exceed nine cents per hour.

30. City witness Barbara Margolius<sup>6</sup> also conducted an evaluation of Cleveland's wage payments to its building tradesmen. Unlike Dr. Rosen, Mrs. Margolius examined actual payroll records for each of the years after

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<sup>6</sup> Mrs. Margolius is presently a consultant performing economic and statistical analysis. She received her master's degree in public policy from the University of Michigan and is a Ph.D. candidate at Case Western Reserve University. She has worked as a budget analyst for NASA and the City of Cleveland. While with Cleveland, her work dealt with the building trades and she also served as controller of the Department of Public Safety (Margolius Tr. 144-150).

the decision in Pinzone, as well as the City's pay band ordinances (Margolius Tr. 178). That study is reflected in DX T (Margolius Tr. 179-183). On the basis of that analysis, Mrs. Margolius concluded that the City, since 1973, has paid the prevailing wage to its building trades classifications, subject to occasional minor errors of a few cents (Margolius Tr. 177, 178, 183).

31. Based upon the evidence before it, this Court finds that Cleveland was in compliance with its obligation to pay the prevailing rate of compensation to its building trades employees.

32. The prevailing rate of compensation paid by the City to its building tradesmen was the gross or total rate paid to private sector building tradesmen prior to the deduction of fringe benefits (Haddad Tr. 98-104, Pinzone Tr. 364). For example, in 1983, the prevailing rate for a pipefitter was \$22.93. From that gross amount, various union deductions were made for holidays, vacations, pensions, health and welfare funds, dues, etc., with the result that the private sector tradesmen would receive net pay of \$17.41 per hour (Haddad Tr. 102, 103; DX B-14). The City tradesmen received the gross rate of \$22.93 per hour. None of the union deductions were subtracted from the City employee's pay or paid into the union; all amounts were paid directly to the City tradesman for use as he saw fit (Haddad Tr. 103, 104).

33. The City's contribution on the employee's behalf to the Public Employees Retirement System is 13.94 percent of that gross amount (Margolius Tr. 175).

34. Charles R. Pinzone, Executive Secretary of the Cleveland Building and Construction Trades Council, representing approximately 30,000 building tradesmen in northern Ohio (Pinzone Tr. 382), represents the

buildings trades in the negotiation of the prevailing union wage (Pinzone Tr. 359, 360). Pinzone testified that the prevailing wage is a high rate because union members do not work steadily all year and often work for five to six different employers each year (Pinzone Tr. 364). Work in the trades, Pinzone testified, is seasonal -- "If the weather is bad, you don't work" (Pinzone Tr. 364, 365); erratic -- "If you run out of work on one job . . . a man has to go to the hall" (Pinzone Tr. 365); and subject to the state of the economy -- "We have not had full employment . . . in the last 10 or 15 years until now. By steady employment I mean everyone working at least 1800 hours a year," "The Continuity is not there." (Pinzone Tr. 366, 398)

35. Mr. Pinzone's testimony is corroborated by that of each of the expert witnesses -- Dr. Rosen, George Johnson who gave economic testimony for Cleveland,<sup>7</sup> and Jack Day. The construction industry is highly seasonal, cyclical and transitory (Johnson Tr. 295, 296; Day Tr. 479; Rosen Tr. 698-700).

Thus, Dr. Johnson testified that private construction is seasonal since there are times of the year when demand for labor is greater than other times. Construction workers therefore do not work all year (Johnson Tr. 296). Cyclicalities refers to the unemployment that comes when the economy sags. Unemployment is much greater for those engaged in investment type activities such as construction with the result that the unemployment

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<sup>7</sup> Dr. George Johnson is a Professor of Economics at the University of Michigan. He received his Ph.D. in Economics at the University of California and specializes in labor economics. ("[T]hat part of economics that deals with labor markets, wages, employment and all things associated with jobs.") He has served as Director of Evaluation, United States Department of Labor and as Senior Staff Economist to the President's Council of Economic Advisors.) (Johnson Tr. 284-287)

rate of construction workers is usually twice the national average (Johnson Tr. 296). It is, Johnson testified, standard economics that wages are high in the construction industry because of the cyclicity and seasonality associated with employment in that industry (John Tr. 297).

36. Two consequences flow from the payment by Cleveland of the prevailing union rate to its building trades employees. First, there is created a separate and distinct class of public employees whose compensation is substantially higher than that of other large classifications of municipal employees (Margolius Tr. 184). Second, as a consequence of the relative continuity of public employment, tradesmen employed by Cleveland are generally better compensated than their private sector counterparts from whose wage structure their pay is derived (Johnson Tr. 295).

37. Over the span of years from 1969 through 1986, the compensation of Cleveland's craftsmen held constantly at levels more than twice that of the largest classifications of City employees -- patrol officer, firefighter and waste collector (Margolius Tr. 158-161; DX H). In 1981, the first of the years for which payroll figures were readily available (Margolius Tr. 161), the highest paid trades classification (electrical worker foreman, \$43,567.37) received more than 99.9% of all City employees and more than twice the average City salary for 1981 of \$19,307.00. The lowest paid trades employee, bricklayer helper, earned more than 87.5% of all City employees (DX G-1). Similarly, in 1983 the highest paid trades classification (again electrical worker foreman, \$52,367.00) received compensation exceeded only by that of the Mayor and substantially more than twice the average City salary of \$20,679.00. That year, the lowest paid tradesman (paver, \$34,268.10) received pay exceeding 96.8% of City employees. 1983 records show the electrical worker foreman was paid more

than the Chiefs of Police and Fire, as well as thousands of other Cleveland employees. In the same year, fifteen electrical workers were each paid more than the City's Director of Finance and twelve construction operators and one pipefitter were paid more than the Directors of Law, Port Control and Public Safety (DX G-2). 1986 earnings figures similarly show that the trades classifications earned more than from 99.8% (electrical worker foreman, \$62,465.00) to 91.4% (asphalt tomper, \$37,125.00) of all City employees (Margolius Tr. 170; DX G-3). Thus, the 1986 compensation of the most lowly paid tradesman was substantially more than the City's major classifications (Firefighter 1, \$28,514.00, and Patrol Officer, \$29,524.00) and the City-wide average of \$26,594.00 (Margolius Tr. 170, 171; DX G-3, p. 15).

