

IN THE SUPREME COURT OF OHIO

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

Relators )

vs. )

CITY OF CLEVELAND, et al. )

Respondents )

CASE NO. 2006-2056

ORIGINAL ACTION IN MANDAMUS

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RELATORS' REPLY  
TO  
RESPONDENTS' MERIT BRIEF

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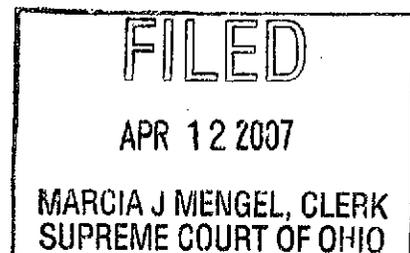
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**RELATORS' REPLY  
TO RESPONDENTS' MERIT BRIEF**

**STATEMENT OF THE FACTS**

Relators the Municipal Construction Equipment Operators' Labor Council and the individually named defendants (referred to hereafter collectively as the "CEO Union") incorporate herein its Statement of the Facts contained in its Brief on the Merits in this action. In addition, Relators respond as follows to the Statement of Facts presented by Respondents the City of Cleveland, and it's Mayor and City Council (hereafter collectively referred to as "Cleveland").

The construction equipment operators and master mechanics working for Cleveland (referred to collectively hereafter as the "CEOs") were never organized into a bargaining unit nor represented by a collective bargaining representative until the CEO Union was certified as their representative in January of 2003.<sup>1</sup> The CEOs were not covered by a collective bargaining agreement until February of 2005. Prior to that time, the wages of the CEOs were not the result of collective bargaining, and the CEOs did not receive paid sick leave,<sup>2</sup> nor "fringe" benefits of employment.<sup>3</sup> Under the Cleveland City Charter, Sec. 191,<sup>4</sup> the CEOs, as building trades employees, were entitled to be compensated at the prevailing wage rates. In the Cleveland area,

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<sup>1</sup> Thus, there is no issue of "subsequent representation," as suggested on page 2 of Respondents' Brief on the Merits, nor does there exist a "former" representative. See *SERB Opinion 2006-008* (Relators' Evidence, Exh. C) at p. 2.

<sup>2</sup> In the face of overwhelming evidence as set forth in Relator's Merit brief, including sworn admissions of Cleveland's own personnel manager (Relators' Evidence Exh. M) Cleveland admits that it has failed and refused to provide paid sick leave for its CEOs.

<sup>3</sup> Cleveland assertion in its statement of facts that it had "agreements" with Local 18 that controlled Relators' wages is baldly false, as found by the State Employment Relations Board in *SERB Opinion 2006-008* (Exhibit C in Relators' Evidence).

<sup>4</sup> Charter sec. 191 is in Relators' Evidence as Exhibit A.

the prevailing wage rates are contained in a private-sector collective bargaining agreement to which Cleveland was and is not a party. Private-sector agreements are those made between non-government employers such as construction companies or contractors, and non-government employees. That private-sector contract which was pertinent to the CEOs was and is made between the Construction Employers Association and the International Union of Operating Engineers, Local 18 (hereafter "Local 18").<sup>5</sup> That contract is casually referred to as the "Building Agreement." Several CEOs, over the years of their municipal employment, were members of Local 18 because of prior private-sector employment, even though Local 18 was not their collective bargaining representative when they were employed by Cleveland. At Cleveland's request, Local 18 has at various times informed Cleveland of the then-current prevailing rates under the private-sector agreement, and has informed Cleveland of various terms of the private-sector contract which impact on wages.

Under Cleveland's Charter Sec. 191, building trades' employees, such as the CEOs, are to receive gross wages which equal the prevailing wage rates in the Building Agreement. The complaint which the CEOs present to this Court is that Cleveland has, since 1994 and until 2005, been reducing their gross wage rate below the prevailing wage rate on various pretextual bases. Two of those recently-alleged pretextual bases are: (1) that Cleveland unilaterally decided to eliminate some of those components of the prevailing wage rate which are listed in the Building Agreement, thus lowering the gross wage below the prevailing hourly rates,<sup>6</sup> and (2) alleging that the Building Agreement, which has served for half-a-century as the prevailing wage

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<sup>5</sup> This Court has ruled that R.C. §4115.03 does not apply to regular, full-time, civil service municipal employees. *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362 at 367-368.

