

IN THE SUPREME COURT OF OHIO

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

CASE NO. 2006-2056

Relators

vs.

CITY OF CLEVELAND, et al.

Respondents

RELATORS' MOTIONS FOR ORDERS:

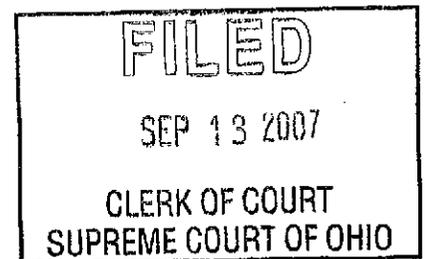
- (1) TO REQUIRE RESPONDENTS TO SHOW CAUSE WHY THEY SHOULD NOT BE DEEMED TO BE CONTEMNORS OF THIS COURT, AND
- (2) FOR SANCTIONS UNTIL THEIR COMPLIANCE WITH THIS COURT'S JUDGMENT ENTRY AND WRITS OF MANDAMUS, WITH MEMORANDUM IN SUPPORT OF THOSE MOTIONS

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MOTIONS

Relators move this Court to issue orders: (1) to require Respondents to show cause why they should not be deemed contemnors of this Court, and (2) for sanctions until compliance with this Court's August 15, 2007 Judgment Entry and Writs of Mandamus (the "Judgment and Writs"). These motions should be granted because Respondents have failed to comply with the Judgment and Writs, and because they have refused to commit to when they will comply with the Judgment and Writs..

MEMORANDUM

The Judgment and Writs require Respondents to pay Relators, who were and are Respondents' construction equipment operators and master mechanic employees, the difference in amount between the prevailing wage rate and the amount that Relators were paid for the period of May 1, 1994 - February 14, 2005. The Court's Judgment recognizes that Cleveland has fought its obligation to pay these wage earners at the Court ordered prevailing wage rate since 1994. Respondents continuing failure to pay these employees hourly wages that were earned but remain unpaid, notwithstanding this Court's August 15, 2007 Judgment Entry, evidences Respondents' contempt for this Court.

The Judgment clearly identifies the hourly payment deficits. Compliance with the Writs simply required multiplying the hours worked by the hourly deficits, and writing appropriate checks. On August 28, 2007, after hearing no response from Respondents to the Judgment and Writs, counsel for Relators hand delivered to Robert Triozzi, Respondents' Director of Law, the August 28, 2007 letter attached as Exhibit "A" to these Motions. Among other things, that letter provides Respondents with a copy of the Court's opinion, judgment entry and describes the amounts owed,

which exceed \$2.7 million, based upon Respondents' previously produced payroll records for the period from May 1, 1994 - December 31, 2003 and asks Relators to produce its payroll records from January 1, 2004 - February 14, 2005 to facilitate computation of the amount owed for that period.

The email correspondence between counsel for Relators and counsel for Respondents between August 28, 2007 and September 11, 2007 that is attached as Exhibit "B" to these Motions confirms Respondents' August 28, 2007 promise and September 6, 2007 retraction of their promise to promptly pay Relators in accord with this Court's Judgment and Writs. Respondents excuse for nonpayment was an alleged difficulty in finding their own payroll records for the affected employees and time period at issue. Notwithstanding Relators' attorney's advice in that email, which has been acknowledged by Respondents' chief counsel to be accurate, that Respondents previously produced records during the tortured history of this litigation which provides that information for most of the affected employees, Respondents nonetheless have failed to even partially comply with the Judgment and Writs, and refuse to commit to a date for that compliance.

Respondents' email advice that they cannot commit to when they might comply with the Judgment and Writs because they can't easily locate their payroll records, when they have already produced most of those records in litigation, is at best disingenuous. That fact and the seriousness of failing to comply within a reasonable time with this Court's Judgment and Writs warrants the issuance of an Order requiring Respondents to appear and show cause why they should not be deemed contemnors of this Court.

If this Court determines that Respondents have acted and continue to act in contempt of this Court's Judgment and Writs, Relators pray that this Court will issue an Order assessing a penalty of \$10,000 or higher per day, plus an award of reasonable attorney's fees and costs, that will hopefully

convince Respondents to comply with this Court's Judgment and Writs.

Respectfully submitted,



**OF COUNSEL:
PERSKY, SHAPIRO &
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*Representing Relator CEO Union and
Individual Relators*

CERTIFICATE OF SERVICE

A copy of the foregoing Motions for Orders: (1) to Require Respondents to Show Cause Why They Should not be Deemed to be Contemnors of this Court, and (2) for Sanctions Until Their Compliance with this Court's Judgment Entry and Writs of Mandamus, With Memorandum in Support of those Motions has been sent to the following via regular U.S. mail, on this 12th day of September, 2007.

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STEWART D. ROLL (Reg. #0038004)
*Representing Individual Relators and
the Municipal Construction Equipment
Operators' Labor Council*

EXHIBIT "A"

Letter dated August 28, 2007 from Stewart D. Roll, counsel for Municipal Construction Equipment Operators' Labor Council, addressed to Robert J. Triozzi, Esq., Director of Law, City of Cleveland regarding demand for payment of Supreme Court Judgment.

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STEWART D. ROLL

August 28, 2007

Robert J. Triozzi, Esq.
Director of Law
City of Cleveland, Dept. of Law, Rm. 106
601 Lakeside Avenue
Cleveland, OH44114-1077

**Re: State of Ohio, ex rel, Municipal Construction Equipment
Operators' Labor Council, et al. v. City of Cleveland, et al
In the Supreme Court of Ohio Case No. 2006-2056**

Dear Mr. Triozzi:

On August 15, 2007 the Ohio Supreme Court issued its mandamus judgment in the case of *State ex rel. Municipal Construction Equipment Operators Labor Council v. City of Cleveland*, 114 Ohio St.3d 183. A copy of the complaint and judgment are respectively attached as Exhibit "A" and "B" to this letter. Paragraph 69 of that opinion describes the Court's determinations that the CEO Union has proven the hourly rate deficiencies between the amount paid and the amount due to Cleveland's construction equipment operators and master mechanics during the period of May 1, 1994 – February 14, 2005, and the relators' entitlement to a writ of mandamus to compel respondents' payment of these amounts. Paragraph 85 of the Court's opinion grants that writ, less a \$2,500 per employee credit per CEO employee who worked for Cleveland during the period of January 1, 2004 – January 31, 2005.

Please find attached as Exhibit "C" to this letter a spreadsheet which shows the amount due pursuant to this writ of mandamus through December 31, 2003. The annual hourly deficit amounts shown on the spreadsheet are taken directly from Exhibit "B" of the complaint. Please accept this letter as the CEO Union's demand for relators' prompt payment of that amount, plus post-judgment interest to relators and their attorneys. Please accept this letter as our demand for these employees' records of hours worked from January 1, 2004 – February 15, 2005. With that information we will compute the remaining balance due.

Please also consider this letter as the CEO Union's demand for Cleveland's provision of a sick leave credit to these employees, and payment of back wages from April 1, 2007 until

EXHIBIT "A"

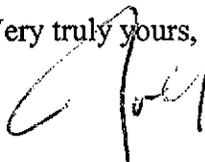
PERSKY, SHAPIRO & ARNOFF CO., L.P.A.

Robert J. Triozzi, Esq.
Director of Law, City of Cleveland
August 28, 2007
Page 2

payment. Those back wages are due based upon the Supreme Court's rejection of Cleveland's claim that it was entitled to an offset for PERS and other fringe benefit payment obligations, and need to reflect the current prevailing wage rate, based upon the CEA building agreement rate described in paragraphs 4 and the components of that rate that are described in 52 of this opinion. The relevant regular hourly rate provisions of that current contract are attached as Exhibit "D" to this letter.

Please respond to these demands no later than close of business on September 7, 2007. Please contact me if you have any questions or if you would like to discuss these matters.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Stewart D. Roll', is written over the closing text.

Stewart D. Roll

SDR:Eva
Attachments

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL
CONSTRUCTION EQUIPMENT
OPERATORS' LABOR COUNCIL
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and

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and

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and

LOUIS A. CIPRIANO
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and

LAWRENCE C. DOUGLAS (deceased)
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and

MICHAEL W. GRALEY
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and

THEODORE E. HUEY
951 E. 143rd Street
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and

CASE NO.

06-2056

Original Action in Mandamus

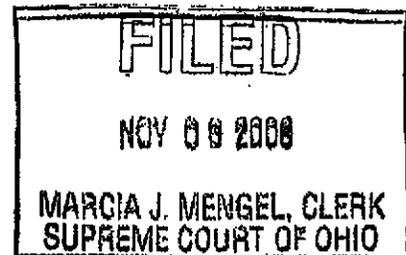


EXHIBIT "A"

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and

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and

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and

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and

BRADY REID
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and

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and

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and

MILTON WRIGHT
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and

JOHN MOSES
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Relators

vs.

CITY OF CLEVELAND
601 Lakeside Ave.
Cleveland, Ohio 44114

and

FRANK JACKSON, MAYOR)
City of Cleveland)
601 Lakeside Ave.)
Cleveland, Ohio 44114)

and)

CLEVELAND CITY COUNCIL)
EMILY LIPOVAN, CLERK)
601 Lakeside Ave.)
Cleveland, Ohio 44114)

Respondents)

ORIGINAL ACTION COMPLAINT FOR WRIT OF MANDAMUS

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COUNSEL FOR RESPONDENTS

Relator Municipal Construction Equipment Operators' Labor Council (the "CEO Union") and the individual Relators make the following statements as their complaint for a peremptory writ of mandamus, or an alternative writ directing that Respondents shall perform the acts as prayed for in this Complaint, or to show why the writ of mandamus should not issue. This complaint is supported by the attached memorandum, affidavits, and exhibits.

JURISDICTION

1. Jurisdiction with respect to this original action is supported by Article IV, §2(B)(1)(b) of Ohio's Constitution and Supreme Court Rule X.

PARTIES

2. Relator CEO Union is a non-profit Ohio corporation. It is an employee organization which has been certified as the exclusive collective bargaining representative of those persons who are employed by Cleveland, Ohio as construction equipment operators and master mechanics. The individual Relators are those persons who are or were employed by Cleveland as construction equipment operators or master mechanics, many of whom were plaintiffs and appellees in *Consolo v. Cleveland* (2004), 103 Ohio St. 3d 362. The members of the CEO Union and the individual Relators are hereafter collectively referred to as the "CEOs" or "CEO".

3. The CEO Union has standing to bring this action on behalf of its members, as their representative in litigation. The CEO Union is also the certified collective bargaining representative of a bargaining unit of the CEOs employed by Cleveland.

4. Respondent City of Cleveland is a political subdivision of Ohio which has adopted a municipal charter.

5. Respondent Frank Jackson is the duly elected mayor of Cleveland. Pursuant to the

Charter of the City of Cleveland, he is the executive officer of the municipality and oversees, *inter alia*, the office of the treasurer.

6. Respondent Cleveland City Council is Cleveland's legislative body. Pursuant to the Charter of the City of Cleveland, the City Council is responsible for setting the wages of employees and for appropriating funds for the payment of financial obligations of the City.

COUNT I

7. The Cleveland City Charter provides in part:

"... 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." From sec. 191, Charter of the City of Cleveland (attached hereto as Exhibit "A").

8. The CEOs are employed by Cleveland in the civil service classifications Construction Equipment Operator "Group A," Construction Equipment Operator (the "CEOs"), "Group B," or Master Mechanic.

9. The classifications Construction Equipment Operator Group 'A', Group 'B' and Master Mechanic are among the building and construction trades which are entitled to receive compensation in accordance with prevailing wages paid in the building and construction trades as set forth in paragraph 7 above.

10. Pursuant to the Cleveland City Charter, the CEOs were entitled to receive wages in accordance with the prevailing rates of salary or compensation for their services.¹

11. From May 1, 1994 through February 14, 2005 Cleveland paid the CEOs at a rate of

¹*State ex rel. IUOE v. Cleveland* (1992) 62 Ohio St. 3d 537: in the absence of a collective bargaining agreement, the Cleveland City Charter requires prevailing wages.

pay less than the prevailing wage rates for their services, as reflected in the Wage Chart attached hereto as Exhibit "B." The Wage Chart is hereby incorporated into this Complaint by reference, as if wholly re-written herein.

12. During the period May 1, 1994 to February 14, 2005, no collective bargaining agreement covered the CEOs working for Cleveland.²

13. During the period May 1, 1994 to January 30, 2003, the CEOs working for Cleveland were not in a bargaining unit and were not represented by an exclusive bargaining agent for any purposes within R.C. Chapter 4117.³

14. The CEO Union asserts the following facts as found in *SERB Opinion* 2006-008 after an evidentiary hearing by the State Employment Relations Board ("SERB"):

- (a) The CEO Union is an "employee organization" which on January 30, 2003 was certified by SERB as the exclusive representative of those persons that Cleveland, Ohio employs as CEOs.⁴
- (b) The CEO Union is the only "employee organization" that ever represented Cleveland's CEO Employees as a collective bargaining representative.⁵
- (c) From 1994 to February 14, 2005 the wages of Cleveland's CEO Employees were

²*SERB Opinion* 2006-008 at pp.2, 6 at ¶12, and 11 at no.6 (attached as Exhibit "C"); and *SERB Opinion* 2004-004 (attached as Exhibit "D").

³*SERB Opinion* 2006-008 at p. 2 and p.10 no.3,

⁴*SERB Opinion* 2006-008 Finding of Fact ¶16.

⁵ SERB's response to *Consolo, supra*, Question No. 1. Local 18's motion to sustain this and SERB's administrative law judge's other recommended determinations, which have been adopted in SERB's Opinion, is attached as Exhibit "E" to this Complaint.

never the result of collective bargaining between Local 18⁶ and Cleveland.⁷

(d) Cleveland and Local 18 never negotiated and implemented a benefits package for the CEO Employees with equal or better benefits than are provided in the City Charter.⁸

(e) Until February 14, 2005, no collective bargaining agreement existed between Cleveland and any union representing Cleveland's CEO employees. On that date, the CEO Union and Cleveland entered into the first collective bargaining agreement which affected Cleveland's CEO Employees.⁹

15. Cleveland had and has a clear legal duty to pay its CEO employees the difference between the prevailing wage rates and the lower hourly rates that Cleveland actually paid to its CEO employees during the period from May 1, 1994 to February 14, 2005 (the "Underpayments"), as shown on the Wage Chart, Exhibit "B" hereto.

16. The CEOs have no adequate legal remedy which would allow them to recover Cleveland's Underpayments that were below the prevailing wage rates during the period of May 1, 1994 to February 14, 2005; thus the requested writ of mandamus is the appropriate remedy.¹⁰

COUNT II

17. Relators repeat into this Count II all of the assertions contained in paragraphs 1

⁶ International Union of Operating Engineers, Local 18.

⁷ *SERB Opinion* 2006-008 in response to *Consolo, supra*, Question No. 6.

⁸ *SERB Opinion* 2006-008 in response to *Consolo* Question No. 7.

⁹ *SERB Opinion* 2006-008 in response to *Consolo* Question No. 6.

¹⁰ *State ex rel. IUOE v. Cleveland, supra*, syllabus, 62 Ohio St.3d at 538.

through 16 of this Complaint.

18. Ohio Rev. Code §124.38 states in part:

“Each of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay:

(A) Employees in the various offices of the . . . municipal . . . service, . . .