38. Professor Johnson, using 1980 census data, compared the average earnings of carpenters, painters, plumbers and electricians employed by Cleveland with the compensation of their private sector counterparts in the Cleveland building area. He found comparative earnings for 1979 to be as follows:

	<u>City — 52 weeks worked</u>	<u>City — 48 weeks worked</u>	<u>Private Sector — 52 weeks worked</u>
Carpenters	\$33,900	\$31,300	\$17,700
Painters	\$30,800	\$28,700	\$18,200
Plumbers	\$33,800	\$31,200	\$23,200
Electricians	\$34,600	\$31,900	\$22,100

Thus, City tradesmen earned up to 77% more than their private sector counterparts, exclusive of fringe benefits (Johnson Tr. 292-294; DX Z, Tables 1, 2 and 3). Additionally, during the year in question, only 43% of private sector carpenters, 38% of painters, 65% of plumbers, and 69% of electricians employed in the private sector in this area worked year-round (DX Z, Table 3). Johnson concluded the City-employed tradesmen earned

considerably more than their counterparts in the construction industry (Johnson Tr. 295).

39. It has been the consistently applied policy and practice of the City of Cleveland, at all times pertinent to this branch of the litigation,<sup>8</sup> not to grant the fringe benefits of paid vacations and holidays and paid sick leave to its building trades employees.

40. That policy was implemented through a series of ordinances enacted by the Cleveland Council.

(A) Vacation Pay

From October 1, 1968 until June 12, 1979, Section 171.28 of Cleveland's Codified Ordinances (previously codified as Section 1,4764) provided that "the Mayor and other authority in charge of the work of officers and employees of the City may grant to such officers and employees who have been in the service of the City one year or more . . . " vacations with pay for specified periods of time depending on length of City service (DX U-5).

It is undisputed that during that period of time, no mayor or other City authority authorized the granting of paid vacation to the City's building trades workers.

In 1979, Section 171.28 was substantially rewritten and now includes the following proviso (DX U-6, U-7):

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<sup>8</sup> From May 7, 1969 until October 1, 1972, Cleveland provided limited paid sick leave to its building trades employees under authority of Ordinance No. 216-69 (DX U-14) and Board of Control Resolution No. 328-69 (DX U-15). In 1973, the Board of Control undertook to eliminate the sick leave entitlement of the tradesmen (Board of Control Resolution Nos. 1-73 and 375-73, DX U-16, U-17). The Court of Appeals, in Stasiuk v. City, Case No. 53718, held that the Board of Control exceeded its authority by denying sick leave to plaintiffs. Issues relating to the 1972-1980 entitlement are now before the Court of Appeals in Case No. 59272.

The provisions of this section shall not apply to hourly rate craft employees paid on the basis of building trades prevailing wages.

(B) Holiday Pay

At all pertinent times until May 2, 1984, Section 173.30 of Cleveland's Codified Ordinances (formerly codified as Section 1.476402) provided that "all full time annual rate employees and certain hourly rate employees designated by the rules and regulations established by the Board of Control" shall be exempted from work and be paid on certain designated holidays. (DX U-8 through DX U-11)

It is undisputed that building trades workers were never granted holiday pay by the Board of Control. (See DX U-12)

Section 173.30 was amended effective May 2, 1984 to provide holiday pay for all full-time annual rate and hourly rate employees "except hourly rated craft employees paid on the basis of building trades prevailing wages." (DX U-13)

(C) Sick Leave

From and after October 27, 1980, Section 171.31 of Cleveland Codified Ordinances provided (DX U-18):

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

41. The City's practice was based on the fact that building trades employees in the private sector receive their compensation in the form of a high wage from which fringe benefits were deducted and that since Cleveland paid the same high wage, it was not obligated to pay fringe benefits in addition to the wage. That concept was expressed by present and former Cleveland officials. Thus, Phillip Hamilton, personnel director of

the City from 1971 to 1975, testified that the City did not pay the benefits of paid sick leave and holiday and vacation pay because those benefits "were all inclusive within the prevailing rate . . . we always had the understanding that those benefits were within the prevailing rate." (Hamilton Tr. 225, 226) It was Hamilton's understanding that private sector tradesmen are expected to buy their own benefits or sick leave, vacations and holidays (Hamilton Tr. 237, 238). Similarly, Phillip Haddad, Cleveland's Labor Relations Manager, whose dealings with the building trades extended from 1973 to the time of trial (Haddad Tr. 68, 81, 82) testified that the fringe benefits in issue were not paid to Cleveland building tradesmen because "the prevailing rate reflected . . . the benefits received from the private sector in the form of wages." (Haddad Tr. 93)

