

IN THE SUPREME COURT OF OHIO

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

Appellant,

v.

STATE EMPLOYMENT RELATIONS
BOARD,

and

CITY OF CINCINNATI,

Appellees.

Case No. 2007-2269

On Appeal from the
Hamilton County Court of Appeals,
First Appellate District

Court of Appeals Case
No. C-060782

MEMORANDUM IN OPPOSITION TO JURISDICTION OF
APPELLEE, STATE EMPLOYMENT RELATIONS BOARD

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INTRODUCTION

The Court should not exercise jurisdiction in this case. The First District Court—deferring to the Appellee, State Employment Relations Board (“SERB’s”) interpretation of R.C. Chapter 4117 and to SERB’s findings supported by substantial evidence—agreed that SERB’s Order should have been affirmed by the common pleas court. The court of appeals’ opinion is well reasoned, grounded solidly in the record, and correct.

Moreover, the facts are unusual. This case involves an amendment of the City Charter (“Charter Amendment”) which was approved by the electorate of the City of Cincinnati (“City”) in the wake of the April 2001 Cincinnati riots. The language of the Charter Amendment was suggested by a citizens committee in which the Assistant Police Chiefs positions must be appointed by the City Manager. The City Council placed this language on the ballot and it was approved by the citizens of Cincinnati.

When an Assistant Police Chief submitted a notice to retire, a Cincinnati police captain asserted a right to be promoted based upon an unwritten past practice. Previously, this practice had been followed for promotions of Cincinnati police captains to the rank of Assistant Police Chiefs. The City refused to promote the police captain based upon this past practice and instead followed the Charter Amendment appointment language. The FOP filed an unfair labor practice charge (“ULP”) against the City with SERB. After a hearing, SERB found that the City had committed no ULP because the past practice had been overridden by the Cincinnati electorate when it approved the Charter Amendment requiring the Cincinnati City Manager to appoint Assistant Police Chiefs. SERB found that the Cincinnati citizens were a “higher-level legislative authority” who had taken legislative action via the Charter

Amendment, and that the City did not commit a ULP when it complied with this “higher level legislative authority.”

The FOP contests this. In its First Proposition, it argues that the Charter Amendment and the collective bargaining agreement (“CBA”) between the FOP and the City conflict and that based upon case law, the CBA must prevail. The FOP refers to non-relevant contract provisions to make its argument. But this ULP is about promotions and so the focus is whether the CBA conflicts with the Charter Amendment regarding promotions. SERB closely reviewed the CBA and found no promotion procedure. The parties had followed a past practice for promotions. So the Charter Amendment requiring the Cincinnati city manager to *appoint* Assistant Police Chiefs did not conflict with the CBA. Thus, the First Proposition of law is without merit.¹

The FOP’s Second Proposition, while of possible academic interest, is narrowly confined to the special circumstances that followed in the wake of the 2001 Cincinnati riots. The FOP dismisses the authority of the electorate of Cincinnati and states the voting public is not a “higher-level legislative authority.” The FOP focuses narrowly on only one part of the Charter Amendment process – the City Council role in initiating the Charter Amendment for consideration by the voters of Cincinnati. The FOP contends that this role of the City Council trumps all other aspects of the process. The FOP completely disregards the recommendation of the citizens’ panel to have certain City positions appointed and the majority vote of the electorate approving that recommendation.

¹ Even if this Court decides to consider other CBA provisions, there is no conflict since SERB recently decided that the CBA applies to the Assistant Police Chiefs’ position. See *In the Matter of the City of Cincinnati* (2007), SERB 2007-003 at <<<http://www.serb.state.oh.us>>> (last visited January 7, 2008).

However, “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*.” See *State Empl. Rel. Bd. v. Queen City Lodge No. 69, FOP* (1st Dist.), 2007-Ohio-5741 (“App. Op.”) ¶ 36. *In the Matter of Toledo City School District Board of Education* (2001), 2001 OPER (LRP) LEXIS 785, SERB No. 2001-005 (“*Toledo*”) SERB had found a party does not commit a ULP if it modifies a CBA mid-term without negotiation and agreement by the other party when immediate action is required due to legislative action taken by a “higher-level legislative authority”. Even if certain issues are not covered in the CBA that require mandatory midterm bargaining such as promotions, the “higher-level legislative authority” exception applies under *Toledo*. “Higher-level legislative authority” is a SERB created term of art and as an interpretation of R.C. Chapter 4117 is entitled to due deference. See *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Board* (1988), 40 Ohio St. 3d 257.

