

IN THE SUPREME COURT OF OHIO

State Employment Relations Board, :  
: :  
and : : On Appeal from the Hamilton  
: : County Court of Appeals,  
: : First Appellate District  
City of Cincinnati, :  
: :  
Appellees : : Court of Appeals  
: : Case No. C-060782  
v. : :  
: : 07-2269  
Queen City Lodge No. 69, :  
Fraternal Order of Police, :  
: :  
Appellant. : :

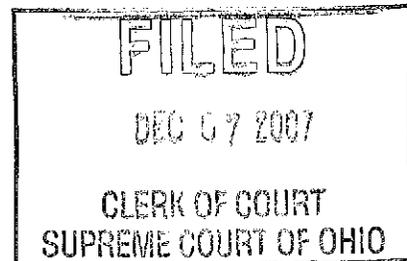
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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF PUBLIC OR GREAT GENERAL INTEREST .....	1
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW .....	7
Proposition of Law No. I: .....	7
Proposition of Law No. II: .....	10
CONCLUSION .....	13
PROOF OF SERVICE .....	14
APPENDIX	<u>Appx. Page</u>
Opinion and Judgment Entry of the Hamilton County Court of Appeals (October 26, 2007) .....	1
Opinion of the Hamilton County Court of Common Pleas (June 23, 2004) .....	19
SERB Opinion 2005-006 .....	34
(September 21, 2005)	

**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

This case presents a critical issue for the viability of collective bargaining between public employees and their employers. This Court, in *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.*, described Public Employees Collective Bargaining Act as a positive step forward stating:

[t]he Act assures that both public employers and employees will be accorded many of the same rights and be governed by many of the same responsibilities as employees and employers in the non-public sector. In now being treated relatively equally with employees in the private-sector, public employees have been removed from second-class citizenship.

The Act provides public employees with a more level playing field in negotiating with their employers. The Court of Appeals split decision in the present case effectively removes that level playing field.

In this case, a collective bargaining agreement between the City of Cincinnati ("City) and its police union, Queen City Lodge No. 69, Fraternal Order of Police ("FOP"), has existed for decades. Cincinnati City Council has the ultimate authority to approve collective bargaining agreements for the City. In August 2001, a few months after approving the latest FOP agreement, City Council voted to place an "Emergency Ordinance" on the November ballot that conflicted with the FOP agreement by eliminating many rights of members of the bargaining unit, including just cause protections.

City Council attempted to alter the collective bargaining agreement at the polls rather than during negotiations with the FOP. Allowing City Council to bind the City to a two year collective bargaining agreement with the FOP and then during the contract period place a proposed amendment to the charter on the ballot is clearly an abusive power and inconsistent with the core purpose of the Public Employees Collective Bargaining Act.

Unlike City Council, the FOP does not have the ability to put a Charter Amendment on the ballot. Specifically, the Ohio Constitution requires only a two-thirds vote of the legislative authority to place a matter on the ballot. However, a voter initiated petition requires signatures of “ten per centum of the electors.”<sup>1</sup> Because City Council is the “legislative authority,” it only needs six members to vote for a charter amendment to be placed on the ballot. The FOP would need to obtain thousands of signatures of the electors to place an amendment on the ballot. City Council clearly used its legislative power to gain an advantage over the FOP.

Additionally, the Court of Appeals improperly determined that the voters of Cincinnati are a “higher level legislative authority” and as such, the Charter Amendment can be implemented without bargaining with the FOP. The dissenting opinion concisely states:

Further, I agree with the trial court that the term “higher-level legislative body” contemplates a situation where a superior legislative or executive authority acts beyond the control of the public entity that is the party to the labor agreement in such a way that it frustrates the purpose of the labor agreement. It does not apply in a situation, where, as here, the city, the public-entity party to the CBA, places legislation before the voters that unilaterally affects the terms and conditions of employment already agreed upon in the CBA. I find it relevant that but for city council placing the Charter Amendment on the ballot, the voters could not have approved the Charter Amendment....

“Courts should not allow public employers to disregard the terms of their collective bargaining agreements whenever they find it convenient to do so. On the contrary, the courts [should] require employers to honor their contractual obligations to their employees just as the courts require employees to honor their contractual obligations to their employers.”<sup>2</sup>

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<sup>1</sup> Ohio Constitution, Article XVIII – Municipal Corporations, Section 9 – Amendments to charter; submission; approval.

<sup>2</sup> *State Emp. Relations Bd. v. Queen City Lodge No. 69, FOP*, 2007-Ohio-5741, dissenting opinion, quoting, *Mahoning Cty. Bd. of MRDD v. Mahoning Cty. TMR Edn. Assoc.* (1986), 22 Ohio St.3d 80, 84.

This Court should accept review of the erroneous decision of the Court of Appeals to preserve the integrity of the Act.

### **STATEMENT OF THE CASE AND FACTS**

The City is a “public employer” as defined by § 4117.01(B) and the FOP is an “employee organization” as defined by § 4117.01(D) and is the exclusive representative for two bargaining units collectively comprising all sworn members of the City’s police division. The City and the FOP were parties to a collective bargaining agreement (“CBA”) governing the supervisors’ unit effective December 10, 2000 through December 31, 2002. The CBA contains a grievance procedure in Article III that provides for appeals to the Civil Service Commission of suspensions of three days or less and terminations. The CBA also refers to filling vacancies through promotional eligibility lists and the civil service process in Article VII, Section 22, “Terminal Benefits.”

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. On August 1, 2001, Cincinnati City Council passed an emergency ordinance placing on the November 6, 2001 ballot a 2001 Charter Amendment modifying Article V of the City Charter (“Charter Amendment”). Under the terms of the Charter Amendment, a person holding a position in the classified civil service that becomes unclassified under the terms of the Charter Amendment shall be deemed to hold a position in the classified civil service until he or she vacates the position, after which time the position shall be filled as an unclassified position. The position of Assistant Police Chief purportedly became unclassified under the Charter Amendment, and, under its terms, future vacancies would be filled through appointment by the City Manager. Issue 5 also covered over one hundred

other city positions. However, none of those other individuals were members of bargaining units. On November 6, 2001, the Charter Amendment passed with a majority of votes.

On October 17, 2002, the FOP filed an Unfair Labor Practice Charge ("ULP") against the City alleging the Charter Amendment violated the CBA and longstanding past practice. Specifically, the ULP states:

In or about December 2000, the parties entered into a Collective Bargaining Agreement. This Labor Agreement provided for the rights of those promoted to the rank of Assistant Police Chief to appeal disciplinary actions of three (3) days or less to either the Civil Service Commission or Peer Review. The Labor Agreement also provided for the rights of those promoted to the rank of Assistant Police Chief to appeal terminations to either the Civil Service Commission or arbitration. ... On August 1, 2001, City of Cincinnati City Council passed an emergency ordinance to put on the ballot on November 6, 2001 a Charter Amendment that would remove contractually guaranteed Civil Service Commission appeal protection for Assistant Police Chiefs who were promoted into that position during the life of the Labor Agreement.... The proposed Charter Amendment was unilaterally placed on the ballot by a vote of at least 2/3rds of City Council members approving its placement on the ballot at their request. A Promotional Eligible List for the position of Assistant Police Chief is currently in existence ... and the City has publicly stated that it does not intend to utilize this list for the promotion of an Assistant Police Chief, basing that position on the passage of the ballot initiative. The ballot initiative was written so as to knowingly affect the promotional examination process and the establishment and/or utilization of promotional eligible lists, including an eligibility list for the rank of Assistant Police Chief. Council's placement of the issue on the ballot was done with the intent to deny contractual rights of sworn members of Cincinnati Police Department. This matter only recently became relevant with the vacancy created by an Assistant Police Chief on September 10, 2002 ... The City failed to negotiate over these items prior to their placement on the ballot.

The State Employment Relations Board ("SERB") found probable cause to believe that the City violated Ohio Rev. Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs in the Cincinnati Police Department. On April 10, 2003, SERB issued a Complaint against the

City and directed the matter to a hearing before an Administrative Law Judge (“ALJ”). After a hearing and submission of post-hearing briefs, the ALJ issued a Proposed Order finding that the City had violated §§4117.11(A)(1) and (A)(5). The Proposed Order recommended that the City be required to fill Assistant Police Chief vacancies from the Promotional Eligible list and to cease and desist from implementing the Charter Amendment. At the time of the Proposed Order, a Promotional Eligible list for the position of Assistant Police Chief existed. The City requested a hearing by the full SERB board. On March 19, 2004, SERB conducted a hearing on the matter.

On September 20, 2005, SERB issued an opinion dismissing the ULP. SERB’s opinion failed to even address the obvious conflict between the Collective Bargaining Agreement and Charter Amendment as it relates to the grievance process. Instead, without explanation, SERB only addressed the promotions portion of the ULP. On October 4, 2005, the FOP filed a Notice of Appeal to the Hamilton County Court of Common Pleas.

The trial court set aside SERB’s order. Specifically, the trial court found that the Charter Amendment conflicted with terms of the pre-existing CBA. The trial court also found that the electorate of the City is not a “higher level legislative authority.” The Court of Appeals, in a 2-1 decision, reversed the trial court finding that Charter Amendment takes precedent over the CBA because the voters of Cincinnati are a “higher level legislative authority.”

Despite the fact that the City had entered into a CBA with the FOP in December, 2000, which contained a disciplinary process and the promotion language, City Council placed a contradictory Charter Amendment before the voters in November 2001. The origin of this Charter Amendment can be traced back to members of City Council who

were displeased with the grievance procedure in the recently negotiated CBA. Implementation of the Charter Amendment would change the terms and conditions of employment for Assistant Police Chiefs.

The FOP made it abundantly clear to the City that the City would need to negotiate the terms of the Charter Amendment prior to implementation with regard to the Assistant Police Chiefs. Any changes to the terms and conditions of employment must be negotiated with the FOP prior to implementation.<sup>3</sup> The requirement of such negotiations was very clear to the Mayor who publicly indicated that any change to the terms and conditions of employment for Assistant Police Chiefs would have to be negotiated. This understanding was very clear to all people involved with the Charter Amendment and was a part of their public campaign. However, the City never made a request for negotiations with the FOP. Instead, City Council placed the Charter Amendment on the ballot for the voters to approve.

Additional evidence of the City's knowledge that the Charter Amendment directly contradicted the Labor Agreement is the City's attempts in subsequent negotiations to remove all reference to the Assistant Police Chiefs and promotional language from the Agreement. In the City's Pre-Hearing statement submitted at the Fact-Finding hearing on January 3, 2003, the City recognized the conflict stating,

...the CBA states that when an officer opts to voluntarily cease his duties after staying on the payroll until having used all of his accumulated leave time, "such position shall immediately become vacant and shall *immediately be filled from the existing promotional eligibility list for that officer's rank, or shall be filled through the competitive promotional examination process mandated by state civil service law.*" CBA, Art. VII, S 22. On its face, this provision is in conflict with the Charter language that Assistant police chiefs shall be appointed by the City Manager, and "solely on the basis of their

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<sup>3</sup> Ohio Rev. Code §4117.08(A); 4117.03(A)(4); 4117.11(A)(5)

executive and administrative qualifications in the field of law enforcement. Yet this contradictory provision remains in the new contract.

The SERB appointed fact-finders and conciliators all rejected the City's attempts as ill-advised. Specifically, Fact-Finder David Stanton stated:

During the course of the Fact Finding proceeding, it became abundantly clear, based on the evidentiary record provided, that certain questions regarding the legality of the Charter V Amendment and the impact on the current Collective Bargaining Agreement would be subject to judicial scrutiny not only in the court system, but through the administrative agency that oversees and polices the Collective Bargaining Law in the State of Ohio. The City takes the position that the "will of the voters" must override the current status of Ohio Collective Bargaining Law. To recommend the City's position would require that the Fact Finder ignore prevailing law which if recommended based thereon, would render voidable, as a matter of law, those provisions contained in the contractual document. Contracting Parties have never been required to enter a binding agreement that compels illegal activity or sanctions illegal status. Until the law changes, a negotiated Collective Bargaining Agreement must pre-empt and supercede a City Charter, and any Amendment thereto, as set forth in prevailing Ohio law. This fact simply cannot and will not be ignored.