42. Cleveland's fringe benefit practices simply followed those of the private sector. In the building trades, fringe benefits, if any, are deducted from the ultimate or prevailing wage rate (Day Tr. 446, 447; Rosen Tr. 720-722; Pinzone Tr. 361). Private sector tradesmen do not receive paid sick leave, holiday pay or paid vacations except by deduction from the prevailing rate (Pinzone Tr. 361-363). In like manner, Cleveland's building tradesmen receive the ultimate or prevailing rate which is paid directly to the employee. (Haddad Tr. 103, 104) In essence, Cleveland said to its trades employees that the City would pay the employees' contribution to fringes and that the employee could do with that amount whatever he deemed proper in purchasing those benefits (Johnson Tr. 299). Cleveland's practice is not to pay for those benefits twice. Thus, if Cleveland tradesmen received a compensation package of the prevailing rate plus fringe benefits, he would receive a level of compensation "much more" than his private sector counterpart (Pinzone Tr. 367, 368).

43. Plaintiffs have asserted that they have been deprived of the opportunity to work overtime as a consequence of their employment by the City (Rosen Tr. 653; Michos Tr. 567; Zone Tr. 568).

44. Overtime pay is not a benefit but is instead designed to prevent overtime work (Day Tr. 441). Nor do there exist significant opportunities for overtime work in the private construction industry. Thus, Mr. Pinzone pointed out that overtime opportunities have not been greater in private sector than with the City (Pinzone Tr. 399) and that only a small percentage of union craftsmen actually work overtime (Pinzone Tr. 400). Additionally, the only documentary evidence on the subject shows that workers in a number of City classifications received substantial overtime compensation, as witnessed by the following instances in which gross earnings exceeded average salary for particular classifications.

Exhibit	Page	Classification	Average Salary	Average Gross Earnings	Count
G1	1	Electrical Worker Foreman	41,912.00	43,567.37	1
G1	1	Construction Equipmt Op 1	39,832.00	41,253.07	2
G1	1	Plumber Foreman	40,518.40	40,615.84	1
G1	1	Electrical Worker	40,040.00	40,600.99	15
G2	1	Electrical Worker Foreman	50,689.60	52,367.57	1
G3	1	Electrical Worker Foreman	55,057.60	62,403.52	3
G3	1	Construction Equipmt Op 1	49,316.80	60,991.31	8
G3	1	Construction Equipmt Op 3	48,276.80	53,275.49	5
G3	1	Construction Equipmt Op 2	49,004.80	51,600.89	13
G3	1	Painter Foreman	47,881.60	48,353.48	1
G3	2	Construction Equipmt Op 5	36,774.40	40,164.54	1

45. Plaintiffs also claim that not only were City tradesmen subject to layoff, but that layoffs fell disproportionately upon the trades (Stasiuk Tr. 543; Michos Tr. 564). Although there is evidence that both plaintiffs Stasiuk and Michos were subject to long layoffs during Cleveland's financial distress of the early 1970's (Stasiuk Tr. 537, 538; Michos

Tr. 563, 564), there is no evidence that layoffs fell more heavily upon the crafts classifications than on other City workers.

46. During the early 1970's, the City's entire work force creased from 13,333 to between 9,000 and 10,000 employees (Hamilton Tr. 259, 260). Plaintiffs claimed that there had occurred a layoff of 525 craftsworkers in May, 1974 (Hamilton Tr. 259, 260). That contention is refuted by City records which show only 251 craftsmen on the whole payroll that year (DX T, p. 2).

The only probative evidence concerning layoffs related to a February, 1984 layoff of approximately 550 employees, including 23 tradesmen (Margolius Tr. 739, 741). The burden of that layoff which was dispersed throughout the City work force fell most heavily upon 269 patrol officers and upon 32 waste collectors (Margolius Tr. 741; DX CC). There was no policy to lay off craftworkers first. The policy instead was to lay off those workers whose absence would have the least effect upon the service levels maintained by the City, while saving the City sufficient money to balance its budget (Margolius Tr. 742, 743).

47. Until January 12, 1976, Cleveland observed ten holidays (Codified Ordinance Section 1.476402, DX U-8). In 1976, the holiday ordinance was amended to include Martin Luther King's birthday (DX U-10). Effective May 2, 1984, the holiday pay ordinance was amended, deleting two holidays and providing for two "personal holidays" which may be scheduled at the employee's preference, subject to the approval of the appointing authority (Codified Ordinance Section 171.30; DX U-13). The 1984 ordinance specifically excepts hourly rate craft employees from holiday entitlement.

48. As a general rule, City craft workers do not work on City holidays (Haddad Tr. 126; Pinzone Tr. 376).

49. Cleveland observes more holidays than are recognized by the trades union (Pinzone Tr. 377). It has been estimated that the City observes five or six more holidays than are recognized by trades unions (Stasiuk Tr. 531, 532; Michos Tr. 560; Zone Tr. 587). No contract clause supporting that conclusion is in evidence.

50. Defendant's witness, Day, testified that although there was "some logic" to plaintiffs' contention that City tradesmen should have been paid for holidays recognized by the City but not private industry, pointed out that tradesmen in private construction are subject to "vastly more unpaid days than the five holidays" (Day Tr. 449) and that therefore there was logic to Cleveland practice (Day Tr. 451).

51. Following the decision in the Pinzone litigation, in 1973 there were negotiations between Cleveland and the craft unions concerning payment of a percentage of the prevailing rate coupled with payment by the City of full fringe benefits (Hamilton Tr. 226, 227). Those negotiations ultimately broke down (Haddad Tr. 75, 76), but resumed a decade later.