The citizens of Cincinnati approved the Charter Amendment which affects only one FOP position – the Assistant Police Chief position. This impacts only a few people. In a companion case, SERB has determined that the Assistant Police Chief positions are covered by the CBA between the FOP and the City. See *In the Matter of the City of Cincinnati, supra*. So the Assistant Police Chiefs have all the protection of the CBA, but simply can not be hired according to the past practice.

The arguments pressed by the FOP are solely driven by this singular fact pattern, which is not likely to recur often. This case would affect future cases in which there has been a catastrophic occurrence which causes the citizens of a locality to approve a change in their

charter amendment. This is not very likely. But if such a scenario occurs again, this Court should not deny citizens the right to vote and approve a change of their charter amendment.

In short, the facts underlying the proffered Propositions of Law in this case are so fact intensive and the standard of review are so well-settled that this Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. The FOP is the exclusive representative for the bargaining units comprising all members of the City's police division. The City and the FOP were parties to a CBA governing the police supervisors' unit effective from December 10, 2000 through December 31, 2002.

In April 2001, after a fatal shooting of a young man by Cincinnati police officers, riots occurred in Cincinnati. In response, a citizen's panel was convened which made several recommendations including giving the City Manager authority to hire Assistant Police Chiefs from outside the police department. Almost one year after the CBA had gone into effect, Cincinnati's City Council passed an emergency ordinance placing on the upcoming ballot a Charter Amendment which allowed for this outside hiring. On November 6, 2001, the electorate passed the Charter Amendment. Under the Charter Amendment terms, certain high level city employees, including Assistant Police Chiefs, were to be reclassified from classified to unclassified service. Current Assistant Police Chiefs were to remain classified until they vacated their positions. Future vacancies were to be filled by the City Manager solely on the basis of the candidate's executive and administrative qualifications in law enforcement.

Before the Charter Amendment passed, the promotion process was governed by past practice. 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. That person shall be appointed pursuant to R.C. 124.44.

On September 10, 2002, one of the City’s Assistant Police Chiefs submitted a notice of intent to retire pending a criminal investigation of his alleged misconduct. A City police captains 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 in effect, the City did not follow the “Rule of 1”. It refused to appoint the police captain to the Assistant Police Chief position.

On October 17, 2002, the FOP filed a ULP charge with SERB. The ULP alleged that the City had violated R.C. 4117.11(A)(1)² and (A)(5)³ 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 found probable cause to believe that the City had violated R.C. 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs and ordered the parties to hearing.

Following the hearing, a SERB Administrative Law Judge (“ALJ”) issued a Proposed Order recommending that SERB find the City had committed a ULP, it must fill vacancies

² R.C. 4117.11(A)(1) states that a public employer commits an unfair labor practice if it interferes with, restrains or coerces employees in the exercise of rights guaranteed in R.C. Chapter 4117.

³ R.C. 4117.11(A)(5) states that a public employer commits an unfair labor practice if it refuses to bargain collectively with the exclusive representative of employees. R.C. 4117.01(G) defines “to bargain collectively.”

from the Promotional Eligibility List, and the City cease and desist from implementing the Charter Amendment.

Before SERB had issued its Order, the FOP filed a second ULP charge on July 29, 2004, based on the City's decision not to fill a second Assistant Police Chief vacancy. SERB issued a Finding of Probable Cause directing the second ULP to a hearing.

On September 20, 2005, SERB ordered the first ULP dismissed. SERB ruled that the Charter Amendment did not conflict with the CBA regarding the promotional process, and thus 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 FOP 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 the voting public of Cincinnati, which constituted a "higher-level legislative authority" under *Toledo*. Finally, SERB determined that the City had "not engaged in trickery or gamesmanship with the union" in enacting the Charter Amendment. The language of 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." See App. Op. at ¶ 34. In this instance, the Cincinnati electorate voted for and approved the Charter Amendment and thus enacted a law, which changed the past practice for filling vacant Assistant Police Chiefs' positions. Thus, the City had not violated R.C. 4117.11(A)(1) and (A)(5) and had not failed to bargain in good faith with the FOP. On October 24, 2005, SERB vacated the second ULP probable cause finding based on the dismissal of the first ULP.

The FOP appealed both cases separately to the Hamilton County Common Pleas Court which were consolidated. The City was not named as an Appellee nor did the City immediately move to intervene.

