

IN THE SUPREME COURT OF OHIO

STATE EMPLOYMENT RELATIONS :
BOARD, : CASE NO. 2007-2269
:
and :
:
CITY OF CINCINNATI, : On Appeal from the Hamilton
:
Appellees, : County Court of Appeals,
:
First Appellate District
:
QUEEN CITY LODGE NO. 69, :
FRATERNAL ORDER OF POLICE, :
:
Appellant. :

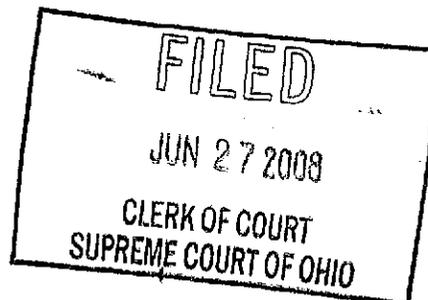
BRIEF OF APPELLEE
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I. STATEMENT OF FACTS

The statement of facts submitted by Appellant, Queen City Lodge No. 69, Fraternal Order of Police (“FOP”), is somewhat incomplete and misleading.¹

In April 2001, numerous individuals within the City of Cincinnati began rioting and otherwise engaged in unlawful activities lasting the better part of one week. The government of the City of Cincinnati, including the Cincinnati Police Department, was one of the targets of the rioters.

On or about August 1, 2001, Cincinnati City Council passed an ordinance placing on the ballot for November 6, 2001, the amendment to the City of Cincinnati Charter that is the subject of this appeal (“Charter Amendment”).² As the First District Court of Appeals acknowledged, “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.”³

Prior to the August 1, 2001, City Council vote to place the Charter Amendment on the ballot, a member of City Council met with the FOP president to discuss the Charter Amendment.⁴ There was also significant public discussion concerning the Charter Amendment.⁵ The FOP had been aware of the Charter Amendment for some

¹ For instance, the FOP describes at great length one Councilmember’s interest for the City to negotiate changes in the collective bargaining agreement’s grievance process, a matter irrelevant to the issue before this Court (i.e., the City Manager’s authority to appoint new assistant police chiefs).

² Joint Stipulations of Fact, ¶7 City of Cincinnati Supplement (“Supplement”) 0022. Testimony of Love, p. 95; Supplement 0011. The full text of the ordinance and the Charter Amendment are in Appellant’s Supplement, pp. 50, *et seq.*

³ Decision dated October 26, 2007, p. 12; FOP’s Appendix, p. 14.

⁴ Dewine Testimony, pp. 78-84; Supplement 0013-0019.

⁵ Joint Exhibits 12, 28-44; Supplement 0073-0108.

time and had actively campaigned against it.⁶ The State Employment Relations Board (“SERB”) specifically determined:

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.⁷

SERB added:

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 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.⁸

SERB emphasized:

This situation is not comparable to one party holding back an issue from collective bargaining and then springing it on the other party after the collective bargaining agreement has been ratified by both sides.⁹

The Charter Amendment was enacted by the citizenry on November 6, 2001.¹⁰

The Charter Amendment covered over one hundred City positions¹¹ and removed many from classified civil service including the positions of assistant chief of police. The Charter Amendment was “a broad based charter reform” with an impact on many employment classifications in numerous City departments.¹² Under the Charter Amendment, new appointments to the position of assistant chief of police would be in the unclassified service.¹³ Then current assistant chiefs remained grandfathered in the classified service.¹⁴

⁶ Dewine Testimony, p. 83 Supplement 0018; Fangman Testimony, p. 133 Supplement 0021; Joint Exhibit 11; Supplement 0072.

⁷ SERB Opinion 2005-006, p. 17; Appellant’s Supplement, p. 53.

⁸ *Id.*, p. 19; Appellant’s Supplement, p. 55.

⁹ *Id.*

¹⁰ Joint Stipulations of Fact, ¶ 8; Supplement 0002.

¹¹ Brief of Appellant, p. 3.

¹² Dewine Testimony, p. 83, Supplement 2018.

¹³ Joint Stipulations of Fact, ¶9 Supplement 0002; Joint Exhibit 2; Supplement 0058.

¹⁴ Joint Exhibit 2, Supplement 0058.

