

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., MUNICIPAL)
CONSTRUCTION EQUIPMENT)
OPERATORS' LABOR COUNCIL, et al.)
)
Relators)
)
vs.)
)
CITY OF CLEVELAND, et al.)
)
Respondents)

CASE NO. 2006-2056

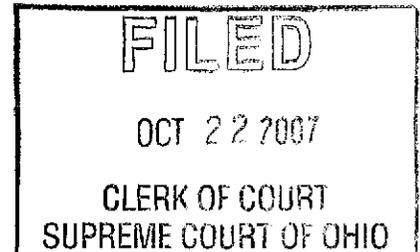
OPPOSITION TO RESPONDENTS'
MOTION TO STRIKE AFFIDAVITS

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
scroll@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



Relators oppose and pray that the Court will deny Respondents' motion to strike affidavits because that motion is not supported by fact or law. That motion relates to three separate affidavits, which are identified in this opposition.

Frank P. Madonia's Affidavit that was filed with the Court on October 9, 2007.

Respondents' first argument is that paragraph 5 of Mr. Madonia's affidavit should be struck because it was not made upon personal knowledge. Review of paragraph 1 of that affidavit discloses that it is made upon personal knowledge. Respondents argue that paragraph 5 cannot have been made upon personal knowledge because it comments upon Respondents' motive for not complying with this Court's August 15, 2007 Judgment Entry and Writs of Mandamus. Review of that paragraph discloses that it does not comment upon Respondents' motive but does observe that Respondents' actions were deliberate and part of Respondents' scheme to resist and defy this Court's Judgment Entry and Writs. The facts stated in support of that statement are that Respondents failed to pay as required by this Court's judgment, and that the Judgment and Writs clearly require payment. Relators suggest that this paragraph conforms with the requirements of Rule 10, section 7 of the Rules of Practice.

Respondents argue that paragraphs 2, 3, 4 and 11 should be struck as conclusions and not statements of fact. That claim is clearly erroneous with respect to paragraphs 2, 3 and 4 of Mr. Madonia's affidavit. The Court will judge whether this claim should be sustained for paragraph 11 of Mr. Madonia's affidavit.

Respondents argue that paragraphs 6, 7, 8, 9 and 10 of Mr. Madonia's affidavit relate to irrelevant evidence. Relators disagree. The noted paragraphs relate to Respondents' failure to pay

Relators the prevailing wage rate from May 1, 2007 into the future. Relators believe that this case establishes among other things that: (1) Respondents failed to pay Relators the prevailing wage rate during the period of May 1, 1994 - February 14, 2005; (2) how the parties are to determine the prevailing wage rate; and (3) Respondents are obligated to pay that prevailing wage rate to Relators pursuant to Cleveland's charter whenever no collective bargaining agreement exists to establish Relators' wages and benefits.

That last point is underscored by this Court's holding that: "allow[s] 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 ... in accordance with prevailing wage rates." Emphasis added. *State, ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St.3d 537, 540. Respondents' continuing failure to make those payments after May 1, 2007 and into the future when no collective bargaining agreement controls their relationship evidences Respondents' resistance to this Court's judgment. These facts and this law evidences the relevance of these affidavit paragraphs.

Mr. Roll's Affidavit that was filed with the Court on October 9, 2007. Respondents claim that paragraph 6 of Mr. Roll's affidavit is not made upon his personal knowledge. Review of numbered paragraph 1 of that affidavit discloses that it is made upon Mr. Roll's personal knowledge. Numbered paragraph 6 states that it is clear to the affiant that Respondents are well aware of their obligation to pay all of those persons employed as construction-equipment operators and master mechanics for the stated time period and not just the named Relators. That statement is made based upon his knowledge resulting from discussions with Respondents' attorneys to the effect that one

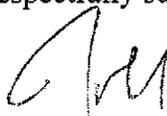
or more of them have read and understand the Court's Judgment Entry and Writs of Mandamus entered in this case, and his observations with respect to their ability to comprehend matters of fact and law. For these reasons, Relators suggest that it would be appropriate to deny Respondents' motion to strike numbered paragraph 6 of this affidavit.

Mr. Roll's Affidavit that was filed with the Court on October 12, 2007. Respondents seek to strike numbered paragraph 2 of this affidavit, claiming that it states a legal conclusion that Respondents are obligated to pay back wages to more than the 19 Respondents paid. That claim is erroneous. Review of paragraph 2 of that affidavit discloses that it makes no such claim. Respondents make no objection to numbered paragraph 4 of this affidavit, which describes Mr. Roll's identification to Respondents of the 72 persons who were employed by Cleveland as construction-equipment operators and master mechanics during the period of May 1, 1994 - February 14, 2005. That undisputed fact evidences the false nature of Respondents' October 18, 2007 Notice of Compliance which states that they have paid 19 persons so employed by Cleveland during this period of time.

Respondents' conclusion states that it wants the Court to strike this entire affidavit. Respondents only support for this claim is to generally allege that the affidavit "contains legal conclusions that are more properly before the Court." Relators disagree with this claim. Although this affidavit was based upon the undersigned's personal knowledge, he prepared it at home when he had a fever from a subsequently diagnosed acute sinus infection. In reviewing that affidavit, he has observed that it does not state that it was made on the undersigned's personal knowledge. That deficiency is being corrected with a newly filed affidavit, making the same substantive statements.

Conclusion. Relators pray that the Court will overrule and deny Respondents' Motion to Strike for the reasons noted above.

Respectfully submitted,



STEWART D. ROLL (Reg. #0038004)
Persky, Shapiro & Arnoff Co., L.P.A.
Signature Square II
25101 Chagrin Boulevard, Suite 350
Cleveland, Ohio 44122-5687
Telephone: (216) 360-3737
Fax: (216) 593-0921
*Representing Individual Relators and
the Municipal Construction Equipment
Operators' Labor Council*

CERTIFICATE OF SERVICE

A copy of the foregoing Opposition to Respondents' Motion to Strike Affidavits was sent to the following via regular U.S. Mail on this 19th day of October, 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*