<sup>6</sup> Cleveland admits in its statement of facts that it did reduce the gross wages of the CEOs

determinant for CEOs is simply the “wrong” agreement and a lower wage would be more applicable. These pretexts are simple excuses used by Cleveland to justify cutting gross wage rates.

With respect to the first pretext, it is beyond dispute as shown in the Building Agreement contracts in the Relators’ Evidence herein, Exh. J, that the prevailing wage rate includes an amount allowed for a pension contribution. In the private sector, the pension contribution is made directly to the union pension fund. In the public sector, the employees are deemed to have consented, by virtue of R.C. §145.55, to a payroll deduction from their paychecks into a separate account in the Public Employees Retirement System (“PERS”). This payroll deduction is shown on the payroll records of the CEOs as exemplified by the record for the employee, Charles Adkins, which is included in the Respondents’ Evidence at Exh. 15. According to law, i.e. R.C. Sec. 145. 21, the amounts thus deducted from the wages of public employees (defined as a “contributor” in R.C. Sec. 145.01 – only individual employees are called “contributors”) are deposited into the Employee Savings Fund in an individual account in the name of the employee. These amounts remain their property, having been deducted from their paychecks, and when they leave public employment they may withdraw only the money which is their accumulated contributions, regardless of whether they qualify for a pension. R.C. Sec. 145.40(A), *Wright v. Dayton* (2004), 158 Ohio App. 3d 152; and *Williams v. Columbus* (1987), 40 Ohio App.3d 71; R.C. §145.561. Persons who leave public employment other than by death or retirement have no entitlement to other funds in the PERS system. Thus, the “pension” component of the prevailing wage rate is, by this mechanism, devoted to its intended purpose via the required PERS payroll

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unilaterally after 1992, at page 2 of its merit brief.

deduction.<sup>7</sup> The CEOs do not complain of the payroll deduction. Rather their complaint is that Cleveland's tactic has been, as admitted by Cleveland in its brief, to reduce the gross wages of the CEOs, by removing from the prevailing wage rate the "pension" component which appears in the Building Agreement, and, in addition to reducing the gross wages, to continue to make the required payroll deduction. This double-subtraction results in a reduction of gross wages before payroll deductions even become relevant.

In general, one should note that when payroll deductions are taken, the money deducted "goes" somewhere to the account of the employee (such as to pay his taxes or his child support). Cleveland is incorrect when claiming, on page 5 of its Brief, that an Ohio law allows it to reduce gross wages below the prevailing wage rate. No statute or regulation allows Cleveland to reduce an employee's gross wage rate, regardless of whether Cleveland chooses to call it an "offset". The regulation to which Cleveland refers was enacted pursuant to the Ohio Prevailing Wage Law, which this Court has found to be inapplicable to regular, full-time, civil service employees of a charter city. *Craig v. Youngstown* (1954), 162 Ohio St. 215, quoted in *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362 at 368. Chapter 4115 of the Revised Code pertains to non-civil service employees hired for special construction projects. Further, the thrust of that Chapter's definition of prevailing wage is to identify what must be included in the wage – not to authorize slashing gross wages. Cleveland is missing a very important point when it fails to note that employees covered by Rev. Code Chapter 4115, the State Prevailing Wage Law – and the

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<sup>7</sup> It deserves comment that public employees are not covered by social security, while private-sector employees are. Thus private-sector employees accrued social security benefits in addition to their union pensions. Public employers are relieved of paying the social security payroll tax, and public employees will not qualify for social security coverage such as payments to families in the event of premature death. Further, social security benefits vest much faster (after 10 quarters of employment) and provide broader benefits (such as survivor benefits).

regulations thereunder including OAC 4101:0-4-07(A)(3), - are not regular full-time employees and therefore are not covered by the Public Employees Retirement System (“PERS”).