From the time of the Charter Amendment's enactment, the City's position has been that newly-appointed assistant police chiefs are subject to the terms of the collective bargaining agreement, including discipline and termination procedures.¹⁵ The City ratifies that position again today, on the record before this Court, and expressly foregoes argument to the contrary.¹⁶ The FOP filed grievances and succeeded in its challenges when some City officials negotiated separate employment agreements in 2005 with two newly-appointed assistant police chiefs. The City conceded those grievances and concedes again that, unless and until the collective bargaining agreement is modified, newly-appointed assistant police chiefs remain in the existing bargaining unit.

On October 17, 2002, 14 months after City Council voted to place the Charter Amendment on the ballot and one year after the Charter Amendment was enacted by the citizenry, the FOP filed an unfair labor practice charge at SERB against the City. The reason the FOP filed the unfair labor practice charge at that time was because on September 19, 2002, Assistant Chief of Police Twitty ("Twitty") had submitted notice of his intent to retire.¹⁷ Twitty's retirement was the result of his placement on administrative leave on July 12, 2002, pending a criminal investigation and subsequent plea agreement.¹⁸

The FOP alleged in its unfair labor practice charge at SERB that is the basis for this appeal:¹⁹

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,

¹⁵ December 14, 2002, Memorandum from City Solicitor to Mayor and City Manager; Appellant's Supplement, pp. 151, *et seq.*

¹⁶ The FOP declined the City's suggestion that the City's acknowledgement be filed in this case in the form of a written stipulation.

¹⁷ Joint Stipulation ¶ 10, Supplement 0002; Joint Exhibit 6; Supplement 0071.

¹⁸ Joint Exhibit 5b, 5c, Supplement 0065-0066.

¹⁹ Joint Exhibit 1, Supplement 0056.

basing that position on the passage of the ballot initiative *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.²⁰

On October 15, 2002, the FOP filed a grievance against the City on behalf of Captain Gregoire (“Gregoire”)²¹ seeking to determine whether, in fact (as also alleged in the unfair labor practice charge) a vacancy in the rank of assistant police chief actually existed on September 10, 2002, and whether Captain Gregoire was entitled to that vacancy.²² The grievance was arbitrated but the FOP unjustifiably and unfairly failed to inform the Court about this final and binding arbitration.²³ Captain Gregoire and the FOP also filed suit in the Court of Common Pleas seeking to extend a preexisting civil service promotional eligibility list for the rank of assistant police chief scheduled to expire October 23, 2002.

The FOP and Captain Gregoire lost the final and binding arbitration proceeding and lost the civil litigation. The arbitrator ruled that there was no vacancy in the rank of assistant police chief on September 10, 2002, and that the vacancy did not arise until later, when Twitty retired on December 7, 2002.²⁴ The FOP and Gregoire did not appeal the arbitrator’s ruling.²⁵

In the separate civil litigation, the Court of Common Pleas dismissed the complaint. The First District Court of Appeals affirmed the dismissal and emphasized: “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

²⁰ Id., Supplement 0057 (emphasis added).

²¹ Joint Exhibit 5, Supplement 0063.

²² Joint Stipulation, ¶¶ 18-19, Supplement 0002-0003.

²³ The Magistrate’s Decision, summarily adopted by the Court of Common Pleas, similarly neglects to consider the preclusive determination in the final and binding arbitration proceeding.

²⁴ 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).

²⁵ The Arbitrator’s Opinion was part of the record before SERB. Supplement 0025.

promote Gregoire.”²⁶ In the case at bar, the Court of Appeals reiterated its earlier ruling: “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”²⁷

Consequently, Captain Gregoire’s claim to the position of assistant police chief (the claim that triggered the unfair labor practice charge in the case at bar) is moot. Captain Gregoire has since retired from the Cincinnati Police Department.

Subsequent to the expiration of the collective bargaining agreement in effect at the time the Charter Amendment was enacted, the parties conducted negotiations for successor collective bargaining agreements. In an order and opinion issued November 29, 2007, SERB found that the City violated Ohio Revised Code §§4117.11(A)(1) and (A)(5) by insisting to impasse on the City’s proposals to delete all existing references to assistant police chiefs. The City appealed that SERB ruling to the Hamilton County Court of Common Pleas and the appeal is pending for decision in that court.²⁸ That pending Common Pleas case evaluates the merits of the FOP’s challenge to the City’s application of the Charter Amendment to negotiate an exclusion for newly-appointed assistant police chiefs from the deemed-certified bargaining unit.