..... may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee's immediate family. Unused sick leave shall be cumulative without limit. When sick leave is used, it shall be deducted from the employee's credit on the basis of one hour for every one hour of absence from previously scheduled work.”

19. Ohio Rev. Code §124.39 states in part:

“(B) Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of the employee's accrued but unused sick leave credit. The payment shall be based on the employee's rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.”

20. Cleveland's CEO employees were, during their period of employment with Cleveland, entitled to accrue paid sick leave and be paid for periods of illness, in accord with the provisions of state law set forth in paragraphs 18 and 19 of this Complaint, until February 14, 2005.

21. Cleveland has failed and refused to accrue or provide and pay for sick leave to CEO

employees since October 29, 1980, when it enacted an ordinance¹¹ excusing itself from paying sick leave to its building and construction trade employees. These sick leave benefits have not been provided for or paid by Cleveland to its employees from October 29, 1980 to February 14, 2005.

22. Cleveland has a clear legal duty to accrue and provide paid sick leave to its employees in accord with state law.

23. The CEOs have no adequate remedy at law to obtain the accrual of sick leave, or to obtain payment for periods of time they were absent from work due to illness or injury, or due to illness, injury or death in their immediate families, as provided in R.C. §124.38, or to obtain payment upon retirement for their accumulated but unused sick leave as provided in R.C. §124.39; thus a writ of mandamus is appropriate.

WHEREFORE, the CEO Union and the individual Relators named herein, pray that the Court shall issue an alternative writ requiring Respondents to show why the writ of mandamus should not issue, or a peremptory writ granting them relief as follows:

As to Count I, a writ of mandamus ordering that:

(a) Cleveland City Council shall establish a schedule of compensation for the CEO Employees in accordance with the prevailing wage rates in the private sector as shown on Exhibit "B", the Wage Chart, for the period of May 1, 1994 through February 14, 2005;

(b) Cleveland City Council shall appropriate funds for the payment to the CEO Employees of unpaid prevailing wage rates retroactively for the period of May 1, 1994 through February 14, 2005;

(c) The Mayor of Cleveland shall cause payment to issue to the CEO Employees so as to

¹¹ Cleveland's Codified Ordinances, Sec. 171.31 "Sick Leave" is attached in Exhibit "N" hereto.

compensate retroactively the difference between the actual wages paid and the prevailing wages for the period of May 1, 1994 through February 14, 2005.

As to Count II, a writ of mandamus ordering that:

(d) the CEO employees shall be credited with accumulated sick leave at the rate of 4.6 hours for every 80 hours worked during the period from October 29, 1980 to February 14, 2005;

(e) 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 at the time of the absence due to illness; and

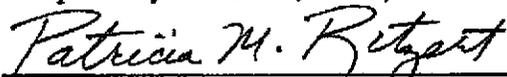
(f) those employees who retired from service for Cleveland during the time period from October 29, 1980 through February 14, 2005, be paid in cash for one-fourth (1/4) of the value of their accumulated but unused sick leave, as provided in R.C. §124.39.

Further, the CEO Union and individual Relators pray the court to require the addition of pre-judgment interest at statutory rates to the wage deficiencies below the prevailing rates, running from the various payroll dates upon which wages were due, and that this court award Relators' attorney fees plus their costs and expenses of litigation, plus post-judgment interest from the date of the requested writ.

OF COUNSEL:

**PERSKY, SHAPIRO &
ARNOFF CO., L.P.A.**

Respectfully submitted,



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Operators' Labor Council*

**MEMORANDUM IN SUPPORT
OF ORIGINAL ACTION IN MANDAMUS**

STATEMENT OF THE FACTS

This is a case about an Ohio city which fails and refuses to follow its own Charter's requirement¹² that it pay its CEO employees at prevailing wage rates during the period of 1994 - 2005. During that period, that city employed its CEOs as full-time employees. During that period, there was no collective bargaining agreement between that city and its CEOs.¹³ That city is Cleveland, Ohio.

Cleveland is a charter city. A copy of its Charter is attached as Exhibit "A"; section 191 of its text states in relevant part:

". . . 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."¹⁴ Adopted 1980. Effective February 17, 1981.

Cleveland's construction equipment operator employees were identified as being part of the building and construction trades in the schedule of compensation for 1979, as shown in Cleveland Ordinance 1682-79 (1979), which is attached as Exhibit "F".

Relator, the Municipal Construction Equipment Operators' Labor Council (the "CEO Union") is a labor organization which was certified by SERB in 2003 as the exclusive bargaining

¹² Cleveland City Charter Sec. 191 (Exhibit "A")

¹³ *SERB Opinion* 2006-008 (Exhibit "C"), which is incorporated herein by reference. Among other things, that Opinion finds that *no collective bargaining* occurred between Cleveland and its employee CEOs until after the below-described CEO Union became the CEOs' exclusive labor organization representative.

¹⁴ Charter for the City of Cleveland, §191 attached Exhibit "A". Construction equipment operators were among those building trades employees listed in the 1979 ordinance, Cleveland Ordinance 1682-79 (1979), attached hereto as Exhibit "F" setting wage rates for building trades employees.

agent for Cleveland CEOs. The individually named Relators are persons who previously worked as construction equipment operators and master mechanics for Cleveland, and are not represented by the CEO Union in this litigation.

Cleveland's CEO employees operate, repair, and maintain heavy construction equipment, including but not limited to, mechanized hoes, loaders, bulldozers, and graders. The CEOs have been variously referred to as "craft" employees, building trades employees, and operating engineers. The CEOs are classified by the Cleveland Civil Service Commission as Construction Equipment Operators Group 'A', Group 'B', or Master Mechanic.

Cleveland's obligation to pay the CEOs at the prevailing wage rate.

In *State ex rel. IUOE v. Cleveland*, (1992), 62 Ohio St. 3d 537, this Court recognized that in the absence of a collective bargaining agreement, Section 191 of Cleveland's Charter mandates payment to the CEOs at the prevailing wage rate. For the CEOs, the private sector contract which establishes the prevailing wage in Cleveland is the "Building Agreement."¹⁵ Copies of the wage rates from the Building Agreement documents from 1994 to 2005 are attached as Exhibit "J". Those are as set forth as the "prevailing wage" in the Wage Chart, Exhibit "B". During this period of time, Cleveland paid the CEOs at less than the prevailing wage rates.

The wage rates set forth in the Building Agreement documents (Exhibit "J") are the sum of various listed components, i.e. a base rate, plus an amount for "health & welfare," designated "H&W" which provides medical insurance, an amount to be applied to an employee's individual pension fund account, and components for an apprenticeship program and a construction industry

¹⁵See Exhibit "G", Inter-Office Correspondence October 28, 1993 from Assistant Water Commissioner N. Jackson to Water Commissioner Julius Ciaccia. Affidavit of Frank Madonia (Exhibit "H"), and Affidavit of Santo Consolo (Exhibit "I"). See also, *State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 537 at 538 and SERB Fact-Finder Virginia Wallace-Curry's report, Exhibit "K", at p. 14, referring to "...the long-standing practice of paying these employees at the rate established by the CEA Building Agreement..."

service program. This Building Agreement sum-of-components method for establishing the prevailing wage rates for the CEOs is validated by the report of SERB-appointed Fact-Finder Virginia Wallace-Curry, which is attached as Exhibit "K". The Fact-Finder's report demonstrates how that calculation was made. (See p.13, Fact-Finder's Report, Exhibit "K").

Another example of the use of this sum-of-components method of calculating the prevailing wage rate for CEOs is provided by the Cleveland Inter-Office Correspondence dated October 28, 1993 which is attached as Exhibit "G". That use is identical to the method described by the SERB Fact-finder.

The Public Employees Collective Bargaining Act became effective in 1984.

The State Employment Relations Board ("SERB") was created in 1984 by Chapter 4117 of the Ohio Revised Code. That legislation is known as the Public Employees Collective Bargaining Act. This Act gave employees of political subdivisions the right, but not the obligation, to form bargaining units, designate an exclusive representative for bargaining and to bargain collectively. Following certification of the CEO Union, Cleveland's CEO employees chose not to exercise their right to bargain collectively nor to attempt to negotiate a collective bargaining agreement until 2003, after they formed the CEO Union. Cleveland's unfair labor practice of "surface bargaining" delayed achievement of a collective bargaining agreement until February 14, 2005.¹⁶

The CEOs and State ex rel. IUOE, supra

Several CEOs working for Cleveland in 1992 had previously worked as construction equipment operators in the private sector. During that private sector employment, they were members of Local 18 of the International Union of Operating Engineers ("Local 18"). After

¹⁶ SERB Opinion 2004-004, which is incorporated herein by reference, and attached as Exhibit "D" to this Memorandum.

becoming employed by Cleveland, they chose to continue their membership in Local 18.¹⁷ As a result of that relationship, they allowed Local 18 to represent them in the litigation in *State ex rel. IUOE, supra*.

The Court's opinion in *State ex rel. IUOE* makes a statement, which stemmed from an alleged and erroneous stipulation, that Local 18 was the certified collective bargaining agent for the CEOs. The truth was that Local 18 only acted as a litigation agent for its members. It was not a collective bargaining representative.¹⁸ A claim which surfaced later, that Local 18 should be considered a "grandfathered" or "deemed certified" collective bargaining representative due to activities prior to the passage of the Public Employees Collective Bargaining Act, has also been found erroneous by SERB.¹⁹ *State ex rel. IUOE, supra*, mandated that CEOs shall be compensated at prevailing wage rates under the Building Agreement for 1992 and thereafter.²⁰ Wages increased temporarily.

Cleveland's Failure to Pay the CEOs at Prevailing Wage Rates.

Then, in 1994, Cleveland unilaterally allowed wage rates to fall below the rising private sector prevailing hourly wage. For the next eight years, Cleveland developed one pretext after another for cutting the wages of the CEOs below the prevailing wage rate. Cleveland's various pretexts included a disagreement over which overtime hours are compensated at time-and-a-half and which at double-time; disputing the components of overtime pay; and complaining that it would

¹⁷Exhibit "H" Affidavit of Frank P. Madonia; Exhibit "I," Affidavit of Santo Consolo.

¹⁸ *SERB Opinion* 2006-008, at p. 2, no. 2, and p. 10: "It is undisputed that SERB has never certified Local 18 as the exclusive bargaining representative for the CEOs under §4117.05."

¹⁹ *SERB Opinion* 2006-008, at p. 2, no. 1, and p. 7: "... Local 18 never was the deemed-certified representative of the CEOs."

²⁰ *State ex rel. IUOE, supra* at 538.

rather use a different private sector contract than the one recognized in *State ex rel. IUOE, supra* at 538. As shown on Exhibit "B," the Wage Chart, CEO wages fell farther below the prevailing wage rates every year during the period of 1994-2005.

One example of a pretext used by Cleveland for cutting CEO wages is Cleveland's past assertion that CEO employees are not entitled to receive the "pension" component of the prevailing wage. One of Cleveland's pretexts for reducing the wages of the CEOs below the prevailing wage was that it should carve out of the CEOs' income the amount of its Employer Accumulation Fund obligation. Cleveland's "rationale" for this position, was that it is required by law to make deposits into an "Employers Accumulation Fund" (R.C. §145.23(B)) under the Public Employees Retirement System (hereafter "PERS"). Cleveland's "rationale" is erroneous because it fails to recognize that by law, employees do not receive those deposits.²¹ Instead, the Employers Accumulation Fund is used to provide insurance coverage for current retirants in the system if such coverage is granted by the public employees retirement board (R.C. §145.58), to make up the under-funding for already-accrued and vested pension liabilities, and if the amount in the earnings fund (R.C. §145.23(D)) is insufficient, the amount of the deficiency will be transferred out of the Employers Accumulation Fund. Nothing is earmarked for a particular employee. By law, the fund which holds the employers' payments is a separate legal entity (R.C. §145.25) in which no individual is vested. No employee "receives" to their credit the Employers Accumulation Fund payments made by Cleveland; those payments do not accrue to the benefit of employee savings.²² See, *Wright v. Dayton* (2004), 158

²¹ See Exhibit "M" hereto, at paragraph 8, in which Cleveland claims not to know that the law provides that the annually-billed obligation of a public employer is deposited in the employers accumulation fund (R.C.145.23(B)), in which no employee is vested or has accounts, and does not accrue to the benefit of any individual employee.

²²R.C. §145.25.

Ohio App. 3d 152; and *Williams v. Columbus* (1987), 40 Ohio App.3d 71; R.C. §145.561. The court in *Wright v. Dayton*, supra, emphasized this, saying: "we are perplexed as to why [claimants] believed they were entitled to a share of the city's money that it had budgeted for payment to PERS. . ." *Wright v. Dayton* at 160.

The treatment of an employee's contribution, under law, is different than the Employers Accumulation Fund payment. An employee's contribution is taken from his paycheck as a payroll deduction (R.C. §145.55) and deposited into an individual account in his name (R.C. §145.21) where it is held for him in the Employee Savings Fund (R.C. §145.23(A)).²³ If he leaves employment, the public employment relations board will return to him the "accumulated contributions" in his individual account (§145.40(A)(1)). However, "accumulated contributions" include only the employee's own payments to his individual account, but does not include any portion of the Employers Accumulation Fund (§145.01(J)).

"... in the event the employee terminates his employment, rather than retires, that portion which is regarded as the employee's contribution is returned to him or her, but the employer's contribution is not..." *Williams v. Columbus* (1987, 5th Dist.), 40 Ohio App.3d at 74, and R.C. §145.40.

The withdrawal of his contributions "shall cancel" a former employee's participation in the retirement system (R.C. §145.40(A)(1)). He will not receive anything except the return of what was taken out of his paycheck and put into his individual account.²⁴ No PERS statute or precedent allows Cleveland to deduct out of the paychecks of its employees any portion of its payments to the Employers Accumulation Fund.

²³ In R.C. Chap. 145, which covers the public employees retirement system (hereafter "PERS") a "contributor" is an individual employee who has an account in the employee savings fund. R.C. §145.01(F). A "member" is any public employee. R.C. §145.01(B).

²⁴ With some interest, after December of 2000 pursuant to R.C. §145.471.

In summary, the employee does not "receive" the employer's payments and an employer cannot deduct the amount it must pay from the wages due to an employee. Those funds are not deposited to the employees accounts. Employees are not receiving those funds any more than they receive Cleveland's unemployment compensation and workers' compensation deposits. Cleveland is not entitled to a "credit" against CEO wages for its obligation to the Employers Accumulation Fund.

The cited precedent and statutes make clear that Cleveland's deduction of the employer's portion of its PERS payment from the CEOs' wages is improper.

SERB Answers this Court's *State ex rel. Consolo, supra*. Questions.

In 2002, individual Relators and others sued Cleveland to once again bring their wages up to the prevailing rate in the private sector. Cleveland once again resisted and chose to ignore its City Charter requirement to pay its CEO employees at the prevailing wage rate. Cleveland again appealed to the Ohio Supreme Court its clear duty to pay the prevailing wage. That appeal was decided in *State ex rel. Consolo v. Cleveland*, (2004) 103 Ohio St. 3d 362, 2004-Ohio-5389. In *State ex rel. Consolo*, this Court identifies a number of factual issues, and states that those issues should be determined by SERB. Pursuant to this direction, and in response to the CEO Union's Petition, SERB ordered and held a hearing to respond to the Court's queries.²⁵ SERB administrative law judge Beth Jewell issued a recommended decision, which was adopted by SERB,²⁶ finding the following facts:

"(1) International Union of Operating Engineers, Local 18 was not a deemed-certified bargaining agent on or before April 1, 1984, for those persons employed by the City of

²⁵ The SERB Order directing a hearing on the issues is attached hereto as Exhibit "L".