In its Merit brief (again on p. 5), Cleveland cites two affidavits which make no reference to the prevailing wage law. These are the same affidavits which are not based upon personal knowledge, are over three years old, and are the subject of a motion to strike filed herein. The affidavits do not contain the proposition for which Cleveland cites them. These citations precede an even more problematic reference to a collective bargaining agreement. Cleveland did not include a collective bargaining agreement in its evidence. None is before the Court in this case, and no defense based upon a contract is pled herein.

The second pretext advanced by Cleveland, that it has been following the “wrong” contract, contradicts half-a-century of past practice. The young and short-lived Cleveland municipal administration making this argument has failed, and currently is failing, to produce even a scintilla of evidence as to the why the long-standing past practice should be overturned. Not a scintilla of evidence produced by Cleveland establishes what aspect of the work activities of the CEOs has changed, to justify slashing their gross wage rates and changing decades of established and accepted reference to the Construction Employers Association Building Agreement with IUOE Local 18. To the contrary, Relators have submitted the Affidavit of the CEO Union President Frank P. Madonia, who has worked both in the private-sector and for the City of Cleveland as a CEO.<sup>8</sup> Mr. Madonia is familiar with the jobs done by construction equipment operators in both public and private employment.<sup>9</sup> He has operated, maintained, and repaired heavy construction equipment since he was 18 years old, and it was he who was

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<sup>8</sup> See Supplemental Evidence of Relators at Exhibit “R”, Affidavit of Frank P. Madonia.

<sup>9</sup> Id. at para.6.

responsible, as Union President, for the eventual negotiation of the first-ever, initial, collective bargaining agreement for the Cleveland CEOs. Mr. Madonia is able to state under oath that:

“I am personally familiar with the CEA Agreement and its jurisdictional description of work. Cleveland's construction equipment operator's job duties are consistent with the jurisdictional description of work contained in the CEA [Construction Employers Association Building] Agreement. The supplemental evidence being submitted by the CEO Union in support of this Writ shows that Local 18 had the same view, at least until 1998.”

Further, Mr. Madonia commented upon the bare conclusions advanced by Cleveland in the old and stale affidavits of a lawyer (William Fadel) and a business representative (Steven DeLong) who never worked for Cleveland, which are submitted by Cleveland as evidence.<sup>10</sup> Those affidavits are not based upon personal knowledge. Both Fadel and DeLong have contradicted themselves in the past, as shown in the supplemental evidence submitted by the CEO Union (Exhibits 3 and 4). Mr. Madonia was able to state under oath as follows:

“I note that Mr. Fadel and Mr. DeLong were never employed by Cleveland as construction equipment operators. My employment as a Cleveland construction equipment operator began in 1986.”

Relators' Exhibit P includes the following statement by Fadel, signed by him and filed in court, in contradiction to his alleged affidavit:

“Local 18 negotiated a new collective bargaining agreement with the Construction Employers Association [the Building Agreement] effective May 1, 1994 to April 30, 1997 which agreement, by virtue of The Supreme Court of Ohio's opinion, constituted the prevailing wages for the city construction equipment operators for that period of time.”

The other alleged affiant, Steven DeLong is likewise contradicted by his predecessor Ronald Sharpless, in Exhibit “Q” in Relators' Supplemental Evidence herein. Mr. Sharpless, under oath in a deposition, stated as follows on the subject of what contract contained the prevailing wage

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<sup>10</sup> Those affidavits, Cleveland Exhibits 3 and 4 are the subject of a motion to strike, filed herein on March 2, 2007.

rate which governed the wages of Cleveland CEOs.<sup>11</sup> DeLong's predecessor testified as follows in answer to questions posed by the other alleged affiant, attorney William Fadel in 1990:

"A. . . . My understanding is in the absence of a bargaining agreement, that the City Charter prevails, that the City is required to pay those prevailing wages which have been negotiated by the local bargaining Construction Employers Associations.

Q: Now how are the wages negotiated with the local construction building employers memorialized as relates to the Operating Engineers?

A: How are they memorialized, don't understand.

Q: Withdraw the question, it was -- I apologize, it was convoluted. Do you have collective bargaining agreements negotiated with the local construction, building construction employers in the City of Cleveland?