The current CBA covers Assistant Police Chiefs and includes the same promotional language and civil service protection for disciplinary actions.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

##### **Proposition of Law No. I: The Charter Amendment conflicts with the Collective Bargaining Agreement**

In *City of Cincinnati v. Ohio Council 8, AFSCME*, this Court stated:

[t]he provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for those laws specifically exempted by R.C. 4117.10(A).<sup>4</sup>

As a result, the Collective Bargaining Agreement by and between the FOP and the City prevails over conflicting laws.

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<sup>4</sup> *City of Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658, 576 N.E.2d 745. syllabus, para.

The trial court properly determined that SERB's Order was not supported by substantial evidence and that the Order was unreasonable. Generally, a SERB order is entitled to deference when the findings are supported by substantial evidence.<sup>5</sup> However, a SERB Order is not entitled to deference when it conflicts with the statutory purpose of Chapter 4117 and is otherwise arbitrary and unreasonable.<sup>6</sup>

The split Court of Appeals improperly determined that "the ULP charge before SERB in this case was based solely on the city's application of the Charter Amendment to the promotional process." The ULP set forth several areas where the Charter Amendment conflicts with the CBA. For instance, Article III, §1 of the Collective Bargaining Agreement ("CBA"), the grievance procedure, provides for just cause review of discipline, including termination, through arbitration and appeals to the Civil Service Commission. The Charter Amendment makes Assistant Chiefs unclassified and eliminates just cause review and civil service appeals for the Assistant Police Chiefs making the positions at-will employment. How can an unclassified employee pursue an appeal to the Civil Service Commission? Even more basically, the Assistant Chiefs have no right to pursue arbitration of discipline matters if they are employed at will. Reasonable minds could come to but one conclusion; there is a clear and express conflict between the CBA and the Charter Amendment on this issue.

The Court of Appeals improperly determined that there was no conflict on promotions. Article VII, § 22 of the CBA states, in relevant part:

Upon the effective date of the officer's actual voluntary cessation of the duties of said position, such position shall immediately become vacant and shall be immediately filled from the existing promotional eligibility list for

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<sup>5</sup> *Lorain City School Dist. Bd. Of Ed. v. SERB* (1988), 40 Ohio St.3d 257, 267, 533 N.E.2d 264,266.

<sup>6</sup> *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538.

that officer's rank or shall be filled through the competitive promotional examination process mandated by state civil service law.

The Charter Amendment removes Assistant Police Chiefs from the civil service promotional process and vests the authority to "appoint" Assistant Police Chiefs with the City Managers. The Court of Appeals attempts to lessen the apparent conflict between the Charter Amendment and the CBA by stating:

Simply because there could have been a potential conflict between the Charter Amendment and the CBA had no bearing on the issue that was before SERB, which was whether the city had committed a ULP by applying the Charter Amendment and refusing to fill a vacant assistant-police-chief position by the Rule of 1.

The parties have clearly bargained over promotions in the supervisory bargaining unit. The Charter Amendment removed the Assistant Chiefs from classified civil service and vested the power to hire and fire with the City Manager. The CBA must prevail over the Charter Amendment.

The trial court adopted the Magistrate's decision stating: "The court concludes the provisions of the Charter Amendment removing the Assistant Police Chief position from the classified civil service and allowing the City Manager to fill vacancies in those positions conflicted with Art. III, § 1 and Art. VII, § 22 of the CBA." SERB blatantly ignored substantial evidence in the record demonstrating that the Charter Amendment conflicts with the CBA. Ignoring explicit language in the CBA does not make that language non-existent. Ignoring the language does not eliminate the conflict.

The trial applied the appropriate standard of review and properly concluded that SERB's factual conclusions were not supported by the record. In fact, there is substantial evidence in the record urging reversal of SERB's Order. Dissenting Judge Hildebrandt succinctly stated:

Although the majority recognizes that one of the essential purposes of R.C. Chapter 4117 is to promote good-faith bargaining, it had failed to uphold that purpose. There was substantial evidence in the record that the city had acted in bad faith. The mayor of the city and other city official publicly acknowledged that the CBA would have to be renegotiated if the Charter Amendment passed. But instead of requesting that the union enter into mid-term bargaining, the city chose to unilaterally implement the Charter Amendment, which changed the terms and conditions of employment for assistant police chiefs that the city had originally agreed upon. This did not demonstrate or support a finding of “good faith.”

The Court of Appeals erred by ignoring the clear conflicts.

**Proposition of Law No. II: The City’s electorate is not a “higher-level legislative authority.”**

The trial court properly determined that the electorate is not a “higher-level legislative authority” such that the City is permitted to implement the Charter Amendment without negotiating with the FOP. SERB avoided the precedent set by this Court in *Ohio Council 8*, by finding no conflict. SERB then applied its decision in *In re Toledo City School District Bd. of Ed.*, where SERB articulated two exceptions, exigent circumstances and legislative action taken by a “higher-level legislative authority,” that allow a public employer to impose changes without bargaining with the union.<sup>7</sup>

At issue in *Toledo* was statutory legislation enacted by the Ohio General Assembly. The Ohio General Assembly is undoubtedly a “higher-level legislative body” in relation to a school district and a City Council. SERB held that “[l]egislation enacted before a union contract was signed is known to the parties, and cannot justify unilateral changes to the contract based on legislative mandate.”<sup>8</sup> In the present case, the legislation was created by one of the parties.

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<sup>7</sup> *In re Toledo City School District Bd. of Ed.*, SERB 2001-005.

<sup>8</sup> *Id.* at syllabus para. 3.

The trial court reviewed various definitions of legislative body and came to the logical conclusion that the electorate is not a “higher-level legislative body.” The court stated:

More importantly, the term “higher-level legislative body” connotes a situation wherein a superior legislative or executive authority acts beyond the control of the public entity CBA party in such a manner as to modify or otherwise frustrate the purpose of the CBA... but for the City’s enactment of the ordinance placing the Charter Amendment on the ballot, the electorate could not have approved said provision... The court cannot condone a procedure allowing any “legislative body” to place a measure on the ballot that would unilaterally modify a CBA term to which it is a party, and then absolve itself of culpability through a plebiscite’s veneer of legitimacy.<sup>9</sup>

Significantly, Chapter 4117 states “‘legislative body’ includes the governing board of a municipal corporation...that has authority to approve the budget of their public jurisdiction...”<sup>10</sup>

In this case, it is undisputed that City Council has ultimate authority to approve collective bargaining agreements between the City and the various unions representing City employees. City Council exercised its legislative power to gain an advantage over the FOP. Following SERB’s logic, anytime City Council wants to change a term in a collective bargaining agreement without negotiating with the union, all Council has to do is place a Charter Amendment before the voters for approval. Unlike City Council, the FOP does not have the ability to put a Charter Amendment on the ballot. Specifically, the Ohio Constitution states, in relevant part:

Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority.<sup>11</sup>

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<sup>9</sup> T.d. 21, p. 9.

<sup>10</sup> Ohio Rev. Code 4117.10(B)

<sup>11</sup> Ohio Constitution, Article XVIII – Municipal Corporations, Section 9 – Amendments to charter;

Because City Council is the “legislative authority,” it only needs six members to vote for an amendment. The FOP would need to obtain thousands of signatures of the electors to place an amendment on the ballot. Why does the Ohio Constitution set forth different standards for placing an amendment on the ballot if the electorate is a “higher level legislative authority?” City Council clearly used its legislative power to gain an advantage over the FOP.

Chapter 4117 is to be construed liberally “for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees.”<sup>12</sup> The Charter Amendment was not the “will of the People.” The Charter Amendment was not a voter referendum. It was the will of City Council. Had City Council not placed the Charter Amendment on the ballot, it would not exist. Permitting the City to do an end run around collective bargaining by placing this or any other matter to a vote totally circumvents the rights of the FOP and uproots the purpose of the State Employment Relations Board and Chapter 4117 of the Ohio Revised Code. As stated by dissenting Judge Hildebrandt, “[u]nfortunately, SERB has set a dangerous precedent by allowing the city to circumvent the rights of the union and to frustrate the purpose of Ohio’s collective-bargaining law by allowing a public employer to agree to certain terms and conditions of employment with a union and then shortly thereafter pass legislation that conflict with those terms.”

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submission; approval.

<sup>12</sup> Ohio Rev. Code § 4117.22

## II. CONCLUSION

The type of legislative activism demonstrated in this case shakes the very foundation of collective bargaining. Allowing City Council to bind the City to a two-year CBA with the FOP and then only months into the term of that contract propose a charter amendment that conflicts with the CBA to be placed on the ballot is inconsistent with the purpose of Chapter 4117. If this type of conduct is condoned, municipalities can effectively ignore collective bargaining laws and absolve all responsibility by hiding behind the voters.

Appellant respectfully requests this Court grant jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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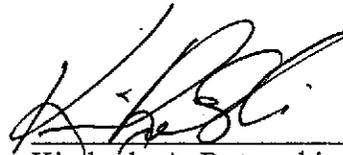
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**CERTIFICATE OF SERVICE**

I hereby that a copy of the foregoing was served via Regular U.S. Mail on December 6, 2007 upon the following:

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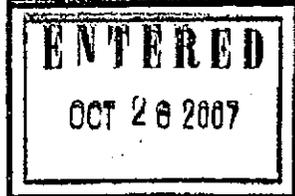
\_\_\_\_\_  
Kimberly A. Rutowski (0076653)

# **APPENDIX**



D75660209

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO



STATE EMPLOYMENT RELATIONS BOARD,	:	APPEAL NO. C-060782
	:	TRIAL NOS. A-0508286 ✓
	:	A-0509296 ✓
Plaintiff-Appellant,	:	
and	:	JUDGMENT ENTRY.
	:	
CITY OF CINCINNATI,	:	
	:	
Intervenor-Appellant,	:	
	:	
vs.	:	
	:	
QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE,	:	
	:	
Defendant-Appellee.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed with final entry of judgment for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on October 26, 2007 per Order of the Court.

By: *[Signature]*  
Presiding Judge



MARK P. PAINTER, Presiding Judge.

{¶1} Can a labor agreement continue to override a vote of the people amending the Cincinnati City Charter? The trial court said that it could—forever. But we hold that the charter must prevail.

{¶2} Plaintiff-appellant, the State Employment Relations Board (“SERB”), and intervenor-appellant, the city of Cincinnati (“the city”), appeal the trial court’s determination that the city had committed an unfair labor practice by failing to bargain in good faith with defendant-appellee, Queen City Lodge No. 69, Fraternal Order of Police (“the union”), over terms and conditions of employment affecting assistant police chiefs. SERB had previously ruled that the city had not committed an unfair labor practice, and because that determination was supported by substantial evidence in the record, the trial court should not have substituted its judgment for SERB’s.

{¶3} Because the trial court applied the wrong standard of review, and was clearly in error, we reverse.

*1. The Charter Amendment*

{¶4} The city is a charter municipality with home-rule authority as provided by the Ohio Constitution. The union is the exclusive representative for the bargaining units comprised of members of the city’s police department. The city and the union were parties to a collective-bargaining agreement (“CBA”) governing the police supervisors’ unit from December 10, 2000, through December 21, 2002.

{¶5} Almost one year after the CBA went into effect, Cincinnati’s city council passed an emergency ordinance placing on the upcoming ballot an

amendment to the city's charter ("the Charter Amendment") that proposed to reclassify certain high-level city employees, including assistant police chiefs, from the classified service to the unclassified service. But current assistant police chiefs would remain classified employees until they vacated their position. On November 6, 2001, a majority of the Cincinnati electorate voted in favor of the Charter Amendment. Thus, the city charter was amended to read, in relevant part, as follows:

{¶6} "The positions of police chief and assistant police chief shall be in the unclassified civil service of the city and exempt from all competitive examination requirements. The city manager shall appoint the police chief and assistant police chiefs to serve in said unclassified positions. The police chief and assistant police chiefs shall be appointed solely on the basis of their executive and administrative qualifications in the field of law enforcement and need not, at the time of appointment, be residents of the city or state[.] \* \* \* The incumbent officers in the police chief and assistant police chief positions at the effective date of this Charter provision, shall remain in the classified civil service until their position becomes vacant after which time their positions shall be filled according to the terms of this section."

{¶7} The Charter Amendment did not apply to the police department alone—it also covered dozens of other city positions, removing many from classified civil service.

