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' OPPOSITION TO RESPONDENTS' MOTIONS: (1) FOR A PROTECTIVE ORDER, AND (2) TO QUASH SUBPOENAS

Stewart D. Roll (0038004)
Persky, Shapiro & Arnoff Co., L.P.A.
Signature Square II
25101 Chagrin Boulevard, Suite 350
Beachwood, Ohio 44122
(216) 360-3737
Fax No. (216) 593-0921
sroll@perskylaw.com

COUNSEL FOR RELATORS

Robert J. Triozzi, Esq.
Director of Law City of Cleveland
Theodora M. Monegan, Esq.
Chief Assistant Director of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
(216) 664-2800
Fax No. (216) 664-2663
tmonegan@city.cleveland.oh.us

COUNSEL FOR RESPONDENTS

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Relators oppose and pray that the Court will deny and overrule Respondents' Motions: (1) for a Protective Order, and (2) to Quash Subpoenas, because Respondents' behavior strongly suggests their contempt of this Court based upon their response to its August 15, 2007 Judgment and Writs of Mandamus, and for the other reasons stated in this Opposition. Those facts and relevant law make the discovery at issue appropriate.

I. Respondents' announced plan to act contrary to this Court's judgment and writs validates the planned discovery, and proposed contempt and sanctions hearing.

Paragraph 69 of the opinion in this case states:

> **{¶ 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.
> [Emphasis added.]

Notwithstanding the clarity of the underlined text, page 5 of Respondents' Motion for a Protective Order tells this Court that:

> "Respondents are diligently complying with the Court's Judgment Entry by calculating the amounts due to each of the individually named Relators to prepare to issue paychecks to those persons."

The disparity between what this Court ordered and what Respondents say this Court ordered again appears in the first sentence on page 3 of Respondents' opposition to Relators' pending motions to show cause and for sanctions. In that sentence, Respondents claim that the Court only ordered payment to the individually named parties in this case.

The difference between the payment that Respondents say they plan to make, and the payment ordered by this Court is striking in its boldness. While the Court ordered payment to all of those persons employed by Cleveland as construction equipment operators and master mechanics

during the relevant period [over seventy (70) employees], Cleveland says that this Court ordered and therefore it only plans to pay the individually named Relators.

The non-accidental and clear intent of Respondents' statement is further evidenced at numbered paragraph 5 on page 7 of Respondents' Opposition to Relators' Motions to Show Cause and for Sanctions. In that paragraph, Respondents observe that they have received payment instructions for "52 persons who claim to have been employed as construction equipment operators or master mechanics [during the applicable period]. That paragraph concludes with Respondents' confirmation of their concurrent receipt of additional payment instructions from those persons listed as individually named relators. Respondents' contempt is evidenced by their announced plan to only pay 19 of 71 construction equipment operators and master mechanics affected by this Court's Judgment and Writs of Mandamus. That Respondents suggest that there could be any doubt about who was and is employed by Cleveland in these capacities during the period identified in ¶69 above, based upon Cleveland's production of its payroll records for all of these employees during the tortured history of this litigation,[1] demonstrates Respondents' contempt for this Court, warrants the discovery at issue and cries out for a contempt hearing and issuance of the orders sought by Relators.

Respondents' contempt is also evidenced by the ¶69 "offset" requirement in this Court's opinion, which only applies to those Relators who were employed from January 1, 2004 - January 1, 2005, most of whom are not individually named Realtors. This credit directive would be nonsensical unless Respondents were obligated to pay all of its construction equipment operators' and master mechanics employed by Cleveland from May 1, 1994 - February 14, 2005.

In ***Zakany v. Zakany*** (1984), 9 Ohio St.3d 192] this Court states that R.C. 2705.02(A) provides, in material part, as follows:

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[1] Ms. Barbara A. Langhenry, who identifies herself as "Cleveland's Chief Counsel" in her Affidavit that is attached as Exhibit "B"to Respondents' Opposition to Relators' Motions to Show Cause and for Sanctions, identifies and attaches September 10, 2007 email from her to the undersigned that acknowledges that Cleveland has "located" these payroll records.

"A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer."

This is still the law today. Relators suggest that Respondents' decision to make believe that this Court's clear directive to pay all of these construction equipment operator and master mechanic employees requires them to only pay the individually named Relators evidences their disobedience of and resistance to this Court's lawful judgment and writs. The judgment and writs issued in this case mandate Respondents' payment of 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 ." Respondents announced payment plan evidences their intent to disobey and ignore that directive. Respondents' bold and unsupported planned modification of this Court's judgment and writs of mandamus also supports an order denying Respondents' Motions for a protective order and to quash subpoenas.

II. Relators' discovery will allow investigation of and confirm Respondents' illicit planned actions. Respondents' claims that the requested discovery is "an annoyance" and "undue burden" are erroneous.