A: Yes, sir.

Q: What is that known as?

A: The Construction Employers Association [Building} Agreement."

DeLong's predecessor further testified under oath:

"Q: . . . can you tell me how the wages of the Operating Engineers were determined by the City of Cleveland to be paid to those Operating Engineers?

A: They were determined by the wages contained -- wages plus the fringes contained in these local building agreements.

Q: How do you know that?

A: Because that is what they have been paying for one thing, they always paid it." [Underlining added.]<sup>12</sup>

Still further, Relators' have submitted a letter penned by the alleged affiant William Fadel in 1994 as Supplemental Evidence Exhibit "O." Mr. Fadel wrote in 1994:

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<sup>11</sup> Cleveland CEOs are also variously referred to as operating engineers, craft employees, or building and construction trade employees.

<sup>12</sup> Relators' Supplemental Evidence, Exhibit Q at pp. 40-41.

“The prevailing rates were determined by adding together the hourly wage rates and hourly fringes rates for operating engineers employed under the Construction Employers Association Building Agreement. This process was used to calculate the amount of court ordered back wages paid to the operating engineers.

...  
the city unilaterally has decided to defy logic and court orders by reducing the prevailing rate on overtime hours by the amount of Local 18's fringe benefit package before calculating the overtime rate. In other words the hourly rate is changed before the city calculates the overtime rate.”

Cleveland actually admits in its merit brief to the prior practice. If any further evidence is needed, it is clearly set forth in Relators’ merit brief that the long-standing practice of payment of the prevailing wage rates as defined in the private-sector Construction Employers Association Building Agreement was cited by a SERB-appointed Fact Finder in 2004.<sup>13</sup> Relators’ merit brief and the evidence in support of its Complaint overwhelmingly demonstrate in detail that Respondent Cleveland has continuously failed to pay the CEOs at the prevailing wage rate from 1994-2005.

Cleveland has submitted no evidence to the contrary, but has avoided the real issues throughout its Brief.

### ARGUMENT

**A. Cleveland’s Merit brief misrepresents the law with respect to statutory sick leave under R.C. Secs. 124.38 and 124.39**

R.C. §4117.10(A), makes clear that, in the absence of a collective bargaining agreement, state and local law govern the public employment relationship. State law with respect to sick leave for municipal employees is contained in R.C. §§124.38 and 124.39. Revised Code

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<sup>13</sup> Relators’ Evidence at Exhibit K, Fact Finders Report at p. 13. That report on the issue of the parties’ past practice contradicts Respondents’ assertion at p. 9 of their Merit brief that they never agreed that the Building Agreement contains the prevailing wage rates. The SERB-appointed Fact Finder found that Cleveland had been paying the CEOs based upon the Building Agreement wage rates for almost two decades. Such lengthy practice is binding. *Association of Cleveland*

§§124.38 and 124.39 were enacted pursuant to Ohio Constitution, Art. II, Sec. 34. They cannot be overridden by City Ordinances. With respect to the state legislature, Ohio Constitution, Article II, Section 34 states:

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

Cleveland has misquoted the judicial precedent in *State, ex rel. Reuss v. Cincinnati* (1995) 102 Ohio App 3d, 521. The *Reuss* case is part of a line of cases which have held that state laws requiring sick leave for public employees may not be overridden by charter municipalities. There is no contrary line of authority.

This Ohio Supreme Court held in *Ebert v. Stark County Bd. Of Mental Retardation* (1980) 63 Ohio St. 2d, 31 at page 32: R.C 124.38 “ensures that employees of such offices will receive at least a minimum sick leave benefit or entitlement.” The Northern District stated: “it is a statewide concern, for the legislature to determine, that all governmental employees receive a reasonable amount of sick leave.” *Civil Service Personnel Association, Inc. v. Akron* (1984) 20 Ohio App 3d 282 at 284.

The Eighth District agrees:

“R.C. 124.38 creates vested rights in sick leave . . . the employing unit does not ‘grant’ sick leave; the employee earns it and accumulates it as a vested right. He may, at his option, use that vested right to sick leave for any purpose listed in the statute.” *South Euclid Fraternal Order of Police v. D’Amico* (1983) 13 Ohio app. 3d 46.