²⁶ *SERB Opinion* 2006-008. Exhibit "C"

Cleveland as construction equipment operators;

(2) International Union of Operating Engineers, Local 18 was not the exclusive representative for the construction equipment operators at any time during the period of 1994 to 1998;

(3) The City of Cleveland and International Union of Operating Engineers, Local 18 informed the construction equipment operators of the prevailing wage rate agreed to by International Union of Operating Engineers, Local 18 and the City of Cleveland to settle a contempt action, but International Union of Operating Engineers, Local 18 did not negotiate a decrease in compensation of those persons employed by the City of Cleveland as construction equipment operators with the knowledge or consent of the construction equipment operators;

(4) No evidence was presented in the record showing that the construction equipment operators themselves, as individual employees, had agreed to a decrease in compensation;

(5) **The wages of the construction equipment operators who were appellees in *Consolo v. City of Cleveland* (2004), 103 Ohio St. 3d 362, 2004-Ohio-5389, were not the result of collective bargaining between International Union of Operating Engineers, Local 18 and the City of Cleveland; and**

(6) No evidence was presented in the record showing that any benefits package was negotiated or implemented for the construction equipment operators until February 2005,²⁷ which was after SERB certified the Municipal Construction Equipment Operators' Labor Council as the construction equipment operators' exclusive representative in January 2003. (Emphasis Added).

IUOE Local 18 joined Petitioner CEO Union in asking that SERB adopt all of these findings.

Cleveland protested these recommended determinations of the administrative law judge to the full State Employment Relations Board. On September 28, 2006 SERB rendered Board Opinion 2006-008. In that opinion, SERB adopts and approves all of the determinations above, as well as the reasoning of the administrative law judge. No appeal was taken from SERB's decision; that decision

²⁷ The collective bargaining agreement reached by the CEO Union and Cleveland provided for a combination of hourly wage, days off with pay for vacations, holidays jury duty, funeral leave and personal days. The agreement also provided for other benefits of employment, notably health insurance plus dental and vision coverage, paid by Cleveland. The dollar value of the total package of compensation, when divided into an hourly rate, exceeded the dollar value of the then-current prevailing wage rates in the private sector Building Agreement, between the construction Employers Association and International Union of Operating Engineers, Local 18. See Exhibit "H", Affidavit of CEO Union President Frank P. Madonia.

is now final.

All of these facts are supported by the affidavit of Frank Madonia, CEO and President of the CEO Union, attached as Exhibit "H," and the other attached affidavits and Exhibits support this Complaint.

Count I - Prevailing wages

In 1992, this Court held in *State ex rel. IUOE v. Cleveland*²⁸ and re-affirmed again in *State ex rel. Consolo v. Cleveland*, (2004) 103 Ohio St. 3d 362, that:

"In *IUOE*, we stated that the city must comply with its charter, specifically because the employees' compensation was not a result of collective bargaining." (§ 22).

"...If appellees prevail before SERB on their claim that their wages did not result from collective bargaining, **then the city charter controls.**" (§ 22).

Section 191 of the Cleveland City Charter grants the right to CEOs, and other building trades employees, to be compensated at the same rates generally paid in the private sector.

The CEOs prevailed on their claim before SERB that their wages between 1994 and February of 2005 did not result from collective bargaining, therefore they are entitled to be paid at prevailing wage rates under the City Charter.

In response to this Court's *State ex rel. Consolo* inquiry, SERB has found that the CEOs' wages were not the result of collective bargaining and that no collective bargaining agreement existed until February of 2005. SERB's finding, and this Court's ruling in *State ex rel. IUOE* and *State ex rel. Consolo, supra*, that §191 of Cleveland's Charter obligates it to pay its CEOs at the

²⁸*State ex rel. IUOE v. Cleveland* (1992), 62 Ohio St. 3d 537.

prevailing wage rate in the absence of a collective bargaining agreement, yield the conclusion that CEOs are entitled to be paid at the prevailing wage rate. Based upon these facts and law, the CEOs pray that this Court will issue the prayed for writ of mandamus, ordering Cleveland to pay such amount in back wages as will compensate the CEOs for Cleveland's below-prevailing-wage-rate payments during the period of May 1, 1994 -February 14, 2005. The deficiency of those payments below the prevailing wage on an hourly basis is shown on attached Exhibit "B".

"Prevailing wage rates" include all components of the wages in the private sector.

This Court rendered its opinion in *State ex rel. Pinzone v. Cleveland* (1973), 34 Ohio St.2d 26, that mandamus will lie to compel compliance with a municipal charter requiring that municipal wages be set in accordance with the prevailing wage in private industry. Still further, this Court ruled that the prevailing wage rate should not be offset by fringe benefits, saying:

"Permitting an offset for such "fringe benefits" would necessarily encourage arbitrary and probably inaccurate lowerings of the municipal wage scale. Clearly, this is not the intent or meaning of Section 191." (*Pinzone* at p.31).

In 1979 Cleveland City Council enacted Ordinance 1682-79 (1979) (Exhibit "F"), which set the wage of building trades employees, including Construction Equipment Operators Group 1 (now referred to as "Group A") Construction Equipment Operators Group 2 (now referred to as "Group B") and Master Mechanics, at prevailing wage rates in private industry. The wages so set were taken from the then-current Building Agreement union contract for private sector construction equipment operators. A true copy of the relevant portion of the 1979 Building Agreement is attached to the affidavit of Santo Consolo, attached hereto as Exhibit "I." In accord with the Pinzone decision, all components (100%) of the wage rate in the private sector contract were added together to calculate

the prevailing wage rates prescribed in Cleveland Ordinance 1682-79.

In November 1980, the people of the City of Cleveland adopted the current version of Charter § 191 by popular vote, effective February 17, 1981. Sec. 191 of the Charter (Exhibit "A") refers specifically to the schedule of compensation for building trade employees passed by the city council in 1979 (Exhibit "F"). The "Building Agreement" wage rates shown for 1979 in Exhibit "I", when all components are totaled (100%), are the same as the prevailing wage rates in the 1979 ordinance, and the same as the wages paid in 1979 to Mr. Consolo, as also evidenced in attached Exhibit I.

The Building Agreements' components are as follows: Base rate + H & W (Health and Welfare) + Pension + Industry Advancement Program (IAP) + Apprenticeship Program.

| Classification | Effective Date | 1979 "Building Agreement" Private sector contract-100% of all components | 1979 Ordinance #1682-79 pay range | Difference |
|-----------------|----------------|--|-----------------------------------|------------|
| CEO 1 (or A) | May 1, 1979 | \$15.88 | \$15.88 | None |
| CEO 2 (or B) | May 1, 1979 | \$15.73 | \$15.73 | None |
| CEO 3 (or C) | May 1, 1979 | \$15.38 | \$15.38 | None |
| CEO 4 (or D) | May 1, 1979 | \$14.60 | \$14.60 | None |
| Master Mechanic | May 1, 1979 | \$16.38 | \$16.38 | None |

This chart shows that the rates established in the benchmark 1979 Ordinance, referred to in City Charter § 191, included all components, and were thus equal to 100% of the prevailing wage. This is what the people of Cleveland approved when they voted on the Charter.

The charter of a municipality is enacted by the vote of the people and, as the will of the people, carries supreme authority within a municipality. The Ohio Supreme Court in *State ex rel. Pell v. Westlake* (1980), 64 Ohio St. 2d 360, stated:

We begin the analysis by recognizing that the charter of a city, as approved by the residents of that city, represents the framework

within which the city government must operate. *Cleveland ex rel. Neelon v. Locher* (11971), 25 Ohio St. 2d 49.

The Ninth District Court of Appeals expressed the relationship in this way:

A municipal charter acts as the constitution of the municipality. *Calco v. Stow* (Apr. 29, 1981) 9th Dist. No. 9990, at 4, citing *State ex rel. Pell v. Westlake* (1980), 64 Ohio St. 2d 360, 361. Accordingly, when provisions of a city's charter and its ordinances conflict, the charter provision prevails. *Reed v. Youngstown* (1962), 173 Ohio St. 265, paragraph two of the syllabus. See, also, *Deluca v. Aurora* (2001), 144 Ohio Spp. 3d 501, 511.

The Ohio Supreme Court has also held that “. . . ordinances and resolutions in conflict with provisions of [a] city charter [are] invalid.” *State ex rel. Plain Dealer Publishing Co., v. Barnes* (1988), 38 Ohio St. 3d 165 at 168. Consequently, the vote of the people of Cleveland, adopting a Charter requirement for compensation at prevailing wage rates, citing compensation set at 100% of those rates, may not be overridden by any other municipal power. The vote of the people requires payment to the CEOs at 100% of the prevailing wage. Cleveland's payment of wages at below the prevailing wage rates was improper and should be remedied by the issuance of the requested writ of mandamus.

If there is no collective bargaining agreement, 100% of the prevailing wage rates must be paid.

Under R.C. §4117.10(A), in the absence of a collective bargaining agreement, the public employer (here, Cleveland) and the public employees are “subject to all applicable state or local laws pertaining to the wages, hours, and terms and conditions of employment for public employees.”

This Ohio Supreme Court specifically ruled in 1992²⁹ that §4117.10(A) means that the wages of construction equipment operating engineers employed by Cleveland continue to be governed by the City Charter when “there is no collective bargaining agreement.” *State ex rel. IUOE v. Cleveland*

²⁹*State ex rel. IUOE v. Cleveland*, (1992) 62 Ohio St. 3d 537

(1992), 62 Ohio St.3d 357 at p.540.

"When negotiations between public employees represented by an exclusive bargaining agent and a city have not produced a collective bargaining agreement, will mandamus lie to resolve a wage dispute by compelling compliance with a city charter provision pursuant to R.C. 4117.10(A)? We find that it does, . . . and allow the writ." *State ex rel. Internat'l Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St. 3d 537 at 539.

Further

". . . the city charter, in light of R.C. 4117.10(A), identifies a clear legal right to the relief sought and a concomitant clear legal duty to grant that relief." *Id.* At 540.

See also, *Consolo, supra*, at 368, ¶22.

To reiterate, SERB determined³⁰ that Cleveland does not provide benefits of employment to CEOs. Cleveland had no valid reason to reduce the gross wages of CEOs below the prevailing wage rates.

The remedy for an underpayment of compensation to public employees is the issuance of a writ commanding that the payment be made, plus pre-judgment interest.

"It is well settled that a claim by public employees for wages or benefits is actionable in mandamus." *State ex rel. Kabert v. Shaker Hts. City School Dist. Bd. of Edn.* (1977), 78 Ohio St.3d 37, citing *State ex rel. Chavis v. Sycamore City School Dist Bd. of Edn.* (1994), 74 Ohio St.3d 26, 34; *State ex rel. Madden v. Windham Exempted Village School Dist. Bd. of Edn.* (1989), 42 Ohio St.3d 86, 88. A request for a declaration of rights under law can be coupled with an action in mandamus to compel payment of amounts due under the law as so declared. *Fenske v. McGovern*, 11 Ohio St. 3d 129 at 131 (1984). Consequently, the CEOs are entitled to a writ of mandamus which requires that the Cleveland City Council set wages and appropriate funds for the payment of the described deficiency in the CEOs' prevailing wages during the period of 1994-2005, and further, that

³⁰*SERB Opinion* 2006-008. (Exhibit "C")

the Mayor of Cleveland cause the payment of that deficiency, as determined by this Court, to the CEO Union members and the individual Relators. Relators also pray for the award of pre-judgment interest, so that they may be made whole for their loss of income over a period of years. As R.C. §1343.03(A) states in part

“... when money becomes due and payable upon any bond, bill, note ... or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code.”

Prejudgment interest is not a form of punitive damages. “The Supreme Court has held that in determining whether to award prejudgment interest pursuant to R.C. 1343.03(A), a court need only ask one question: Has the aggrieved party been fully compensated?” *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 116.

Further,

“An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment, legitimate claims. Further, prejudgment interest does not punish the party responsible for the underlying damages, * * * but, rather, it acts as compensation and serves ultimately to make the aggrieved party whole. Indeed, to make the aggrieved party whole, the party should be compensated for the lapse of time between accrual of the claim and judgment.” *Royal Elec., supra*, as quoted in *Commsteel, Inc. v. Bender Constr., Inc.* (Dec, 3, 1998), Cuyahoga App. No. 74189, unreported.

Thus, the award of prejudgment interest is compensatory in nature. The CEOs seek to be made whole for the money due them but not paid, and therefore request the award of prejudgment interest on the difference between the amounts they were paid and the full prevailing wage rate, running from the various payroll dates on which their wages were due.

Count II - Sick Leave

Paid sick leave is required to be provided by political subdivisions in Ohio by R.C. §124.38. It should be treated separately and distinguished from other voluntary benefits of employment which might be granted to employees or not granted, in the discretion of the subdivision. Paid sick leave is mandatory, not discretionary. The sick leave statutes in R.C. Chap. 124 were enacted to be of state-wide application for the health and welfare of public employees in general. Constitutionally, they may not be overridden by local legislation such as municipal ordinances. Ohio Const., Art. II Sec. 34 and 26.

Ohio Revised Code §124.38 provides that public employees:

“... shall be entitled, for each completed eighty hours of service, to sick leave of four and six-tenths hours with pay. . . . Unused sick leave shall be cumulative without limit.”

And pursuant to R.C. sec. 124.39,

“... an employee of a political subdivision covered by section 124.38 or 3319.141 [3319.14.1] of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of the employee's accrued but unused sick leave credit. . . .”

The Home Rule powers of municipalities are specifically made subject to Sec. 3 of Article XVII of the Ohio Constitutions Article XVIII §3 limits the power of cities by stating that municipalities may enforce only such local laws “as are not in conflict with general laws.”

The Ohio Constitution states further:

All laws, of a general nature, shall have a uniform operation throughout the state; nor shall any act, except such as relates to public schools, be passed to take effect upon the approval of any other authority than the general assembly...” Ohio Const. Art. II Sec. 26.

Most specifically, with respect to "Welfare of Employees," the Ohio Constitution Article II,

Sec. 26 provides:

"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."

Thus the home rule power Cleveland may exercise is limited. Cleveland may not exercise its home rule power so as to contradict a state law of uniform operation throughout the state, dealing with the comfort, health, safety, and general welfare of employees. Cleveland may not eliminate the right to paid sick leave which is granted to employees by virtue of RC §§ 124.38 and .39.

Even a charter city may not take away by ordinance an employee's right to sick leave under state law. The First District Court of Appeals put it this way:

"The issue presented in this case is whether the Home Rule Amendment of the Ohio Constitution allows a charter city to circumvent the provisions of R.C. 124.38 as it pertains to the transfer of an employee's unused accumulated sick leave. We hold that it does not..." *State ex rel. Reuss, v. Cincinnati* (1995) 102 Ohio App. 3d 521 at 522-523.

Cleveland City Code sec. 171.31, (attached as Exhibit "N", City of Cleveland Codified Ordinances) attempts to specifically exclude CEOs from receiving paid sick leave. This attempt to exclude CEOs from receiving sick leave must be ruled invalid.