In the case at bar, the City unsuccessfully tried to intervene before the Court of Common Pleas after the FOP filed its appeal. The FOP objected to the City’s intervention. As the Court of Appeals described:

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 The city’s not

²⁶ *State of Ohio ex rel. Gregoire v. City of Cincinnati*, Case No. A0208052, affirmed First District Court of Appeals, Case No. C-050772, jurisdiction declined Supreme Court of Ohio, Case No. 2006-1953.

²⁷ Decision, Case No. C-060782, p. 4; FOP’s Appendix, p. 7.

²⁸ Case No. A-0711489.

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.²⁹

The Court of Appeals properly cited and applied this Court's holdings that "SERB's findings are entitled to a presumption of correctness"³⁰ and "courts must accord due deference to SERB's interpretation of R.C. Chapter 4117."³¹ By reference to this Court, the Court of Appeals emphasized: "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."³² The Court of Appeals 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 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.³³

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."³⁴ 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 the fact. *Essentially, what the trial court did here was to substitute its judgment for that of SERB. That was improper.*"³⁵

²⁹ Decision, p. 5; FOP's Appendix, p. 8.

³⁰ Decision, p. 7; FOP's Appendix, p. 10.

³¹ *Id.*

³² *Id.*

³³ *Id.*, pp. 7-8 (emphasis in original).

³⁴ *Id.*, p. 8; FOP's Appendix, p. 11.

³⁵ *Id.*, p. 9 (emphasis added).

II. ARGUMENT³⁶

PROPOSITION OF LAW NO. I

UNFAIR LABOR PRACTICE CHARGES ARE NOT RIPE WHERE THE CHARGED PARTY HAS NOT YET ACTED

In its unfair labor practice charge filed in 2002 before SERB, the FOP did not challenge any actual appointment made by the City Manager to the rank of assistant chief of police. Nor did the FOP allege that the City had actually deprived any newly-appointed assistant chief of the terms of the collective bargaining agreement. Later, in 2005, the City Manager appointed Captain Cureton and Captain Demasi to the rank of assistant chief of police. The FOP has not challenged either appointment. The FOP did challenge the terms of employment the City offered to both Cureton and Demasi. The City conceded both those challenges and both Cureton and Demasi are provided the terms of the collective bargaining agreement. However, the FOP does not challenge the actual appointments by the City Manager. Furthermore, as previously described, the City stipulates on the record before this Court that unless and until the collective bargaining agreement is modified in this regard, other newly appointed assistant police chiefs will be provided the terms of the collective bargaining agreement.

The FOP's challenge to the appointment authority conferred on the City Manager by the Charter Amendment is not ripe. The FOP has not challenged any assistant chief appointment. The City is not depriving any newly-appointed assistant chief of the terms of the collective bargaining agreement. This Court should decline jurisdiction over the FOP's appeal.

³⁶ The FOP's propositions of law do not comply with SCt R VI, Section 2 (B) (4).

PROPOSITION OF LAW NO. II

SERB LACKS JURISDICTION OVER UNTIMELY UNFAIR LABOR PRACTICE CHARGES

An unfair labor practice charge must be filed with SERB within 90 days after the alleged unfair labor practice was committed.³⁷ The FOP filed its unfair labor practice charge on October 17, 2002.³⁸ In that charge, the FOP alleged that the City acted “unilaterally” when City Council voted more than 14 months earlier on August 1, 2001, to place the Charter Amendment on the ballot and allegedly failed “to negotiate over these items prior to their placement on the ballot in August, 2001.”³⁹ If the FOP’s unfair labor practice charge is deemed to be either the vote of City Council in August 2001 or the vote of the citizenry in November 2001, the charge was filed well outside the 90 day period required by statute.

Therefore, SERB lacked jurisdiction over the FOP’s unfair labor practice charge. The charge was filed more than 14 months after the City allegedly acted “unilaterally” and in alleged violation of Ohio’s Collective Bargaining Act. The matter should have been dismissed by SERB, and this Court should decline jurisdiction now.

PROPOSITION OF LAW NO. III

AN UNFAIR LABOR PRACTICE CHARGE BECOMES MOOT WHEN THE CLAIM CAN NO LONGER BE REDRESSED

*State of Ohio ex rel. Gregoire v. City of Cincinnati*⁴⁰ was Captain Gregoire’s effort to obtain a promotion to the rank of assistant police chief in the Cincinnati Police Department. His complaint sought to extend a preexisting civil service promotional

³⁷ O.R.C. § 4117.12(B); Ohio Administrative Code § 4117-7-01.

³⁸ Joint Stipulation, ¶20, Supplement 0003.