52. Effective May 1, 1987, a collective bargaining agreement was consummated between the City and all except two of the building trades. The agreement called for payment by the City of wages equal to 80% of the prevailing wage plus a full package of fringe benefits, including paid sick leave, vacation pay and holiday pay at issue in this lawsuit. DX A1-A3; Haddad Tr. 84, 85, 92; Pinzone Tr. 370. The two building trades not parties to the agreement are the Operating Engineers (Local 18) and Laborers Union (Local 1099) with whom negotiations are continuing (Haddad Tr. 92, 120).

53. Three witnesses gave testimony bearing on the ultimate issue implicated in this lawsuit: Whether the City's classifications of its

employees for the payment of fringe benefits bears a rational relationship to a legitimate governmental purpose.

54. Professor George Johnson concluded that Cleveland's policy of paying the prevailing union wage, without fringe benefits, to its building tradesmen, was "a reasonable, rational, equitable policy" and that payment by Cleveland of the fringe benefits would have been unnecessary from an economic point of view (Johnson Tr. 313).

55. Jack G. Day concluded that the policy and practice of the City in not granting fringe benefits to craftsmen receiving the prevailing union rate constituted a rational differentiation because:

- (a) It attempted to be fair; and
- (b) It attempted not to duplicate compensation which has already been allowed. (Day Tr. 437)

Day testified further that the matching of public and private sector wage rates plus the historic fact that high private construction wage rates are intended to compensate for lack of fringe benefits constituted the underpinning of his opinion (Day Tr. 445, 452, 453). Cross-examination elicited from Day the view that any grant of paid sick leave while paying the prevailing rate constituted a double payment for same benefit and was therefore irrational (Day Tr. 452, 455) while the decision to withdraw the sick leave benefit by ordinance in 1980 was logical (Day Tr. 456).

56. Plaintiffs' witness, Dr. Rosen, expressed a conflicting view. Rosen concluded that the City's practices were irrational. In his view, once the prevailing wage was determined, comparisons with the private sector became irrelevant and for the purpose of determining benefits, City tradesmen should be compared only with other City workers because of commonality of circumstance and interest (Rosen Tr. 649-658).

57. Building tradesmen or craftsmen employed by the City of Cleveland constitute a separate, distinct and unique class of public employees for the reasons that:

- (a) By operation of law, their compensation was set at rates negotiated for the private construction industry in the Cleveland, Ohio area.
- (b) That rate was set at a high level because of the economic factors peculiar to the construction industry, including transitory and seasonal employment and sensitivity to economic cycles.
- (c) As a consequence of that high rate, tradesmen as a group were paid at levels of compensation strikingly higher than other groups of Cleveland employees.

58. The City of Cleveland and all subdivisions of the State of Ohio are required to maintain balanced budgets and have a continuing concern with their fiscal stability.

59. Cleveland, therefore, has a legitimate governmental interest in maintaining the compensation of its work force at reasonable, yet not excessive, levels. It flows evitably from that concept that the City has a legitimate governmental interest in preventing excessive or duplicative compensation of any segment of its work force.

60. The evidence of record clearly shows that the prevailing rate upon which the compensation of Cleveland's craftsmen is based is a total or ultimate rate from which any and all fringe benefits are deducted. Payment by Cleveland in addition to that prevailing rate would have constituted a duplication of compensation.

61. Therefore, this Court finds that Cleveland policy of not paying fringe benefits to building tradesmen compensated at the prevailing

rate, as reflected in its various ordinances, bore a rational relationship to legitimate governmental purposes.

#### CONCLUSIONS OF LAW

1. The named plaintiffs, Mitchell Stasiuk, Gust Michos and John V. Zone, have heretofore been certified pursuant to Ohio Civ. Rule 23 as representatives of a class comprised of "all . . . members of the various building trades employed by the City of Cleveland between May 7, 1969 and July 14, 1976."

2. Plaintiffs and their class were at all pertinent times paid pursuant to Section 191 of the Cleveland Charter and, until February 17, 1981, Section 1.4754 of the Codified Ordinances of the City. Until the amendment at Charter Section 191 in 1981, the Charter provided generally that the schedule of compensation for members of the classified service shall be in accordance with the prevailing rates of compensation for such services. Codified Ordinance Section 1.4754 provided specifically that "in the case of positions involving the building trades an ordinance shall be introduced in Council at such time as the prevailing rate is established by negotiation with employers generally in the City of Cleveland." Amended Charter Section 191, which became effective February, provided that only building trades employees were to receive the prevailing wage.

3. On May 5, 1972, the Court of Appeals of Cuyahoga County, in the case of State, ex rel. Pinzone v. City of Cleveland, No. 31391, issued a writ of mandamus ordering the City of Cleveland to implement the union wage rate schedule established by negotiations between the Cleveland Building and Construction Trades Council and private contractors in the Cleveland area. That order was affirmed by the Supreme Court of Ohio in the decision reported at 34 Ohio St. 2d 26. The mandate of that decision was to require

the City of Cleveland to pay the union rate to its trades employees. Those decisions neither contemplated nor permitted payment of a blended or non-union rate.

4. From and after the decision of the Supreme Court in Pinzone, supra, Cleveland has been in substantial compliance with its obligation thereunder to pay the prevailing union rate of compensation.

5. Cleveland, through its various ordinances and Board of Control resolutions, implemented a policy of not providing the fringe benefits of paid sick leave, paid vacation and paid holidays to its building trades employees.