{¶8} Before the Charter Amendment passed, any promotion to a vacancy in the assistant-police-chief position was made from the civil-service promotional eligibility list under the "Rule of 1," which required that the highest-ranked employee automatically be promoted to any vacancy.

{¶9} In September 2002, one of the city's assistant police chiefs submitted notice of his intent to retire pending a criminal investigation of his alleged

misconduct. In anticipation of this retirement, one of the city's police captains, Stephen Gregoire, asserted a right to be promoted to the assistant police chief's position in accordance with the Rule of 1. Because the Charter Amendment was now in effect, the city did not follow the Rule of 1 and refused to appoint Captain Gregoire to the vacancy. Captain Gregoire filed a contractual grievance, which was ultimately denied through arbitration, once it was determined that no vacancy existed when Gregoire asserted his right to be promoted.

{¶10} In October 2002, the union filed an unfair-labor-practice ("ULP") charge against the city with SERB. The ULP charge alleged that the city had failed to bargain in good faith with the union when it unilaterally modified the established promotional process for assistant police chiefs by applying the Charter Amendment and refusing to fill a vacant assistant-police-chief position under the Rule of 1. SERB ordered the parties to mediation, which was unsuccessful. There was a hearing before a SERB Administrative Law Judge ("ALJ"), who recommended that SERB determine that the city had committed a ULP, that it fill vacancies from the promotional eligibility list, and that the city cease and desist from implementing the Charter Amendment. The city filed exceptions, and SERB heard those exceptions in March 2004. But while SERB's decision was pending, the union filed a second ULP charge against the city when the city refused to fill another vacant assistant-police-chief position. With respect to that charge, SERB issued a probable-cause finding and directed that the dispute proceed to a hearing.

## *II. The ULP Charge and SERB's Decision*

{¶11} In September 2005, SERB dismissed the first ULP charge, ruling that the Charter Amendment did not conflict with the CBA regarding the promotional

process, and thus that the CBA did not govern the dispute between the parties. But SERB did determine that because it was a past practice to promote based on the Rule of 1, the city had a duty to bargain with the union over a modification to the promotional process for assistant police chiefs. SERB then concluded that this duty to bargain was excused because the Charter Amendment was enacted by a “higher-level legislative authority,” the voting public of Cincinnati. Finally, SERB determined that the city had “not engaged in trickery or gamesmanship with the union,” and thus that the city had not violated R.C. 4117.11(A)(1) and (A)(5) by failing to bargain in good faith with the union. SERB also dismissed the second probable-cause finding based on the dismissal of the first ULP charge.

{¶12} The union appealed both of these decisions to the Hamilton County Court of Common Pleas.<sup>1</sup> SERB moved to dismiss the appeal of the second ULP charge for lack of jurisdiction. The trial court denied the motion, consolidated both administrative appeals, and referred the case to a magistrate. The union did not name the city as a party to the appeals to the Common Pleas Court. This was a bit odd. Before briefs were due in the appeals, the city filed a motion to intervene, which was denied.

{¶13} The city’s not being a party to the case resulted in a procedural nightmare that took some doing to straighten out. We made the city a party to this appeal.

### *III. The Trial Court’s Turn*

{¶14} The Common Pleas magistrate recommended reversing SERB’s decision. The magistrate determined that the Charter Amendment conflicted with the CBA in two respects: it interfered with Article III, Section 1 of the CBA dealing

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<sup>1</sup> See R.C. 4117.13.

with grievance procedures, and it interfered with Article VII, Section 22, which the magistrate construed as dealing with promotions.

{¶15} The magistrate then determined that because of this conflict, the city had a duty to bargain with the union. The magistrate held that the city had not bargained with the union and that the city had committed a ULP by passing the August 2001 ordinance that placed the Charter Amendment on the ballot. Because the magistrate construed the ULP as passing the ordinance to place the Charter Amendment on the ballot, and not the act of applying the Charter Amendment, the magistrate concluded that the Charter Amendment was not enacted by a “higher-level legislative body,” and that SERB’s determination to the contrary was unreasonable. Ultimately, the magistrate recommended reversing SERB’s decision, finding that it was not supported by substantial evidence, and opined that the city had violated R.C. 4117.11(A)(5). The magistrate also held that the city had improperly denied Captain Gregoire a promotion to assistant police chief. SERB filed objections to the magistrate’s decision, which the trial court overruled without comment. All of this was erroneous.

{¶16} Because the trial court simply adopted the magistrate’s decision without further elaboration, we refer to the decision prepared by the magistrate as the “trial court’s decision.”

{¶17} On appeal, SERB brings forth two assignments of error. Because we have granted the city’s motion to intervene in this appeal under Civ.R.24(A), we consider the city’s three assignments of error as well.

{¶18} In SERB’s first assignment of error and the city’s first and second assignments of error both maintain that the trial court erred when it reversed SERB’s order that the city had not committed a ULP. Because we conclude that the trial

court improperly reviewed SERB's decision de novo and did not properly defer to SERB's findings that were supported by substantial evidence in the record, we sustain these assignments of error.

*IV. Standard of Review—Deference is Required*

{¶19} In administrative appeals, the appellate court generally reviews the trial court's judgment for an abuse of discretion. But the Ohio Supreme Court has consistently recognized that "SERB's findings are entitled to a presumption of correctness."<sup>2</sup> The court has also explained that "courts must accord due deference to SERB's interpretation of R.C. Chapter 4117. Otherwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations. \* \* \* It was clearly the intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117 [and] this authority must necessarily include the power to interpret the Act to achieve its purposes."<sup>3</sup>

{¶20} Thus we, and the trial court, must defer to SERB when SERB's decision is supported by "substantial evidence" and is not a misapplication of law.

{¶21} The Ohio Supreme Court has articulated the standard as follows: "Ohio law is clear: if an order from SERB is supported by substantial evidence on the record, the common pleas court **must** uphold SERB's decision. 'Substantial evidence' is such relevant evidence that a reasonable mind might accept as adequate

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<sup>2</sup> *Hamilton v. State Employment Relations Bd.* (1994), 70 Ohio St.3d 210, 214, 638 N.E.2d 522.

<sup>3</sup> *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 267, 533 N.E.2d 264.

to support a conclusion, but less than the weight of the evidence. 'Substantial evidence' is a low burden."<sup>4</sup> (Emphasis added.)

{¶22} A trial court's conclusion that a SERB order is not supported by substantial evidence is a legal determination, and it is fully reviewable by an appellate court.<sup>5</sup>

### *V. Conflicting Provisions?*

{¶23} The city and SERB both contend that the trial court erred in rejecting SERB's determination that there was no conflict between the Charter Amendment and the CBA.

{¶24} A collective-bargaining agreement under R.C. Chapter 4117 governs the terms and conditions of public employment covered by the agreement. In considering R.C. 4117.10(A), the Ohio Supreme Court has held that if a local law conflicts with a term-and-condition-of-employment provision found in a collective-bargaining agreement, the collective-bargaining agreement prevails over the local law.<sup>6</sup> Thus, it was necessary for SERB to determine first whether the Charter Amendment, which allowed for the city manager to appoint future assistant police chiefs, conflicted with any provision in the CBA governing promotions of assistant police chiefs. If there were conflicting provisions, then the CBA would prevail over the Charter Amendment, and bargaining would be required.

{¶25} The record demonstrates that SERB reviewed the CBA and concluded that "[it] did not specify the promotional process for assistant police chiefs." SERB

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<sup>4</sup> *Oak Hills Education Assn. v. Oak Hills Local School Dist. Bd. of Edn.*, 158 Ohio App.3d 662, 2004-Ohio-6843, 821 N.E.2d 616, at ¶12 (citations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> R.C. 4117.10(A); *Jurcisin v. Cuyahoga County Bd. of Elections* (1988), 35 Ohio St.3d 137, 519 N.E.2d 347.

would not be applied to any current assistant police chief. Second, the ULP charge before SERB in this case was based solely on the city's application of the Charter Amendment to the promotional process. This is demonstrated by the fact that the union did not file its ULP charge until October 2002, one year after the Charter Amendment had been enacted. And that is because the union had to wait until the city had actually sought to apply the Charter Amendment to a bargaining-unit member before alleging that a ULP had occurred. (Although we note that, in actuality, the city did not apply the Charter Amendment to the CBA that was in effect when the Charter Amendment was enacted—it was determined in a separate proceeding that there was no vacant assistant-police-chief position available until after the CBA at issue had expired.) Simply because there could have been a potential conflict between the Charter Amendment and the CBA had no bearing on the issue that was before SERB, which was whether the city had committed a ULP by applying the Charter Amendment and refusing to fill a vacant assistant-police-chief position by the Rule of 1.

***VI. Duty to Bargain, Good Faith, and a Higher-Level Legislative Authority***

{¶29} A public employer that intends to implement a decision that “affects wages, hours, terms and conditions of employment” must bargain on that issue, “even if the question is reserved for managerial discretion.”<sup>7</sup> Thus, although the CBA contained a Management-Rights provision that reserved for the city the right to “promote” employees except to the extent expressly limited by the CBA, SERB

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<sup>7</sup> *Lorain*, supra, at 533.

properly concluded that the city would ordinarily be required to bargain over the promotion process for assistant police chiefs.<sup>8</sup>

{¶30} The trial court agreed that the city had a duty to bargain with the union over the Charter Amendment's change to the promotion process, and it also agreed with SERB that *In re Toledo City School Board of Education*<sup>9</sup> was the controlling administrative precedent governing mid-term bargaining. In *Toledo*, SERB held that "[a] party cannot modify an existing [CBA] without the negotiation and by agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that required a change to conform \* \* \*."<sup>10</sup> SERB also held that "in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test."<sup>11</sup>

{¶31} Because the Charter Amendment was enacted by a majority of the city's voting public, SERB concluded that when "voters decide an issue at the ballot box, they are acting as a 'higher-level legislative authority' " to the city council under the second exception set forth in *Toledo*.

{¶32} We note that this is the first time that SERB has sought to apply the second exception in *Toledo* to a specific set of facts. And in its application, SERB construed its term "higher-level legislative body" to encompass a "higher-level legislative authority." SERB based this determination on the fact that the term "higher-level legislative body or authority" was not defined in the Ohio Revised Code,

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<sup>8</sup> See *DeVennish v. Columbus* (1990), 57 Ohio St.3d 163, 566 N.E.2d 668 (holding that all matters affecting promotions are appropriate subjects of collective bargaining).

<sup>9</sup> (Oct. 1, 2001), SERB No. 2001-005.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

but instead was an agency-created concept. SERB itself created the term. Thus, as SERB correctly noted, it could define the term as long as the definition was consistent with the objectives of R.C. Chapter 4117.<sup>12</sup> SERB then relied on the fact that the electorate of Cincinnati enacted the Charter Amendment, and not city council, in determining that the circumstances here fit the second exception set forth in *Toledo*. In so doing, SERB recognized that one of the objectives of R.C. Chapter 4117 is to promote good-faith bargaining.

{¶33} Thus, a city council cannot agree to a collective-bargaining agreement, then pass an ordinance abrogating it. But that is not what happened here.

{¶34} SERB recognized that the city, through city council, did not act in bad faith in placing the Charter Amendment on the ballot. SERB specifically found that the circumstances here were not comparable to “one party holding back an issue from bargaining and then springing it on the other party after the [CBA] ha[d] been ratified by both parties,” and that “the record does not support a finding that the city was engaged in trickery or gamesmanship with the union.” And there was substantial evidence to support these findings. The CBA had been effect for almost a year before city council voted to place the Charter Amendment on the ballot, and city council did not attempt to apply the Charter Amendment until the expiration of the CBA at issue here. Further, the Charter Amendment was drafted with input from a committee comprised of citizens from the community that had been formed in response to tension between the community and the police department that had surfaced in April 2001.

{¶35} But the trial court reversed SERB’s determination that the voting public was a “higher-level legislative authority,” because it was inconsistent with the objectives

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<sup>12</sup> See *Springfield Township Bd. of Trustees v. State Employment Relations Bd.* (1990), 70 Ohio App.3d 801, 806, 592 N.E.2d 871.

of R.C. Chapter 4117. The trial court believed that concluding that the voting public was a “higher-level legislative authority” created a disincentive for public employers to bargain in good faith with their union employees. The trial court reached this conclusion by improperly relying on its own determination that the city had acted in bad faith by voting to place the Charter Amendment on the ballot. But the trial court should have deferred to SERB’s resolution of the evidence before it and its finding that the city had not acted in bad faith, as there was substantial evidence to support that determination. (The dissent here makes the same error—it is for SERB to resolve the evidentiary issues before it, not a trial court acting in an appellate capacity—and certainly not an appellate court. We cannot change the facts.)

