

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

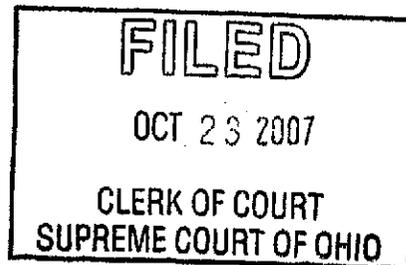
**RELATORS' (1) OPPOSITION TO RESPONDENTS'
OCTOBER 19, 2007 MOTIONS TO STRIKE AFFIDAVITS,
AND FOR SANCTIONS; AND (2) MOTION TO STRIKE
THOSE MOTIONS, AND MOTION FOR SANCTIONS**

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Relators oppose and pray that the Court will issue an order that alternatively either strikes or denies Respondents' Motions to Strike the October 9, and October 15, 2007 Affidavits of Frank Madonia and Stewart D. Roll, and for sanctions. Relators also move the Court pursuant to SCt Rule VI, Section 8 and Rule XIV, Section 5(A) for an Order imposing sanctions on Respondents and their attorneys. This relief should be granted because Respondents have misrepresented to the Court the nature of the affidavits filed by those persons in support of Relators' pending motions to show cause and for sanctions, which were filed to address Respondents' failure and refusal to make the payments mandated by this Court's August 15, 2007 Judgment Entry to at least 53 additional persons that are beneficiaries of that Judgment Entry. Contrary to Respondents' claims, those affidavits are made upon their affiant's personal knowledge. This relief should also be granted because Respondents' motions violate this Court's rule that prohibits parties from making a supplemental filing in support of their merit brief.

The care taken by Respondents' attorneys in their recent filings with this Court is evidenced by the authority that they cite in support of their October 19, 2007 Motions. Respondents claim that their current Motion is based upon SCt R VIII, Section 8. Review of this Court's rules of practice discloses that this rule has no section 8.

Respondents' claim is similarly erroneous because Relators have no need to supplement their merit brief. On August 15, 2007, this Court issued its Judgment Entry and Writs of Mandamus requiring Respondents "to pay the city's construction-equipment operators and master mechanics the difference between the prevailing wage rate and the lower rates that they were paid for the period from May 1, 1994 - February 14, 2005...." Respondents have failed and refused to make those

payments to those persons who were not “named relators.” The sole purpose of the affidavits that Respondents have asked this Court to strike was to provide the Court with evidence of Respondents’ contempt by their failure to comply with the Court’s Judgment Entry, Writs and opinion.

Respondents’ current motion’s explanation for their contempt is a “lack of standing argument” that first appears in a “Supplemental Authority” brief that they served on Relators on or about October 17, 2007, but which was rejected by the Clerk for filing. The arguments contained in that rejected filing are repeated in these current motions.

Those arguments violate Rule XIV, Section 4(B) of the Rules of Practice for this Court, because contrary to that Rule’s directive for a single opposition to be filed within 10 days from the date of the motion, in this instance Relators’ pending Motions to Show Cause and for Sanctions: (1) Respondents’ current Motions make a new argument for, and provide no supplemental authority supportive of Respondents’ original opposition to Relators’ motions to show cause, and for sanctions; (2) Respondents’ argument that “Relators lack standing” was raised by but not argued in their answer or brief in response to the mandamus complaint, and has been subsumed by this Court’s judgment entry in this case; (3) Respondents could have but failed to file a motion for reconsideration raising these arguments pursuant to Rule XI, Section 2 of this Court’s Rules of Practice and Respondents’ arguments seek to avoid its application; (4) this Court previously held that the union representative for this group of employees may seek prevailing wages for its members; and (5) this Court’s August 15, 2007 Judgment Entry and Writs of Mandamus obligate Respondents to pay *all* of those persons employed by Cleveland during the period of May 1, 1994 - February 14, 2005 the difference between the prevailing wage rate and the lower wages that they were paid for

that period, *not* just the individually named Relators.