Referring again to R.C. §4117.10(A), that section makes clear what governs the public employment relationship. That section provides that where no collective bargaining agreement exists, or where an agreement "makes no specification about a matter," state and local laws apply. No collective bargaining agreement which covered the CEOs was in effect prior to February of

2005.³¹ No specification existed in any alleged agreement about sick leave; therefore R.C. §§ 124.38 and 124.39 govern the employment relationship with respect to sick leave. Ohio Rev. Code §4117.10(A). Since October 29, 1980, Cleveland has failed to provide paid sick leave to the CEOs as required by R.C. §124.38, despite the fact that they are regular full-time hourly rate employees of Cleveland. See Affidavit of Frank P. Madonia, Exhibit "H".

Without paid sick leave for this period, if a CEO was injured or ill, he may be excused from work, but he would not be paid for any of the time he is not working. Because CEOs also were not allowed medical and hospitalization insurance as a benefit of employment, when an injured CEO is not working, he still must continue paying the premiums for his medical and hospitalization insurance. Without a paycheck, this may necessitate borrowing money to pay health insurance premiums. The CEO Union submits that this is contrary to the intent of R.C. sec. 124.38 and Ohio Const. Art. II sec. 34.

In *South Euclid Fraternal Order of Police v. D'Amico* (1983) 13 Ohio App. 3d 46 at 47 (Cuy. Cty.) a local ordinance which denied the use of sick leave where it was permitted by §124.38 was declared unconstitutional. Further, the 8th District Court of Appeals held R.C. §124.38 gives employees a vested right in accumulated sick leave, the right to use sick leave, and does not give the employing unit the right to choose whether to grant sick leave or to deny it.

Both *South Euclid, supra*, and *Fraternal Order of Police v. East Cleveland* (1989) 64 Ohio App. 3d 421 at 424 (Cuy. Cty) declare that R.C. sec. 124.38 and 124.39 prevail over conflicting municipal ordinances. See also, *Weir v. Rimmelin* (1984) 15 Ohio St. 3d 55 at 56. The City of Cleveland's attempt to exclude the CEO Union's members from receiving paid sick leave cannot be

³¹*SERB Opinion 2006-008* (Exhibit "C") p. 12: "Furthermore, the City and Local 18 do not dispute that they never entered into a collective bargaining agreement."

given effect. *See, also, State ex rel. Reuss v. Cincinnati* (1995) 102 Ohio App. 3d 521 at 524; *Ebert v. Bd. Of Mental Retardation* (1980) 63 Ohio St. 2d 31 at 33.

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.

CONCLUSION

SERB has determined that the CEOs' wages were *not* the result of collective bargaining during the period of 1994 - 2005. In *State ex rel. IUOE* and *State ex rel. Consolo, supra*, this Court ruled that Cleveland was required to pay its CEOs at the prevailing wage rate, in the absence of a collective bargaining agreement. This issue was confused by Cleveland's erroneous claim that the CEOs' wages were the result of collective bargaining between it and Local 18 of the International Union of Operating Engineers. SERB's Opinion 2006-008, which is attached as Exhibit "C" to this Memorandum rejects Cleveland's claim. Since the evidence shows that Cleveland has not paid the CEO's at the prevailing wage rate, this Court should issue the writ of mandamus sought by this Complaint to remedy the underpayment of wages.

SERB Opinion 2006-008 also holds that no collective bargaining during the period of 1994-

February 17, 2005 affected benefits. Since the evidence shows that Cleveland wrongly failed to provide paid sick leave to the CEOs as required by Ohio R.C. §§ 124.28 and 124.39, this Court should also issue a writ of mandamus ordering sick leave accrual and payment as sought by this Complaint.

Respectfully submitted,

Patricia M. Ritzert

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LIST OF EXHIBITS

- A. Charter of the City of Cleveland, Ohio - Section 191 "Compensation of Officers and Employees" requiring compensation at prevailing wages for construction trades employees.
- B. Wage Chart showing the underpayment of CEOs on an hourly basis from \$0.92 in 1994 to \$6.97 in 2004.
- C. SERB Opinion 2006-008 in SERB Case No. 2002-REP-06-0116 –making findings of fact and conclusions of law – as directed by the Ohio Supreme Court in State ex rel. Consolo v. Cleveland (2004), 103 Ohio St.3d 362.
- D. SERB Opinion 2004-004, in SERB v. City of Cleveland, Case No. 2003-ULP-06-0322, (August 5, 2004) Order and Opinion finding that Cleveland committed an unfair labor practice by engaging in bad-faith bargaining with the Municipal Construction Equipment Operators' Labor Council.
- E. Motion by Local 18, filed August 31, 2006, for SERB to adopt the Recommended Determination of Administrative Law Judge Beth Jewell.
- F. Cleveland Ordinance #1682-79 (1979) setting prevailing wage rates for building trades employees.
- G. Cleveland Inter-Office Correspondence from N. Jackson, Assistant Commissioner to Julius Ciaccia, Commissioner of Division of Water, dated October 28, 1993 using the sum-of-components for the prevailing wage under the Building Agreement.
- H. Affidavit of Frank P. Madonia, President of the CEO Union.
- I. Affidavit of Santo Consolo, with 1979 prevailing wage rates attached.

- J. Prevailing Wage Rates from Building Agreements between the Construction Employers Association and International Union of Operating Engineers, Local 18, 1994 through 2005.
- K. SERB Fact Finder's report from Virginia Wallace-Curry dated May 10, 2004.
- L. SERB Order dated August 25, 2005 in SERB Case No. 02-REP-06-0116, directing an administrative hearing on the questions raised in *State ex rel. Consolo v. Cleveland* (2004), 013 Ohio St. 3d 362.
- M. Sworn statements of Cleveland Chief of Personnel Management admitting that CEOs are not given paid sick leave and do not receive benefits of employment.
- N. Codified Ordinances of Cleveland, Sec. 171.31 "Sick Leave," effective October 29, 1980. This code section provides paid sick leave for all full-time hourly rate employees except craft employees paid at building trades prevailing rates.



**AMOUNTS CLEVELAND UNDERPAID ITS
CONSTRUCTION EQUIPMENT OPERATORS AND MASTER MECHANICS
ON AN HOURLY BASIS**

| Master Mechanic | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Hourly Wages Paid | 27.28 | 27.28 | 27.28 | 27.28 | 28.63 | 29.48 | 29.48 | 29.88 | 31.53 |
| <u>Prevailing Hourly Rate</u> | <u>28.85</u> | <u>29.60</u> | <u>30.35</u> | <u>31.10</u> | <u>31.95</u> | <u>32.80</u> | <u>34.10</u> | <u>35.10</u> | <u>36.10</u> |
| Underpayment-Hourly (Deficiency) | -1.57 | -2.32 | -3.07 | -3.82 | -3.32 | -3.32 | -4.62 | -5.22 | -4.57 |

| CEO Group "A" | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Hourly Wages Paid | 27.28 | 27.28 | 27.28 | 27.28 | 28.78 | 29.63 | 29.63 | 30.03 | 31.03 |
| <u>Prevailing Hourly Rate</u> | <u>28.35</u> | <u>29.10</u> | <u>29.85</u> | <u>30.60</u> | <u>31.45</u> | <u>32.30</u> | <u>33.60</u> | <u>34.60</u> | <u>35.60</u> |
| Underpayment-Hourly (Deficiency) | -1.07 | -1.82 | -2.57 | -3.32 | -2.67 | -2.67 | -3.97 | -4.57 | -4.57 |

| CEO Group "B" | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Hourly Wages Paid | 27.28 | 27.28 | 27.28 | 27.28 | 28.63 | 29.48 | 29.48 | 29.88 | 30.88 |
| <u>Prevailing Hourly Rate</u> | <u>28.20</u> | <u>28.95</u> | <u>29.70</u> | <u>30.45</u> | <u>31.30</u> | <u>32.15</u> | <u>33.45</u> | <u>34.45</u> | <u>35.45</u> |
| Underpayment-Hourly (Deficiency) | -0.92 | -1.67 | -2.42 | -3.17 | -2.67 | -2.67 | -3.97 | -4.57 | -4.57 |

**AMOUNTS CLEVELAND UNDERPAID ITS
CONSTRUCTION EQUIPMENT OPERATORS AND MASTER MECHANICS
ON AN HOURLY BASIS**

| Master Mechanic | Jan.-Apr. 2003 | May 2003- Apr. 2004 | May 2004- Feb. 13, 2005 |
|-------------------------------------|---------------------------|--------------------------------|------------------------------------|
| Hourly Wages Paid | 31.53 | 31.53 | 31.53 |
| <u>Prevailing Hourly Rate</u> | <u>36.10</u> | <u>37.30</u> | <u>38.50</u> |
| Underpayment-Hourly (Deficiency) | -4.57 | -5.77 | -6.97 |

| CEO Group "A" | Jan.-Apr. 2003 | May 2003- Apr. 2004 | May 2004- Feb. 13, 2005 |
|-------------------------------------|---------------------------|--------------------------------|------------------------------------|
| Hourly Wages Paid | 31.03 | 31.03 | 31.03 |
| <u>Prevailing Hourly Rate</u> | <u>35.60</u> | <u>36.80</u> | <u>38.00</u> |
| Underpayment-Hourly (Deficiency) | -4.57 | -5.77 | -6.97 |

| CEO Group "B" | Jan.-Apr. 2003 | May 2003- Apr. 2004 | May 2004- Feb. 13, 2005 |
|-------------------------------------|---------------------------|--------------------------------|------------------------------------|
| Hourly Wages Paid | 30.88 | 30.88 | 30.88 |
| <u>Prevailing Hourly Rate</u> | <u>35.45</u> | <u>36.65</u> | <u>37.85</u> |
| Underpayment-Hourly (Deficiency) | -4.57 | -5.77 | -6.97 |

EXHIBIT B

The Supreme Court of Ohio

FILED

AUG 15 2007

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio ex rel. Municipal
Construction Equipment Operators' Labor
Council et al.

Case No. 06-2056

IN MANDAMUS

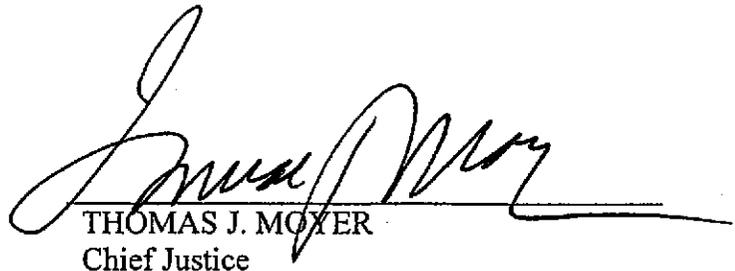
v.

JUDGMENT ENTRY

City of Cleveland et al.

This cause originated in this Court on the filing of a complaint for a writ of mandamus and was considered in a manner prescribed by law.

It is ordered by the Court that a writ of mandamus is granted in part to compel respondents to pay the city's construction-equipment operators and master mechanics the difference between the prevailing wage rates and the lower rates they were paid for the period from May 1, 1994, through February 14, 2005, less the collective-bargaining offset of \$2,500.00 for those employees who worked during the period from January 1, 2004, through January 31, 2005. The writ is denied in all other respects, consistent with the opinion rendered herein.



THOMAS J. MOYER
Chief Justice

EXHIBIT "B"

[Cite as *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831.]

THE STATE EX REL. MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS'
LABOR COUNCIL ET AL. v. CITY OF CLEVELAND ET AL.

[Cite as *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831.]

City charter provision requiring "prevailing wages" for some employees—Setoffs for benefits disallowed—No estoppel created by collective bargaining—Res judicata defense rejected—Mandamus not precluded by opportunity for collective bargaining—Prejudgment interest denied for claim based on city charter—Statutory sick leave for municipal employees—Evidence in original actions in Supreme Court—Motion to strike granted for affidavits not based on personal knowledge and unauthenticated exhibits.

(No. 2006-2056 — Submitted May 1, 2007 — Decided August 15, 2007.)

IN MANDAMUS.

Per Curiam.

{¶ 1} This is an original action filed by relator, Municipal Construction Equipment Operators' Labor Council, the certified bargaining representative of construction-equipment operators and master mechanics employed by respondent city of Cleveland, Ohio, and certain individual construction-equipment operators and master mechanics employed by Cleveland. Relators request a writ of mandamus to compel respondents, Cleveland, its mayor, and its city council, to pay the construction-equipment operators and master mechanics the difference between the prevailing wage rates and the lower rates they were paid for the period from May 1, 1994, through February 14, 2005, as well as prejudgment interest on these sums. Municipal Construction and the individual relators also request a writ of mandamus to compel Cleveland to credit the construction-

EXHIBIT "B"

SUPREME COURT OF OHIO

equipment operators and master mechanics with sick leave during the period from October 29, 1980, to February 14, 2005, compensate those employees who missed work due to illness or injury of themselves or a family member to the extent of their accumulated paid sick leave, and pay cash for unused sick-leave hours for those employees who retired from employment with the city during that period. We grant the writ in part and deny it in part.

{¶ 2} Construction-equipment operators and master mechanics employed by the city of Cleveland operate, repair, and maintain heavy construction equipment, including mechanized hoes, loaders, bulldozers, and graders. These employees are referred to as craft employees, building-trade employees, and operating engineers, and they are regular full-time hourly rate employees who are classified as Construction Equipment Operator A, Construction Equipment Operator B, or Master Mechanic.

{¶ 3} In 1979, the Cleveland City Council enacted Ordinance No. 1682-79, which set the hourly wages for various job classifications, including construction-equipment operators and master mechanics. Section 191 of the Cleveland Charter provides that “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.” Consistent with these provisions, construction-equipment operators and master mechanics were initially paid the prevailing wage rates set forth in certain building agreements. The prevailing wage rate was the sum of the following components: base rate, pension, health and welfare, apprenticeship, and construction industry service program.

*State ex rel. Internatl. Union of Operating Engineers,
Local 18 v. Cleveland* (1992), 62 Ohio St.3d 537, 584 N.E.2d 727

{¶ 4} Cleveland considered International Union of Operating Engineers, Local 18, 18A, 18B, 18C, 18RA, AFL-CIO, an employee organization, to be the representative of the city's construction-equipment operators and master mechanics. Before May 1, 1987, the city paid these workers in conformity with the Construction Employers Association Building Agreement with Local 18. Sometime thereafter, however, the city failed to pay the employees the prevailing wages as set forth in the building agreement.

{¶ 5} In 1989, Local 18 filed a complaint in the Court of Appeals for Cuyahoga County for a writ of mandamus to compel the city, its city council, and its mayor, to pay the members of Local 18, who were construction-equipment operators and master mechanics employed by the city, back and future wages in accordance with prevailing wage rates paid in private industry, as set forth in Section 191 of the Cleveland Charter. Local 18 and respondents stipulated that Cleveland had not paid these employees prevailing wages since May 1987.

{¶ 6} The court of appeals denied the writ based on its conclusion that Local 18 had an adequate remedy at law by way of filing a charge of unfair labor practice against Cleveland.

{¶ 7} On appeal, we reversed the judgment of the court of appeals and granted a "writ of mandamus directing respondents to comply with city charter Section 191 by paying back and future wages to the city's construction equipment operators and master mechanics, members of [Local 18] in accordance with prevailing wage rates." *State ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St.3d 537, 540, 584 N.E.2d 727. We held that because there was no existing collective-bargaining agreement between Cleveland and Local 18, the city had a duty to pay its construction-equipment operators and master mechanics the prevailing wage rates in accordance with Section 191 of the Cleveland Charter. *Id.* at 540.

Actions after Internatl. Union

SUPREME COURT OF OHIO

{¶ 8} After 1993, Cleveland disputed the prevailing wage rate it was required to pay the construction-equipment operators and master mechanics. Cleveland claimed that it was entitled to deduct certain items from the private-sector prevailing wage rate.