{¶36} The trial court also noted that the term “higher-level legislative body” should have been linked to the definition of “legislative body” found in R.C. 4117.10(B). But the definition of “legislative body” is specifically limited to that code section and did not apply here. We see nothing wrong with SERB’s interpretation of a “higher-level legislative authority.” Black’s Law Dictionary defines “legislative” as “of or relating to lawmaking or to the power to enact laws,” and it defines “authority” as “the right or permission to act legally on another’s behalf.”<sup>13</sup> Because the electorate of Cincinnati has the power to pass, and thus to enact, laws, and because city council is the representative body or agent, it was reasonable for SERB to conclude that the electorate of Cincinnati constituted a “higher-level legislative authority,” as set forth in *Toledo*. (We note that the voting public could have just as easily voted against the Charter Amendment.)

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<sup>13</sup> Black’s Law Dictionary (8 Ed.2004) 919 and 142.

{¶37} We note that, if the citizens of Cincinnati, in passing a charter amendment, are not a “higher-level legislative authority,” then any charter amendment could never affect future collective bargaining. On its face, that is impossible—both the city and any union could simply ignore the charter, which is the highest authority in city governance. Likewise, we assume, the citizens of Ohio could enact a constitutional amendment, but it could be ignored if it conflicted with a collective-bargaining agreement. To so state the issue shows its absurdity. The law must be obeyed. And we perceive no difference in whether the amendment was put on the ballot by council, or whether an initiative put it on the ballot by gathering signatures—either way, the voters have the last word.

{¶38} For the trial court to reverse SERB’s reasonable legal interpretation of what constituted a “higher-level legislative authority” for purposes of the second exception set forth in *Toledo*, and thus to hold that the city was not excused from its duty to bargain, was erroneous.

{¶39} As we noted earlier, in reviewing a SERB order, a trial court “must accord due deference to SERB’s interpretation of R.C. Chapter 4117. Otherwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations.”<sup>14</sup>

{¶40} The trial court failed to defer and applied the wrong standard of review. Because SERB’s legal interpretations of its own precedent were reasonable and because there was substantial evidence in the record to support SERB’s findings, we hold that the trial court abused its discretion in reversing SERB’s decision that the city had not committed a ULP in violation of R.C. 4711.11(A)(1) and (5). The trial

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<sup>14</sup> *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 267, 533 N.E.2d 264.

court also erred in determining that Captain Gregoire was entitled to be promoted to assistant police chief.

{¶41} Accordingly, we sustain SERB's first assignment of error and the city's first and second assignments of error.

*VIII. Second Probable-Cause Finding*

{¶42} In SERB's second assignment of error, it asserts that the trial court erred in reversing SERB's decision to vacate its probable-cause finding involving the union's second ULP charge. Because the second ULP charge involved the same set of facts and issues, we sustain this assignment based on our reasoning set forth under SERB's first assignment of error.

*VII. Motion to Intervene*

{¶43} We decline to address the city's third assignment of error, which asserts that the trial court erred in denying its motion to intervene in the administrative appeal below, as any remedy we could afford the city is now moot given our decision to reverse the trial court's judgment and to reinstate SERB's order that the city had not committed a ULP.

{¶44} Based on the foregoing, we enter final judgment in favor of SERB and the city and thus reinstate SERB's order.

Judgment accordingly.

SUNDERMANN, J., concurs.  
HILDEBRANDT, J., dissents.

HILDEBRANDT, Judge, dissenting.

{¶45} Because I believe that there was substantial evidence demonstrating that the city had acted in bad faith by placing the Charter Amendment on the ballot

and because the city violated R.C. Chapter 4117 by refusing to bargain over the change to the terms and conditions of employment for assistant police chiefs, I dissent.

{¶46} Although the majority recognizes that one of the essential purposes of R.C. Chapter 4117 is to promote good-faith bargaining, it had failed to uphold that purpose. There was substantial evidence in the record that the city had acted in bad faith. The mayor of the city and other city officials publicly acknowledged that the CBA would have to be renegotiated if the Charter Amendment passed. But instead of requesting that the union enter into mid-term bargaining, the city chose to unilaterally implement the Charter Amendment, which changed the terms and conditions of employment for assistant police chiefs that the city had originally agreed upon. This did not demonstrate or support a finding of “good faith.”

{¶47} Further, I agree with the trial court that the term “higher-level legislative body” contemplates a situation where a superior legislative or executive authority acts beyond the control of the public entity that is the party to the labor agreement in such a way that it frustrates the purpose of the labor agreement. It does not apply in a situation, where, as here, the city, the public-entity party to the CBA, places legislation before the voters that unilaterally affects the terms and conditions of employment already agreed upon in the CBA. I find it relevant that but for city council placing the Charter Amendment on the ballot, the voters could not have approved the Charter Amendment. (The city council was essentially the public-entity party to the CBA here, as city council had the ultimate authority to approve all labor agreements that the city entered into.)

{¶48} Thus, the Charter Amendment was not the “will of the people,” as the city argues, but instead was the will of the city. Unfortunately, SERB has set a

dangerous precedent by allowing the city to circumvent the rights of the union and to frustrate the purpose of Ohio's collective-bargaining law by allowing a public employer to agree to certain terms and conditions of employment with a union and then shortly thereafter pass legislation that conflicts with those terms. "Courts should not allow public employers to disregard the terms of their collective bargaining agreements whenever they find it convenient to do so. On the contrary, the courts [should] require public employers to honor their contractual obligations to their employees just as the courts require employees to honor their contractual obligations to their employers."<sup>15</sup>

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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<sup>15</sup> *Mahoning County Bd. of Mental Retardation & Developmental Disabilities v. Mahoning County TMR Education Assoc.* (1986), 22 Ohio St.3d 80, 84, 488 N.E.2d 872 .

**ENTERED**  
AUG 25 2006



COURT OF COMMON PLEAS  
ENTER  
HON. ETHNA M. COOPER  
THE CLERK SHALL SERVE NOTICE  
TO PARTIES PURSUANT TO CIVIL  
RULE 53 WHICH SHALL BE TAXED  
AS COSTS HEREIN.

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

QUEEN CITY LODGE NO. 69,  
FRATERNAL ORDER OF  
POLICE,

Appellant,

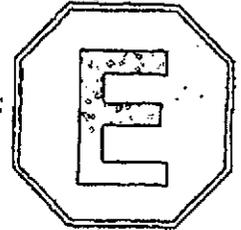
v.

STATE EMPLOYMENT  
RELATIONS BOARD

Appellee.

Case No.: A 0508286

Consolidated with Case No.:  
A 0509296



**ENTRY OVERRULING  
OBJECTIONS TO  
MAGISTRATE'S JUNE 15, 2006  
DECISION AND ADOPTING  
MAGISTRATE'S DECISION**

This matter is before the Court on the Objections of Appellee State Employment Relations Board (SERB) to the Magistrate's Decision. Having reviewed the Magistrate's June 15, 2006 decision setting aside "SERB Opinion 2005-006" and remanding to SERB for adjudication, SERB's Objections thereto, the Response of Appellant Queen City Lodge Fraternal Order of Police to the Objections and all pertinent pleadings, the Court finds nothing incorrect in the Magistrate's legal or factual analysis. Accordingly, the Court finds the Objections to the Magistrate's Decision not well taken and hereby accepts and adopts as its own the June 15, 2006 Decision of the Magistrate pursuant Civ. R. 53. There is no just cause for delay.

**IT IS SO ORDERED.**

Ethna M. Cooper, Judge

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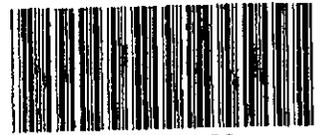
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D68794109

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

QUEEN CITY LODGE NO. 69,  
FRATERNAL ORDER OF POLICE,

Case No. A0508286  
(A0509296 Consolidated)

Plaintiff-Appellant,

Judge Cooper

v.

STATE EMPLOYMENT RELATIONS  
BOARD,

MAGISTRATE'S DECISION

Defendant-Appellee.

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RENDERED THIS 15<sup>th</sup> DAY OF JUNE, 2006.

This case involves an appeal from a State Employment Relations Board's ("SERB") Order mailed September 21, 2005, wherein the appellee found the City of Cincinnati ("City") did not commit an unfair labor practice "by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs . . . ."<sup>1</sup> Hamilton County Court of Common Pleas case number A0509296 was consolidated herein on November 30, 2005.<sup>2</sup> The appeals were filed pursuant to R.C. § 4117.13(D). Oral arguments were made before the Common Pleas Magistrate on May 23, 2006, at which time the case was taken under submission.

BACKGROUND

A thorough factual recitation is contained in the SERB Opinion.<sup>3</sup> The appellant ("Union") initially filed an unfair labor practice charge with SERB against the City in

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<sup>1</sup> / SERB Order and Opinion 2005-006 (SERB case no. 2002-ULP-10-0677).

<sup>2</sup> / (SERB Case No. 2004-ULP-07-0427). SERB filed a Motion to Dismiss in this case. The court addresses the motion at the end of this decision.

<sup>3</sup> / SERB Opinion 2005-006, § I Background. An additional source of pre-grievance facts can be found in the "Parties' Joint Stipulation of Facts and Exhibits", May 16, 2003, 2002-ULP-10-0677.

October 2002.<sup>4</sup> On February 27, 2003, SERB found probable cause to believe the City had committed an unfair labor practice. The case was referred to mediation, which proved unsuccessful in resolving the dispute.<sup>5</sup> A complaint was issued and, following a hearing, the Administrative Law Judge recommended that SERB find the City had committed an unfair labor practice.<sup>6</sup> However, SERB found that

Captain Gregoire had no statutory right to the promotion; the Charter Amendment does not conflict with the provisions of the collective bargaining agreement ["CBA"]; the change in the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining; the second exception to the bargaining requirement set forth in *Toledo* – legislative action taken by a higher-level legislative body after the [CBA] became effective – excuses the City's unilateral implementation; and the City of Cincinnati did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed the terms and conditions of employment for Assistant Police Chiefs when it did not promote Captain Gregoire to a vacancy in the position of Assistant Police Chief.<sup>7</sup>

#### STANDARD OF REVIEW

Any person aggrieved by any final order of the board granting or denying, in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal.

\* \* \*

The court has exclusive jurisdiction to grant the temporary relief or restraining order it considers proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. The findings of the board as to the facts, if supported by substantial evidence on the record as a whole, are conclusive.<sup>8</sup>

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<sup>4</sup> / *SERB v. City of Cincinnati*, SERB 2005-006 (Sept. 21, 2005). Specifically, the grievance alleged the City committed an unfair labor practice in not promoting Captain Stephen R. Gregoire to Assistant Police Chief.

<sup>5</sup> / *Id.*

<sup>6</sup> / *Id.*

<sup>7</sup> / SERB Opinion 2005-006, § III Conclusion.

<sup>8</sup> / Ohio Rev. Code 4117.13(D) (West 2006).

“Substantial evidence” has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, but less than the weight of the evidence.<sup>9</sup> The trial court shall examine the evidence but must accord due deference to the factfinder.<sup>10</sup> Courts must also afford due deference to SERB’s legal interpretations of Chapter 4117 of the Revised Code.<sup>11</sup> Courts may not substitute their judgment for that of SERB.<sup>12</sup> However, SERB’s legal interpretations lose their deferential status when they cannot be reconciled with the explicit language of the statute,<sup>13</sup> or are otherwise unreasonable.<sup>14</sup>

### DISCUSSION

The Union first argues SERB erred in finding no conflict between the Charter Amendment and the CBA.<sup>15</sup> The Union next claims SERB erred in determining that the electorate of the City of Cincinnati constituted a ‘higher-level legislative authority’.<sup>16</sup> Given the aforementioned determination, the Union argues SERB erred in finding Captain Gregoire was not entitled to promotion to Assistant Police Chief.<sup>17</sup> Finally, SERB argues case A0509296 must be dismissed for lack of jurisdiction.<sup>18</sup> The court addresses each argument in turn.