³⁹ Joint Exhibit 1, Supplement 0056.

⁴⁰ *State of Ohio ex rel. Gregoire v. City of Cincinnati*, Case No. A0208052, affirmed First District Court of Appeals, Case No. C-050772, jurisdiction declined Supreme Court of Ohio, Case No. 2006-1953.

eligibility list (due to expire October 23, 2002) to provide him time to potentially succeed with his then pending demand for arbitration (filed October 15, 2002) pursuant to the collective bargaining agreement. Gregoire also sought time to succeed with his unfair labor practice charge filed at SERB (October 17, 2002) that is the subject of the case at bar. In order to succeed in his effort to become assistant chief of police, 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.

Gregoire erroneously alleged in his original complaint in the Court of Common Pleas 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 was that no vacancy opened at the rank of assistant chief of police until December 7, 2002 (after the October 23, 2002, scheduled expiration of the civil service list). In his civil lawsuit, the parties agreed to provide Gregoire an opportunity 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, Gregoire lost his final and binding arbitration (and he did not appeal), there was no vacancy in the rank of assistant chief of police on September 10, 2002, and Gregoire’s claim to promotion became moot. The Court of Common Pleas consequently dismissed Gregoire’s lawsuit, the First District Court of Appeals affirmed the dismissal, and this Court declined jurisdiction over Gregoire’s appeal.

As the Court of Appeals emphasized in its prior ruling affirming the dismissal of Gregoire’s lawsuit, a “SERB determination about the city’s proposed charter amendment would have had no effect on the vacancy question 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."⁴¹

By force of the same reasoning, the unfair labor practice charge in the case at bar is moot. The central question is whether a change in the circumstances that existed at the time of filing the unfair labor practice charge has eliminated the possibility of effective relief. When the charge was filed, Gregoire sought an alleged vacancy. It has been conclusively adjudicated that Gregoire erroneously alleged there was a vacancy. Gregoire lost that claim. He has retired from the Cincinnati Police Department. Courts in Ohio have long recognized that the judiciary cannot entertain jurisdiction over a moot question. It is not the duty of a court to decide purely academic or abstract questions.⁴² Therefore, the case at bar is moot and the Court should decline jurisdiction.

PROPOSITION OF LAW NO. IV

UNDER OHIO LAW, A HOME-RULE MUNICIPAL CHARTER CONTROLS THE RELATIONSHIP BETWEEN THE MUNICIPALITY AND A LABOR UNION WHEN THE CHARTER AND A COLLECTIVE BARGAINING AGREEMENT DO NOT CONFLICT

The FOP overbroadly asserts: "The Charter Amendment conflicts with the CBA in many areas."⁴³ Primarily emphasizing the alleged loss of grievance procedures, the FOP claims that SERB "chose to ignore this clear conflict."⁴⁴ That grievance procedure issue was not ripe in the unfair labor practice charge before SERB. The City had not even appointed any new assistant chiefs much less deprived them of grievance procedures. However, as the City previously admitted, newly-appointed assistant police chiefs are covered by the terms of the collective bargaining agreement including

⁴¹ Case No. C-050772, p. 4, not accepted for review 112 Ohio St. 3d 1489, 861 N.E.2d 144, 2007-Ohio-388; Supplement 0051.

⁴² *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910).

⁴³ Brief of Appellant, p. 9.

⁴⁴ *Id.*, p. 10.

grievance procedures. Moreover, unclassified employees may be in collective bargaining units. The issue addressed by SERB, and the only issue properly before this Court (assuming *arguendo* the issue is otherwise justiciable), is whether the citizenry of the City of Cincinnati, as a matter of home-rule municipal self-government, may authorize the City Manager to appoint senior executive management positions in the unclassified service (including assistant police chiefs).

SERB is vested with broad authority to administer and enforce Revised Code Chapter 4117 and to interpret its provisions to achieve its purposes.⁴⁵ R.C. 4117.22 mandates that Chapter 4117 be “construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between . . . public employers and their employees.” Therefore, reviewing courts must accord due deference to SERB’s interpretation and application of Chapter 4117. This Court emphasized: “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.”⁴⁶

A. CONCERNING THE APPOINTMENT OF NEW ASSISTANT POLICE CHIEFS, THERE IS NO CONFLICT BETWEEN THE CITY CHARTER AND THE COLLECTIVE BARGAINING AGREEMENT

The FOP falsely asserts: [pp.9-10; “The Charter Amendment conflicts”]. The FOP added; [11-12]. The City reiterates its acknowledgement that newly-appointed

⁴⁵ *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988).