Following oral argument, a Hamilton County Common Pleas Court magistrate issued a Decision finding that SERB should be reversed, both for dismissing the first ULP, and for vacating the probable cause finding in the second ULP. The magistrate reviewed the underlying merits of the case and determined that the Charter Amendment conflicted with the CBA in two respects: it conflicted with the CBA provision dealing with grievance procedures, and it conflicted with Article VII, Section 22, which the magistrate construed as dealing with promotions. The magistrate then determined that based on this conflict the City had a duty to bargain with the FOP. The magistrate also held that the City had committed a ULP when it passed the August 2001 ordinance that placed the Charter Amendment on the ballot. The magistrate re-construed the ULP as passing the ordinance to place the Charter Amendment on the ballot, and not the act of applying the Charter Amendment. Therefore, the magistrate concluded the Charter Amendment was not enacted by a "higher-level legislative body," and SERB's contrary determination was unreasonable. The common pleas court adopted the magistrate's decision and issued an order that was timely appealed.

The Hamilton County Court of Appeals made the City a party to the appeal. The Court determined that the common pleas court improperly reviewed SERB's decision de novo and did not properly defer to SERB's findings that were supported by substantial evidence on the record. The Court of Appeals found the lower court failed to defer to SERB's finding of no conflict between the Charter Amendment and the CBA regarding the promotion process. Also, the Court of Appeals found that any conflict between the Charter Amendment and the CBA

regarding the grievance procedure was not before SERB because the ULP charge was based solely on the City's application of the Charter Amendment to the promotional process. Thus, a conflict based on the grievance procedure was simply a potential conflict. Lastly, the Court of Appeals found that SERB's determination that the Cincinnati electorate's approval of the Charter Amendment constituted action by a "higher-legislative authority" was reasonable and that SERB had substantial evidence before it that the City did not act in bad faith by voting to place the Charter Amendment on the ballot. Thus, the Court of Appeals reinstated SERB's order that the City had not committed a ULP. This appeal followed.

THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

- A. The FOP's claims are not worth review because the fact pattern is unique and unlikely to affect other cases and the standard of review of SERB's decision are highly deferential.**

This case does not merit further review. FOP claims no substantial constitutional question, but rather argues only that this case is of public or great general interest. But the issues in this case arise from a very specific, unusual fact pattern not likely to be present in the future. As explained above, the proper standard of review has been addressed in countless cases. In this case, SERB's decision was supported by substantial evidence and therefore it meets the test for deference by the courts. R.C. 4117.13(D) and *Lorain, supra*.

The FOP dramatically asserts that this case is about the future of collective bargaining between public employees and their employers. Nothing in the Court of Appeals' decision changes the fundamental principle that the terms of a CBA prevail over a conflicting law (other than the laws specifically enumerated in R.C. 4117.10(A)). In this case, since no term of the CBA conflicts with the Charter Amendment, the Charter Amendment prevails. The decision is consistent with prior case law on this issue.

The FOP misstates the facts surrounding the enactment of the Charter Amendment. It alleges that the City Council underhandedly agreed to terms of the CBA and then turned around and placed a proposed Charter Amendment on the ballot that changed the terms of the agreement. First, the Charter Amendment did not change the terms of the CBA. The CBA was silent on the promotion process. The parties stipulated that promotions were based upon past practice, so the proposed Charter Amendment could not change nonexistent CBA terms. Additionally, this case was only about the promotion process, so any other potential conflict was not yet ripe for review. As stated above, the Charter Amendment language was drafted by a citizen committee in response to the April 2001 riots. The CBA had been in effect for almost a year before City Council voted to place the Charter Amendment on the ballot. The City Council did not attempt to apply the Charter Amendment until after the CBA at issue expired.

The Charter Amendment was enacted by a vote of the city's electorate so it was the "vote of the people" which SERB properly found was a "higher-level legislative authority." Under *Toledo and Jurcisin v. Cuyahoga County Bd. of Elections* (1988), 35 Ohio St.3d 137, Cincinnati was justified in changing the promotional past practice during the term of a collective bargaining agreement since the contract was silent on that issue and the electorate is a "higher-level legislative authority."

Obviously, the facts in this case as described above are unique. This case will not result in the demise of collective bargaining. The affected populace enacted a change of law, which among other matters, changed an unwritten rule of promotion to a written law of appointment for the Assistant Police Chief position. SERB was justified in using the *Toledo* exception to recognize a matter on which the CBA was silent.

Neither proposition of law warrants review because both are clearly incorrect. Nor does this case raise issues of particular importance. This case is not one of public or great general interest.