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<sup>9</sup> / *State Employment Relations Bd. v. Pickaway County Dep’t of Human Services*, (App. 4 Dist., 1995), 108 Ohio App.3d 322, 326 (citing *Consolo v. Fed. Maritime Comm.* (1966), 383 U.S. 607, 619-20).

<sup>10</sup> / *Lorain City Sch. Dist. Bd. of Educ. v. Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 257.

<sup>11</sup> / *Id.*

<sup>12</sup> / *City of Hamilton v. SERB* (1994), 70 Ohio St. 3d 210.

<sup>13</sup> / *SERB v. Adena Local School Dist. Bd. of Education* (1993), 66 Ohio St. 3d 485.

<sup>14</sup> / *State ex rel. Calabreze v. Nat’l Lime and Stone Co.* (1994), 68 Ohio St.3d 377, 382.

<sup>15</sup> / Appellant Br. at 7-9.

<sup>16</sup> / *Id.* at 9-11.

<sup>17</sup> / *Id.* at 11-13.

<sup>18</sup> / Mot. to Dismiss.

## Conflict between Charter Amendment and the CBA

“The provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for those laws specifically exempted by R.C. 4117.10(A).”<sup>19</sup> Section 4117.10(A) of the Revised Code states, in pertinent part:

[a]n agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, terms and conditions of employment for public employees.<sup>20</sup>

SERB relies upon *Jurcisin v. Cuyahoga Cty. Bd. Of Elections* in arguing the Charter Amendment does not conflict with the CBA.<sup>21</sup> In *Jurcisin*, the Ohio Supreme Court found R.C. § 4117.10(A) inapplicable where a city charter amendment establishing a police review board did not conflict with the relevant CBA and thus R.C. § 4117.10(A) did not apply.<sup>22</sup> Specifically, the Court found the charter amendment would not affect the grievance procedures outlined in the CBA.<sup>23</sup>

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<sup>19</sup> / *City of Cincinnati v. Ohio Council 8, et al.* (1991), 61 Ohio St.3d 658, syllabus, para. 1.

<sup>20</sup> / Ohio Rev. Code § 4117.10(A) (West 2006).

<sup>21</sup> / *Jurcisin v. Cuyahoga Cty. Bd. Of Elections* (1988), 35 Ohio St.3d 137 (SERB Opinion 2005-006, § II D); Appellee Br. at 8-10.

<sup>22</sup> / *Jurcisin*, 35 Ohio St.3d at 145.

<sup>23</sup> / *Id.* at 144.

SERB's reliance upon *Jurcisin* is misplaced. The charter amendment in *Jurcisin* left the grievance portion of the relevant CBA unaffected.<sup>24</sup> The same grievance procedures contained in the *Jurcisin* CBA would remain available to all covered employees following the completion of all procedures occurring before the newly created police review board.<sup>25</sup>

The instant Charter Amendment directly modified the grievance procedures provided in Art. III, § 1 of the CBA. The CBA states, in relevant part:

*All sworn members of the Cincinnati Police Division shall be entitled to the following grievance procedures: . . . [e]mployees who are discharged or terminated shall, at his or her option, select this grievance and arbitration procedure. In the alternative, said discharged or terminated employees may appeal their discharges through the state civil service laws.*<sup>26</sup>

The Charter Amendment states, in relevant part: "Shall the Charter of the City of Cincinnati be amended to provide that unclassified positions in the civil service shall include . . . the positions of . . . police chiefs and . . . assistant police chiefs . . . ; and that the police chief . . . shall be subject to removal only for cause . . ."<sup>27</sup> Clearly, by not including assistant police chiefs in the clause directing that police chiefs may only be removed for cause, the Charter Amendment recategorized the position of assistant police chief as employment at will. Employment at will employees lose the protection of the grievance procedures contained in Art. III, § 1 of the CBA noted above.

The Charter Amendment also modified the CBA's promotion procedures. As indicated above, the Charter Amendment removed the positions of Police Chief and

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<sup>24</sup> / *Id.*

<sup>25</sup> / *Id.*

<sup>26</sup> / Unfair Labor Practice Charge, 2002-ULP-10-0677, Oct. 17, 2002; Ex. A, Art. III Grievance Procedure (Labor Agreement by and between Queen City Lodge No. 69, Fraternal Order of Police and the City of Cincinnati for the Years 2001 [and] 2002)(emphasis added).

<sup>27</sup> / Unfair Labor Practice Charge, 2002-ULP-10-0677, Oct. 17, 2002; Ex. B at 4 (City of Cincinnati Ordinance No. 238-2001).

Assistant Police Chief from classified civil service.<sup>28</sup> The Charter Amendment thus made appointments to the Chief and Assistant Chief positions exempt from competitive examination requirements.<sup>29</sup> SERB concluded the CBA did not specify the promotional process for Assistant Police Chiefs.<sup>30</sup> This conclusion fails to consider that prior to the Charter Amendment, *all* police officers were in the classified civil service and that *all* vacant positions above the rank of patrolman were filled through the “Rule of 1” as contained in R. C. § 124.44 and referenced in the language of Art. VII, § 22 of the CBA (“§ 22”). § 22 states, in relevant part:

Upon the effective date of the officer’s actual voluntary cessation of the duties of said position, such position shall immediately become vacant and shall be immediately filled from the *existing promotional eligibility list for that officer’s rank, or shall be filled through the competitive promotional examination process mandated by state civil service law.*<sup>31</sup>

Therefore, the lack of an express mention of Assistant Police Chief in § 22 is immaterial because all police officers above the rank of patrolman were promoted in like manner. The court finds SERB’s determination that the Charter Amendment did not conflict with the CBA is unreasonable. The court concludes the provisions of the Charter Amendment removing the Assistant Police Chief position from the classified civil service and allowing

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<sup>28</sup> / Unfair Labor Practice Charge, 2002-ULP-10-0677, Oct. 17, 2002; Ex. B at 4 (City of Cincinnati Ordinance No. 238-2001).

<sup>29</sup> / Ohio Rev. Code § 124.44 (West 2006). But note: “The positions of police chief and assistant police chief shall be in the unclassified civil service of the city and exempt from all competitive examination requirements. The city manager shall appoint the police chief and assistant police chiefs to serve in said unclassified positions. . . . The incumbent officers in the police chief and assistant police chief positions at the effective date of this Charter provision shall remain in the classified civil service until their position becomes vacant[,] after which time their positions shall be filled according to the terms of this section. Unfair Labor Practice Charge, 2002-ULP-10-0677, Oct. 17, 2002; Ex. B at 2.

<sup>30</sup> / SERB Opinion 2005-006 at 5, 14.

<sup>31</sup> / Unfair Labor Practice Charge, 2002-ULP-10-0677, Oct. 17, 2002; Ex. A at 33-34 (Labor Agreement by and between Queen City Lodge No. 69 Fraternal Order of police and the City of Cincinnati for the Years 2001 and 2002)(emphasis added).

the City Manager to fill vacancies in those positions conflicted with Art. III, § 1 and Art. VII, § 22 of the CBA.<sup>32</sup>

### Unfair Labor Practice

Having concluded the Charter Amendment conflicted with the CBA, the court then looks to see if the conflict constitutes an unfair labor practice. It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

\* \* \*

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117 of the Revised Code.<sup>33</sup>

SERB correctly determined that mid-term changes in Assistant Police Chief promotion procedures required collective bargaining.<sup>34</sup> Such collective bargaining did not occur prior to the City passing the ordinance placing the Charter Amendment on the ballot. The City's enactment of Ordinance No. 238-2001 ("Ordinance"), which placed the Charter Amendment on the ballot, constitutes an unfair labor practice unless the Ordinance falls within one of two SERB-created exceptions.

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.<sup>35</sup>

<sup>32</sup> / Any distinction regarding the nature of the incumbent's departure from his or her position is irrelevant, as section 22 refers to those officers who choose "Option 1" for any reason. "*Notwithstanding any other provision of this Section, an employee who . . . selects Option 1 above . . .*" Labor Agreement by and between Queen City Lodge No. 69 Fraternal Order of Police and the City of Cincinnati for the Years 2001 [and] 2002, Art. VII, § 22 (emphasis added).

<sup>33</sup> / Ohio Rev. Code § 4117.11(A) (West 2006).

<sup>34</sup> / SERB Opinion 2005-006 at 17.

<sup>35</sup> / *Id.* at 18 (quoting *In re Toledo City School Dist. Bd. of Ed.*, SERB 2001-005 (9-20-2001)).

SERB found the instant facts do not involve the 'exigent circumstances' exception in *Toledo*.<sup>36</sup> The court thus turns to the second *Toledo* exception noted above. 'Higher-level legislative body' is not defined in the Ohio Revised Code. Noting it may define a term not defined in the Ohio Revised Code as long "as the definition is consistent with the objectives of Ohio Revised Code Chapter 4117,"<sup>37</sup> SERB found the voters of the City of Cincinnati constituted a 'higher-level legislative body' "under the second exception to the bargaining requirement set forth in *Toledo*."<sup>38</sup> The court finds SERB's definition is inconsistent with the Ohio Revised Code following two reasons.

First, the Ohio Revised Code generally describes 'legislative body' as an elected or appointed public body with budgetary authority.<sup>39</sup> 'Legislature' has been commonly defined as "a deliberative body of persons, usually elective, who are empowered to make, change, or repeal the laws of a country or state; the branch of government having the power to make laws, as distinguished from the executive and judicial branches of government."<sup>40</sup> Both the common definition, as well as the definitions contained in Chapter 4117, reflect traditional themes concerning the republican form of government, wherein the people elect their representatives. Simply put, an electorate cannot reasonably be considered a deliberative 'body' with budgetary authority over a public jurisdiction.

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<sup>36</sup> / *Id.*

<sup>37</sup> / *Id.* at 19.

<sup>38</sup> / *Id.*

<sup>39</sup> / See Ohio Rev. Code § 4117.10(B) (West 2006) ("As used in this section, "legislative body" includes the governing board of a municipal corporation, school district, college or university, village, township, or board of county commissioners or any other body that has authority to approve the budget of their public jurisdiction and, with regard to the state, "legislative body" means the controlling board. As used in this section, "legislative body" includes the governing board of a municipal corporation, school district, college or university, village, township, or board of county commissioners or any other body that has authority to approve the budget of their public jurisdiction and, with regard to the state, "legislative body" means the controlling board"); Ohio Rev. Code § 4117.14(C)(6)(b) (West 2006) ("As used in division (C)(6)(a) of this section, "legislative body" means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is party to the fact-finding process").

<sup>40</sup> / The Random House Dictionary of the English Language 1099 (2d ed. 1987).

'The people' are not a branch of the government. SERB's finding that electorates fall within the scope of 'higher-level legislative body' cannot be reconciled with the explicit statutory definition of 'legislative body', as the finding strains the plain meaning of 'legislature' beyond the breaking point.

Second, and more importantly, the term 'higher-level legislative body' connotes a situation wherein a superior legislative or executive authority acts beyond the control of the public entity CBA party in such a manner as to modify or otherwise frustrate the purpose of a CBA. SERB claims the people of the City of Cincinnati are a 'higher-level legislative body' and maintains the electorate, and not the City, was responsible for the Charter Amendment provisions removing the Assistant Police Chief positions from the classified civil service and allowing the City Manager to fill vacancies in these positions.<sup>41</sup> However, this finding glosses over the one obvious, material fact in this case: but for the City's enactment of the ordinance placing the Charter Amendment on the ballot, the electorate could not have approved said provision.

By enacting the ordinance in question, the City put in motion a process which ultimately modified the existing CBA without the negotiation by and agreement of the Union. The City, through SERB, thus comes before the court with unclean hands. The court cannot condone a procedure allowing any 'legislative body' to place a measure on the ballot that would unilaterally modify a CBA term to which it is a party, and then absolve itself of culpability through a plebiscite's veneer of legitimacy. Such procedures would undoubtedly provide a strong disincentive for legislative bodies to bargain with their union employees in good faith. Such a course of action therefore contradicts the

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<sup>41</sup> / SERB Opinion 2005-006 at 19.

spirit of, and is inconsistent with, the objectives of Chapter 4117 of the Revised Code.