⁴⁶ *Id.*, 40 Ohio St.3d at 267.

assistant police chiefs receive the terms of the collective bargaining agreement, unless and until the terms are renegotiated.

Concerning the FOP's challenge to the City Manager's authority to appoint new assistant police chiefs, the FOP fabricates an alleged conflict between the Charter Amendment and the collective bargaining agreement *solely* by reference to Article VII, §22, Terminal Benefits, of the agreement. That section of the agreement provides in its last paragraph:

Notwithstanding any other provision of this Section, an employee who on or after January 1, 2000, selects Option 1, above, shall not continue to accrue vacation, sick leave, longevity pay, holiday/compensatory time, working out of rank, or OPOTA certification allowance while on the payroll but in inactive status under Option 1. 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. Nothing herein shall be construed to deny medical insurance coverage and/or the payment of the City's contribution to the Ohio Police and Fireman's Disability and Pension Fund on behalf of the member selecting Option 1.

Neglecting to inform this Court that it had already conclusively grieved the meaning of that narrow section of the collective bargaining agreement, the FOP overbroadly and falsely asserts: "The parties have clearly bargained over promotions in the supervisory bargaining unit."⁴⁷ By contrast, SERB analyzed Article VII, § 22, and the arbitrator's binding interpretation of the agreement's language. SERB concluded:

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 vacant⁴⁸

⁴⁷ Brief of Appellant, p. 11.

⁴⁸ SERB Opinion 2005-006, pp. 5-6; FOP's Supplement, pp. 41-42.

Unlike the FOP, which chose not to inform this Court about the arbitration, SERB expressly discussed and justifiably relied upon the arbitrator's final and binding decision:

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 On this issue the arbitrator found . . . "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"⁴⁹

SERB concluded, therefore, "Captain Gregoire had no contractual right to the promotion."⁵⁰ SERB reiterated: "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 [more than one year earlier] on November 6, 2001."⁵¹

SERB further concluded that the Charter Amendment did not conflict with the collective bargaining agreement or R.C. 4117.10(A).⁵² SERB observed that the agreement "does not specify the promotional process for Assistant Police Chiefs,"⁵³ and carefully reviewed the agreement's Management Rights article, Integrity of Agreement clause, and Abolishment of Promoted Positions article, to support its conclusion that the "Charter Amendment . . . does not conflict with the express terms of the contract."⁵⁴ SERB emphasized: "[T]he Agreement does not specify the promotional process for

⁴⁹ *Id.*, p. 6; Appellant's Supplement, p. 42.

⁵⁰ *Id.*

⁵¹ *Id.*, p. 12; FOP's Supplement, p. 48.

⁵² *Id.*, p. 13; FOP's Supplement, p. 49.

⁵³ *Id.*, p. 14; FOP's Supplement, p. 50 (quoting the SERB Administrative Law Judge).

⁵⁴ *Id.*, p. 15; FOP's Supplement, p. 51.

Assistant Police Chiefs [T]he Agreement did not speak specifically to promotions [to the rank of assistant chief of police]”⁵⁵

There is no basis in law for this Court to interpret the parties’ collective bargaining agreement differently than the arbitrator or SERB. This Court should decline jurisdiction over this appeal or otherwise affirm the decisions of SERB and the Court of Appeals.

B. THE CITIZENRY OF THE CITY DID NOT HAVE A DUTY TO BARGAIN WITH THE FOP TO AUTHORIZE THE CITY’S CHIEF EXECUTIVE TO APPOINT NEW ASSISTANT POLICE CHIEFS

The FOP’s second proposition of law reads: “The City’s electorate is not a ‘higher-level legislative authority.’” The FOP’s implicit argument is that SERB erred when it applied its own precedents to conclude that the citizenry that established the City of Cincinnati by adopting a home-rule charter was more powerful than the City Council created in the charter. The FOP generically refers to “the City” as if the citizenry and the constituent components of the municipal corporation are one and the same.

SERB described the issue presented to it by the FOP: “The ultimate issue before the Board is whether the District [sic] 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.”⁵⁶ SERB concluded that the promotional process for assistant police chiefs is a mandatory subject of collective bargaining.⁵⁷ SERB described that “the controlling legal principle” includes that prior negotiation and agreement between the parties to a collective bargaining agreement is not required when “immediate

⁵⁵ *Id.*, p. 21; FOP’s Supplement, p. 57.

