

IN THE SUPREME COURT OF OHIO

STATE EMPLOYMENT RELATIONS :
BOARD :
and :
CITY OF CINCINNATI, :
Appellees :
vs. :
QUEEN CITY LODGE NO. 69, :
FRATERNAL ORDER OF POLICE :
Appellant. :

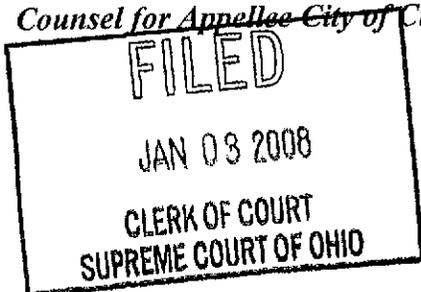
CASE NO. 2007-2269
On Appeal from the Hamilton
County Court of Appeals,
First Appellate District
COURT OF APPEALS
CASE NO. C-060782

CITY OF CINCINNATI'S
MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The case at bar is moot, in one respect, and not ripe, in another. Captain Gregoire has retired from the Cincinnati Police Department. Also, not surprisingly, the only two newly-appointed assistant police chiefs did not intervene on the side of Queen City Lodge No. 69, Fraternal Order of Police ("FOP") and oppose their appointments to the position of assistant chief. Moreover, related litigation is still pending in the Hamilton County Court of Common Pleas. To the extent this Court nevertheless deems the matter justiciable, the underlying dispute is governed by the required deference to be accorded by the judiciary to the Ohio State Employment Relations Board ("SERB"), a legal issue previously decided by this Court.

The memorandum in support of jurisdiction filed by the FOP could have identified, but does not, that Captain Gregoire (the individual whose desire to fill an alleged vacant assistant police chief position was the catalyst for the filing of the unfair labor practice charge that is the subject of the case at bar) lost his arbitration proceeding, lost his separate civil litigation, and has now retired from the Cincinnati Police Department after many years of service.

The memorandum filed by the FOP also should have included, but does not, the recent order and opinion issued November 29, 2007, by SERB, finding that the City of Cincinnati ("City") violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by insisting to impasse on the City's proposals to remove newly-appointed assistant police chiefs from a deemed-certified bargaining unit and by unilaterally negotiating individual employment contracts with the only two affected newly-appointed assistant chiefs. The City has appealed that SERB ruling to the Hamilton County Court of Common Pleas and the appeal is pending in that Court. That case, not this case, evaluates the merits of the

FOP's challenge to the City's application of the Charter amendment to exclude newly-appointed assistant chiefs from the deemed-certified bargaining unit. Furthermore, in the case pending before the Court of Common Pleas challenging the terms and conditions of employment for the two newly-appointed assistant chiefs, the FOP expressly declined to challenge the actual appointment of the individuals to the rank of assistant chief.

Contrary to the FOP's erroneous assertion, the City's home-rule Charter does not conflict with the collective bargaining agreement between the City and the FOP. The agreement does not provide a promotion or appointment process for assistant police chiefs. The citizenry of the City is empowered under the Ohio Constitution, as an act of local self-government, to establish positions in the unclassified civil service of the City including newly-appointed assistant police chiefs. Many cities in Ohio, and the state of Ohio, have unclassified positions. The FOP communicated its opposition to the Charter amendment to the electorate. SERB's decision was supported by substantial evidence and was properly affirmed by the First District Court of Appeals. This is not a case of public or great general interest and this Court should decline jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

As the FOP asserts, the generally applicable Charter amendment ("amendment" or "Issue 5") "covered over one hundred other city positions"¹ in addition to the two assistant police chiefs since appointed to their positions. Incumbent assistant chiefs are unaffected by the amendment. The assistant chief promotion portion of the amendment was the only portion of the amendment implemented and subject to SERB's review because the City had refused Captain Gregoire's demand to be promoted into the assistant chief position. The FOP's challenge to the City's subsequent implementation of

¹ Memorandum in Support of Jurisdiction, pp. 3-4.

the amendment by negotiating individual employment agreements with two newly-appointed assistant chiefs is now being litigated before the Hamilton County Court of Common Pleas.²