6. Plaintiffs have challenged that policy as being in contravention of their constitutional right to equal protection of the law under Article I, Section 2 of the Constitution of Ohio. ("All political power is inherent in the people. Government is instituted for their equal protection and benefit.")

7. In dealing with constitutional challenges to legislative enactments, this Court does not sit in judgment of the wisdom of legislative enactments. Sedar v. Knowlton Construction Co. (1990), 49 Ohio St. 3d 193, 201. This cardinal rule of constitutional law has applied with consistency on issues of equal protection as well as in other constitutional settings. Thus, the Supreme Court of Ohio, in State, ex rel. Bishop v. Bd. of Edn. (1942), 139 Ohio St. 427, held:

A court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of government.

Similarly, the Supreme Court of the United States concluded in New Orleans v. Dukes (1976), 427 U.S. 297, 303-304:

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.

. . . .  
In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . .

That deferential standard was applied in Jackson Firefighters Ass'n v. City of Jackson (5th Cir. 1984), 736 F. 2d 209; Anderson v. Winter (5th Cir. 1980), 631 F. 2d 1238; Medler v. United States (9th Cir. 1980), 616 F. 2d 450; and Confederation of Chicago Police v. City of Chicago (N.D. Ill. 1980), 481 F. Supp. 566, all upholding governmental employment practices against equal protection challenges.<sup>9</sup>

8. All legislative enactments enjoy a presumption of constitutionality. When legislation is challenged as unconstitutional, courts must apply all presumptions and pertinent rules of construction so as to uphold, if possible, the legislation. Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St. 3d 193, 199.

The presumption of rationality is a crucial ingredient of equal protection analysis, uniformly applied in cases implicating social and economic legislation. Thus, the Supreme Court of the United States asserted in Kadmas v. Dickinson Public School (1988), 108 S. Ct. 2481, 2489, 2490.

Social and economic legislation like the statute at issue in this case, moreover, "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality". . . . "[W]e will not overturn such a statute unless the varying treatment of different groups or

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<sup>9</sup> The limitations placed upon legislatures by the Ohio and federal equal protection clauses "are essentially identical." Sedar, supra, at 203.

persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." . . . In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (Emphasis added.)

9. A legislative classification which neither involves a suspect class nor a fundamental right does not violate the equal protection clause of the Ohio Constitution if it bears a rational relationship to a legitimate governmental interest. Menefee v. Queen City Metro (1990), 49 Ohio St. 3d 27, 29; Sedar, supra, at 203; Wargetz v. Villa Sancta Anna Home (1984), 11 Ohio St. 3d 15, 17; Meek v. Papadopolos (1980), 62 Ohio St. 2d 187, 193-194; Lyng v. International Union U.A.W. (1988), 108 St. Ct. 1184, 1191-2.

In Menefee, supra, the Supreme Court, in upholding the bar of subrogated claims against political subdivisions and the statutory offset of collateral source benefits of R.C. 2744.05, the Political Subdivision Tort Liability Act, emphasized the public interest in preserving the financial soundness of political subdivisions of the State. The case at bar involves Cleveland's exercise of its obligation to maintain the compensation of its employees within reasonable bounds and to preclude duplicative payment of benefits to plaintiffs and members of their class.

10. In the area of economics, a legislative classification does not violate equal protection principles merely because the classification is imperfect. If the classification has some reasonable basis, it does not offend constitutional principles merely because it is not made with mathematical nicety or because in practice it results in some inequality. Sedar,

supra, at p. 204; Dandridge v. Williams (1970), 397 U.S. 471, 485. The problems of government are practical ones and may justify, if they do not require, rough accommodations. Metropolis Theatre Co. v. Chicago (1913), 228 U.S. 61, 69.

For example, plaintiffs argue that they are entitled to a portion, if not all, of their holiday pay claim because Cleveland's practices did not "mirror" with nice precision the holiday practices of the private construction industry. Such precision or symmetry is not required as long as the legislative policy is, as the witness Day pointed, logical (Day Tr. 451) and therefore rational.

11. In a rational basis analysis, the Court must uphold the legislative classification in issue unless the classification is wholly irrelevant to the achievement of a governmental purpose. A legislative discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Menefee, supra, at p. 29; McGowan v. Maryland (1961), 366 U.S. 420, 426. The challenger of the validity of legislative policy must negate every conceivable basis which might support that policy. Lyons v. Limbach (1988), 40 Ohio St. 3d 92, 94.

Plaintiffs have wholly failed to meet that burden of proof and persuasion. Their case is bottomed on a series of untenable assumptions, including the following claims:

- (a) That contrary to the holdings of the Court of Appeals and Supreme Court in Pinzone, supra, Cleveland should have paid something other than the prevailing union rate.
- (b) That relying upon occasional and minuscule variations from the exact rate, Cleveland did not pay the prevailing rate.
- (c) That the fringe benefit practices of the private construction industry, from which

the prevailing union rate is directly derived, are irrelevant to plaintiffs claim of benefit entitlement. That concept is based on the testimony of plaintiffs' expert Rosen, who admitted that his theory was not derived from any school of economic theory (Rosen Tr. 704, 705) and who, when he undertook an economic study of a different class of Cleveland employees, relied upon a comparable salary and benefit data in towns from New York to California (Rosen Tr. 709-716; DX BB, Table 14).

12. It is not necessary that this Court either agree or disagree with the policies of the City of Cleveland with respect to building trades fringe benefits. The legal issue is simply one of whether that policy is rationally related to legitimate governmental objectives. This Court concludes that a rational basis exists for the legislative policies at issue in this lawsuit.