For the foregoing two reasons, SERB's finding is inconsistent with the objectives of Chapter 4117 of the Revised Code. The court finds SERB's determination that the term 'higher-level legislative body' includes a political jurisdiction's electorate is unreasonable. The court thus concludes the City committed an unfair labor practice under section 4117.11(A)(5) of the Revised Code, to wit: the City modified the existing collective bargaining agreement without the negotiation by and agreement of the Union. Pursuant to section 4117.13(D) of the Revised Code, the court determines the Order in SERB Opinion 2005-006 is unsupported by substantial evidence in the record. As such, the City improperly denied Captain Gregoire a promotion to Assistant Chief.

#### **Motion to Dismiss**

The court now addresses SERB's Motion to Dismiss the appeal of case number A0509296 filed pursuant to Civ. R. 12(B)(1). The uncontroverted evidence indicates that the Union filed an unfair labor practice charge with SERB on July 29, 2004 (SERB Case No. 2004-ULP-07-0427) alleging a second Assistant Police Chief vacancy had occurred following the passage of the Charter Amendment in which the City failed to promote an officer from the active promotional list that existed at the time. "After the investigation, SERB initially found probable cause to believe the City had committed an unfair labor practice. The allegations in the charge, however, were identical to those of Case No. 2002-ULP-10-0677. . . . [SERB] dismissed the charge in case number 2002-ULP-10-0677 and issued its opinion on September 20, 2005."<sup>42</sup> In its Directive mailed October 24, 2005, SERB stated "[s]ince [SERB] has already held that the allegations underlying Case No.

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<sup>42</sup> / Mot. to Dismiss at 3.

2004-ULP-07-0427 lack merit, [SERB] *sua sponte* vacates its probable cause finding in Case No. 2004-ULP-07-0427 for reasons set forth in *SERB v. City of Cincinnati*, SERB 2005-06 (9-8-05).<sup>43</sup>

Motions to dismiss are governed by Ohio Rule of Civil Procedure 12(B). Civ.R.

12(B) states, in relevant part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter . . . .<sup>44</sup>

“The standard to apply for a dismissal pursuant to Civ.R.12(B)(1), lack of jurisdiction over the subject matter, is whether the [appellant] has alleged any cause of action which the court has authority to decide.”<sup>45</sup>

SERB argues the court lacks jurisdiction over the second appeal because the dismissal does not constitute a quasi-judicial adjudication.<sup>46</sup> The Union claims the instant Directive constitutes an adjudication. Specifically, the Union argues that “as the merits are identical in both [unfair labor practice (“ULP”)] cases, the adjudication on the merits in the first ULP equates to adjudication on the merits in the second ULP.”<sup>47</sup>

Upon a review of the record, the court finds SERB’s motion lacks merit. SERB made an initial probable cause finding stating the City had committed an unfair labor practice in Case No. 2004-ULP-07-0427. SERB *expressly* vacated this probable cause

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<sup>43</sup> / *Id.*; Ex. A (Directive, Case No. 2004-ULP-07-0427, Oct. 24, 2005).

<sup>44</sup> / Ohio R. Civ. P. 12(B)(West 2006).

<sup>45</sup> / *Johnson v. Wilkerson*. (App. 4 Dist., 1992), 84 Ohio App.3d 509, 516. See, also, *Avco Financial Services Loan, Inc. v. Hale* (App. 10 Dist. 1987), 36 Ohio App.3d 65.

<sup>46</sup> / Mot. to Dismiss at 4 (citing *South Community, Inc. v. SERB* (1988), 38 Ohio St.3d 224).

<sup>47</sup> / Mem. in Opp. at 3-4.

finding "for reasons set forth in *SERB v. City of Cincinnati*, SERB 2005-06 (9-8-05)."<sup>48</sup>

The court concludes SERB's reference to its previous Order was shorthand for incorporating the entire analysis of SERB 2005-06 into its Directive in this second ULP complaint. As such, the court finds SERB incorporated its adjudication of SERB Case No. 2002-ULP-10-0677 (SERB Opinion 2005-006) into its Directive vacating its probable cause finding in SERB Case No. 2004-ULP-07-0427. Because the Directive vacating its probable cause finding constituted an adjudication of Case No. 2004-ULP-07-0427, the court finds jurisdiction over the subject matter of this appeal was proper.

### **DECISION**

SERB Opinion 2005-006 is SET ASIDE. SERB's Motion to Dismiss Case No. 2004-ULP-07-0427 is DENIED. The claims are REMANDED to SERB for adjudication consistent with this Decision.



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**RICHARD A. BERNAT  
MAGISTRATE  
COURT OF COMMON PLEAS**

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<sup>48</sup> / *Id.*; Ex. A (Directive, Case No. 2004-ULP-07-0427, Oct. 24, 2005).

**NOTICE**

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. If this decision contains findings of fact and conclusions of law, a party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as required by Civ. R. 53(E)(3).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date:

6-15-06

Deputy Clerk:

Dana Hall

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

**CASE NUMBER 2002-ULP-10-0677**

**ORDER  
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich: September 8, 2005.

On October 17, 2002, Queen City Lodge No. 69, Fraternal Order of Police ("Union" or "Intervenor") filed an unfair labor practice charge against the City of Cincinnati ("City" or "Respondent") alleging that the City violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5). On February 27, 2003, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the City violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs.

On April 10, 2003, a complaint was issued. On April 16, 2003, the Union filed a motion to intervene, which was granted in accordance with Ohio Administrative Code Rule 4117-1-07(A). On August 19, 2003, following a hearing on May 23, 2003, the Administrative Law Judge issued a Proposed Order in which she recommended that the Board find that the City had violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs, i.e., its promotion processes.

The City filed timely exceptions, to which the Complainant and the Intervenor filed responses. The City also filed a motion for oral argument, which the Board granted on January 8, 2004. The Board heard oral arguments on March 19, 2004. During the period following oral argument, the City and the Union separately filed notices of additional authority with the Board.

After reviewing the complaint, answer, findings of fact and evidence, legal briefs, and all other filings in this case, the Board amends the Administrative Law Judge's Finding of Fact #10 to add the following language: "On January 15, 2004, Arbitrator Hyman Cohen denied the grievance. (S. 18, Jt. Exh. 7; City's Motion to Supplement Record filed January 29, 2004)"; amends Conclusion of Law No. 3 to read as follows: "3. The City of Cincinnati did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs by failing to promote Captain Gregoire to a vacancy in the position of Assistant Police Chief"; adopts the Administrative Law Judge's Findings of Fact and Conclusions of Law as amended, dismisses the complaint, and dismisses the unfair labor practice charge with prejudice.

It is so ordered.

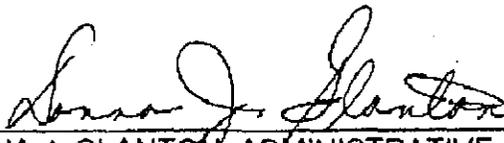
DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code § 4117.13(D), by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 24<sup>th</sup> day of September, 2005.



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

**Case No. 2002-ULP-10-0677**

**OPINION**

GILLMOR, Vice Chairman:

This matter comes before the State Employment Relations Board ("Board" or "Complainant") upon the issuance of a Proposed Order, the filing of exceptions to the Proposed Order by the Respondent, City of Cincinnati ("City"), the filing of responses to exceptions by the Intervenor, Queen City Lodge No. 69, Fraternal Order of Police ("Union"), and the Complainant, and the oral arguments presented to the Board by the parties. For the reasons that follow, we find that the Respondent did not commit an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs when it did not promote Captain Gregoire to a vacancy in the position of Assistant Police Chief.

**I. BACKGROUND**

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. The Union is the exclusive representative for two bargaining units

collectively comprising all sworn members of the City's police division. The City and the Union were parties to a collective bargaining agreement ("CBA") governing the supervisors' unit effective December 10, 2000 through December 31, 2002, containing a grievance procedure that culminates in final and binding arbitration.

On August 1, 2001, the City Council passed an emergency ordinance placing on the November 6, 2001 ballot a 2001 Charter Amendment modifying Article V of the City Charter (the "Charter Amendment"). On November 6, 2001, the Charter Amendment passed with a majority of votes. Under the terms of the Charter Amendment, a person who holds a position in the classified civil service that becomes unclassified under the terms of the Charter Amendment shall be deemed to hold a position in the classified civil service until he or she vacates the position, after which time the position shall be filled as an unclassified position. The position of Assistant Police Chief became unclassified under the Charter Amendment, and, under its terms, future vacancies would be filled through appointment by the City Manager.

Before the Charter Amendment passed, all promotions to vacancies in the classification of Assistant Police Chief were made from the civil service promotional eligibility list following the "Rule of 1." Under the "Rule of 1," if a vacancy exists in a municipal police department above the rank of patrol officer and an eligibility list exists, the municipal civil service commission shall immediately certify the name of the person with the highest rating, and the appointing authority shall appoint that person within thirty days from the date of certification, pursuant to O.R.C. § 124.44.

On September 10, 2002, Assistant Police Chief (Lieutenant Colonel) Ronald J. Twitty submitted a notice of intent to retire within 90 days. Assistant Police Chief Twitty's retirement was effective December 7, 2002. During the time period from September 10, 2002 to December 7, 2002, Assistant Police Chief Twitty was on paid administrative leave.

The Union filed Grievance #29-02 regarding whether Captain Stephen R. Gregoire should be placed in the vacancy created by Assistant Police Chief Twitty's retirement. Captain Gregoire was the person with the highest rating on the promotional eligibility list for Assistant Police Chiefs.

In November 2002, the Union filed a motion for a preliminary injunction in the Court of Common Pleas, Hamilton County, Ohio. On December 4, 2002, the parties to the common pleas court action filed an agreed judgment entry ("Entry"). In the Entry, the parties agreed to extend the expiration date for the promotional eligibility list for Assistant Police Chiefs pending the final resolution of both this unfair labor practice case and Grievance #29-02, unless the parties mutually agree otherwise. The Entry also set forth a procedure the parties agreed to follow should the City decide to conduct a search and fill an Assistant Police Chief vacancy other than through the promotional eligibility list.

The City and the Union met to negotiate a successor collective bargaining agreement to the Agreement that expired on December 31, 2002. The City and the Union proceeded to fact finding and, subsequently, to binding conciliation. The conciliator issued the award on July 2, 2003. The City had not filled the vacancy in the position of Assistant Police Chief created by Assistant Police Chief Twitty's retirement.

On January 29, 2004, the City filed a motion to supplement the record; the City provided a copy of the Arbitrator's Opinion, AAA No. 52 390 00595 02, rendered by Arbitrator Hyman Cohen, Esq., on January 15, 2004, denying the Union's grievance (Grievance #29-02). Arbitrator's Opinion, *City of Cincinnati and Queen City Lodge No. 69 Fraternal Order of Police*, AAA No. 52 390 00595 02, issued 1-15-2004 ("Arbitrator's Award"). Arbitrator Cohen found that Section 22 of the CBA – specifically the "voluntary cessation" language – is not applicable to the facts of this grievance. On February 17, 2004, the Union filed a motion to supplement the record to include the

parties' post-hearing briefs from the grievance arbitration and the arbitrator's decision. The motions were unopposed and were granted by the Board on March 11, 2004.

On March 18, 2004, the City filed a Notice of Citation of Additional Authority, which contained a copy of the common pleas court's decision in *Oak Hills Local School Dist Bd of Ed v. SERB*, 2004 SERB 4-14 (CP, Hamilton, 2-23-04). On January 5, 2005, the Union filed a Notice of Citation of Additional Authority, which contained a copy of the appellate court decision in *Oak Hills Edn. Assn. v. Oak Hills Local School Dist. Bd. of Edn.*, 158 Ohio App.3d 662, 2004-Ohio-6843, 2004 SERB 4-59 (1<sup>st</sup> Dist Ct App, Hamilton, 12-17-2004). On February 28, 2005, the Union filed a Notice of Citation of Additional Authority, which included the Report and Recommendations issued by the fact finder, Michael Paolucci, on February 25, 2005, in SERB Case Nos. 2004-MED-08-0741 and 04-MED-08-0742. On March 7, 2005, the Union filed a Notice of Citation of Additional Authority, which included City Ordinance 74-2005 in which it voted to approve the fact-finder's report in SERB Case Nos. 2004-MED-08-0741 and 04-MED-08-0742. On June 14, 2005, the Union filed a Notice of Citation of Additional Authority, which contained the Conciliator's Opinion and Award of June 7, 2005, SERB Case Nos. 2004-MED-0741 and 2004-MED-0742, in which the City proposals to remove the newly appointed Assistant Police Chiefs from the Bargaining Unit were rejected.