Intending to create the appearance of a conflict where none exists, the FOP misrepresents Article VII, Section 22, “Terminal Benefits,” of the collective bargaining agreement.³ SERB properly determined that section is not a general procedure for filling vacancies in the rank of assistant police chief. Rather, that section simply discusses the process whereby a bargaining unit member must retire due to illness or injury but elects to remain on the payroll until his leave balances are exhausted, instead of taking a lump-sum payment. SERB justifiably concluded that Article VII, Section 22 was inapplicable to the case at bar. The FOP’s assertion that “City Council placed a contradictory Charter amendment before the voters in November 2001” is misleading.⁴ Throughout its filing, the FOP falsely represents that there was a conflict between the collective bargaining agreement and the amendment. In fact, there was no conflict. The collective bargaining agreement did not provide for promotions to the position of assistant chief and the Charter amendment filled that gap.

*State of Ohio ex rel. Gregoire v. City of Cincinnati*⁵ was Captain Gregoire’s separate litigation effort to obtain a promotion to the rank of assistant police chief in the Cincinnati Police Department. He filed his complaint in 2002 seeking to extend a preexisting civil service promotional eligibility list for the rank of assistant chief to provide time for him to potentially succeed with his then pending demand for arbitration

² Case No. A0711489.

³ Memorandum in Support of Jurisdiction, p. 3.

⁴ *Id.*, p. 5.

⁵ *State of Ohio ex rel. Gregoire v. City of Cincinnati*, Case No. A0208052, affirmed by the First District Court of Appeals, No. C-050772, jurisdiction declined by this Court, Case No. 2006-1953.

filed pursuant to his collective bargaining agreement (trying to establish there was an existing vacancy in the rank he claimed). He also sought time to succeed with the complaint at SERB that is the subject of the case at bar. In order to succeed in his effort to become assistant police chief, Captain Gregoire had to prevail both in his arbitration effort to establish a vacancy to which he was entitled and in his effort before SERB to declare the Charter amendment unlawful.

Captain Gregoire erroneously alleged in his original complaint in the separate civil litigation that “Effective September 10, 2002, a vacancy existed at the position of Assistant Police Chief.” However, the final and binding determination in his arbitration proceeding held that there was no vacancy at the position until December 6, 2002 (after the October 23, 2002, scheduled expiration of the civil service list). The parties had agreed in that case to provide Captain Gregoire a chance to succeed in his arbitration and his SERB proceeding because, if he succeeded in *both* proceedings, he could then prevail with his claim to promotion. However, he lost his final and binding arbitration proceeding,⁶ there was no vacancy in the rank of assistant chief on September 10, 2002, and Captain Gregoire’s claim to the position became moot. An arbitrator, a Common Pleas judge, two panels of the First District Court of Appeals, and SERB, all recognized that Captain Gregoire does not have a claim to the rank of assistant chief. This Court declined jurisdiction. Had Captain Gregoire prevailed in his arbitration proceeding, rather than lost, the SERB proceeding would not be moot. Once he lost the arbitration proceeding, however, his claim to promotion became moot. Captain Gregoire has since retired.

⁶ *Queen City Lodge No. 69, Fraternal Order of Police and the City of Cincinnati*, AAA Case No. 52 390 00595 02, Arbitrator Hyman Cohen (January 15, 2004).

The First District Court of Appeals recognized that the “agreed entry’s extension of the promotion list simply maintained the status quo until resolution of the underlying dispute, that is, whether a vacancy had occurred as of . . . September 10, 2002 A SERB determination about the city’s proposed charter amendment would have had no effect on the vacancy question.”⁷ The Court of Appeals emphasized in that case: “Once the arbitrator determined that no vacancy had existed before the expiration of the promotion list and denied the grievance, the city no longer had a ‘clear legal duty’ to promote Gregoire.” Therefore, the Court of Appeals affirmed the dismissal of Captain Gregoire’s complaint.

In the case at bar, the Court of Appeals reiterated its earlier ruling. The Court held: “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 The trial court also erred in determining that Captain Gregoire was entitled to be promoted to assistant police chief.”⁸

The FOP goes far afield from the record and disregards the broad reach of Issue 5 to many positions by asserting: “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.”⁹ Further, there also is no support in the record for the FOP’s additional assertions: “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,” “This understanding was very clear to all

⁷ Case No. C-050772.