In *South Euclid*, a city ordinance limiting sick leave was declared unconstitutional, since “only R.C. 124.38 can define what ‘sick leave’ is.” At p. 48. Still further, the Eight District stated:

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*Fire Fighters v. Cleveland* (2003), 99 Ohio St. 3d 476.

“R.C. 124.38 is a law of general nature which prevails over conflicting municipal ordinances. R.C. 124.38 and 124.39 are closely related . . . it reasonably follows that R.C. 124.39 is a law of general nature, governing a statewide concern, which prevails over conflicting municipal ordinances.” *Fraternal Order of Police, Lodge 39, v. E. Cleveland* (1989) 64 Ohio App. 3d 421 at 424.

The opinion in *FOP Lodge 39* further states:

“R.C. 124.39 was clearly enacted pursuant to Section 34 [Article II, Ohio Constitution], since it provided for the general welfare of employees and gives such employees incentive to accumulate sick time. Consequently, the supremacy clause of Section 34 operates to invalidate conflicting legislation, including [a municipal ‘home rule’ ordinance].” *Id.*

That line of cases, holding that the state sick leave statutes §§124.38 and 124.39 take precedence over all local ordinances, is followed with respect to vacation rights in *Adkins v. Sobb* (1986), 26 Ohio St. 3d 46. In that case, a charter city attempted to ignore R.C. §9.44, and disregarded the number of years which policemen served in state employment when figuring the length of their vacation leave. Realtors sought a writ of mandamus requiring the city to give them credit for their years of state service when determining the length of paid vacation to which they were entitled under state law. This court granted the writ because Article II, Sec. 34 of the Ohio Constitution gives state laws providing for the general welfare of all employees precedence over laws enacted under the home rule power of municipalities in Ohio. The municipal ordinance which disregarded a state law was invalid. The same constitutional provision prevents Cleveland from eliminating the CEOs’ entitlement to paid sick leave.

Cleveland has no answer to this argument.

A writ should be granted mandating the accumulation of paid sick leave for the hours worked by the members of the CEO Union as provided by statute, at the rate of 4.6 hours for every 80 hours worked during the period from October 29, 1980 to February 13, 2005. Further, it

should be mandated that those employees who were required to miss work due to illness or injury, or the illness or injury of a family member, shall be compensated for the time away from work to the extent of their accumulated paid sick leave.

Finally, The CEO Union asks that it be also mandated that those employees who retired from service for Cleveland during the relevant time period, be paid in cash for one-fourth (1/4) of the value of their accumulated but unused sick leave pursuant to R.C. §124.39.

**B. Cleveland's claim of *res judicata* based upon a contempt application is inapplicable to the question of whether it is required to follow its Charter and pay building trades employees at prevailing wage rates.**

The case of *Brown v. Felsen* (1979) 442 U.S. 127 is cited by Respondents, for irrelevant dictum. In fact, the U.S. Supreme Court rejected the application of *res judicata* in that opinion.

In more pertinent language to the decision of the Court, the Supreme Court said:

*“Res judicata* may govern grounds and defenses not previously litigated, however, it blockades paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat, as well as the honest person. It is therefore to be invoked only after careful inquiry.

...

Refusing to apply *res judicata* here would permit the bankruptcy court to make an accurate determination . . .” *Brown* at pp. 132 and 138. [Underlining added.]

Cleveland has submitted to this Court a tortured argument in which it is frantically seeking to recover from its utter inability to substantiate, in an evidentiary hearing before SERB, any of its unsupported factual assertions made to this Court in the case of *State ex rel. Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362, as well as in a 2003 contempt action. Cleveland is attempting to raise again the dead arguments that the CEOs' wages were covered by a non-existent collective bargaining agreement, which it formed with a non-existent former certified

exclusive bargaining representative of the CEOs.