The stake of subdivisions of the State in preservation of their resources, equitable payment of all their employees and the avoidance of duplicative payment is manifest and is rational.

Judgment is therefore entered in favor of the City of Cleveland.

  
\_\_\_\_\_  
JAMES J. CARROLL, JUDGE

DATE: 12-11, 1990

CERTIFICATE OF SERVICE

A copy of the foregoing Findings of Fact and Conclusions of Law has been sent by regular U.S. mail this 4th day of December, 1990, to Harry T. Quick, Esq. and David W. Mellott, Esq., Benesch, Friedlander, Coplan and Aronoff, 1100 Citizens Building, 850 Euclid Avenue, Cleveland, Ohio 44114; Timothy J. Howard, Esq., Burgess Building, Fourth Floor, 1406 West Sixth Street, Cleveland, Ohio 44113; and Richard F. Gonda, Esq., 75 Public Square, Suite 920, Cleveland, Ohio 44113, attorneys for plaintiffs; and Malcolm C. Douglas, Esq., Assistant Director of Law, Room 106 - City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114, attorney for defendant.

  
\_\_\_\_\_  
JAMES J. CARROLL, JUDGE

STATE OF OHIO )  
 ) SS:  
COUNTY OF CUYAHOGA )

IN THE COURT OF COMMON PLEAS

CASE NO. 949449

MITCHELL STASIUK, et al. )  
 )  
 Plaintiffs )  
 )  
 vs. )  
 )  
 CITY OF CLEVELAND )  
 )  
 Defendant )

JUDGMENT ENTRY

James J. Carroll, J.:

This matter came on to be heard on the pleadings, the briefs and memoranda of counsel, the evidence, and the arguments and contentions of counsel, both parties having submitted to the Court Proposed Findings of Fact and Conclusions of Law;

And the Court, being fully advised, adopts hereby and incorporates herein by reference, as though fully included herein, defendant's Proposed Findings of Fact and Conclusions of Law.

Further, the Court finds for the defendant City of Cleveland and against the plaintiffs, and renders judgment in accordance therewith. Plaintiffs to pay Court costs.

  
\_\_\_\_\_  
JAMES J. CARROLL, JUDGE

DATE: 12-4-, 1990

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry has been sent by regular U.S. mail this 4th day of December, 1990, to: Harry T. Quick, Esq. and David W. Mellott, Esq., Benesch, Friedlander, Coplan and Aronoff, 1100 Citizens Building, 850 Euclid Avenue, Cleveland, Ohio 44114; Timothy J. Howard, Esq., Burgess Building, Fourth Floor, 1406 West Sixth Street, Cleveland, Ohio 44113; and Richard F. Gonda, Esq., 75 Public Square, Suite 920, Cleveland, Ohio 44113, attorneys for plaintiffs; and Malcolm C. Douglas, Esq., Assistant Director of Law, Room 106 - City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114, attorney for defendant.

  
\_\_\_\_\_  
JAMES J. CARROLL, JUDGE

R.C. 4115.03

E) "Prevailing wages" means the sum of the following:

- (1) The basic hourly rate of pay;
- (2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;
- (3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected:
  - (a) Medical or hospital care or insurance to provide such;
  - (b) Pensions on retirement or death or insurance to provide such;
  - (c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;
  - (d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;
  - (e) Life insurance;
  - (f) Disability and sickness insurance;
  - (g) Accident insurance;
  - (h) Vacation and holiday pay;
  - (i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;
  - (j) Other bona fide fringe benefits.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

BALDWIN'S OHIO ADMINISTRATIVE CODE ANNOTATED  
4101 COMMERCE DEPARTMENT--INDUSTRIAL COMPLIANCE DIVISION  
**4101:9 WAGE AND HOUR**  
CHAPTER **4101:9-4. PREVAILING WAGE RULES AND REGULATIONS**  
(c) 2005 Thomson/West

Rules are current through September 30, 2005;  
Appendices are current through March 31, 2004

**4101:9-4-07 Permissible payroll deductions**

(A) The following **deductions** from wages may be made without application to and approval of commerce:

- (1) Any **deduction** from wages required by federal, state, or local law;
- (2) Any **deduction** of amounts required by court order, process, or judgment to be paid to another unless collusion or collaboration exists between the employer and the employee for whose benefit the **deduction** is made;
- (3) Any **deduction** which constitutes a contribution by the employee to funds, plans, or programs established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries in addition to that required by Chapters 4121. and 4123. of the Revised Code, compensation for illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits in addition to those required by Chapter 4141. of the Revised Code or vacation pay.

(B) The following **deductions** from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary **deductions** signed by the employee:

- (1) Savings accounts or similar savings plans for the benefit of employees, their families and dependents;
- (2) Any **deduction** constituting a contribution toward the purchase of United States defense stamps or savings bonds;
- (3) Any **deduction** enabling the employee to repay loans to or purchase shares in credit unions organized and operated in accordance with federal and state credit union statutes;
- (4) Any **deduction** for the making of contributions to governmental or quasi-governmental agencies;
- (5) Any **deduction** for the making of contributions to legitimate charitable institutions;
- (6) Any **deductions** to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such **deductions** and such **deductions** are not otherwise prohibited by law.

(7) Any **deduction** for the making of contributions to a state or federal political action committee.