{¶ 9} In 1998, Local 18 filed a motion in the court of appeals for an order for respondents to show cause why they should not be held in contempt of this court's 1992 mandate in *Internatl. Union*, 62 Ohio St.3d 537, 584 N.E.2d 727. Local 18 claimed that Cleveland had failed to pay the city's construction-equipment operators and master mechanics the prevailing wage rate. Local 18 and Cleveland resolved the contempt action by agreeing to a calculation of the prevailing wage rate that included a deduction for the city's pension contributions. The Local 18 president held a meeting to inform the union members how the prevailing wage rate would be calculated. The employees never authorized Local 18 to negotiate a decrease in their wages.

Consolo v. Cleveland, Cuyahoga App. No. 81117,

2002-Ohio-7065, 2002 WL 31839150

{¶ 10} In 2001, certain construction-equipment operators and master mechanics employed by Cleveland filed a complaint in the common pleas court against the city and Local 18 for declaratory judgment and damages. The employees claimed that the city was obligated to pay them the prevailing wage without any offset for retirement benefit payments, that Local 18 was not their certified exclusive bargaining representative, and that Local 18 had failed to adequately represent them. The employees further claimed that their prevailing wage rate consisted of the rate and benefits contained in the building agreements. Local 18 and Cleveland filed motions to dismiss the employees' action, and the common pleas court dismissed the case because the State Employment Relations Board ("SERB") had exclusive jurisdiction pursuant to R.C. Chapter 4117.

{¶ 11} On appeal, the court of appeals reversed the judgment and held that the common pleas court had erred in dismissing all of the employees' claims because they did not necessarily arise out of or depend upon the collective-bargaining rights conferred by R.C. Chapter 4117. The court of appeals reversed the common pleas court's judgment. *Consolo v. Cleveland*, Cuyahoga App. No. 81117, 2002-Ohio-7065, 2002 WL 31839150.

Municipal Construction Equipment Operators' Labor Council
and Contempt Motion in *Internatl. Union*

{¶ 12} On January 30, 2003, SERB certified relator Municipal Construction Equipment Operators' Labor Council ("Municipal Construction") as the exclusive representative of a bargaining unit including city employees in the classifications of Construction Equipment Operator A, Construction Equipment Operator B, and Master Mechanic.

{¶ 13} In October 2003, Municipal Construction filed a motion in this court in the *Internatl. Union* case for an order for respondents, Cleveland, the city council, and the mayor, to show cause why they should not be held in contempt for refusing to comply with this court's 1992 writ. Municipal Construction claimed that it filed the motion as the successor in interest to Local 18.

{¶ 14} We found that respondents were not in contempt of the 1992 writ. *State ex rel. Internatl. Union of Operating Engineers v. Cleveland*, 102 Ohio St.3d 1419, 2004-Ohio-2003, 807 N.E.2d 365.

Consolo v. Cleveland, 103 Ohio St.3d 362,
2004-Ohio-5389, 815 N.E.2d 1114

{¶ 15} On October 20, 2004, we reversed the court of appeals' judgment in *Consolo* and held that the claims asserted by the Cleveland construction-equipment operators and master mechanics were correctly dismissed by the common pleas court because "[a]ll of the claims asserted by [them] relate to rights created by R.C. Chapter 4117" and "[t]hese claims must be pursued through

SERB.” *Consolo v. Cleveland*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114, ¶ 24. More specifically, we held that the city employees’ claim that Cleveland had failed to pay the prevailing wage rates was not ripe for review because SERB had exclusive jurisdiction to resolve the claim:

{¶ 16} “If [the employees’] compensation levels were the result of collective bargaining under R.C. Chapter 4117, then the city’s charter provisions would be inapplicable. * * * SERB has exclusive jurisdiction to decide whether collective bargaining occurred.

{¶ 17} “If [the employees] prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls.” *Id.* at ¶ 21-22.

Post-*Consolo* SERB Actions

{¶ 18} In April 2005, Municipal Construction filed a petition requesting that SERB appoint a hearing examiner to adjudicate the issues that we found to be within SERB’s exclusive jurisdiction in *Consolo*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114.

{¶ 19} In July 2006, an administrative law judge recommended a determination on the *Consolo* issues. The city filed exceptions to the recommendation, and Municipal Construction and Local 18 filed responses in support of the recommendation.

{¶ 20} On September 28, 2006, SERB adopted the administrative law judge’s recommended determination and found the following:

{¶ 21} 1. Local 18 was not a deemed-certified bargaining agent on or before April 1, 1984, for construction-equipment operators employed by Cleveland.

{¶ 22} 2. Local 18 was not the exclusive representative for construction-equipment operators from 1994 through 1998.

{¶ 23} 3. Cleveland and Local 18 informed construction-equipment operators of the prevailing wage rate agreed upon by the city and the union, but Local 18 did not negotiate a decrease in compensation of the operators with their knowledge or consent.

{¶ 24} 4. No evidence established that Local 18 informed Cleveland that the construction-equipment operators themselves had agreed to a decrease in their compensation.

{¶ 25} 5. The wages of the construction-equipment operators who were appellees in *Consolo* did not result from collective bargaining between Local 18 and the city.

{¶ 26} 6. No evidence established that any benefits package was negotiated or implemented for the construction-equipment operators until February 2005, which was after SERB certified Municipal Construction as their exclusive representative in January 2003.

Collective-Bargaining Agreement Between
Municipal Construction and Cleveland

{¶ 27} Following its certification as the exclusive bargaining representative of the construction-equipment operators and master mechanics, Municipal Construction began negotiating an initial collective-bargaining agreement. In 2004, SERB found that Cleveland has committed an unfair labor practice by refusing to bargain in good faith. SERB ordered the city to bargain in good faith with Municipal Construction. *In re State Emp. Relations Bd. v. Cleveland* (Aug. 5, 2004), SERB No. 2004-004.

{¶ 28} Effective February 2005, Municipal Construction and Cleveland entered into a collective-bargaining agreement, which provided that the agreement “shall address all matters pertaining to hourly wages, and hours, or terms or conditions of employment mutually expressed between the parties.” The agreement specified, “In recognition of no wage increases for the period of

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January 1, 2004 through January 31, 2005, the City shall make a one-time lump sum payment of \$2,500.00 to each employee who worked 1,400 or more hours during 2004, on the first regular pay-day after Agreement ratification * * * .” Under the agreement, all regular full-time employees would be credited with three days of paid sick leave, and they thereafter would be credited with paid sick leave, of ten hours per month, which is 15 days per year.

{¶ 29} The agreement also contained the following clause:

“Agreement Has No Effect on Pending Litigation

{¶ 30} “This Agreement shall have no effect on or be used by either party to this Agreement, or any other entity, in lawsuits related to any claims for back or future pay or benefits pertaining to prevailing wage rates, or outside contracts, except with respect to a \$2,500.00 offset to any judgment against the City for back pay pertaining to the period of January 1, 2004 through January 31, 2005.”

{¶ 31} At the time of the agreement, no lawsuit on these matters was pending. The negotiation that led to the collective-bargaining agreement included discussions about back wages, sick leave, and fringe benefits. During negotiations, the city agreed that Municipal Construction and its members could initiate litigation to resolve these claims. The \$2,500 lump-sum payment was the amount Cleveland paid in recognition of not giving these employees raises in 2004. The union members ratified the collective-bargaining agreement only after it was represented to them that they were not waiving their claims for back wages at prevailing wage rates and for back credit for paid sick leave.

State ex rel. Mun. Constr. Equip. Operators’ Labor Council

v. Cleveland, Cuyahoga App. No. 86263, 2006-Ohio-4273

{¶ 32} Municipal Construction brought an action in the Court of Appeals for Cuyahoga County against respondents, Cleveland, the city council, and the mayor, for a writ of mandamus to compel the city to pay its members the prevailing wage paid in the building and construction trades from January 2003

(when Municipal Construction became the certified union for the city's construction-equipment operators and master mechanics) to February 2005 (when the collective-bargaining agreement between the union and the city became effective). Municipal Construction also sought a writ of mandamus to compel the city to provide sick-leave benefits for the period and to pay for unused sick leave for retiree members during the period.

{¶ 33} In August 2006, the court of appeals, in a two-to-one decision, denied the writ. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, Cuyahoga App. No. 86263, 2006-Ohio-4273. The court of appeals held that (1) Municipal Construction had an adequate remedy by way of its collective-bargaining agreement to resolve its claims for back wages and sick-leave benefits, (2) res judicata barred Municipal Construction's mandamus action because it raised the same claim in its 2003 contempt action in this court in the *Internatl. Union* case, (3) Municipal Construction's claims were not ripe or not within its jurisdiction until SERB ruled on the issues raised in *Consolo*, and (4) Municipal Construction might have an adequate remedy by way of an action for declaratory judgment.

{¶ 34} Municipal Construction appealed from the court of appeals' judgment to this court in case No. 2006-1688. We affirmed the judgment of the court of appeals because the issues raised by Municipal Construction were not ripe at the time the court of appeals denied the writ. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 113 Ohio St.3d 480, 2007-Ohio-2452, 866 N.E.2d 1065. We specified in that case that we would examine the remaining claims in the context of this original action, which does not suffer from the same ripeness defect. *Id.* at ¶ 26.

Present Mandamus Case

{¶ 35} On November 6, 2006, relators, Municipal Construction and 19 individuals who are or were employed by Cleveland as construction-equipment

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operators or master mechanics, filed this action for a writ of mandamus to compel respondents, Cleveland, its city council, and its mayor, to pay the city's construction-equipment operators and master mechanics the difference between the actual wages paid to them and the prevailing wages to which they were entitled for the period from May 1, 1994, through February 14, 2005, credit these employees with sick leave at the statutory rate of 4.6 hours for every 80 hours worked from October 29, 1980, to February 14, 2005, compensate those employees who missed work due to illness or injury of themselves or a family member to the extent of their accumulated but unused sick leave at the time of their absence, and pay those employees who retired from employment with the city during the period from October 29, 1980, to February 14, 2005, for one-fourth of the value of their accumulated but unused sick leave. Relators also request attorney fees, prejudgment interest on the wage deficiencies, and postjudgment interest. After respondents filed an answer, the court granted an alternative writ, and the parties submitted evidence and briefs. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 112 Ohio St.3d 1438, 2007-Ohio-152, 860 N.E.2d 764.

{¶ 36} This cause is now before the court for our consideration of relators' motion to strike and remove certain exhibits from respondents' evidence, relators' request for oral argument, and the merits of relators' mandamus claims.

Motion to Strike

{¶ 37} Relators request that certain exhibits contained in respondents' evidence be stricken. "The determination of a motion to strike is vested within the broad discretion of the court." *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 26. In exercising our discretion here, we grant the motion for the following reasons.

{¶ 38} First, the affidavits attached as Exhibits 3 and 4 of respondents' evidence are not made on the personal knowledge of the affiants. Under

S.Ct.Prac.R. X(7), affidavits submitted in original actions in this court “shall be made on personal knowledge.” See *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶ 20; cf. *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 32 (construing the comparable S.Ct.Prac.R. X(4)(B) personal-knowledge requirement). In addition, the affidavits are premised upon the theory that Local 18 acted as the exclusive bargaining representative of the construction-equipment operators and master mechanics when it agreed to a pension offset in settling litigation with the city concerning the prevailing wage. As relators observe, SERB has now concluded that Local 18 was not the exclusive bargaining representative for these employees, and the employees did not agree to the offset.

{¶ 39} Second, the remaining challenged exhibits—1, 5, and 7 through 13—are not authenticated. “[E]vidence submitted under the Supreme Court Rules of Practice in an original action in this court should comport with the Rules of Evidence.” *State ex rel. Brenders v. Hall* (1995), 71 Ohio St.3d 632, 637, 646 N.E.2d 822, fn. 1. Evidence that is not properly authenticated may be stricken by the court. *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1992), 63 Ohio St.3d 190, 192-193, 586 N.E.2d 114 (court granted motion to strike exhibits in prohibition action because they were not properly authenticated under Evid.R. 902(4)). These exhibits are not self-authenticating pursuant to Evid.R. 902(4) or authenticated by affidavit pursuant to Evid.R. 901(B)(7). Cf. *State ex rel. Columbia Res. Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 25.

{¶ 40} Finally, respondents filed no timely memorandum in opposition to relators’ motion to strike.

{¶ 41} Therefore, we grant relators’ motion and strike exhibits 1, 3, 4, 5, and 7 through 13 from respondents’ evidence. We will not consider these exhibits in our merits determination.

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Request for Oral Argument

{¶ 42} Relators request oral argument pursuant to S.Ct.Prac.R. IX(2). Oral argument is not required in an original action in this court; instead, oral argument is discretionary in these cases. S.Ct.Prac.R. IX(2)(A).

{¶ 43} “Among the factors we consider in determining whether to grant oral argument in [cases] in which oral argument is not required is whether the case involves a matter of great public importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals.” *Clark v. Connor* (1998), 82 Ohio St.3d 309, 311, 695 N.E.2d 751.

{¶ 44} Oral argument is not warranted here. Relators do not specify in their request any of the foregoing factors. In fact, relators do not provide any rationale in support of their request. This case does not involve any substantial constitutional issue or a conflict between courts of appeals. And although the procedural history is somewhat convoluted, the issues of law and fact are not. Further, the parties’ briefs are sufficient to resolve the pertinent legal issues.

{¶ 45} Therefore, we deny relators’ request for oral argument and proceed to consider the merits of their mandamus claim.

Mandamus—In General

{¶ 46} In order to be entitled to the requested writs of mandamus, relators must establish a clear legal right to the wages and benefits, a corresponding clear legal duty on the part of respondents to so provide, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Boccuzzi v. Cuyahoga Cty. Bd. of Commrs.*, 112 Ohio St.3d 438, 2007-Ohio-323, 860 N.E.2d 749, ¶ 13. “It is well settled that a claim by public employees for wages or benefits is actionable in mandamus.” *State ex rel. Kabert v. Shaker Hts. City School Dist. Bd. of Edn.* (1997), 78 Ohio St.3d 37, 39, 676 N.E.2d 101.

{¶ 47} Relators’ claims are for back wages in accordance with the applicable prevailing wage rates and for sick-leave benefits.

Prevailing Wage Rates

{¶ 48} Relators initially request a writ of mandamus to compel the city, the city council, and the mayor, to pay the construction-equipment operators and master mechanics the difference between the prevailing wage and the actual wages that were paid to them for the period from May 1, 1994, until the February 2005 effective date of the collective-bargaining agreement executed by Municipal Construction and Cleveland.

{¶ 49} In the absence of a collective-bargaining agreement during this period, Section 191 of the Cleveland Charter required respondents to pay the city's construction-equipment operators and master mechanics in accordance with the prevailing wages in industry. *Internatl. Union*, 62 Ohio St.3d at 539-540, 584 N.E.2d 727. Subsequently, in *Consolo*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114, at ¶ 22, we specified that if the appellees therein—individual construction-equipment operators and master mechanics employed by Cleveland—“prevail before SERB on their claim that their wages did not result from collective bargaining, then the city charter controls.” Because Municipal Construction prevailed before SERB when the board issued Opinion 2006-008, relators are entitled to be paid in accordance with the prevailing wage rates pursuant to Section 191 of the Cleveland Charter.