Where *res judicata* might apply in the instant case, is to bar Cleveland from challenging SERB's determinations of fact in *SERB Opinion 2006-008* – a decision it did not appeal. *Res judicata* might be applicable in this case to bar Cleveland from raising defenses it should have raised in 1992 when *IUOE Local 18 v. Cleveland*<sup>14</sup> was decided, and a writ issued, requiring Cleveland to pay its CEOs at prevailing wage rates. Cleveland lost, in 1992, the argument that the CEOs had some adequate remedy, other than a writ of mandamus, in the form of negotiating and striking. Cleveland failed to raise in 1992 any other defense such as that a “two step formula” existed. Cleveland failed to raise at that time the defense that the Building Agreement was the “wrong” contract to govern CEO wages. If such defenses might have been raised, then by Cleveland's own reasoning, they are barred to this day. *Res judicata* might apply to prevent Cleveland from ignoring the mandate in *State ex rel. Pinzone v. Cleveland* (1973) 34 Ohio St. 2d 26, which held that Cleveland may not arbitrarily choose to reduce prevailing wage rates by offsets for amorphous “advantages” of municipal employment. The *Pinzone* decision was approved by this Court in *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 3d 537 at 539. *State ex rel. IUOE v. Cleveland*, in turn, was reaffirmed by this Court in the *Consolo* decision. Each of those three decisions of this Ohio Supreme Court applied specifically to Cleveland. Those cases lead to one conclusion: “prevailing wage” required by the Cleveland City Charter means the full prevailing wage.

What is quite clearly true, is that no matter which judicial rubric is applied, such as “the law of the case,” “issue preclusion,” collateral estoppel, or *res judicata*, Cleveland cannot avoid the inevitable consequences of the conclusion of this Court in *Consolo*, that “**If appellees [the**

CEOs] prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls. *IUOE*, 62 Ohio St. 3d 537, 584 N.E.2d 727.” The CEOs did prevail before SERB.

In *Consolo*, this court observed that the CEOs denied that Local 18 ever was their certified exclusive bargaining representative. Because Cleveland alleged otherwise, this Court said that SERB should examine the issue. This Court also said in *Consolo* that SERB should determine whether Cleveland was correct that the CEOs wages resulted from some (ambiguous) form of collective bargaining - which the CEOs denied.

In a full and fair evidentiary hearing Cleveland was given the opportunity to substantiate its claim that the CEOs had an exclusive bargaining representative prior to 2003. It failed to substantiate that claim. Cleveland was given the opportunity to substantiate its claim that prior collective bargaining agreements existed which justified its reductions in gross wages. It failed to substantiate that claim. Cleveland was given the opportunity to substantiate its claim that the CEOs were receiving benefits of employment which should offset their gross wages (despite the fact that such reductions would be illegal if taken as payroll deductions). It failed to substantiate that claim.

Every factual point was decided by SERB in the CEOs' favor, including: (a) they have no negotiated benefits package; (b) they had no exclusive bargaining representative until they elected the CEO Union in 2003; (c) the CEOs' wages were never the result of collective bargaining until 2005; and (d) the CEOs never agreed to a decrease in their gross wages, below the prevailing wage rate. See SERB Opinion 2006-008, Relators' Evidence, Exh. C. Relators' Evidence includes as Exhibit E, a motion by Local 18 itself, asking SERB to adopt those rulings,

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<sup>14</sup> *State ex rel. IUOE Local 18 v. Cleveland* (1992), 62 Ohio St. 3d 537.

including the ruling that it was never an exclusive bargaining representative for the CEO's, and that it never negotiated a collective bargaining agreement with Cleveland. Under *Consolo* – which is the law of this case, or *res judicata* – the CEOs are entitled to be compensated at prevailing wage rates.

*Consolo* was decided in 2004. In the year 2003, Cleveland was still attempting to raise the spectre of prior collective bargaining to justify its unilateral reductions of the CEOs' gross wage rates, below the prevailing wage rates. When this court ruled on a contempt action in 2003, no basis was given for its ruling. However, at that time the *Consolo* case was also pending before this Court. Cleveland may have avoided a contempt finding against it by obfuscating whether collective bargaining contracts or a bargaining representative existed. Whatever basis might have prompted the ruling in 2003, the decision the following year in *Consolo*, which was fully explained, described the path which must be followed for a resolution of Relators' claims. That path included obtaining a ruling from SERB about certain facts. The ruling was issued. Cleveland did not appeal that ruling. That ruling, SERB Opinion 2006-008, has now become another part of the law of this case – or *res judicata* against Cleveland. The fact determinations in SERB Opinion 2006-008 should now serve as the basis for the issuance of a writ of mandamus against Cleveland.