## II. DISCUSSION

### A. The Unfair Labor Practice Charge Was Timely Filed

In its exceptions, the City alleges that the Administrative Law Judge erred in determining that the unfair labor practice charge was both timely filed and ripe for review. O.R.C. § 4117.12(B) establishes a ninety-day period in which the charge must be filed. In *In re City of Barberton*, SERB 88-008 (7-5-88), *aff'd sub nom. SERB v. City of Barberton*, 1990 SERB 4-46 (CP, Summit, 7-31-90), the Board set forth the following two-prong test to be utilized in determining when the statute of limitations begins to run:

To begin rolling of the ninety-day period, two conditions must be present. The first is the acquired knowledge, or constructive knowledge, by the Charging Party of the alleged unfair labor practice which is the subject of the charge. The second is the occurrence of actual damage to the Charging Party resulting from the alleged unfair labor practice.

The Union filed its unfair labor practice charge on October 17, 2002, apparently based upon its belief that under the Agreement, the City was required to fill the vacancy being created by Assistant Police Chief Twitty's then-upcoming retirement within thirty days of September 10, 2002, the date on which he submitted his notice of intent to retire. The City's refusal to appoint Captain Gregoire to fill the vacancy was the first instance since the passage of the Charter Amendment that the City had sought to apply the Charter Amendment's terms to the bargaining-unit members.

The unfair labor practice charge may have been prematurely filed since the effective date of Assistant Police Chief Twitty's retirement was not until December 7, 2002. But the unfair labor practice charge was not filed *after* the expiration of the limitations period, and it most certainly was ripe for review when SERB issued the complaint in this case on April 10, 2003. Thus, the City's timeliness and ripeness arguments are denied.

**B. Captain Gregoire Did Not Have A Contractual Right To The Promotion**

The Agreement does not specify the promotional process for Assistant Police Chiefs. The parties stipulated that they have historically followed the "Rule of 1" when filling promotional vacancies. The "Rule of 1" is set forth in the state civil service law under O.R.C. § 124.44.

Article VII, Section 22 of the Agreement, entitled "Terminal Benefits," mentions the filling of vacancies. This provision does not describe the promotion process itself. Instead, the provision discusses the process whereby a bargaining-unit member must

retire due to illness or injury but elects to remain on the payroll until his or her leave balances are exhausted rather than taking a lump-sum payment. It also describes when a position becomes vacant, stating:

Upon the effective date of the officer's actual voluntary cessation of the duties of said position, such position shall immediately become vacant and shall immediately be filled from the existing promotional eligibility list for that officer's rank, or shall be filled through the competitive promotional examination process mandated by state civil service law.<sup>1</sup>

The foregoing provision in Article VII, Section 22 of the Agreement was at issue in Grievance #29-02, which eventually went to arbitration. After outlining the events that led to Assistant Police Chief Twitty's retirement, Arbitrator Cohen stated: "The phrase 'actual voluntary cessation of duties of such position' in Section 22 implies a choice with respect to relinquishing the duties of the position. There is nothing in the evidentiary record to infer that Twitty had such a choice." See Arbitrator's Award, p. 10. On this issue, the arbitrator found:

In summing up this aspect of the dispute between the parties, the evidentiary record establishes that there was no "actual voluntary cessation" by Twitty of the duties of his position to warrant that the position of Assistant Police Chief "shall immediately become vacant and shall immediately be filled from the existing promotional eligibility list for that officer's rank" as required by the Forced Retirement provisions of Section 22 of the Labor Agreement.

Id at p. 13. In the Conclusion of the Arbitrator's Award, Arbitrator Cohen held: "There is no question that the Grievant [Captain Gregoire] has an exemplary background, service with the City, and character. However, the interpretation of the applicable terms of Section 22 of the Agreement governs this dispute. Accordingly, the grievance is denied." Id at p. 24. Thus, Captain Gregoire had no contractual right to the promotion.

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<sup>1</sup> Joint Exhibit 27, pp. 30-31.

**C. Captain Gregoire Did Not Have A Statutory Right To The Promotion**

The next question is whether Captain Gregoire had a statutory right to the position under O.R.C. § 124.44, which provides as follows:

No position above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. No competitive promotional examination shall be held unless there are at least two persons eligible to compete. Whenever a municipal or civil service township civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions in the then next lower rank who are eligible, to compete with the persons holding positions in the rank lower than the position to be filled. An increase in the salary or other compensation of anyone holding a position in a police department, beyond that fixed for the rank in which such position is classified, shall be deemed a promotion, except as provided in section 124.491 of the Revised Code. Whenever a vacancy occurs in the position above the rank of patrolman in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's examination grade unless the applicant achieves at least the minimum passing grade on the examination without counting such extra credit.

The City asserts that as a Charter City it is not covered by state civil service law. "Express charter authorization is necessary to enable municipalities to adopt ordinances or administrative rules that will prevail over statutory provisions in case of conflict." *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 633 N.E.2d 524, Syllabus.

O.R.C. § 4117.10(A) provides in relevant part as follows:

An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or *where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.* (emphasis added)

In *State ex rel. Bardo v. City of Lyndhurst* (Ohio 1988) 37 Ohio St.3d 106 ("*Bardo*"), the Ohio Supreme Court addressed the application of O.R.C. § 124.44 to the promotion of a police officer to a vacant lieutenant position in a city with home rule powers under the Ohio Constitution. The Court stated, at 110, the following:

Although the Constitution gives municipalities the authority to adopt home rule, local self-government, the exercise of those powers by the adoption of a charter should clearly and expressly state the areas where the municipality intends to supersede and override general state statutes. Accordingly, we hold that express charter language is required to enable a municipality to exercise local self-government powers in a manner contrary to state civil service statutes.

The Court in *Bardo* found that the Lyndhurst Charter did not contain a clear and express exercise of the home rule powers specifically authorizing the civil service commission to adopt rules with regard to certification of names from promotion lists. As a result, neither the commission's rules nor the charter superseded the requirements of O.R.C. § 124.44 as to certification of candidates from eligibility lists. Consequently, when a vacancy in a position arose under that statutory section, the highest-ranked employee on the current eligibility list was entitled to a writ of mandamus compelling the city to appoint him to the vacancy.

The record in this case does not indicate that the City exercised its home rule powers in this area before the passage of the Charter Amendment on November 6, 2001. The parties stipulated that before the passage of the Charter Amendment, "all promotions to vacant positions within the classification of Assistant Police Chief were made from the promotional eligibility list pursuant to the Rule of 1."<sup>2</sup> Thus, the City's argument would fail if the vacancy occurred before November 6, 2001.

Establishing the date of a vacancy is also important under O.R.C. § 124.44:

No positions above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. \* \* \* Whenever a vacancy occurs in the position above the rank of patrolman in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest

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<sup>2</sup> Stipulation 15.

rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification.

Under the "Rule of 1," within approximately 30 days from the date of the vacancy, the person with the highest rating on the promotional eligibility list is to be appointed to the vacancy. A Promotional Eligibility List for Assistant Police Chief (Lieutenant Colonel) was approved and posted by the Cincinnati Civil Service Commission on October 24, 2001, with an expiration date of October 23, 2002.<sup>3</sup> The record does not contain a promotional eligibility list for any period after October 23, 2002.

The Agreement does not specifically state when a vacancy occurs. Article VIII of the Agreement is titled "Publication of Assignment" and "Availability." It states in part: "When a new assignment or vacancy in an existing assigned area becomes available by reason of promotion, retirement, resignation, or transfer, notice of such assignment availability shall be forwarded to all units within ten (10) days of creation of the new assignment or vacancy and conspicuously posted."

In the Proposed Order, the Administrative Law Judge found that the vacancy appeared to have begun, consistent with the language cited above from Article VII, Section 22 of the Agreement, on September 10, 2002, when Assistant Police Chief Twitty submitted his letter and went on paid administrative leave. But the Administrative Law Judge did not have the benefit of the Arbitrator's Award that interpreted this provision.

If the vacancy occurred when Assistant Police Chief Twitty submitted his retirement on September 10, 2002, the promotional eligibility list was still in effect. The

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<sup>3</sup> Jt. Exh. 7; Transcript 149-150.

civil service commission was required to immediately certify the name of the person having the highest rating, and the appointing authority was required to appoint that person within thirty days from the date of such certification. If the vacancy occurred when Assistant Police Chief Twitty's retirement was effective, which was December 7, 2002, then the City had exercised its home rule powers through the Charter Amendment.

In the absence of language in the Agreement defining when a vacancy occurs, we must revert to the state civil service law if the municipality has not exercised its home rule powers on this point. In *McCarter v. City of Cincinnati* (Ohio App. 1 Dist., 11-25-1981) 3 Ohio App.3d 244, 444 N.E.2d 1053, 3 O.B.R. 276, the City of Cincinnati claimed that under the home rule and civil service provisions of the Ohio Constitution – Sections 3 and 7, Article XVIII, and Section 10, Article XV, Ohio Constitution, respectively – the appointing authority can determine whether or when a vacancy occurs, and that in the absence of any ordinance establishing a specific complement of police captains, a vacancy does not occur upon the retirement of an incumbent captain until the city manager decides that the position is to be filled. The court disagreed with this argument. Instead, the court held:

We have no difficulty in affirming the trial court's conclusion that the retirement of Captain Stout created a vacancy that had to be filled in accordance with R.C. 124.44. Among other conceivable circumstances creating a vacancy, a vacancy in public office occurs when a position that has been established and occupied becomes vacant (by reason of the death, retirement, dismissal, promotion or other permanent absence of the former incumbent). *Ballantine's Law Dictionary* 1331 (3 Ed. 1969).

\* \* \*

We hold that a vacancy in that position was created by the retirement of the incumbent during the continuance of the position, without the necessity of any further action whatsoever. The vacancy occurred even though the city manager as appointing authority did not "declare" it to be in existence. There is no requirement for certification of a vacancy in the police department under R.C. 124.44, as there is under R.C. 124.48 in the case of a vacancy in the fire department.

In *Bardo* and later in *Zavisin v. City of Loveland* (1989), 44 Ohio St.3d 158, 541 N.E.2d 1055, the Ohio Supreme Court cited with approval *McCarter v. City of Cincinnati*, supra. Therefore, the vacancy in the present case occurred upon the retirement of Assistant Police Chief Twitty, which was effective December 7, 2002, and after the Charter Amendment was approved on November 6, 2001.

**D. The Charter Amendment Does Not Conflict With The Provisions Of The Collective Bargaining Agreement**

The next question to be addressed is whether the Charter Amendment, approved on November 6, 2001, was in conflict with the parties' collective bargaining agreement. In the case, *Jurcisin v. Cuyahoga Cty. Bd. of Elections* (1988), 35 Ohio St.3d 137, appellants Paul Jurcisin and the Cleveland Police Patrolmen's Association ("CPPA") sought an injunction, prior to the election, in the Cuyahoga County Common Pleas Court, against the submission of the proposed charter amendment to the voters.

In *Jurcisin*, the proposed charter amendment sought to establish a police review board to investigate complaints of police misconduct and to recommend disciplinary action. The trial court declared the unofficial election results null and void, enjoined the certification of the election results by the board of elections, and enjoined the amendment from becoming part of the charter, ruling that under O.R.C. § 4117.10(A), the amendment would conflict with the city's collective bargaining agreements with the appellant CPPA and was therefore void. Upon appeal, the Eighth District Court of Appeals held that no conflict existed between the charter amendment and the collective bargaining agreements. It further noted that O.R.C. § 4117.10(A) does not invalidate laws that conflict with provisions of a collective bargaining agreement. Instead, the statute provides that, in the event of a conflict between a law and a particular collective bargaining agreement, the agreement rather than the law governs the relationship between that particular bargaining unit and the employer.

In upholding the decision of the Court of Appeals, Chief Justice Moyer stated:

Appellants argue that the grievance procedures contained in the collective bargaining agreements are in conflict with the police review board process. Under R.C. 4117.10(A), where a law conflicts with a wage, hour, or term and condition of employment provision (such as grievance procedures) found in a collective bargaining agreement entered into pursuant to R.C. Chapter, 4117, the collective bargaining agreement, prevails over the conflicting provisions of the law.