RESPONSES TO PROPOSITIONS OF LAW

A. Response to Proposition of Law No. 1:

The FOP first asks the Court to adopt the following Proposition of law:

The Charter Amendment conflicts with the Collective Bargaining Agreement.

This Court should not accept jurisdiction over a Proposition merely to repeat the holding of the Court of Appeals and prior case law. Appellee SERB readily concedes that the provisions of a CBA prevail over conflicting laws (with exceptions not relevant here). See *Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St. 3d 658, paragraph one of the syllabus and R.C. 4117.10(A).

However, where no agreement exists or where an agreement makes no specification about a matter, the parties are subject to applicable state or local laws, including a city charter. *Id.* In *Jurcisin, supra* at 145 this Court found no conflict between the CBA and a proposed charter amendment that sought to establish a police review board to investigate complaints of police misconduct and to recommend disciplinary action. Per *Jurcisin*, the CBA only takes precedence over a local law when there is a clear and express conflict. In *Jurcisin*, this Court found no such conflict existed between the CBA and the proposed charter amendment.

Similarly, in this case, no conflict exists between the CBA and the Cincinnati Charter Amendment. Exercising jurisdiction over this case is a fruitless exercise and would be a waste of judicial resources. This Court has already ruled on this issue in *Jurcisin*. However, if the Court does accept this Proposition as written, this Proposition of law is incorrect. The

grievance procedure is not relevant here. But if the Court decides it is pertinent, SERB has recently decided in a companion case that the appointed Assistant Police Chiefs must be afforded the same wages, hours, terms and conditions of employment as are set forth in the collective bargaining agreement. See *In the Matter of the City of Cincinnati* (2007), *supra* at 22. Thus, the Charter does not conflict with the grievance procedure in the CBA since the Assistant Police Chiefs are still subject to that agreement, including the grievance procedure.

The FOP also inaccurately asserts that the Charter Amendment eliminates the CBA's just cause review of Assistant Police Chiefs and makes them *at will employees*. FOP's Memorandum in Support of Jurisdiction ("Memo in Support") at 8. However, the pertinent language of the Charter Amendment only discusses the dismissal rights of the appointed *Police Chief*. (After a probationary period, the Police Chief is entitled to just cause review.) The Charter Amendment is silent about the rights given to a disciplined *Assistant Police Chief*. Since the CBA includes a grievance procedure for disciplined members of the Cincinnati Police Division, which includes the Assistant Police Chiefs, the Charter Amendment and the CBA do not conflict. The Assistant Police Chief positions are not *at will* just because they become unclassified positions under the Charter. The Assistant Police Chiefs are still covered by the terms of the CBA, which provides for just cause protection. No conflict exists between the CBA and the Charter Amendment over the Assistant Police Chiefs' grievance rights.

The promotional issue is also a red herring. At the hearing on this case, the parties stipulated that they historically followed the "Rule of 1" when filling promotional vacancies since the contract was silent on this issue. Now, the FOP claims that Article VII, Section 22 of the CBA entitled "Terminal Benefits" sets forth the promotion process. The filling of vacancies is indeed mentioned in this Article, but a careful reading of the provision shows that what is

described is not the promotion process itself, but rather a determination of the date upon which a vacancy is deemed to have occurred. Interestingly, the FOP neglects to mention another provision of the CBA, Article XX, entitled “Abolishment of Promoted Positions,” which vested the City Manager with authority to abolish any promoted positions in the police division in accord with R.C. 124.37 or any successor statute.

SERB found that “(i)t 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.” All of the foregoing constitute substantial evidence supporting SERB’s position and SERB’s ruling was clearly reasonable. The First District agrees with SERB’s position. See App. Op. at ¶¶23-28.

In summary, the FOP’s assertions and arguments addressing a conflict are incorrect. This Proposition is not worthy of review.

B. Response to Proposition of Law No. II:

The FOP asks the Court to adopt the following Proposition of law:

The City’s electorate is not a “higher-level legislative authority.”

As explained by the Court of Appeals, the Ohio Supreme Court has consistently recognized that “SERB’s findings are entitled to a presumption of correctness.” See App. Op. at ¶19 and *Hamilton v. State Employment Relations Bd.* (1994), 70 Ohio St. 3d 210. The Court of Appeals at App. Op. ¶19 also stated 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 purpose. (Citation omitted.)