⁸ Decision, Case No. C-060782, pp. 4, 14-15.

⁹ Memorandum in Support of Jurisdiction, pp. 5-6.

people involved with the Charter Amendment and was a part of their public campaign,” and “the City never made a request for negotiations with the FOP.”¹⁰

III. ARGUMENT IN OPPOSITION TO FOP’S PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1:

The judiciary may not exercise jurisdiction over a moot claim.

The test for determining mootness is whether a judgment, if rendered, would have any practical legal effect upon an existing controversy. The central question is whether a change in circumstances that existed at the beginning of the litigation has eliminated the possibility of effective relief. At the beginning of the litigation, Captain Gregoire believed he would prevail in *both* his arbitration and this SERB unfair labor practice proceeding. In fact, Captain Gregoire lost his arbitration proceeding and did not appeal that adverse ruling. He also lost his separate civil litigation proceeding and that case is final. The First District Court of Appeals has now twice ruled that Captain Gregoire’s claim to the assistant chief position is moot. Captain Gregoire has retired from the Cincinnati Police Department.

The doctrine of mootness is rooted in the general notion of judicial restraint. Courts in Ohio have long recognized that a court cannot entertain jurisdiction over a moot question. It is not the duty of the Court to decide purely academic or abstract questions.¹¹

PROPOSITION OF LAW NO. 2:

The judiciary must properly defer to SERB’s expertise applying its operative statute and interpreting collective bargaining agreements. The judiciary may not substitute its judgment for SERB’s judgment.

¹⁰ *Id.*, p. 6.

¹¹ *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910).

The First District Court of Appeals properly cited and applied this Court's holdings that "SERB's findings are entitled to a presumption of correctness"¹² and "courts must accord due deference to SERB's interpretation of R.C. Chapter 4117."¹³ The Court of Appeals emphasized by reference to this Court: "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."¹⁴ Leaving no doubt, the Court of Appeals accurately reiterated the standard articulated by this Court and the United States Supreme Court:

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 to support a conclusion, but less than the weight of the evidence. "Substantial evidence" is a low burden.¹⁵

The Court of Appeals correctly observed that SERB had reviewed the collective bargaining agreement and concluded that "[it] did not specify the promotional process for assistant police chiefs."¹⁶ The FOP's protestations to the contrary are just summary and erroneous assertions belied by the agreement itself. The Court of Appeals also noted that "the parties stipulated to the fact that past promotions were governed by the Rule of 1, and common sense dictates that if there had been a provision in the CBA governing promotions, the parties would not have had to stipulate to that fact. Essentially, what the

¹² Decision, p. 7, citing *Hamilton v. State Employment Relations Bd.* (1994), 70 Ohio St.3d 210, 214, 638 N.E.2d 522.

¹³ *Id.*, citing *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 267, 533 N.E.2d 264.

¹⁴ *Id.*

¹⁵ Decision, pp. 7-8 (emphasis in original), citing an earlier First District decision that relied upon the following authority: *Univ. Hosp. v. State Employment Relations Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835; *Lorain City Bd. of Edn. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264; R.C. 4117.13(D); *Consol. Edison Co. v. Natl. Labor Relations Bd.* (1938), 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.

¹⁶ Decision, p. 8.

trial court did here was to substitute its judgment for that of SERB. That was improper.”¹⁷

By contrast, to bootstrap itself into an alleged conflict between the Charter amendment and the collective bargaining agreement concerning the appointment of assistant police chiefs, the FOP merely cites the very narrow “Terminal Benefits” provision of the agreement.¹⁸ SERB justifiably rejected that misleading attempt: “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.”¹⁹ SERB also cited Captain Gregoire’s adverse arbitration proceeding and the arbitrator’s final ruling denying his grievance and concluding that Captain Gregoire had no contractual right to be promoted to the rank of assistant chief.²⁰

The FOP goes so far astray that it erroneously claims: “The Charter Amendment was not the ‘will of the People.’”²¹ The citizenry of the City, of course, derives its authority to create a home-rule charter directly from the Ohio Constitution. The citizenry voted to approve the charter amendment. The FOP, and other entities and individuals, are empowered to place issues on the ballot either by persuading the requisite number of legislators to do so or by persuading the requisite number of voters to do so. In the final analysis, however, it is the citizenry itself that determines the form and structure of the government of the City of Cincinnati including whether senior officials serve in the classified or unclassified service.