⁵⁶ SERB Opinion 2005-006, p. 16; FOP’s Supplement, p. 52.

⁵⁷ *Id.*, p. 17; FOP’s Supplement, p. 53.

action is required due to . . . legislative action taken by a higher-level legislative body after the agreement becomes effective that requires a change to conform to the statute.”⁵⁸

SERB concluded 1) the Charter Amendment did not conflict with the collective bargaining agreement because the agreement did not specify the promotional process for assistant police chiefs; 2) promotions were a mandatory subject of bargaining; 3) when the citizenry amends a home-rule charter it acts as a “higher-level legislative authority” to the City Council elected by the citizenry;⁵⁹ 4) City officials did not commit an unfair labor practice by honoring the terms of the Charter Amendment and declining to promote Gregoire to a nonexistent vacancy. SERB did not apply this Court’s decision in *Cincinnati v. Ohio Council 8, AFSCME*⁶⁰ (holding that a collective bargaining agreement prevails over conflicting local law) specifically because SERB found that there was no conflict between the Charter Amendment and the collective bargaining agreement concerning promotions to the rank of assistant police chief.⁶¹

The FOP asks this Court to diminish SERB’s lawful expertise as the tribunal empowered to interpret and apply Ohio Revised Code Chapter 4117. Ohio Revised Code § 4117.01 defines “public employer” to include political subdivisions *such as municipal corporations*. The citizenry is not a political subdivision, not a municipal corporation, and not the “public employer” referenced in the statute. SERB justifiably interpreted and applied Chapter 4117 to conclude that actions of the citizenry are “higher” than actions of the municipal corporation created by the citizenry.

⁵⁸ *Id.*, p. 18; FOP’s Supplement, p. 54, quoting *In re Toledo City School Dist. Bd. of Ed.*, SERB 2001-005.

⁵⁹ *Id.*, p. 19; FOP’s Supplement, p. 55.

⁶⁰ 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991).

⁶¹ SERB Opinion 2005-006, p. 21; FOP’s Supplement, p. 57.

III. CONCLUSION

The City of Cincinnati requests that this Court provide proper deference to both the findings of fact made by SERB and the conclusions of law made by SERB. SERB found and concluded that the City did not engage in “trickery” or “gamesmanship,” the collective bargaining agreement did not provide for promotions to the rank of assistant chief, promotions are a subject for mandatory bargaining, the Charter Amendment did not conflict with the collective bargaining agreement, and the City did not commit an unfair labor practice by honoring the terms of the Charter Amendment enacted by the citizenry authorizing the City Manager to appoint assistant police chiefs.

Boiled down to its essentials, this case addresses the proper deference to be accorded SERB by the judiciary. That issue has previously been decided by this Court:

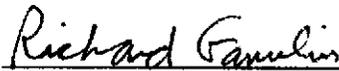
[C]ourts must accord due deference to SERB’s interpretation of R.C. Chapter 4117. Otherwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations * * * * It was clearly the intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117 [and] this authority must necessarily include the power to interpret the Act to achieve its purposes.⁶²

⁶² *Lorain City School Dist. Bd. of Edn. v. State Employment Relations Bd.*, 40 Ohio St.3d 257, 267, 533 N.E.2d 264 (1988).

Assuming the Court otherwise deems the FOP's challenge to the City Manager's promotion authority justiciable and retains jurisdiction, the Court should find the appeal unmeritorious, defer to SERB's expertise, and affirm the ruling of the Court of Appeals.

Respectfully submitted,

PATRICIA M. KING (0061464)
Interim City Solicitor

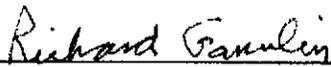


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Brief of Appellee City of Cincinnati was sent to Stephen S. Lazarus, Esq. and Kimberly A. Rutowski, Counsel for Appellant, Hardin, Lazarus, Lewis & Marks, LLC, 30 Garfield Place, Suite 915, Cincinnati, Ohio 45202 and to William P. Marshall, Esq., Benjamin C. Mizer, Esq., and Anne Light Hoke, Esq., Counsel for State Employment Relations Board, Office of the Attorney General of Ohio, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3400 by ordinary United States mail this 26th day of June, 2008.



RICHARD GANULIN
Assistant City Solicitor

PMK/RG/(chs)
(Police) SERB-Issue 5 Brief 0608-RG