The noticed depositions and requests for production of documents were prompted by Cleveland's failure to commit to a date for compliance with this Court's judgment and writs, and continuing failure to provide payroll records for these employees for the last year and six weeks of the applicable period. The depositions are planned for the sole purpose of determining: (1) why 5 weeks after this Court's judgment and issuance of writs of mandamus, Respondents would not state how and when they would comply, and (2) what steps have been taken toward compliance. As noted above, Respondents still have not said that they would comply with this Court's judgment and writs of mandamus. Respondents' *estimate* at page 4 of Respondents' opposition to Relators' motions to show cause and for sanctions that checks will be ready by October 5, 2007 for individually named Relators is appreciated. Unfortunately, that "estimate" does not address when these checks will be

delivered or when checks will be ready for and delivered to Cleveland's other construction equipment operators and master mechanics who are similarly benefitted by this Court's judgment and writs of mandamus. Instead of addressing these issues, Respondents continue to resist compliance by claiming that this Court's Judgment and Writs require something other than what they command.

Initially, that resistance came in the form Ms. Langhenry's September 7, 2007 email claim that before Respondents could comply, they first had to "recover data" from an out-of-date payroll system. Respondents abandoned that excuse when counsel for Relators reminded Respondents that they had already produced those records during this litigation. According to page 4 of Respondents' opposition to Relators' motions to show cause and for sanctions, the requested payroll records have been located. Presumably, their production and the production of Respondents' email, memoranda and other non-privileged communication with respect to Respondents' alleged compliance with this Court's judgment and writs of mandamus since August 15, 2007 would neither be an annoyance nor an undue burden. In view of Respondents' continuing resistance to this Court's lawful judgment and writs, failure to explain why it should take seven weeks to (August 15, - October 5, 2007) for checks to be *ready* [Respondents fail to explain what they mean by "ready"], and the narrow scope of the noticed depositions and request for production of documents, this Court should issue an order denying Respondents' motion for a protective order. Realtors pray that this Order will specifically find that the requested discovery is neither an annoyance or undue burden.

III. Respondents' Motion to Quash Subpoenas should also be denied.

A. The Subpoenas identify the Court from which they issued. Respondents object to the subpoenas because they claim that they do not "state the name of the Court from which it is issued." However, they admit that the caption on each of the subpoenas at issue identify the Supreme Court and Supreme Court case number as the case applicable to those subpoenas. Respondents obviously were not sufficiently confused by this information to prevent their filing of

their motion to quash.

B. The Subpoenas were not directed to a party. Respondents object to the subpoenas because they claim that they were directed to five employees, and that attendance of a party's deposition is controlled by Civ. R. 30. The subpoenaed employees of Respondents are not parties to this case. For that reason their attendance at their depositions is governed by Civ. R. 45. Respondents cite no law in support of their argument to the contrary.

C. Controlling Authority evidences appropriate service of these subpoenas. In ***Denovchek v. Bd. of Trumbull Cty. Commrs.*** (1988), 36 Ohio St.3d 14, 15, this Court held:

> "Where a subpoena is left at the business location or place of employment of a witness, and where that witness has actual knowledge of a subpoena, a valid service of service has been completed."

Here, the subpoenas were served by Attorney Paul Rosenberger, along with the required payment. The subpoenaed parties knowledge of the subpoena is suggested by Respondents' motion to quash. Based upon the authority of ***Denovchek,*** service was effective, and for the reasons stated herein Respondents' motion to quash should be denied.

IV. Conclusion.

Relators pray that this Court will deny Respondents' Motions for a Protective Order and to Quash Subpoenas because those Motions are not meritorious, and evidence Respondents' contempt of this Court. Relators pray that the Court will issue an order and judgment entry that:

(A) denies Respondents' motion for a protective order, and motion to quash subpoenas. Relators;

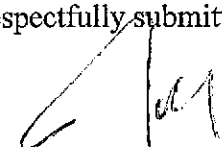
(B) requires Respondents to appear in the offices of Relators' attorney on dates and times convenient to his schedule for noticed depositions;

(C) requires Respondents to immediately produce the requested documents;

(D) requires Respondents to purge their contempt of this Court by fully complying with its August 15, 2007 Judgment Entry and Writs of Mandamus no later than October 5, 2007, under penalty of a $10,000.00 per day or higher sanction, and schedules these matters for a contempt hearing absent full compliance with these orders;

(E) requires Respondents to pay to Relators' attorney a reasonable fee for legal services incurred and costs made necessary by this motion practice.

Respectfully submitted,



STEWART D. ROLL (Reg. #0038004)
25101 Chagrin Boulevard, Suite 350
Cleveland, Ohio 44122-5687
Telephone: (216) 360-3737
Fax: (216) 593-0921
Representing Relator CEO Union and Individual Relators

OF COUNSEL:
PERSKY, SHAPIRO & ARNOFF CO., L.P.A.

CERTIFICATE OF SERVICE

A copy of the foregoing Relators' Opposition to Respondents' Motions: (1) for a Protective Order, and (2) to Quash Subpoenas has been sent to the following via regular U.S. mail, on this 24th day of September, 2007.

Lindsey Williams, Assistant Attorney General
Constitutional Office Section
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428

Robert J. Triozzi, Esq.
Theodora M. Monegan, Esq.
William Sweeney, Esq.
City of Cleveland, Department of Law
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077

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