The Charter Amendment took effect during the term of the CBA. Accordingly, SERB applied its mid-term bargaining standard. *Toledo, supra*. The specific element of the *Toledo* standard at issue here is that mid-term bargaining is not required where there is “legislative action taken by a higher-level legislative body after the agreement becomes effective that requires a change to conform * * *.” *Id.* at 3-29.

The FOP takes issue with how SERB applied *Toledo*. The FOP agrees that the Ohio General Assembly is a “higher-level legislative body” but it does not agree that the Cincinnati electorate is such a body. Memo in Support at 10-11. Although “legislative body” is defined in R.C. 4117.10(B) and 4117.14(C)(6)(b), the term ‘higher-level legislative body’ is not defined in the Ohio Revised Code. SERB has created this term of art within the confines of R.C. Chapter 4117. As a result, this SERB-created term of art can be defined by SERB as long as the definition is consistent with the objectives of Ohio Revised Code Chapter 4117. *Springfield Township Bd. of Trustees v. State Employment Relations Bd.* (1990), 70 Ohio App. 3d 801.

SERB and the Court of Appeals found that “legislative body” as defined in R.C. 4117.10(B) is specifically limited to R.C. 4117.10 and does not apply here. The Court of Appeals noted 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.” Black’s Law Dictionary (8th Ed. 2004) 919, 142. App. Op.at ¶ 36.

SERB found that “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.” Conversely, the FOP claims “all Council has to do is place a Charter Amendment before the voters for approval.” Memo in Support at 11.

The FOP neglects to mention that a majority of the electorate must approve a charter amendment proposed by the City Council, just the same as the electorate must approve a charter amendment put on the ballot by the FOP.

The City Charter expressly and legally enables the people to make laws at the local level. The FOP simply ignores the role of “the people” in this process. The FOP cites approvingly the Court of Appeals’ dissent that SERB allowed the City “to agree to certain terms and conditions of employment with a union and then shortly thereafter *pass legislation* that conflict with those terms.” (Emphasis added.) Memo in Support at 12.

However, the process of approving the Charter Amendment involved first a republican process of “the people’s” representatives putting that Amendment on the ballot, and then a democratic process of “the people” approving or disapproving the Charter Amendment. FOP’s view that the City Council, in this case, is “hiding behind the voters” assumes the government operates *only* through the representative processes. Memo in Support at 13.

In Ohio, as well as many other states “the people” do make and unmake laws through constitutional initiative and referendum processes. For example, in a recent general election the people of Ohio raised Ohio’s minimum wage and banned smoking in all indoor public places. In Cincinnati, the FOP has the same rights as the City to place an amendment of the charter on the ballot. Ohio Constitution, Article XVIII-Municipal Corporations, Section 9.

The FOP also assumes that the “higher-level legislative body” prong of *Toledo* can only apply when “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.” Memo in Support at 11. The FOP cites no case law to support this contention and ignores that fact that the “people” are not controlled by the City Council.

The FOP erroneously states that since the procedure for the FOP to get a charter amendment before the electorate is more wieldy, “the FOP does not have the ability to put a Charter Amendment on the ballot.” Memo in Support at 11. The FOP has the same right as the City to try to put a Charter Amendment to the vote of the people. Additionally, SERB’s view is consistent with the facts involving City Council and the City’s voters, as the voters have rejected other Charter Amendments proposed by the City Council in the recent past.

SERB and the FOP obviously disagree as to causation. SERB found causation to be in the hands of the electorate, but the FOP found causation to be in the hands of the City Council. The FOP does not explain why SERB’s position was unreasonable on this issue. SERB’s interpretation, which was for the purposes of collective bargaining only, is just as reasonable as any other interpretation. SERB’s interpretation was based on its expertise under R.C. Chapter 4117 as an administrative agency created to enforce and interpret that collective bargaining law. Accordingly, the FOP’s request that this Court review this issue ignores the deference to which SERB’s findings are entitled. Since SERB’s interpretation is reasonable, it must be accorded due deference. See *Lorain City School District, supra*, at 267.

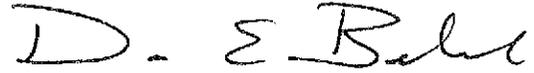
This Proposition of law is without merit and does not merit review by this Court.

CONCLUSION

This case presents no question of public or great general interest. SERB’s decision was supported by substantial evidence and it is well-settled that due deference must be afforded to SERB’s interpretation of RC Chapter 4117. This Court should decline review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the Appellee State Employment Relations Board's Memorandum in Opposition to Jurisdiction was served upon the following, this 7th day of January, 2008 by ordinary U.S. Mail:

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