C. **Compensation at prevailing wage rates means that the gross wage rates (before payroll deductions) must equal 100% of the prevailing wage.**

The CEO Union incorporates here its argument on this point which is contained in its Merit brief. The additional observation is worthwhile that in the *Consolo* decision, this Court referred to its earlier decision that R.C. Chap. 4115, the Ohio Prevailing Wage Law, does not apply to regular, full-time, civil service employees of a charter city. *Consolo* at 368, citing *Craig*

v. *Youngstown* (1954), 162 Ohio St. 215, syll. If any question remains, however, about the calculation of the prevailing wage it might be noticed that the sum of all components in the Building Agreement contracts in Relators' Exhibit J would also satisfy the definition of prevailing wage in R.C. Sec. 4115.03. Under that section of the Revised Code, payments which an employer is required by law to make -- such as social security tax on the employer, unemployment compensation premiums, workers compensation insurance, or legally required payments by Cleveland into the state employers' accumulation fund pursuant to R.C. sec. 145.23(B) and 1415.25 of the public employees' retirement system -- would not enter into the calculation.

Under the private sector Building Agreement, the "pension component" is included in the list of components of the total wage. The payment of that component is actually satisfied by the deposit of an equivalent amount directly to the employee's account in a union pension fund. In municipal employment, the gross wage must include the "pension component." As shown on Charles Adkins' payroll records (Respondents' Exh. 15) that pension amount is taken as a payroll deduction, which the law provides shall be deposited directly to his individual account and will remain his property, pursuant to R.C. Secs. 145.21 and 145.55. A reduction in gross wages, by the amount of the pension component, would have the result that Charles Adkins' pay is cut by a reduction in both his gross pay and in his take-home pay. This would bring his wages below the prevailing wage rate., because a payroll deduction will be deposited into his individual account, while a cut in his gross wage is simply gone.

Relator submits the payment of gross wages equal to 100% of the prevailing wage rate, including all components in the Building Agreement wage rate tables (Exh. J), would satisfy both

the Cleveland City Charter requirement and R.C. Chap. 4115. After the proper gross wage is mandated by this Court to be paid to the CEOs, their proper payroll deductions are governed by general law. As set forth in the Statement of Facts above, the complaint of Relators pertains to Cleveland's arbitrary lowering of their gross wages, and the payroll deduction regulation quoted by Cleveland in its merit brief is irrelevant to this case.

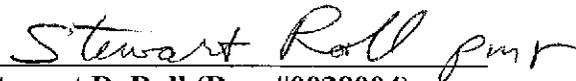
### CONCLUSION

This Court's ruling in *State ex rel. Consolo v. Cleveland* identified the analysis to be followed in the instant case. That analysis follows.

Since the CEOs' wages were not the result of collective bargaining until 2005, their gross wages are required to be the prevailing wage rates in the private sector. The prevailing wage in the private sector, according to long-standing and accepted practice, is the wage which is the sum of all the components in the Construction Employers Association Building Agreement (Relators' Exh. J). Since the CEOs do not receive any benefit package, even under Cleveland's own arguments the gross wages paid to the CEOs must equal the full prevailing wage rates for their respective job classifications.

Therefore, Relator prays that this Court should cause a writ to issue for the relief prayed for in the Complaint and set forth in Relator's Complaint.

Respectfully submitted,



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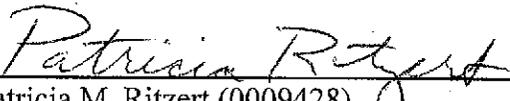
***Representing Relator CEO Union and  
Individual Relators***

**CERTIFICATE OF SERVICE**

A copy of the foregoing Relators' Reply to Respondents' Merit brief has been sent to the following via regular U.S. mail, on this 11<sup>th</sup> day of April, 2007.

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