(C) Any **deduction** from wages not specifically permitted in paragraphs (A) and (B) of this rule shall be permitted only upon approval of the public authority and the director and must meet the following criteria:

- (1) The **deduction** is not otherwise prohibited by law;
- (2) The employer does not make a profit or benefit directly or indirectly from the **deduction** in any form, including, but not limited to, commissions or dividends;
- (3) The **deduction** is either voluntarily consented to by the employee in writing, prior to the period in which the work is to be done, where such prior consent is not a condition for obtaining or continuing employment, or is provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees; and

- (4) The **deduction** serves the convenience and interest of the employee, his family or beneficiaries.
- (D) Failure to provide evidence of voluntary **deductions** pursuant to paragraphs (B) and (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.
- (E) Failure to attain the approval of the public authority and director for any **deduction** taken pursuant to paragraph (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.
- (F) An employer withholding a permissible payroll **deduction** pursuant to paragraph (A), (B) or (C) of this rule shall maintain complete records of the wages withheld, including any and all receipts for donations, contributions, fees, and dues paid on behalf of the employee, from the **deductions** withheld by the employer.
- (G) Failure to comply with paragraph (F) of this rule constitutes a violation of section 4115.07 of the Revised Code.
- (H) Any records required to be maintained by this rule shall be made available to the public authority and commerce upon request.

HISTORY: 2003-04 OMR pam. #11 (A), eff. 6-3-04; 1996-97 OMR 2546 (A), eff. 6- 23-97; 1989-90 OMR 1045 (E), eff. 2-15-90

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**C**

State ex rel. Int'l Union of Operating Engineers v. City of Cleveland Ohio App., 1990. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,  
 Cuyahoga County.

STATE of Ohio, ex rel. INT'L UNION OF OPERATING ENGINEERS, Relator,

v.

CITY OF CLEVELAND, et al., Respondent.  
 No. 57729.

July 25, 1990.

Petition for Writ of Mandamus.

William Fadel, Wuliger, Fadel & Beyer, Cleveland, for relator.

Peter N. Kirsanow, Cleveland, for respondent.

McMANAMON, Presiding Judge.

\*1 Relator, the International Union of Operating Engineers, Locals 18, 18A, 18B, 18C, 18RA, AFL-CIO (hereinafter the "Union"), is seeking a writ of mandamus to compel respondent, the City of Cleveland (hereinafter the "City"), to pay wages to its Union employees, the construction equipment operators and master mechanics in its water department, in accord with prevailing wages paid in private industry from May 1, 1987 to the present.

Because we find that the Union has an adequate remedy available within Chapter 4117, which governs public employees' collective bargaining, we deny the writ of mandamus.

The Union is an employee labor organization as defined in R.C. 4117.01(D) and the City is a public employer as defined in R.C. 4117.01(B).<sup>FN1</sup> On March 1, 1983, pursuant to a "Memorandum of Understanding" signed by the parties, the Union and the City agreed that:

(1) The Local 18 employees will continue to receive their forty (40) hour weekly wage \* \* \* but the forty (40) hours shall begin on Monday 12:01 A.M. and end on Sunday 12:00 A.M. however no premium pay shall be paid for any work performed on Saturday or Sunday.

(2) The Local 18 employees shall receive double time for all hours worked over eight (8) hours per day or forty (40) hours per week whichever is greatest.

After the passage of the new Chapter 4117 in October, 1983, but before the April 1, 1984 effective date of the statutes, the City recognized the Union as the bargaining representative of its construction equipment operators and master mechanics.

Before May 1, 1987, the City's payment of overtime was consistent with the Construction Employers Association Building Agreement (hereinafter "CEABA"), which was in effect between the Union and the Construction Employers Association. From May 1, 1983 through April 30, 1985, CEABA provided that all work performed in excess of eight hours per day or forty hours per week and all work performed on weekends and holidays was to be compensated at a "double time" rate. From May 1, 1985 through April 30, 1988, CEABA provided for the payment of overtime on weekdays at a "time and a half" rate for the first two hours worked in excess of the designated shift time and at a "double time" rate for hours worked thereafter. For Saturdays, overtime was to be paid at a rate of "time and a half" for the first ten hours and at a "double time" rate thereafter. For Sundays and holidays, all hours worked were to be paid at a "double time" rate. For the time period May 1, 1988 through April 30, 1991, CEABA provides for payment at "time and a half" the established rate of pay for weekdays for the first two hours of overtime worked. For Saturdays, "time and a half" is to be paid for the first ten hours worked. All other

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overtime, including Sundays and holidays, is to be paid at "double time" the established rate.

In early 1987 the parties entered into negotiations for a collective bargaining agreement with respect to hours, wages and conditions of employment. Sometime after May 1, 1987, however, the City unilaterally changed the amount and method of overtime payments made to the Union members. For work on weekdays, overtime for all hours worked, other than the designated shift time of 7:00 a.m. to 3:30 p.m., was paid at a "time and a half" rate. For work on weekends, the City paid a "time and a half" rate for all hours worked. Additionally, although CEABA 1985-88 provided for "shift differential pay" or "premium pay" of an additional twenty-five cents per hour for work on the second shift and an additional fifty cents per hour for work on the third shift, the City did not pay shift differential premiums. The parties' negotiations reached an impasse in June or July, 1987, and no collective bargaining agreement currently exists between the City and the Union with respect to hours, wages and conditions of employment.

\*2 On May 15, 1989, the Union brought this mandamus action to compel the City to pay its construction equipment operators and master mechanics the prevailing wages paid in the trades as required in Section 191 of The Charter of the City of Cleveland.<sup>FN2</sup> In support of its position, the Union relies upon R.C. 4117.10(A) which provides in part that "[w]here no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees."