(1) Respondents' filing violates Rule XIV, Section 4(B) of this Court's Rules of Practice. This rule obligates a party opposing a motion to file a memorandum within 10 days after that motion is filed, absent circumstances not applicable here. Respondents' Motions to Strike violate this rule because it makes new argument not previously made by Respondents in their opposition to Relators' pending motions to show cause and for sanctions for failing to comply with this Court's August 15, 2007 Judgment Entry and Writs of Mandamus.

(2) Issuance of an Order Striking Respondents' Motions to Strike is appropriate because their "Relators lack standing" argument was raised by their answer to the mandamus complaint, but no support for that argument is contained in their merit brief, and that argument has been subsumed by the judgment issued in this case. Respondents' special defenses portion of their answer to the mandamus complaint raised a "lack of standing" defense, without any explanation. That defense was never mentioned in Respondents' merit brief. This Court has previously held that its judgments subsume all matters that were or could have been raised by the parties. *State ex rel. Rose v. Ohio Dept. of Rehab. & Corr.*(2001), 91 Ohio St.3d 453, 455. In that case the Court stated:

"Res judicata provides that a final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue for parties and their privies in the same or any other judicial tribunal. *In re Guardianship of Lombardo* (1999), 86 Ohio St.3d 600, 604, 716 N.E.2d 189, 193. Res judicata applies in civil service cases. *State ex rel. Stough v. Norton City School Dist. Bd. of Edn.* (1977), 50 Ohio St.2d 47, 50, 4 O.O.3d 116, 118, 362 N.E.2d 266, 269, overruled on other grounds, *Ohio Assn. of Pub. School Emp., Chapter No. 471 v. Twinsburg* (1988), 36 Ohio St.3d 180, 522 N.E.2d 532; *State ex rel. Bingham v. Riley* (1966), 6 Ohio St.2d 263, 35 O.O.2d 424, 217 N.E.2d 874." Emphasis added.

(3) Respondents' filing violates Rule XI, Section 2 of this Court's Rules of Practice.

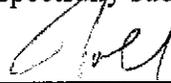
Rule XI, Section 2 of this Court's Rules of Practice requires parties who wish to have the Court reconsider its judgment to file a motion for reconsideration within 10 days after the judgment entry is filed with the Clerk. Respondents never filed a motion for reconsideration. Respondents' Motions to Strike seek to have the Court reconsider its August 15, 2007 Judgment Entry issued in this case by asking the Court to limit its effect to individually named Relators. Relators suggest that Respondents' current Motions are nothing more than an attempt to have the Court reconsider its judgment. That judgment clearly requires Respondents to pay "the city's construction-equipment operators and master mechanics" that it employed during the period of May 1, 1994 - February 14, 2005, not just the individually named relators.

(4) Respondents' Motions to Strike are contrary to this Court's precedent applicable to these employees. In *State, ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St.3d 537, 540, this Court confirmed the right of this group of employees' union to seek payment of the prevailing wages for its members. In that case, this Court held, "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*. We have allowed resort to local law under R.C. 4117.10(A) where collective bargaining agreements did not specifically cover certain matters. [Citations omitted]. The same reasoning applies here when there is no collective bargaining agreement." Emphasis added.

(5) Respondents' Motions to Strike seek to escape their clear obligation to comply with this Court's August 15, 2007 Judgment Entry and Writs of Mandamus, is therefore frivolous

and confirms their contempt of this Court. This Judgment Entry and these Writs are clear. Respondents' Motions to Strike are nothing more than an attempt to escape from the duties imposed by this Court's August 15, 2007 Judgment Entry, Writs of Mandamus and Opinion. For these reasons, and the others contained herein, it would be appropriate for this Court to strike or deny Respondents' Motions, and to sanction Respondents and their attorneys.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Opposition to Respondents' October 19, 2007 Motions to Strike Affidavits, and for Sanctions, and Motion to Strike Those Motions, and Motion for Sanctions was sent to the following via regular U.S. Mail on this 22nd day of October, 2007.

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