¹⁷ *Id.*, p. 9.

¹⁸ Memorandum in Support of Jurisdiction, pp. 8-9.

¹⁹ SERB Opinion 2005-006, pp. 5-6 (attached to Memorandum in Support of Jurisdiction).

²⁰ *Id.*, p. 6.

²¹ Memorandum in Support of Jurisdiction, p. 12.

The Court of Appeals properly held:

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*.²²

In *Toledo*, SERB created an exception to the general rule and held that legislative action taken by a higher-level legislative body after the agreement became effective allows modification of an existing collective bargaining agreement. As the Court of Appeals noted, SERB applied its own agency-created exception by defining "higher-level legislative body" consistent with the objectives of R.C. Chapter 4117. SERB had determined, based on the record, that City Council did not act in bad faith in placing the amendment on the ballot. The Court of Appeals determined that there was substantial evidence to support SERB's findings.²³ The Court of Appeals properly recognized that the trial court had failed to defer to SERB's resolution of the evidence before it.²⁴

Furthermore, the Court of Appeals correctly held:

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.)²⁵

The FOP implicitly and simply argues that SERB is not empowered to interpret and apply Revised Code Chapter 4117 as it has. Rather, the FOP argues that the judiciary may substitute its judgment for SERB's interpretation and application. The Court of Appeals justifiably rejected the FOP's argument:

²² Decision, p. 11, citing SERB's prior ruling in *In re Toledo City School Board of Education*, SERB No. 2001-005 (2001).

²³ Decision, p. 12.

²⁴ *Id.*, p. 13.

²⁵ *Id.*

[T]he Ohio Supreme Court has consistently recognized that “SERB’s findings are entitled to a presumption of correctness.” 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.”²⁶

The required deference to SERB issue presented by the FOP in this appeal has been previously decided by this Court. This appeal does not present any additional authority or rationale for the Court to revisit that issue.

PROPOSITION OF LAW NO. 3:

A union’s claim that a public employer would violate the discipline and other terms and conditions in a collective bargaining agreement is not ripe until the government appoints an employee to the subject position.

The FOP does not just argue that the Charter amendment unlawfully prevented Captain Gregoire from being promoted to the rank of assistant police chief. It also argues that even assuming *arguendo* the City Manager had lawfully appointed Captain Gregoire to the rank of assistant chief, Captain Gregoire would have been entitled to the terms and conditions of the collective bargaining agreement. However, Captain Gregoire was not appointed assistant chief. The FOP’s hypothetical argument about whether the terms and conditions of the collective bargaining agreement would have covered Captain Gregoire is not ripe. By contrast, the FOP’s challenge before SERB to the application of the collective bargaining agreement to actual newly appointed assistant chiefs is pending before the Hamilton County Court of Common Pleas on the City’s appeal in a separate

²⁶ *Id.*, p. 7, quoting *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 267, 533 N.E.2d 264.

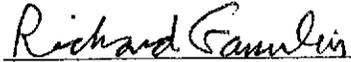
proceeding.²⁷ In due course, that issue may wind its way to this Court. The case at bar does not present a justiciable controversy.

IV. CONCLUSION

Boiled down to its essentials, this case addresses the proper deference to be accorded SERB by the judiciary. That issue has been previously decided by this Court. The case at bar does not present any issue of public or great general interest and this Court should decline jurisdiction.

Respectfully submitted,

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City Solicitor



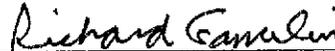
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²⁷ Case No. A0711489.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing City of Cincinnati's Memorandum in Opposition to Jurisdiction has been sent to Stephen S. Lazarus, Esq. and Kimberly A. Rutowski, Esq., Hardin, Lazarus, Lewis & Marks, LLC, 30 Garfield Place, Suite 915, Cincinnati, Ohio 45202 via ordinary United States Mail this 2nd day of January, 2008.



Richard Ganulin
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(Police) SERBvQC Ldg 69 MIO 0108-RG