In his analysis, Chief Justice Moyer compared the management rights clauses in both contracts and determined that this was not a case of an attempt by a public employer to "disregard the terms of their collective bargaining agreements whenever they find it convenient to do so." *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 84, 22 OBR 95, 99, 488 N.E. 2d 872, 876. Rather, this case involved the proper exercise of management powers created by the city charter and recognized in the collective bargaining agreements.

The facts support the conclusion that the City of Cincinnati's Charter Amendment did not conflict with the collective bargaining agreement or O.R.C. § 4117.10(A). The agreement between the parties contains a Management Rights article similar to the one found in *Jurcisin*. Under Article II, Management Rights, the following language exists:

The FOP recognizes that, except as provided in this labor agreement, the City of Cincinnati retains the following management rights as set forth in Ohio Revised Code Section 4117.08(C) 1-9:

1. To determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology and organizational structure;
2. To direct, supervise, evaluate or hire employees;
3. To maintain and improve the efficiency and effectiveness of governmental operations;
4. To determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

5. To suspend, discipline, demote or discharge for just cause, or lay-off, transfer, assign, schedule, **promote** or retain employees; (Emphasis added)
6. To determine the adequacy of the work force;
7. To determine the overall mission of the employer as a unit of government;
8. To effectively manage the work force;
9. To take actions to carry out the mission of the public employer as a governmental unit.

With respect to these management rights, the City of Cincinnati shall have the clear and exclusive right to make decisions in all areas and such decisions, except as otherwise provided in this Agreement, shall not be subject to the grievance procedure.

The City is not required to bargain on subjects reserved to the management and direction of the City in Revised Code Section 4117.08 except as affect wages, hours, terms and conditions of employment and the continuation, modification, or deletion of this collective bargaining agreement. The FOP may raise a legitimate complaint or file a grievance based on this collective bargaining agreement.

In the Proposed Order, the SERB Administrative Law Judge stated: "The Agreement does not specify the promotional process for Assistant Police Chiefs." (Proposed Order, page 4) Additionally, the Agreement contains, within Article XIII, an Integrity of Agreement clause, that states:

This contract represents complete collective bargaining and full agreement by the parties with respect to rates of pay, wages, hours of employment or other conditions of employment which shall prevail during the term hereof and any matters or subjects not herein covered have been satisfactorily adjusted, compromised or waived by the parties for the life of this Agreement. During the term of this Agreement neither the City nor the FOP will be required to negotiate on any further matters affecting these or any other subjects set forth in the Agreement.

Finally, the Agreement also contained Article XX, Abolishment of Promoted Positions, which vested the City Manager with authority to abolish any promoted positions in the police division in accord with Section 124.37 of the Revised Code or any successor statute. While the abolishment of promoted positions is not the issue in this case, the

inclusion of this Article within the parties' collective bargaining agreement is further indication of the understanding between the parties that the City of Cincinnati, through its City Manager, maintained authority in determining, establishing, and setting the maximum number of authorized positions for a specific promoted rank in the police division. It would appear, therefore, that the subsequent Charter Amendment, which included language that the "city manager shall appoint the police chief and assistant police chiefs to serve in said unclassified position," does not conflict with the express terms in the contract. See also *Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658, 1991 SERB 4-87 ("*Ohio Council 8*").

**E. The City Did Not Commit An Unfair Labor Practice**

The City is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide in relevant part as follows:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code\*\*\*;

\*\*\*

(5) Refuse to bargain collectively with the representative of its employees recognized as the exclusive representative \*\*\* pursuant to Chapter 4117. of the Revised Code[.]

The ultimate issue before the Board is whether the District engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) by failing to appoint Captain Gregoire to the vacant Assistant Police Chief position. Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-8-96). A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89).

Essentially, the City advances the argument that it is duty-bound to protect and advance the cause of its voting public (the "People," as they are referred to in the City's post-hearing brief), and, thus, to fill Assistant Police Chief vacancies through the process it would use for unclassified employees, rather than through the classified civil service process. Unless otherwise provided, a public employer maintains the authority to determine matters of inherent managerial policy as outlined in O.R.C. § 4117.08(C). O.R.C. § 4117.08(C)(5) lists as a managerial prerogative the promotion of employees. The change in the method of filling the promotional position of Assistant Police Chief, however, impacts the terms and conditions of employment of bargaining-unit employees, who formerly were the exclusive candidates for such promotional opportunities. See generally *Devennish v. Columbus* (1991), 57 Ohio St.3d 163, 1991 SERB 4-7.

The employer is required to bargain with an exclusive representative on all matters relating to wages, hours, or terms and other conditions of employment under O.R.C. § 4117.08(A). *In re City of Broadview Heights*, SERB 99-005 (3-5-99); *In re Ottawa County Riverview Nursing Home*, SERB 96-006 (5-31-96). Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, a balancing test must be applied to determine whether the subject is a mandatory or permissive subject of bargaining. *SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (1995) ("*Youngstown*"); see also *In re City of Akron*, SERB 97-012 (7-10-97).

If a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion, the following factors must be balanced to determine whether it is a mandatory or permissive subject of bargaining: (1) the extent to which the subject is logically and reasonably related to wages, hours, terms and conditions of employment; (2) the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial

prerogatives set forth in and anticipated by O.R.C. § 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and (3) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter. *Youngstown*, supra at 3-76 – 3-77.

Examining the first prong, the promotional process in the City's police department was a term or condition of employment of bargaining-unit employees. Examining the second prong, the City operates a police department, and its essential mission is enforcing the criminal laws of the City and the State of Ohio. The record reflects that the operation of the City's Police Department has been the subject of intense debate through the news media, citizen committees, and City Council meetings, among other venues. The record does not contain any evidence demonstrating that inherent discretion in filling vacancies in the position of Assistant Police Chief is necessary to achieve the police department's essential mission. Indeed, the intensity of the debate, on both sides of the issue, would indicate otherwise, as would the parties' longstanding use of the procedure set forth in the state civil service law. Examining the third prong, the mediatory influence of collective bargaining would have been the ideal mechanism for the City to negotiate for and attempt to achieve its articulated interest in making the voice of the "People" part of the collective bargaining agreement, and for the Union to articulate its interest in retaining a term and condition of employment enjoyed by bargaining-unit members. The three-prong analysis reveals that, on balance, the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining.

Management decisions that are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and timely request by the employee organization, except where emergency situations render prior

bargaining impossible. *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (9-20-2001) ("*Toledo*"); *Youngstown*, supra. The *Toledo* decision states the controlling legal principle:

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler*:

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement becomes effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow [*In re*] *Franklin County Sheriff* [SERB 90-012 (7-18-90)], and assure consistency in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.

*Toledo*, supra at 3-29.

The City argues that the Union waived its right to bargain. "[W]aiver of a statutory right to bargain \* \* \* must be established by clear and unmistakable action by the waiving party." *Youngstown*, supra at 3-81. The record does not contain clear and unmistakable action by the Union that it waived its right to bargain. The Union asserted its position that changes could not be made without bargaining, and the City's response was disagreement with this position, followed by unilateral implementation of the Charter Amendment when the City refused to fill the Assistant Police Chief vacancy.

This case does not involve the "exigent circumstances" exception under *Toledo*. The City argues that the Charter Amendment was enacted by a higher-level legislative

body. Thus, the City argues, it must follow the terms of the Charter Amendment, and in so doing, the City is complying with the second exception set forth in *Toledo*. The Union and the Complainant argue that the City Council is a same-level legislative body, rather than a higher-level legislative body.

O.R.C. § 4117.10(B) defines the term "legislative body" to include "the general assembly, the governing board of a municipal corporation, school district, college or university, village, township, or board of county commissioners or any other body that has authority to approve the budget of their public jurisdiction." O.R.C. § 4117.14(C)(6)(b) provides: "As used in division (C)(6)(a) of this section, 'legislative body' means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is party to the fact-finding process." The term "higher-level legislative body" is not defined in the Ohio Revised Code. As a result, SERB can define the term as long as the definition is consistent with the objectives of Ohio Revised Code Chapter 4117.

The Charter Amendment was enacted by the vote of the majority of the City's voters in the election. Although the City Council voted to authorize the placing of the Charter Amendment on the ballot, it was not the City Council that enacted the change. Instead, the electorate was responsible for the change. When the voters decide an issue at the ballot box, they are acting as a "higher-level legislative authority" to the City Council under the second exception to the bargaining requirement set forth in *Toledo*. This situation is not comparable to one party holding back an issue from bargaining and then springing it on the other party after the collective bargaining agreement has been ratified by both parties. A review of the record does not support a finding that the City was engaged in trickery or gamesmanship with the Union. The City was attempting to implement the change approved by a higher-level legislative body, the voters, after the agreement became effective. While the agreement was silent on the promotional process, such a change impacted a past practice between the parties. In *Toledo*, we extended the two-part test to issues not covered in the provisions of a collective

bargaining agreement, but which require mandatory midterm bargaining. See *In re Southeast Local School Dist Bd of Ed*, SERB 2002-003 (5-14-2002).

The Ohio Supreme Court's decision in *Ohio Council 8* is instructive as it explains the interplay between local laws and collective bargaining agreements. In *Ohio Council 8*, supra at 662, 1991 SERB at 4-88 – 4-89, the Ohio Supreme Court explained as follows:

The Collective Bargaining Act, most specifically R.C. 4117.10(A), \* \* \* provides, in pertinent part:

"\* \* \* Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to section 5705.41 of the Revised Code, and the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code prevail over conflicting provisions of agreements between employee organizations and public employers. \* \* \*"

This provision lists laws which prevail over a conflicting provision in a collective bargaining agreement. "Under the principle of statutory construction that inclusion of a list of items will exclude other items not on the list, the remaining thousands of state and local laws which may conflict with the contracts, do not prevail over those contracts." [citations omitted] R.C. 4117.10(A) simplifies contract administration by eliminating concern over whether an agreement is "contrary to law," and encourages honesty and good faith in collective bargaining by requiring the parties to live up to the agreement they make.

R.C. Chapter 4117, of which R.C. 4117.10(A) is a part, is a law of a general nature which is to be applied uniformly throughout the state. *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44, v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 22 OBR 1, 488 N.E.2d 181. As such, it prevails over any inconsistent provision in a municipal home-rule charter by virtue of Section 3, Article XVIII of the Ohio Constitution. [citations omitted] We have also recognized that R.C. Chapter 4117 prevails over home-rule charters because it was enacted pursuant to Section 34, Article II of the Ohio Constitution. [citations omitted] Thus, the

language in R.C. 4117.10(A) is applicable to collective bargaining agreements executed by a home-rule city: *By virtue of this provision, where the agreement conflicts with any local law, including the charter itself, the agreement prevails unless the conflicting local law falls into one of the specific exceptions listed in the statute.* (emphasis added)

In *Ohio Council 8*, the Ohio Supreme Court established that a local law, such as the Charter Amendment, does not prevail over the terms of a previously agreed-upon collective bargaining agreement. Conversely, the City was *not* required to change the terms of the Agreement to conform to the Charter Amendment because the Agreement does not specify the promotional process for Assistant Police Chiefs. Since the Agreement did not speak specifically to promotions, the *Ohio Council 8* decision is not controlling over the parties on this issue. Therefore, the second exception to the bargaining requirement set forth in *Toledo* excuses the City's unilateral implementation.

### **III. CONCLUSION**

For the reasons above, we find that the unfair labor practice charge was both timely filed and ripe for review; Captain Gregoire had no contractual right to the promotion; Captain Gregoire had no statutory right to the promotion; the Charter Amendment does not conflict with the provisions of the collective bargaining agreement; the change in the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining; the second exception to the bargaining requirement set forth in *Toledo* – legislative action taken by a higher-level legislative body after the collective bargaining agreement became effective – excuses the City's unilateral implementation; and the City of Cincinnati did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed the terms and conditions of employment for Assistant Police Chiefs when it did not promote Captain Gregoire to a vacancy in the position of Assistant Police Chief. Therefore, the complaint is hereby dismissed, and the unfair labor practice charge is dismissed with prejudice.

DRAKE, Chairman, and Verich, Board Member, concur.