The City argues mandamus is inappropriate because the Union has an adequate remedy available within Chapter 4117. Specifically, the City contends (1) a dispute settlement procedure is available pursuant to R.C. 4117.14(C) and (D) to further the negotiation process with respect to the employees' wages, and (2) the filing of an unfair labor practice charge is or was available under R.C. 4117.12 to remedy the unilateral change in the amount of

wages paid.<sup>FN3</sup>

It is incumbent upon a party seeking mandamus to show it has no plain and adequate remedy in the ordinary course of law. *See* R.C. 2731.05; *State, ex rel. Matheis, v. Russo* (1990), 50 Ohio St.3d 204, 553 N.E.2d 653. Thus, although this court may be of the opinion that the Union members are entitled to the requested wages pursuant to R.C. 4117.10(A), in light of the remedy available in R.C. 4117.01, *et. seq.*, mandamus is not the appropriate vehicle to obtain the requested relief.

Chapter 4117 governs public employees' collective bargaining. The duty to bargain collectively arises when a public employer is notified of the certification of an exclusive representative with whom to bargain. *Franklin County Board of County Commissioners v. SERB*, 1989 SERB 4-116 (10th Dis.Ct.App., Franklin, Sept. 19, 1989). Certification occurs through the procedures provided for in R.C. 4117.05, *id.*, or by achieving "deemed certified" status through recognition based on prior practice, *State Employment Relations Board v. Bedford Heights* (1987), 41 Ohio App.3d 21, 534 N.E.2d 115. In this case, the City stipulated that it has recognized the Union as the bargaining representative of its construction equipment operators and master mechanics and we are unaware of any challenge to that recognized status. Therefore, the parties were under a duty to bargain collectively, and thus subject to Chapter 4117 and the jurisdiction of the State Employment Relations Board ("SERB").

All matters pertaining to wages, hours, and conditions of employment are subject to collective bargaining. R.C. 4117.08(A). Any unilateral change, therefore, in a matter subject to collective bargaining may constitute an unfair labor practice under R.C. 4117.11(A)(5) and would be a violation of the duty to bargain collectively. *See, e.g., In re City of Lakewood*, SERB 88-009 (July 11, 1988), *aff'd SERB v. City of Lakewood*, 1988 SERB 4-141 (Com. Pl. No. 153635, Cuyahoga, Dec. 27, 1988), unreported; *see also National Labor Relations Board v. Katz* (1962), 369 U.S. 736. This court has previously held "that conduct which actually or arguably constitutes an unfair labor practice under

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R.C. Chapter 4117 is subject to the exclusive jurisdiction of SERB." *Turnik v. City of Cleveland* (May 22, 1986), Cuyahoga App. No. 50390, unreported. Thus, the City's unilateral change in the wages of its construction equipment operators and master mechanics while under the duty to bargain collectively actually or arguably constituted or constitutes an unfair labor practice under R.C. 4117.11(A)(5) and is subject to SERB's exclusive jurisdiction. Unfair labor practices are to be remedied by SERB pursuant to R.C. 4117.12. The Union's remedy, therefore, was or is to file a charge with SERB under R.C. 4117.12 for the City's alleged continuing unfair labor practice.<sup>FN4</sup>

Since an adequate remedy exists in the ordinary course of law, the prerequisite for the issuance of a writ of mandamus has not been met. Accordingly, the writ is denied and the petition for mandamus is dismissed.

\*3 Costs to relator.

JOHN V. CORRIGAN and NAHRA, JJ., concur.

FN1. The facts in this case are derived from the parties' filed Stipulation of Facts and the appointed Commissioner's Findings of Facts which were made following an evidentiary hearing.

FN2. Section 191 of the City's Charter provides, in relevant part, that:

The salary or compensation of all officers and employees in the unclassified service of the City shall be fixed by ordinance, or as may be provided by ordinance. The salary or compensation of all other officers and employees shall be fixed by the appointing authority in accordance with ability, fitness and seniority within the limits set forth in the Council's salary or compensation schedule for which provision is hereinafter made. The Council shall by ordinance establish a schedule of compensation for officers and employees in the classified service, which schedule shall provide for like compensation for like services and shall

provide minimum and maximum rates (which may be identical) of salary or compensation for each grade and classification of positions determined by the Civil Service Commission under Section 126 of this Charter. Only in the case of employees in those classifications for which the Council provided in 1979 a schedule of compensation in accordance with prevailing wages paid in the building and construction trades, the schedule established by the Council shall be in accordance with the prevailing rates of salary or compensation for such services. For the guidance of Council in determining the foregoing schedule the Civil Service Commission shall prepare salary or compensation schedules, and the Mayor or any director may, and when required by Council shall, prepare suggested salary or compensation schedules.

FN3. The City also has argued that injunctive relief is available pursuant to R.C. 4117.12(D) [sic]. The petitioning of a court of common pleas for temporary injunctive relief by the State Employment Relations Board under R.C. 4117.12(C), however, is precipitated by the filing of an unfair labor charge and is discretionary with the Board.

FN4. The fact that no collective bargaining agreement yet exists between the parties does not persuade us to conclude that this remedy was or is not available since the City's duty to bargain collectively arose before the unilateral change when the City recognized the Union as its employees' bargaining representative.

Ohio App., 1990.

State, ex rel. Int'l Union of Operating Engineers v. City of Cleveland

Not Reported in N.E.2d, 1990 WL 109078 (Ohio App. 8 Dist.)

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