{¶ 50} At issue here is the appropriate computation of the prevailing wage rates. Respondents assert that the city is entitled to offset from these rates any contributions it makes to provide the employees with certain benefits, including pensions. They assert that this is supported by the definition of “prevailing wages” set forth in R.C. 4115.03(E) and by Ohio Adm.Code 4101:9-4-07. But as we stated in *Consolo*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114, at ¶ 22, quoting *Craig v. Youngstown* (1954), 162 Ohio St. 215, 55 O.O. 110, 123 N.E.2d 19, syllabus, “ ‘A city which has adopted a charter under the Home-Rule Amendment to the Ohio Constitution and has adopted civil service regulations

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consistent with the statutes with respect to civil service is not amenable to the provisions of * * * Section 4115.03 et seq., Revised Code, commonly referred to as the Prevailing Wage Law, with respect to the construction of public improvements with its classified civil service employees.’ ”

{¶ 51} Moreover, in *State ex rel. Pinzone v. Cleveland* (1973), 34 Ohio St.2d 26, 31, 63 O.O.2d 46, 295 N.E.2d 408, we held that under Section 191 of the Cleveland Charter, the city could not offset fringe benefits for “such items as paid sick leave, greater job security and more steady employment” in computing the prevailing wage rates.

{¶ 52} In addition, the evidence is uncontroverted here that the prevailing wage rates for construction-equipment operators and master mechanics were the sum of the components, including the base rate and payments related to pension, health and welfare, apprenticeship, and the construction industry service program. During the pertinent period, the construction-equipment operators and master mechanics were paid below the applicable prevailing wage rates. Insofar as respondents rely on evidence that has been stricken to assert otherwise, their argument must fail.

{¶ 53} Nevertheless, respondents—in this case or in case No. 2006-1688—further contend that relators’ mandamus claim is barred by res judicata, the presence of an adequate legal remedy at law, and estoppel. These arguments are next addressed.

Res Judicata

{¶ 54} Respondents assert that relators’ prevailing-wage claim is barred in whole or in part because Municipal Construction raised the same claim in its October 2003 contempt motion filed in the *Internatl. Union* case. “Under the doctrine of res judicata, ‘[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.’ ” *State ex rel.*

Denton v. Bedinghaus, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶ 14, quoting *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus. “Res judicata bars the litigation of all claims that either were or might have been litigated in a first lawsuit.” *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶ 12.

{¶ 55} Here, however, it is evident that the contempt action did not determine the issue of Municipal Construction’s and the individual relators’ entitlement to be paid at the prevailing wage rates during the pertinent period. As we held in *Consolo*, 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114, ¶ 9, the *Internatl. Union* case, 62 Ohio St.3d 537, 584 N.E.2d 727, did not resolve the prevailing-wage claims raised therein, and certain issues required an initial resolution by SERB. Consequently, *Consolo* contemplated additional proceedings following any subsequent, favorable SERB determination. 103 Ohio St.3d 362, 2004-Ohio-5389, 815 N.E.2d 1114, ¶ 22-24. That determination was not made until after the contempt motion in *Internatl. Union* and the court’s decision in *Consolo*.

{¶ 56} In addition, Municipal Construction’s mandamus claim is not barred by its previous mandamus claim in case No. 2006-1688, in which the claim was denied as premature because when the court of appeals ruled, SERB had not yet made its determination of the issues specified by this court in *Consolo*.

{¶ 57} Therefore, res judicata does not bar relators’ mandamus action.

Adequate Remedy at Law

{¶ 58} Respondents further contend, as they did in case No. 2006-1688, that relators’ mandamus claim lacks merit because relators had an adequate remedy at law by way of collective bargaining. Mandamus is not appropriate “when there is a plain and adequate remedy in the ordinary course of the law.” R.C. 2731.05. “In order to constitute an adequate remedy, the alternative must be

complete, beneficial, and speedy.” *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 40.

{¶ 59} The ability to negotiate a resolution of a dispute concerning past wages and benefits in collective bargaining does not provide a complete, beneficial, and speedy alternative remedy. There is no duty on the part of respondents to resolve these matters in the context of such bargaining. We recognized this in *Internatl. Union*, 62 Ohio St.3d at 539-540, 584 N.E.2d 727, by holding that statutory procedures “for settling disputes arising out of negotiations involving existing or initial collective bargaining agreements” and the possibility of a strike or filing an unfair-labor-practice charge should collective bargaining not resolve a dispute concerning Cleveland’s failure to pay prevailing wages to its construction-equipment operators and master mechanics did not constitute an adequate remedy at law precluding entitlement to a writ of mandamus:

{¶ 60} “Neither remedy directly enforces Local 18’s right, established by charter provision pursuant to R.C. 4117.10(A), to have its members compensated in accordance with prevailing wages in industry. * * *

{¶ 61} “Local 18’s statutory remedies are not adequate and the city charter, in light of R.C. 4117.10(A), identifies a clear legal right to the relief sought and a concomitant clear legal duty to grant that relief.”

{¶ 62} Therefore, the availability of collective bargaining did not bar this mandamus action.

Estoppel: Collective-Bargaining Agreement

{¶ 63} Respondents also claimed in case No. 2006-1688 that relators are estopped from seeking wage and benefit adjustments through mandamus because the February 2005 collective-bargaining agreement between Municipal Construction and Cleveland already provided adjustments for the period from the January 2003 recognition of Municipal Construction as the exclusive bargaining

agent for Cleveland's municipal construction-equipment operators and master mechanics until the collective-bargaining agreement became effective.

{¶ 64} "Equitable estoppel precludes recovery when 'one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.'" *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 52, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 34, 641 N.E.2d 188; see, also, *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 20. "[E]quitable estoppel generally requires actual or constructive fraud." *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 39; see, also, *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630 ("The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice").

{¶ 65} There is no evidence of fraud on the part of relators here. Although the pertinent section of the collective-bargaining agreement was titled "Agreement Has No Effect on Pending Litigation" and this case was not pending at the time of the agreement, the section text is not limited to pending litigation:

{¶ 66} "This Agreement shall have no effect on or be used by either party to this Agreement, or any other entity, in lawsuits related to any claims for back or future pay or benefits pertaining to prevailing wage rates, or outside contracts, except with respect to a \$2,500.00 offset to any judgment against the City for back pay pertaining to the period of January 1, 2004 through January 31, 2005."

{¶ 67} In fact, the uncontroverted evidence is that during the collective-bargaining negotiations, the city agreed that relators could initiate litigation to resolve their claims concerning back wages and sick leave and that it was represented to them that these claims were not waived.

SUPREME COURT OF OHIO

{¶ 68} Consequently, the collective-bargaining agreement does not estop relators' mandamus claim for wages and benefits here. Instead, it merely provides a \$2,500 offset to a back pay award for the period from January 1, 2004, through January 31, 2005.

Prevailing Wages—Conclusion

{¶ 69} Based on the foregoing, relators have established a clear legal right to the relief sought regarding prevailing wages and a concomitant clear legal duty on the part of respondents to grant that relief. Relators have also established the amounts of the hourly rate deficiencies between the actual amounts paid the construction-equipment operators and the master mechanics during the pertinent period. Furthermore, relators lack any adequate remedy in the ordinary course of law to raise this claim. Therefore, relators are entitled to a writ of mandamus to compel respondents to pay the city's construction-equipment operators and master mechanics the difference between the prevailing wage rates and the lower rates they were paid for the period from May 1, 1994, through February 14, 2005, less the collective-bargaining agreement offset of \$2,500 for those employees who worked during the period from January 1, 2004, through January 31, 2005.

Prejudgment Interest

{¶ 70} Relators also request an award of prejudgment interest on the award of back wages. Relators claim entitlement to this award through R.C. 1343.03(A), which provides:

{¶ 71} “[W]hen money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in

relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.”

{¶ 72} The dispute concerning the right of the city’s construction-equipment operators and master mechanics to be paid at the prevailing wage rates for the pertinent period is not based upon a written instrument, book account, settlement, verbal contract, or judgment. Instead, relators’ entitlement to these wages arose as a matter of law pursuant to Section 191 of the Cleveland Charter. Thus, relators are not entitled to prejudgment interest based on R.C. 1343.03(A). See, e.g., *N. Olmsted v. Eliza Jennings, Inc.* (1993), 91 Ohio App.3d 173, 185-186, 631 N.E.2d 1130; *State ex rel. Carver v. Hull* (1994), 70 Ohio St.3d 570, 579, 639 N.E.2d 1175.

Sick-Leave Benefits

{¶ 73} Relators next claim a clear legal right to sick-leave credit at the statutory rate of 4.6 hours for every 80 hours worked by the city’s construction-equipment operators and master mechanics for the period from October 29, 1980, until the February 2005 effective date of the collective-bargaining agreement, payment to those employees who missed work due to illness or injury of themselves or a family member to the extent of their accumulated but unused sick leave at the time of their absence, and payment to those employees who retired from employment with the city during the period for one-fourth of the value of their accumulated but unused sick leave.

{¶ 74} Relators claim entitlement to these benefits under R.C. 124.38 and 124.39. Under R.C. 124.38, municipal employees are entitled to paid sick leave of 4.6 hours for each 80 hours of service, and the statute further provides:

{¶ 75} “Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee’s immediate family.

SUPREME COURT OF OHIO

Unused sick leave shall be cumulative without limit. When sick leave is used, it shall be deducted from the employee's credit on the basis of one hour for every one hour of absence from previously scheduled work."

{¶ 76} R.C. 124.39(B) provides that political subdivision employees covered by R.C. 124.38 "may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivision, or any combination thereof, to be paid in cash for one-fourth the value of the employee's accrued but unused sick leave credit."

{¶ 77} The city, however, did not credit its construction-equipment operators and master mechanics with sick leave before the collective-bargaining agreement took effect in February 2005. Instead, Cleveland relied on Section 171.31 of its codified ordinances, which excepts "hourly rate craft employees paid on the basis of building trades prevailing wages" from the general right to sick leave with pay afforded all other "full-time annual rate City employees and all full-time hourly rate employees."

{¶ 78} As relators contend, however, R.C. 124.38 and 124.39 are laws of a general nature that prevail over conflicting municipal ordinances. See, e.g., *S. Euclid Fraternal Order of Police, Lodge 80 v. D'Amico* (1983), 13 Ohio App.3d 46, 13 OBR 49, 468 N.E.2d 735 (R.C. 124.38); *Fraternal Order of Police, Lodge 39 v. E. Cleveland* (1989), 64 Ohio App.3d 421, 581 N.E.2d 1131 (R.C. 124.39). Under Section 34, Article II of the Ohio Constitution, "[l]aws may be passed * * * 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." Therefore, the statutory right to sick-leave benefits "is a vested right which takes precedence over the authority granted to the city under the Home Rule Amendment." *State ex rel. Reuss v. Cincinnati* (1995), 102 Ohio App.3d 521, 524, 657 N.E.2d 551. Once earned, sick-leave credits become a vested right that cannot be retroactively

revoked. *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 34, 17 O.O.3d 19, 406 N.E.2d 1098.

{¶ 79} Therefore, the conflicting ordinance was ineffective, and the city's municipal construction-equipment operators and master mechanics were entitled to sick-leave benefits under R.C. 124.38 and 124.39 for the pertinent period before the collective-bargaining agreement between Municipal Construction and Cleveland went into effect.

{¶ 80} It is true, as previously stated, that a public-employee claim for wages or benefits is actionable in mandamus. *Kabert*, 78 Ohio St.3d at 39, 676 N.E.2d 101. But even the cases that relators cite for this proposition additionally note that entitlement to the writ is further conditioned upon the relators' establishing the amounts due with certainty. See, e.g., *State ex rel. Madden v. Windham Exempted Village School Dist. Bd. of Edn.* (1989), 42 Ohio St.3d 86, 88, 537 N.E.2d 646 ("In order for a writ to issue in such a case the right to relief must be clear and the amount established with certainty"); *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, 131, 11 OBR 426, 464 N.E.2d 525 ("a reinstated public employee may maintain an action in mandamus to recover compensation due him for the time he was wrongfully excluded from employment provided the amount is established with certainty"); *State ex rel. Adkins v. Sobb* (1986), 26 Ohio St.3d 46, 49, 26 OBR 39, 496 N.E.2d 994 ("Because the city admitted the length of prior service of each officer, the amount of vacation leave attributable to such service is ascertainable with certainty"). That is, "the standard for recovery of such fringe benefits is that the amount sought to be recovered must be established with certainty." *State ex rel. Hamlin v. Collins* (1984), 9 Ohio St.3d 117, 120, 9 OBR 342, 459 N.E.2d 520.

{¶ 81} More particularly, in mandamus actions in which public employees have requested past sick-leave benefits, we have held that the amounts of these benefits must be established with the requisite certainty. See *State ex rel. Stacy v.*

SUPREME COURT OF OHIO

Batavia Local School Dist. Bd. of Edn., 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 65 (“the court of appeals did not err in concluding that [relator’s] claim for 82.5 hours of sick-leave credit, which assumed that [relator] would never have taken sick leave during the period of his layoff, had not been established with the requisite certainty”); *State ex rel. Guerrero v. Ferguson* (1981), 68 Ohio St.2d 6, 7, 22 O.O.3d 98, 427 N.E.2d 515 (“since [vacation and sick leave] days cannot be established with certainty, they cannot be credited to relators”); *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 368, 21 O.O.3d 228, 423 N.E.2d 1099 (rejecting claim of reinstated public employee for vacation days, holidays, and sick-leave hours he would have earned because to accept claim, court would have had to conclude that employee was so healthy that he would never have taken a vacation day, that he would have worked on every holiday, and that he would not have taken any sick leave).

{¶ 82} In this case, relators have introduced no evidence regarding the amounts of the various sick-leave benefits to which each construction-equipment operator and master mechanic is entitled. In other words, there is no evidence regarding the sick-leave hours that would have been used by these employees and whether specific retirees would have elected to be paid for accrued but unused sick-leave benefits. This is in contrast to relators’ evidence concerning the specific hourly-rate difference between the prevailing wages and the actual wages paid for the pertinent classifications of these employees. Under these circumstances, because relators have not established their entitlement to the requested sick-leave benefits with the required certainty, they are not entitled to the writ. See *Stacy, Guerrero, and Crockett*.

Attorney Fees

{¶ 83} Although relators requested attorney fees in their complaint, they did not include any argument in support of this relief in their merit brief. Relators thus waived this claim. See, e.g., *State ex rel. Moore v. Malone*, 96 Ohio St.3d

417, 2002-Ohio-4821, 775 N.E.2d 812, ¶ 39 (relator “raised other claims in her complaint, but she waived them by not pursuing these claims in her merit brief”).

Postjudgment Interest

{¶ 84} Relators are entitled to postjudgment interest on this court’s award as a matter of law. R.C. 1343.03(A); see, also, *State ex rel. Shimola v. Cleveland* (1994), 70 Ohio St.3d 110, 112, 637 N.E.2d 325.

Conclusion

{¶ 85} Therefore, we grant a writ of mandamus to compel respondents to pay the city’s construction-equipment operators and master mechanics the difference between the prevailing wage rates and the lower rates they were paid for the period from May 1, 1994, through February 14, 2005, less the collective-bargaining offset of \$2,500 for those employees who worked during the period from January 1, 2004, through January 31, 2005. In all other respects, we deny the writ.

Writ granted in part
and denied in part.

MOYER, C.J., PFEIFER, LUNDBERG STRATTON, O’CONNOR, O’DONNELL,
LANZINGER and CUPP, JJ., concur.

Perskey, Shapiro & Arnoff Co., L.P.A., and Stewart D. Roll; Climaco,
Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A., and Patricia M. Ritzert, for
relators.

Robert J. Triozzi, Director of Law, Theodora M. Monegan, Chief
Assistant Director of Law, and William A. Sweeney, Assistant Director of Law,
for respondents.

EXHIBIT C

| TOTAL UNDERPAYMENT THROUGH DECEMBER 31, 2003 | | | | | | | | | | | | |
|--|--------------------|--------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|-----------------------|
| | 1/2 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Jan-Apr 2003 | May-Dec 2003 | TOTAL |
| CLASS A: | | | | | | | | | | | | |
| Water Dept | \$8,531.97 | \$15,061.41 | \$71,053.98 | \$93,074.87 | \$76,225.09 | \$75,519.94 | \$112,270.50 | \$131,399.10 | \$128,075.85 | \$46,332.31 | \$116,995.22 | \$874,540.24 |
| CPP | \$2,296.76 | \$4,008.55 | \$10,422.28 | \$13,655.99 | \$11,914.80 | \$11,250.49 | \$19,435.04 | \$14,951.90 | \$9,822.49 | \$3,125.61 | \$7,892.57 | \$108,776.48 |
| Streets | \$6,486.98 | \$14,424.77 | \$27,913.86 | \$34,074.98 | \$26,928.22 | \$27,015.02 | \$46,762.69 | \$57,856.42 | \$52,234.53 | \$11,297.99 | \$28,529.18 | \$333,524.64 |
| Pollution | \$0.00 | \$0.00 | \$16,535.48 | \$22,456.65 | \$17,962.99 | \$17,523.76 | \$27,025.07 | \$30,079.64 | \$30,302.87 | \$9,581.19 | \$24,193.99 | \$195,661.64 |
| Total Class A | \$17,315.71 | \$33,494.73 | \$125,925.60 | \$163,262.49 | \$133,031.10 | \$131,309.21 | \$205,493.30 | \$234,287.06 | \$220,435.74 | \$70,337.10 | \$177,610.96 | \$1,512,503.00 |
| CLASS B: | | | | | | | | | | | | |
| Streets | \$12,345.71 | \$19,925.44 | \$64,296.13 | \$84,358.33 | \$70,170.79 | \$80,636.95 | \$128,943.34 | \$152,772.28 | \$161,313.21 | \$52,169.50 | \$131,735.88 | \$958,667.56 |
| Waste | \$0.00 | \$0.00 | \$4,920.58 | \$6,288.78 | \$5,689.86 | \$5,489.99 | \$8,024.52 | \$16,737.47 | \$29,402.50 | \$8,567.46 | \$21,634.05 | \$106,755.21 |
| Parks | \$0.00 | \$0.00 | \$3,600.96 | \$3,567.06 | \$1,644.72 | \$5,614.67 | \$8,467.39 | \$9,621.63 | \$9,788.61 | \$3,129.51 | \$7,902.50 | \$53,337.05 |
| Total Class B | \$12,345.71 | \$19,925.44 | \$72,817.67 | \$94,214.17 | \$77,505.37 | \$91,741.61 | \$145,435.25 | \$179,131.38 | \$200,504.32 | \$63,866.47 | \$161,272.43 | \$1,118,759.82 |
| Master Mechanic | \$3,091.02 | \$4,637.91 | \$7,102.08 | \$8,605.13 | \$10,130.32 | \$14,728.85 | \$20,142.13 | \$21,664.31 | \$19,412.07 | \$6,175.77 | \$15,594.82 | \$131,284.41 |
| GRAND TOTAL | \$32,752.44 | \$58,058.08 | \$205,845.35 | \$266,081.79 | \$220,666.79 | \$237,779.67 | \$371,070.68 | \$435,082.75 | \$440,352.13 | \$140,379.34 | \$354,478.21 | \$2,762,547.23 |
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |

EXHIBIT "C"

**CONSTRUCTION EMPLOYERS
ASSOCIATION
BUILDING AGREEMENT**

EFFECTIVE
May 1, 2006 through April 30, 2009

Between

**INTERNATIONAL UNION OF
OPERATING ENGINEERS
LOCAL 18 AND ITS BRANCHES
(AFL-CIO)**



And

**CONSTRUCTION
EMPLOYERS ASSOCIATION**



ARTICLE I
GEOGRAPHICAL JURISDICTIONAL AREA

1. The provisions of this Agreement shall govern employment of and conditions under which employees shall work and rates of pay they shall receive on work in Building Construction in the following geographical area.

2. **Zone IA** shall consist of the following counties: Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain and Medina in the State of Ohio.

DEFINITION OF BUILDING CONSTRUCTION

3. **"Building Construction"** work is defined as the erection and construction of building structures, including modifications thereof, or additions or repairs thereto intended for use for shelter, protection, comfort or convenience and demolition of same. Building Construction shall also include the excavation and foundations for building construction.

SCOPE

A. **"Industrial and Building Site"** work is defined as including work inside the property line, but outside the actual building construction and shall include the grading and excavation of the site to bring it to grade level.

B. **"Power Plant, Amusement Park, Athletic Stadium Site"** work is defined as all work which is inside the property line, but outside the actual building construction. Such work shall include, but is not limited to the grading and excavation of the site, all work connected with the installation of sewer lines, drainage lines, gas lines, telephone and television conduit underground electrical lines and similar utility construction, parking lots, bridges, roads, streets, sidewalks, reservoirs, ash pits, storage tanks, ramps and other such construction work performed on the work site.

C. **"Sewage Plant, Waste Plant and Water Treatment Facilities Construction"** work shall be all work in construction of pumping stations, waste and sewage disposal plants, incinerator plants, water treatment plants, filtration plants, solid waste disposal and similar pollution control processes.

D. Any work under A., B. and C. above awarded subsequent from the effective date of this Agreement, then the Employer shall pay the rate of pay determined by adding the Operating Engineers Building Construction classification rate and the Operating Engineers Highway Heavy classification rate and divide by two (2). A

ARTICLE II
RECOGNITION, SECURITY, PROVISIONS & LIMITATIONS

4. **Recognition**—The Association hereby recognizes the Union as exclusive collective bargaining agent for all Operating Engineers (within the territory stated in Article I), and the Union recognizes the Association as the exclusive collective bargaining agent for all Employers of the Operating Engineers (within the territory stated in Article I), and it is mutually acknowledged that each has acted as such agents continually for more than the past twenty (20) years, and that now and over such period each has been so recognized by appropriate departments or agencies of both federal and state governments.

5. **Liabilities**—This Agreement is negotiated by the Association acting as negotiating representative for its members for whom it holds bargaining rights and for any breach of this Agreement the liability of an Employer shall be several, not joint, and the liability of the Association shall be only that of negotiating agent active without liability for the acts of its individual members or other employers within the stated territory.

6. **Provisions and Limitations**—All members of the Association for whom it holds bargaining rights and any person, firm or corporation who as an Employer becomes signatory to this Agreement, shall be bound by all terms and conditions of this Agreement as well as any future amendments which may be negotiated by the Association, and the Union, and furthermore shall be bound to make the Health and Welfare payments, Pension payments and Apprenticeship Fund payments required under Article IV for all work performed within the work jurisdiction outlined in Article I of this Agreement, or any other payment established by the appropriate Agreement.

EXHIBIT "A"
WAGE RATES AND FRINGE CONTRIBUTIONS

ZONE IA covering Cleveland and the following counties: Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain and Medina

Classification:

MASTER MECHANIC/EQUIPMENT FOREMAN

49

| | 05/01/06 | 05/01/07 | 05/01/08 |
|------------------|----------|----------|----------|
| Rate | \$31.33 | \$32.38* | \$33.43* |
| H & W | 5.51 | 5.51 | 5.51 |
| Pension | 3.30 | 3.65 | 4.00 |
| Apprenticeship | 0.50 | 0.50 | 0.50 |
| CISP (Cleveland) | 0.12 | 0.12 | 0.12 |
| E & S | 0.04 | 0.04 | 0.04 |

*In the event that additional funds are needed for fringe benefits, they will be diverted from wages.

40.80.

42.20 (over)

Classification:
GROUP A

40.30

41.70

| | 05/01/06 | 05/01/07 | 05/01/08 |
|------------------|----------|----------|----------|
| Rate | \$30.83 | \$31.88* | \$32.93* |
| H & W | 5.51 | 5.51 | 5.51 |
| Pension | 3.30 | 3.65 | 4.00 |
| Apprenticeship | 0.50 | 0.50 | 0.50 |
| CISP (Cleveland) | 0.12 | 0.12 | 0.12 |
| E & S | 0.04 | 0.04 | 0.04 |

*In the event that additional funds are needed for fringe benefits, they will be diverted from wages.

05 Operators of:

A-Frames

Boller Operators, Compressor Operators, Hydraulic Pumps & Power Pacs when mounted on a crane or regardless of where said equipment is mounted (piggy-back operation)

Boom Trucks (all types)

Cableways

Cherry Pickers

Combination Concrete Mixers & Towers

Concrete Pumps

Cranes (all types)

(Boom & Jib 200' and over - \$31.58 effective 05/01/06)

(Boom & Jib 300' and over - \$31.83 effective 05/01/06)

(Boom & Jib 200' and over - \$32.63 effective 05/01/07)*

(Boom & Jib 300' and over - \$32.88 effective 05/01/07)*

(Boom & Jib 200' and over - \$33.68 effective 05/01/08)*

(Boom & Jib 300' and over - \$33.93 effective 05/01/08)*

Cranes — compact; track or rubber over 4000 lbs. capacity

Cranes — self erecting; stationary, track or truck (all configurations)

Derricks (all types)

Draglines

Dredges (dipper, clam or suction), 3-man crew

Elevating Graders or Euclid Loaders

Floating Equipment

Gradalls

Helicopter Operators, hoisting building materials

Helicopter Winch Operators, hoisting building materials

Hoes (all types)

Hoists (two or more drums)

Lift Slab or Panel Jack Operators

Locomotives (all types)

Maintenance Engineers (Mechanic or Welder)

Mixers, Paving (multiple drum)

Mobile Concrete Pumps with Booms

Panelboards (all types on site)

Pile Drivers

Power Shovels

Robotics Equipment Operator/Mechanic

Rotary Drills, (all), used on caisson work, wells

(all types), Geothermal work and sub-structure work

Rough Terrain Fork Lifts with Winch/Hoist (when used as a crane)

Slide Booms

Slip Form Pavers

Straddle Carriers (building construction on site)

Trench Machines (over 24" wide)

Tug Boats

05

Classification:
GROUP B

| | 40.15 05/01/06 | 41.55 05/01/07 | 05/01/08 |
|------------------|-------------------|-------------------|----------|
| Rate | \$30.68 | \$31.73* | \$32.78* |
| H & W | 5.51 | 5.51 | 5.51 |
| Pension | 3.30 | 3.65 | 4.00 |
| Apprenticeship | 0.50 | 0.50 | 0.50 |
| CISP (Cleveland) | 0.12 | 0.12 | 0.12 |
| E & S | 0.04 | 0.04 | 0.04 |

*In the event that additional funds are needed for fringe benefits, they will be diverted from wages.

52 Operators of:
Asphalt Pavers
Bulldozers
CMI-Type Equipment
Endloaders
Horizontal Directional Drill Locator
Horizontal Directional Drill Operator
Instrument Man**
Kolman-type Loaders (dirt loading)

Lead Greasemen
Mucking Machines
Power Graders
Power Scoops
Power Scrapers
Push Cats
Rotomills
Saw (concrete vermeer-type)

**The addition of this pay classification does not expand jurisdiction, but only establishes the pay classification if Operating Engineers are used.

Classification:
GROUP C

| | 05/01/06 | 05/01/07 | 05/01/08 |
|------------------|----------|----------|----------|
| Rate | \$29.23 | \$30.28* | \$31.33* |
| H & W | 5.51 | 5.51 | 5.51 |
| Pension | 3.30 | 3.65 | 4.00 |
| Apprenticeship | 0.50 | 0.50 | 0.50 |
| CISP (Cleveland) | 0.12 | 0.12 | 0.12 |
| E & S | 0.04 | 0.04 | 0.04 |

*In the event that additional funds are needed for fringe benefits, they will be diverted from wages.

53 Operators of:
Air Compressors, pressurizing shafts or tunnels
Asphalt Rollers (all)
Fork Lifts
Hoists, one drum
House Elevators (except automatic call button controlled)
Laser Screeds and like equipment
Man Lifts

Mud Jacks
Power Boilers (over 15 lbs. pressure)
Pump Operators, installing or operating well points or other type of dewatering system
Pressure Groutings
Trenchers (24" and under)
Utility Operators

EXHIBIT "B"

All E-mail correspondence between Stewart D. Roll, counsel for Relators Municipal Construction Equipment Operators' Labor Council, and counsel for Respondents, City of Cleveland, regarding demand for payment of Supreme Court Judgment.

Eva J. Potter

From: Stewart D. Roll [sdanl@msn.com]
Sent: Monday, September 10, 2007 11:22 AM
To: 'Langhenry, Barbara'
Cc: sdanl@msn.com; 'Eva Potter'
Subject: Ohio Supreme Court Case No. 2006-2056

Dear Ms. Langhenry:

Nothing is preventing Respondents from complying with its obligations by Friday, September 14, 2007 for those persons for whom and to the extent that records are readily available except Respondents desire to stretch out for as long as possible its compliance with the Supreme Court's order. Today's 12:00 p.m. deadline stands for committing to pay those persons those amounts by September 14, 2007 further to my email of this morning. You are welcome to make arrangements with me to review your own records that are in my possession. I will also share with you the spreadsheets that we prepared using those records. I telephoned you about 5 minutes ago to confirm this offer.

Sincerely,
Stewart D. Roll

From: Langhenry, Barbara [mailto:BLanghenry@city.cleveland.oh.us]
Sent: Monday, September 10, 2007 11:07 AM
To: Stewart D. Roll
Cc: Monegan, Theodora; Triozzi, Robert
Subject: RE: Ohio Supreme Court Case No. 2006-2056

Mr. Roll:

The City cannot promise to pay the money due to your clients by Friday, September 14, 2007. The City has an obligation both to your clients and to the public to make sure that it accurately determines the amounts due to your clients. You have stated that you have payroll records for most of the affected employees. We would be happy to look at what you have. Even if what you have is accurate and complete, we will still have to determine the amounts for the employees for whom you do not have payroll records.

As I stated on Friday, the City is working diligently to determine the amounts owed. The City intends to comply with the Supreme Court's order as fast as reasonably possible.

Sincerely,

Barbara Langhenry

From: Stewart D. Roll [mailto:sdanl@msn.com]
Sent: Monday, September 10, 2007 6:09 AM
To: blanghenry@city.cleveland.oh.us
Cc: Monegan, Theodora; rtriozzi@city.cleveland.oh.us

EXHIBIT "B"

Subject: Ohio Supreme Court Case No. 2006-2056

Dear Ms. Langhenry:

Good morning. Please convey my good morning wishes to Mayor Jackson, Mr. Triozzi and Ms. Monegan. You and they should know that if Cleveland does not agree by 12:00 p.m. today by return email to pay no later than Friday, September 14, 2007 the monies known to be due to my clients, based upon Cleveland's previously produced payroll records, in accord with their payment instructions that I delivered to Mr. Triozzi on August 28, 2007, that I will be filing a motion to show cause why Respondents should not be deemed contemnors of the Ohio Supreme Court, as well as taking other legal action to effect collection.

Sincerely,
Stewart D. Roll

----- Original Message -----

From: Stewart D. Roll
To: Langhenry, Barbara
Cc: Monegan, Theodora ; Triozzi, Robert
Sent: Friday, September 07, 2007 11:27 PM
Subject: Ohio Supreme Court Case No. 2006-2056

Dear Ms. Langhenry:

This note further responds to your September 7, 2007 email and memorializes the following advice to Ms. Monegan during our August 28, 2007 meeting. I have in my possession and would be happy to share with Cleveland its own payroll records for most of the affected employees for all but the last year and 6 weeks of the period of time described in the subject order. Cleveland produced those documents to me during the course of our litigation. Ms. Monegan did not seem to be interested in reviewing this data. For the record, my August 28, 2007 correspondence and attached exhibits to Mr. Triozzi included a summary of this data, payment instructions from most of these current and former Cleveland employees and, my request for Cleveland to produce its payroll records for the last year and 6 weeks of this period. Mr. Triozzi has failed to respond and failed to produce that information.

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Cc: Monegan, Theodora ; Triozzi, Robert
Sent: Friday, September 07, 2007 10:49 PM
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Dear Ms. Langhenry:

I regret that Mr. Triozzi and Ms. Monegan are too busy to respond to my recent correspondence. It appears that my clients and your clients have a different understanding of what it means to undertake diligent efforts to comply with the Ohio Supreme Court's subject judgment and writ. Your clients' failure to reasonably respond to my inquiries, and failure to promise when Cleveland will comply with the order in the subject case will result in further legal action next week.

Have a lovely weekend.

Sincerely,
Stewart D. Roll

----- Original Message -----

From: Langhenry, Barbara

To: sdanl@msn.com

Cc: Monegan, Theodora ; Triozzi, Robert

Sent: Friday, September 07, 2007 6:37 PM

Subject: Ohio Supreme Court Case No. 2006-2056

Mr. Roll:

I am responding on behalf the Law Director to your letter of August 28, 2007 containing certain demands and to your subsequent e-mails. The City of Cleveland is working diligently to determine the amount due to the CEO employees. The staff in the Division of Accounts must recover data from a payroll system that is no longer used to determine the hours worked by each employee in each of the relevant years. Because we are looking at old data, those staff people cannot give us a definite time by which they will complete their work. Please be assured that they are working very hard on this.

As to your demands that are unrelated to any payments due as a result of the mandamus order, we will respond as we make our decisions.

Barbara Langhenry
Chief Council
City of Cleveland

Eva J. Potter

From: Stewart D. Roll [sdanl@msn.com]
Sent: Monday, September 10, 2007 6:09 AM
To: blanghenry@city.cleveland.oh.us
Cc: Monegan, Theodora; rtriozzi@city.cleveland.oh.us
Subject: Ohio Supreme Court Case No. 2006-2056

Dear Ms. Langhenry:

Good morning. Please convey my good morning wishes to Mayor Jackson, Mr. Triozzi and Ms. Monegan. You and they should know that if Cleveland does not agree by 12:00 p.m. today by return email to pay no later than Friday, September 14, 2007 the monies known to be due to my clients, based upon Cleveland's previously produced payroll records, in accord with their payment instructions that I delivered to Mr. Triozzi on August 28, 2007, that I will be filing a motion to show cause why Respondents should not be deemed contemptors of the Ohio Supreme Court, as well as taking other legal action to effect collection.

Sincerely,
Stewart D. Roll

----- Original Message -----

From: Stewart D. Roll
To: Langhenry, Barbara
Cc: Monegan, Theodora ; Triozzi, Robert
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Barbara Langhenry
Chief Council
City of Cleveland

Eva J. Potter

From: Stewart D. Roll [sdanl@msn.com]
Sent: Saturday, September 08, 2007 6:59 AM
To: paul shapiro; fred arnoff; Jerrold Goldstein; The Jester; Eva Potter; Stewart D. Roll
Subject: Fw: Ohio Supreme Court Case No. 2006-2056

FYI.

Dan

----- Original Message -----

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Cc: Monegan, Theodora ; Triozzi, Robert
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Subject: Ohio Supreme Court Case No. 2006-2056

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Sent: Friday, September 07, 2007 6:37 PM
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City of Cleveland

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Barbara Langhenry

Chief Council
City of Cleveland

Eva J. Potter

From: Stewart D. Roll [sdanl@msn.com]
Sent: Friday, September 07, 2007 11:28 PM
To: Langhenry, Barbara
Cc: Monegan, Theodora; Triozzi, Robert
Subject: Ohio Supreme Court Case No. 2006-2056

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Subject: Ohio Supreme Court Case No. 2006-2056

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Barbara Langhenry
Chief Council
City of Cleveland

Eva Potter

From: "Stewart D. Roll" <sdanl@msn.com>
To: "Monegan, Theodora" <TMonegan@city.cleveland.oh.us>
Cc: "Eva Potter" <ejpotter@perskylaw.com>; <sdanl@msn.com>
Sent: Thursday, September 06, 2007 11:56 AM
Subject: RE: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056 // Pending SERB Hearings

Dear Ms. Monegan:

I appreciate that the City is checking its records. Please refer to my August 28, 2007 email. Please respond by return email to the following questions.

1. Does Cleveland intend to pay the amounts owed pursuant to the August 15, 2007 Supreme Court mandamus order, without the need for further legal action by my clients?
2. When does Cleveland propose to complete its records review?
3. When does Cleveland propose to make its first payment based upon the information that I sent to Mr. Triozzi?
4. When does Cleveland propose to provide to me the detailed regular and overtime hours worked by these employees during the period of January 1, 2004 - February 15, 2005, to facilitate MCEOLC's computation of what Cleveland owes for this period?
5. What is Cleveland's answer to question 4 from my August 28, 2007 email?

You may be nonplussed, but my clients are becoming increasingly unhappy with Cleveland's failure to put in writing its answer to these questions. We need those answers no later than tomorrow. Your verbal advice that we're working on these issues is appreciated but is inadequate to avoid further legal action by my clients.

Thank you for calling me back this morning to discuss these matters.

Please also accept this email as confirming my voice mail to you that Cleveland's refusal through Mr. Richard Wozniak to allow Lee Ritterbeck to attend next week's scheduled SERB hearings, even though he was subpoenaed to attend by SERB would appear to be contrary to the terms of Cleveland's CBA with Local 1099. I'm sure that it will act in a way to protect its own union members.

Sincerely,
 Stewart D. Roll

From: Monegan, Theodora [mailto:TMonegan@city.cleveland.oh.us]
Sent: Thursday, September 06, 2007 9:06 AM
To: 'Stewart D. Roll'
Cc: Triozzi, Robert; Sweeney, William; Hutchinson, Trudy; Sensenbrenner, Richard; Langhenry, Barbara
Subject: RE: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056

DEPARTMENT OF LAW

Theodora M. Monegan, Chief Assistant Director of Law
 601 Lakeside Avenue, Room 106
 Cleveland, OH 44114
 Office: (216) 664-4507
 Facsimile: (216) 664-2663

September 6, 2007

Mr. Roll:

If you recall our conversations, the message I conveyed was that we had your information and that The City was reviewing its own records related to the back wages. The City is well aware of the Supreme Court's decision and the timelines imposed by their decision. I am a bit nonplussed at the tone of your latest missive. You and I have had several conversations about the Supreme Court decision, and again to reiterate, the City's message was that we had to verify amounts based on our own records. I did not state that the City was going to "pay promptly."

Yours truly,

Theodora M. Monegan

The information contained in this e-mail is attorney-client privilege and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U.S. postal service.

From: Stewart D. Roll [mailto:sdanl@msn.com]
Sent: Wednesday, September 05, 2007 10:00 PM
To: Monegan, Theodora
Cc: Eva Potter; Stewart D. Roll
Subject: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056

Dear Ms. Monegan:

If Cleveland fails to timely and appropriately reply to my recent correspondence to Mr. Triozzi, and my recent inquiries to you continue to go unanswered, that lack of response will convey a message. That message is not consistent with your advice that Cleveland intends to promptly pay pursuant to the Supreme Court's Order. That message will require action by my clients. Please act accordingly.

Sincerely,
 Stewart D. Roll

----- Original Message -----

From: Monegan, Theodora
To: 'Stewart D. Roll'
Cc: Triozzi, Robert ; Langhenry, Barbara ; Sweeney, William ; 'Jon M. Dileno'
Sent: Friday, August 31, 2007 11:21 AM
Subject: RE: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056

DEPARTMENT OF LAW

*Theodora M. Monegan, Chief Assistant Director of Law
 601 Lakeside Avenue, Room 106
 Cleveland, OH 44114
 Office: (216) 664-4507
 Facsimile: (216) 664-2663*

August 31, 2007

Mr. Roll:

I received your email and forwarded the message for further review before a response is sent. I appreciate your patience.

Yours truly,

Theodora M. Monegan

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From: Stewart D. Roll [mailto:sdanl@msn.com]
Sent: Friday, August 31, 2007 11:11 AM
To: 'Monegan, Theodora'
Cc: 'Stewart D. Roll'; sdanl@msn.com; 'Eva Potter'
Subject: FW: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056

Dear Ms. Monegan:

Please refer to the below-noted email. When does Cleveland plan to make the initial payment due pursuant to item 1? Please let me know what is the status of item 2? Item 3 was mailed to you yesterday. What is the status of item 4?

Thanks

Stewart D. Roll Esq.

Persky, Shapiro & Arnoff Co., LPA
25101 Chagrin Blvd. - Suite 350
Beachwood, Ohio 44122
Tel. (216) 360-3737
Fax (216) 593-0921

From: Stewart D. Roll [mailto:sdanl@msn.com]
Sent: Tuesday, August 28, 2007 5:46 PM
To: 'Monegan, Theodora'
Cc: sdanl@msn.com; 'Eva Potter'
Subject: Respondents' Compliance with Ohio Supreme Court Mandamus Order - Case No. 2006-2056

Dear Ms. Monegan:

Please accept this email as my confirmation of what I understand we discussed during today's 2:00 p.m. meeting in your office. Please let me know immediately if this email does not accurately describe the essence of your advice and our conversation.

- (1) Cleveland will be promptly paying Relator MCEOLC's CEO members and individual Relators based upon the deficiency amounts identified in Exhibit "B" to the Complaint and the number of regular and overtime hours worked, all in accord with the then current CEA contracts, further to the mandamus order

issued in the subject opinion.

- (2) Cleveland will promptly provide to me the detailed regular and overtime hours worked by these employees during the period of January 1, 2004 - February 15, 2005, to facilitate MCEOLC's computation of what Cleveland owes for this period.
- (3) My firm's W-9 will be sent to you this week to facilitate Cleveland's compliance with these employees' payment instructions.
- (4) You will let me know this week what is Cleveland's position as to whether it will pay current CEO's the hourly prevailing wage rate in accord with the extant CEA Agreement, a copy of which is attached to my August 28, 2007 letter to Mr. Triozzi.
- (5) Cleveland continues to decline to provide the CEOs with the benefits at issue in Judge Gallagher's case, which are provided to all other Cleveland employees pursuant to ordinance, notwithstanding the Court's finding that it Cleveland did not pay these employees at the prevailing wage rate, as required by Cleveland's Charter. You understand that the CEO Union believes that Cleveland has also not paid the prevailing wage rate since April 1, 2007, because those payments are not based upon the CEA rate, AND Cleveland is wrongfully deducting a portion of its PERS and other payments from the heavy highway wage rate that is using. The subject opinion makes clear that the CEA Agreement establishes the prevailing wage rate. These ordinances make clear that if an employee is not paid at the prevailing wage rate, that the noted benefits must be provided. The ordinance with respect to health care insurance only excuses a failure to provide that insurance if wages are being paid at the prevailing wage rate pursuant to an ordinance that was repealed. For that reason, all insurance payments should be refunded, and that insurance should be provided until Cleveland pays these employees as required by this ordinance.
- (6) I suggested and you agreed that the CEO and Union and Cleveland should renew their CBA negotiations. You advise Mr. Jon Dileno accordingly.

With regard to the issues extant in the Gallagher case, I believe that Cleveland's continuing failure to provide benefits is bad faith, which justifies an award of punitive damages. I disagree with your suggestion that Cleveland's expected payment for 1994 - 2005 cures Cleveland's failure to provide these benefits during this period, because that argument ignores the time value of the cost of not receiving these benefits.

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Persky, Shapiro & Arnoff Co., LPA
25101 Chagrin Blvd. - Suite 350
Beachwood, Ohio 44122
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Fax (216) 593-0921

Eva Potter

From: "Stewart D. Roll" <sdanl@msn.com>
To: "Monegan, Theodora" <TMonegan@city.cleveland.oh.us>
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DEPARTMENT OF LAW

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To: "Monegan, Theodora" <TMonegan@city.cleveland.oh.us>
Cc: "Stewart D. Roll" <sroll@perskylaw.com>; <sdanl@msn.com>; "Eva Potter" <ejpotter@perskylaw.com>
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Dear Ms. Monegan:

Please accept this email as my confirmation of what I understand we discussed during today's 2:00 p.m. meeting in your office. Please let me know immediately if this email does not accurately describe the essence of your advice and our conversation.

- (1) Cleveland will be promptly paying Relator MCEOLC's CEO members and individual Relators based upon the deficiency amounts identified in Exhibit "B" to the Complaint and the number of regular and overtime hours worked, all in accord with the then current CEA contracts, further to the mandamus order issued in the subject opinion.
- (2) Cleveland will promptly provide to me the detailed regular and overtime hours worked by these employees during the period of January 1, 2004 – February 15, 2005, to facilitate MCEOLC's computation of what Cleveland owes for this period.
- (3) My firm's W-9 will be sent to you this week to facilitate Cleveland's compliance with these employees' payment instructions.
- (4) You will let me know this week what is Cleveland's position as to whether it will pay current CEO's the hourly prevailing wage rate in accord with the extant CEA Agreement, a copy of which is attached to my August 28, 2007 letter to Mr. Triozzi.
- (5) Cleveland continues to decline to provide the CEOs with the benefits at issue in Judge Gallagher's case, which are provided to all other Cleveland employees pursuant to ordinance, notwithstanding the Court's finding that it Cleveland did not pay these employees at the prevailing wage rate, as required by Cleveland's Charter. You understand that the CEO Union believes that Cleveland has also not paid the prevailing wage rate since April 1, 2007, because those payments are not based upon the CEA rate, AND Cleveland is wrongfully deducting a portion of its PERS and other payments from the heavy highway wage rate that is using. The subject opinion makes clear that the CEA Agreement establishes the prevailing wage rate. These ordinances make clear that if an employee is not paid at the prevailing wage rate, that the noted benefits must be provided. The ordinance with respect to health care insurance only

excuses a failure to provide that insurance if wages are being paid at the prevailing wage rate pursuant to an ordinance that was repealed. For that reason, all insurance payments should be refunded, and that insurance should be provided until Cleveland pays these employees as required by this ordinance.

(6) I suggested and you agreed that the CEO and Union and Cleveland should renew their CBA negotiations. You advise Mr. Jon Dileo accordingly.

With regard to the issues extant in the Gallagher case, I believe that Cleveland's continuing failure to provide benefits is bad faith, which justifies an award of punitive damages. I disagree with your suggestion that Cleveland's expected payment for 1994 – 2005 cures Cleveland's failure to provide these benefits during this period, because that argument ignores the time value of the cost of not receiving these benefits.

Sincerely,

Stewart D. Roll Esq.

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